FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 4, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. BRADLEY PATE, employed by THE AMERICAN COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-155 A.C. No. 11-02752-29033 A Mine: New Era

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Simonton

This case is before me upon the Secretary's petition for assessment of civil penalty issued in accordance with the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.20 *et seq.* At issue is Bradley Pate's ("Respondent" or "Mr. Pate") motion for summary decision, which also asks the court to deem Mr. Pate's First Requests for Admission ("First Requests") admitted due to the Secretary's untimely response to those requests. For the reasons below, I deny the Respondent's motion.

I. Factual & Procedural Background

On January 24, 2017, MSHA issued Citation No. 9038849 to The American Coal Company, a corporate mine operator, pursuant to section 104(d)(1) of the Mine Act. The citation alleged violation of 30 C.F.R. § 75.1216(b) [1] for a failure to securely block a diesel powered front end loader while the loader was in raised position. The operator contested the associated civil penalty in docket LAKE 2017-346, and the docket was stayed pending MSHA's investigation into the individual liability of Mr. Bradley Pate under Section 110(c) of the Mine Act.

On March 22, 2018, the Secretary filed a petition for Assessment of Penalty against Mr. Pate pursuant to Sections 110(c) and (i) of the Mine Act. Pursuant to Section 110(c), the petition alleged that Mr. Pate "knowingly authorized, ordered or carried out a violation of the mandatory standard of 30 C.F.R. § 75.1726(b)." Respondent Brad Pate's Motion for Summary Decision ("Resp. Mot."), Ex. A. Mr. Pate timely filed an Answer to the Petition, and the court later

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[1] 30 C.F.R. § 75.1726(b) provides "No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

consolidated Mr. Pate's docket with LAKE 2017-346.

On April 4, 2018, Mr. Pate, through counsel, served his First Requests for Admission ("First Requests") on the Secretary. Resp. Mot. at 2. The Secretary served his Responses on May 7, 2018, eight days after the 25-day deadline prescribed by Commission Rule 58(b), 29 C.F.R. § 2700.58(b). On that same day, allegedly minutes prior to receiving the Secretary's admissions, Mr. Pate filed his motion for summary decision. Secretary's Motion to Withdraw Admissions and Response in Opposition to Respondent's Motion for Summary Decision ("Sec'y Opp.") at 3. The Secretary filed his Response in Opposition to Summary Decision on May 18, 2018, and on May 31, the Respondent filed his Reply.[2]

The Respondent alleges that the Court must deem his First Requests admitted because the Secretary failed to answer or object to the Requests within the 25-day deadline prescribed by Commission Rule 58(b). Resp. Mot. at 2-3. Because the First Requests pertain to information necessary for the Secretary to prove its allegation against Mr. Pate, Respondent argues that deeming the Requests admitted would resolve any disputed issues of material fact and would entitle Mr. Pate to summary dismissal as a matter of law. *Id.* Nonetheless, Respondent contends that even if the First Requests are not deemed admitted or the Court grants the Secretary's motion to withdraw the admissions, Mr. Pate is entitled to summary decision as a matter of law. *See* Respondent Brad Pate's Response in Opposition to the Secretary's Motion to Withdraw Admissions and Reply in Support of Motion for Summary Decision ("Resp. Rep.") at 8.

The Secretary argues that the Court retains discretion to determine whether the Respondent's First Requests should be admitted due to the Secretary's untimely response. Sec'y Opp. at 2-4. The Secretary argues that the Requests should not be deemed admitted because the responses were submitted a mere eight days late and were provided to the Respondent on the same day that the above motion was filed. *Id.* at 3. If the Court were to deem the Requests admitted, the Secretary moves in the alternative for leave to withdraw the admissions pursuant to Rule 58(b). *Id.* at 4. Finally, should the Court both deem the First Requests admitted and deny the Secretary's motion for leave to withdraw, the Secretary contends that summary decision is not appropriate because numerous genuine issues of material fact still exist. *Id.* at 7.

II. Summary Decision Standard

The Court may grant summary decision where the "entire record...shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56).

[2] The Respondent filed a Motion for Leave to File a Reply simultaneously with the Reply itself. After review, the motion for leave is **GRANTED**, and the Respondent's Reply was considered in full in this decision.

The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted).

The court must evaluate the evidence "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party's claims. *Celotex*, 477 U.S. at 323. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

III. Discussion

A. Respondent's Motion to Deem his First Requests Admitted

The Respondent argues that the court should deem its First Requests to be admitted because the Secretary filed its response to his requests eight days after the prescribed 25-day limit. Resp. Mot. at 3-4. Respondent argues that the court should look at both Commission Rule 58(b) and Rule 36 of the Federal Rules of Civil Procedure to hold that the untimely filing requires admission of its Requests. *Id.*

29 C.F.R. § 2700.58(b) provides:

> Any party, without leave of the Judge, may serve on another party a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission.

Regarding time to respond to Requests for Admissions Rule 36 of the Federal Rules of Civil Procedure states:

> A matter is admitted unless, within 30 days after being served, the party to whom

the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Fed. R. Civ. P. 36(a)(3).

The court declines to deem the Respondent's Requests as admitted in these circumstances. As an initial matter, the court finds that Commission Rule 58 does not require requests for admission to be deemed admitted merely because the response to those requests was untimely. *See Michael Wilson v. Armstrong Coal Co., Inc.*, 40 FMSHRC 221, 227 (Jan, 2018) (ALJ) (holding that Commission Rule 58 permits the Judge to determine when a party must respond to Requests for Admissions, and thus it is unnecessary to look to the Federal Rules to fill in a perceived gap regarding when Requests should be deemed admitted.) The Rule does not speak to when, if ever, requests for admission must be deemed admitted. Rather, the Rule grants Commission Judges the discretion to determine whether a longer or shorter time period for responding is proper, and thus gives Judges the discretion to determine when requests should be admitted.[3] *Id.*

Respondent argues that the mere fact that an ALJ may adjust the time for filing responses to admissions "should not relieve the party from following the Commission's rules or eliminate the need for a mechanism to encourage or enforce compliance." Resp. Rep. at 4. Respondent continues that Commission judges do retain some discretion in the matter, but that such discretion should be used even handedly and not simply when it favors the Secretary's position. *Id.* The Court agrees wholeheartedly with these contentions and notes that the case law provided by the Respondent (and cited by both parties) indicates that previous judges have used their discretion consistently and according to the circumstances surrounding the case.

As a general course of practice, Commission Judges have deemed untimely responses admitted when the non-requesting party failed to respond to requests or motions on multiple occasions or for significant periods of time. In *Raymond Sand and Gravel*, 34 FMSHRC 1456, 1457 (June 2012) (ALJ), for example, the court did deem the Secretary's request admitted after a mere six-day delay. However, aside from the late filing, the court noted that the operator also ignored an email from the court and failed to respond to the Secretary's motion for summary judgment. *Id.* In *Mariposa Aggregates*, 1997 WL 138295, at *2 (FMSHRC Mar. 1997) (ALJ), the court deemed the amended requests admitted after the operator failed to respond to the Secretary's amended motions for three months. Thus, Judges are inclined to deem late responses admitted when circumstances go well beyond untimely filing and impede the discovery and litigation process as a whole.

Commission Judges have been less inclined to admit requests outright in cases where the non-requesting party has shown willingness to participate in the litigation and discovery process

[3] The Court notes that Federal Rule of Civil Procedure Rule 36 also gives the court discretion to order a shorter or longer response time. Fed. R. Civ. P. 36(a)(3).

or does in fact respond to a Request, albeit in an untimely manner. *See Armstrong Coal Co., Inc.*, 40 FMSHRC at 226-27 (declining to deem disputed requests admitted despite a 367-day delay in response because discovery continued and pleadings were filed); *Durbin Coal, Inc.*, 22 FMSHRC 1150 (Sept. 2000) (ALJ) (declining to deem untimely answered and disputed requests admitted because less drastic remedies, such as directing supplemental responses or deferring resolution of issues until a later date, still existed). Commission case law thus demonstrates that its Judges have utilized their discretion evenhandedly and based on the procedural circumstances of the case. The mere fact that these past cases have benefited the Secretary does not suggest otherwise.

Here, the facts and current procedural posture in the instant case suggest that deeming the First Request admitted would be a harsh outcome, especially in support of a summary decision motion. The Secretary filed its responses to Mr. Pate's requests on May 7, 2018, eight days after the 25-day deadline (or three days after the 30-day deadline prescribed in Federal Rule 36) and the same day that Respondent filed his motion for summary decision. *See* Sec'y Opp. at 3. The delay was due to the Secretary's unintentional failure to calendar the response deadline, and there is no indication that he has been generally unresponsive throughout the course of litigation or discovery. *Id.* Furthermore, the court sees no indication that the 8-day delay prejudiced the Respondent in any manner or drastically affected the discovery or litigation schedule.

Respondent argues that the Secretary was further non-compliant because the late responses were substantively inadequate and did not comply with Rule 58(b). Resp. Rep. at 5. The court declines to consider the adequacy of the Secretary's responses in determining whether summary judgment is appropriate. The proper time to resolve discovery disputes is not within a motion for summary decision, and the court notes that there are "other, less drastic, and here more appropriate alternatives" than deeming the Requests admitted when a party objects to the sufficiency of the responses. *See Durbin Coal, Inc.*, 22 FMSHRC 1150 at *3. (Sept. 2000) (ALJ).

In sum, to deem the requests admitted despite the fact that the Secretary has already submitted its late responses seems extreme given the present stage of discovery. The court therefore declines to deem the Requests admitted, and for that reason need not entertain the Secretary's motion for leave to withdraw the admissions.[4]

Accordingly, the Respondent's Motion to deem its First Requests admitted is **DENIED**, and for these same reasons, the Secretary's request for leave to withdraw the admissions is **DENIED**.

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[4] The court wishes to stress that this order should not in any way be viewed as a statement condoning the Secretary's untimeliness, nor does it give the Secretary license to ignore the requirements of Rule 58(b). The court will view any future violations in a more critical light absent good cause.

B. Summary Decision

The Commission has stated that summary decision is an extraordinary procedure, and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which granting summary decision is authorized only upon proper showings of a lack of genuine, triable issues of material fact." *West Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015) (citations omitted). In considering a motion for summary decision, a Judge's role is limited to a determination of whether the case can be decided without resolving factual disputes, and may not weigh the evidence or engage in fact-finding beyond the facts established in the record. *Id.*

Given the court's above denial of the Respondent's motion on the First Requests and viewed in the light most favorable to the non-moving party, it is clear that genuine issues of material fact exist in this case. The Secretary's Response to Respondent's First Requests for Admission identifies various disputes regarding Mr. Pate's statements regarding his actions and directions to Mr. Clark prior the accident, Mr. Clark's actions prior to the accident, and the condition of the mine and the end loader at the time of the accident.[5] *See* Sec'y Opp., Ex. B. These disputes all speak directly to Mr. Pate's liability under section 110(c) and cannot be resolved based on the information before without improperly weighing the evidence.

Separate and apart from the facts in the First Request, the Secretary identified a number of factual disputes that bear directly on Mr. Pate's liability under section 110(c) and the cited standard. *See* Sec'y Opp. at 9-16. Those factual disputes include, but are not limited to, whether the position of the end loader relative to Mr. Pate prevented him from noticing the absence of cribbing, whether lighting conditions at the time of the accident affected Mr. Pate's ability to notice that the end loader was not cribbed, and whether standard cribbing methods exist at the mine. *Id.* These issues speak directly to whether Mr. Pate should have noticed the absence of standard cribbing practices, whether those practices exist at the mine, and whether mine conditions indicate that Mr. Pate knew or should have known that the front end loader was not properly cribbed at the time of the accident.

On a broader scale, the statements of Mr. Pate and MSHA Special Investigator Phillip Stanley offer conflicting testimony on these material facts and many others. *See* Sec'y Opp., Exs. A, B. Most notably, this case turns on whether Mr. Pate "knowingly authorized, ordered, or carried out" the violation. Resp. Rep. at 16. At this time the court has little to no evidence before it beyond the conflicting testimony regarding the conditions at the mine and the facts surrounding the accident and Mr. Pate's actions. The court would thus have to resolve conflicts in testimony to make the fact-finding and credibility determinations required to determine Mr. Pate's state of mind at the time of the accident, and summary decision is not the proper means by which to make those determinations. *See KenAmerican Resources, Inc.*, 38 FMSHRC 1943, 1953 n. 11 (Aug. 2016) ("[A] hearing, with the opportunity to observe a witness' demeanor, is the proper venue to determine intent and credibility, not a summary decision motion").

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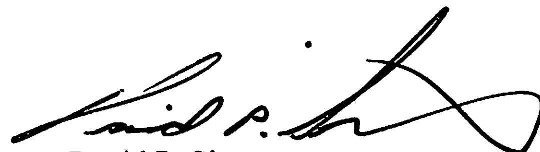
[5] Respondent argues that the Secretary's Response to Mr. Pate's First Request do not support his list of Disputed Material Facts because the Secretary did not actually deny any of the Requests. Resp. Rep at 11. The court disagrees. The Court reads the Secretary's refusal to admit the truth of Mr. Pate's statements as a denial of the substance of those statements. *See* Sec'y Opp., Ex. B.

Respondent contends that the Secretary's attached Declaration of Phillip Stanley should not be considered because he did not have "personal knowledge" of the accident in accordance with Rule 67. Resp. Rep. at 8-9. The court disagrees and notes that Mr. Stanley does have personal knowledge of the accident investigation that prompted the Secretary to file the petition against Mr. Pate in the first place. Mr. Stanley conducted his own interview with Mr. Pate and states that facts he found during his investigation contradicted Mr. Pate's statements during that interview. *See* Sec'y Opp., Ex. A at 3-4. Inspector Stanley also has personal knowledge of standard mining practices that are relevant to determining Mr. Pate's liability under section 110(c). Again, all of those factors are disputed and material in this case, and rest on determinations of witness credibility and additional fact-finding that the court is restrained from making in entertaining a motion for summary decision.

Furthermore, even assuming that no dispute in material facts exists based on the Secretary's responses to the First Requests, the court refuses to disregard the findings of MSHA's investigation and award Mr. Pate summary judgment in the action against him simply because he was the only one present at the time of the accident. Mine Inspectors are rarely, if ever, present at mines at the time of serious accidents, and to rule in this manner would not only be contrary to the presumption of viewing the facts in light most favorable to the non-moving Secretary, but would severely hinder MSHA's ability to enforce 110(c) actions and bring them to hearing.

I therefore find that multiple genuine issues of material fact still exist and that summary decision is not appropriate at this time.

Accordingly, the Respondent's Motion to Deem its First Discovery Requests as admitted is **DENIED**. Furthermore, Respondent's Motion for Summary Decision is **DENIED**.



David P. Simonton
Administrative Law Judge

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