

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

April 21, 2009

HOPKINS COUNTY COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2009-820-R
	:	Citation No. 6694904; 03/23/2009
	:	
v.	:	Docket No. KENT 2009-821-R
	:	Order No. 6694905; 03/23/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-822-R
ADMINISTRATION (MSHA),	:	Citation No. 6694906; 03/23/2009
Respondent.	:	
	:	Mine ID 15-18826
	:	Elk Creek Mine

ORDER STAYING PROCEEDINGS
ORDER REQUESTING SECRETARY’S COUNSEL TO REPORT
AND
ORDER DIRECTING COUNSELS TO SUBMIT STIPULATION IF NECESSARY

These are contest proceedings arising under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (Mine Act or Act), in which Hopkins County Coal, LLC (“HCC”) challenges the validity of two citations and one order of withdrawal issued to the company at its Elk Creek Mine, an underground coal mine located in Hopkins County, Kentucky.

Citation No. 6694904 (Docket No. KENT 2009-820-R) alleges HCC violated section 103(a) of the Act, when, on March 23, 2009, it:

failed to produce/provide records requested by MSHA special investigators during the performance of investigative duties under section 105(c) of the Act.^[1] On February

¹Section 105(c)(2) of the Act (30 U.S.C. § 815(c)(2)) requires the Secretary “[u]pon receipt” of a miner’s discrimination complaint to “forward a copy of the complaint to the . . . [operator] and cause such investigation to be made as . . . [the Secretary] deems appropriate.” Section 105(c)(2) further states, “If upon such investigation, the Secretary determines that . . . [the operator has discriminated against the complainant, the Secretary] shall immediately file a complaint with the Commission.” Under section 105(c)(3) the Secretary must reach a determination whether discrimination occurred within 90 days of the receipt of the miner’s

23, 2009[,] written requests for specific documents were given to the operator's legal counsel . . . as directed by the mine operator.

Sections 103(a) and [103](h) of the Act [require] the operator to furnish information requested by the Secretary that she has determined necessary in carrying out the provisions of the Act.^[2]

In issuing the citation, MSHA Special Investigator Kirby Smith gave HCC 45 minutes, or until 9:00 a.m., to comply. *See* Citation No. 6694904. At 9:00 a.m. the special investigator determined HCC had not complied by providing all of the items requested, and he issued Order No. 6694905 (KENT 2009-821-R) pursuant to section 104(b) of the Act to the company.³ 30 U.S.C. § 814(b).

In issuing the order, the special investigator stated:

The operator['s] agent . . . refused to comply with . . . Citation No. 6694904 requiring the operator to produce/provide records requested by MSHA Special Investigators during the performance of their official duties in investigation activities under [section] 105(c) of the Mine Act.

Order No. 6694905.

After five minutes passed and the requested documents still were not produced, at 9:05 a.m. Smith issued another section 104(a) citation to HCC for continuing to work in the face of the order. Citation No. 6694906 (KENT 2009-822-R) states:

complaint. 30 U.S.C. § 815(c)(3).

²Section 103(a) authorizes the Secretary to “make frequent inspections and investigations . . . for the purpose of determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision . . . or other requirements of this Act.” 30 U.S.C. § 813(a). Section 103(h) in pertinent part requires an operator to “provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act.” 30 U.S.C. § 813(h).

³Section 104(b) of the Act provides for the issuance of an order when an inspector or other authorized representative of the Secretary finds that a violation described in a citation issued under section 104(a) of the Act has not been totally abated within the time originally fixed and that the time should not be further extended.

The operator[']s agent continued to deny to produce/provide the records requested by [the] MSHA Special Investigator after the reasonable time for abatement had expired on . . . 104(a) [C]itation No. 66904904. The Operator[']s agent continued to refuse to provide the requested records after . . . 104(b) withdrawal [O]rder No. 66904905 was issued.

This citation is issued for continuing to operate in [the] face of a withdrawal order.

Citation No. 6694906.

In issuing the citation, the special investigator indicated it should be abated by 10:00 a.m. Citation No. 6694906. When it was not abated, HCC became subject to the provisions of section 110(b)(1) of the Act, which provides that “[a]ny operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$5,000 for each day during which such failure or violation continues.” 30 U.S.C. § 820(b)(1).

THE CONTESTS AND THE PARTIES’ PLEADINGS

On the same day the citations and order were issued, HCC filed its subject contests with the Commission.⁴ HCC maintained, *inter alia*, that the conditions cited did “not fall within the purview of the Mine Act” and that the citations and order were issued for conditions “not violative of the [Act].” Notice of Contest (March 23, 2009). Due to the penalty strictures of section 110(b)(1), HCC moved for expedition of the proceedings. In its motion to expedite, the company noted that among the materials requested by MSHA were the “personnel files of all employees at the Elk Creek Mine who were disciplined or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin[, the miner who filed the original complaint with MSHA].” Mot. For Expedit’n of Proceedings 1 (March 23, 2009) (*quoting MSHA letter of February 23, 2009 Carl E. Boone, II, MSHA District 10 Manager to Marco M. Rajkovich, counsel to HCC*). HCC objected that the requested files were “*not* documents required to be recorded and maintained by the operator pursuant to the Mine Act;” that “release of employees’ personnel files would violate the employees’ rights to privacy and confidentiality;” that “[t]he request [was] unduly burdensome and . . . tantamount to harassment in the overly broad, sweeping request for *all files* covering a *five-year period*.” *Id.* 2 (*emphasis in original*). HCC stated, “Given that the issue is a legal one, . . . [HCC] does not anticipate the necessity for a full evidentiary hearing and, given the nature of

⁴Although only one contest was filed, it pertained to all three enforcement actions, and the single contest was docketed as three separate cases.

the Order and Citations subjecting . . . [HCC] to severe penalties, . . . [HCC] requests that the issue be dealt with *via teleconference today, or as soon thereafter as a telephonic hearing can be scheduled.*” *Id.*

On March 24, the matter was assigned to Commission Administrative Law Judge Jacqueline Bulluck, who at the time was on official duty in Pennsylvania. Shortly thereafter, the Secretary filed an opposition to HCC’s request for expedition. She also filed a motion for summary decision. HCC then filed a reponse and a cross-motion for summary decision, which was followed by the Secretary’s response. In her opposition and motion for summary decision, the Secretary set out in some detail her version of the events that engendered the citations and order. The Secretary’s chronology was not significantly disputed by HCC.

EVENTS LEADING TO THE CONTESTS

The Secretary noted the alleged discriminatee, Robert Gatlin, filed a complaint with MSHA on January 20, 2009. In the complaint, Gatlin, who was fired on January 8, alleged he was discharged in violation of section 105(c) of the Act by HCC.⁵ 30 U.S.C. § 815(c). The company was notified of the January 20 complaint by letter that same day.⁶ On January 26, the MSHA district manager advised HCC by letter that MSHA wanted to interview five named miners “as part of . . . [its] investigation of . . . [Gatlin’s] [d]iscrimination [c]omplaint . . . during the fact-finding segment of this investigation.” Sec.’s Mot. for Sum. Decision 2, Exh. 2. The district manager requested HCC contact one of MSHA’s special investigators by February 6 “with a convenient date and time to conduct these interviews.” *Id.* By letter dated February 6, counsel for HCC responded that the letter of January 26 had not been sent to him or to the legal

⁵In the complaint Gatlin summarized the alleged discrimination he suffered by stating:

I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and backpay for the time I’ve been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 1 at 2.

⁶In addition to notifying the company of the January 20 complaint, the letter stated that MSHA Special Investigator Kirby Smith would contact the company “during the fact-finding segment of this investigation.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 1.

department of the company as counsel previously requested. Counsel renewed his request with regard to all further contact concerning any investigations. Counsel also refused to arrange the interviews requested by the district manager. Counsel stated, “[W]e are not in a position to arrange any interviews yet because we fail to grasp, and would appreciate your identifying, what the alleged protected activity is under this Mine Act discrimination complaint. If the protected activity can be identified, I’m confident my client will give further consideration to your request.” *Id.*, Exh. 3.

On February 23, the district manager sent HCC’s counsel the letter referenced in Citation No. 6694904. In it MSHA requested:

1. Robert Gatlin’s personnel file[;]
2. Any documents showing disciplinary action that was taken against Robert Gatlin by [HCC;]
3. Documents showing any hazards or potentially hazardous conditions, including but not limited to pre-shift, on-shift and conveyor belt examination books at the . . . [m]ine for the period July 1, 2008 - January 31, 2009[;]
4. Any employee handbook or employee manual that was used by [HCC] from January 1, 2004 - January 31, 2009[;]
5. The personnel files of all employees at the . . . [m]ine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which lead to the termination of Robert Gatlin.
6. All documents relied upon by [HCC] in its decision to terminate Robert Gatlin.

Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 4. MSHA asked that the documents be given to the special investigator by the close of business on March 2, 2009.

On March 2, in a letter to the district manager, counsel for HCC stated he regretted not responding sooner, but the letter of February 23 was not received by counsel until Thursday, February 26, when counsel was out of the office. In the March 2 letter counsel again asserted the complaint did not state a protected activity, and counsel renewed his request that MSHA clarify “how . . . [the complaint] states a claim under the Mine Act.” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 5. Counsel noted the record books requested in the February 26 letter

were available for review at MSHA's convenience, and counsel stated he would respond to the request for the other items once he discussed the request with HCC officials. *Id.*

On March 17, the district manager again wrote to counsel, advising him that MSHA's special investigators would be at the mine on March 23 and that they intended to review and copy the specified examination books. The district manager asked counsel to "remind [his] client of its obligation to cooperate in [the] investigation and produce the records that have been requested." Sec.'s Mot. for Sum Dec. (March 26, 2009), Exh. 6. The letter also requested HCC have "all documents listed in the February 23 . . . letter available for inspection . . . on March 23." *Id.*

On March 18, counsel for HCC wrote to the district manager, supplementing counsel's response of March 2. In the March 18 letter, counsel again requested "clarification regarding how [Gatlin's complaint] states a claim under the Mine Act." Sec.'s Mot. for Sum. Decision (March 26, 2009), Exh. 7. Counsel asserted one of HCC's rights under the Act "is to know what it is the agency is investigating." *Id.* Counsel also responded in detail to the items requested by MSHA. With regard to Gatlin's personnel file, counsel stated that, in view of the confidential nature of the contents of the file, the agency should provide HCC with a waiver and release from Gatlin. Sec.'s Mot. for Sum. Dec. (March 26, 2009), Exh. 7. With regard to the documents showing disciplinary action taken against Gatlin, counsel attached them to his letter. *Id.* With regard to the pre-shift, on-shift, and conveyor belt examination books for July 1, 2008 - January 31, 2009, counsel advised the district manager, as he had in his March 2 letter, that the record books were available for review at the mine at MSHA's convenience. *Id.* With regard to a manual or handbook that employees used at the mine from January 1, 2004 - January 20, 2009, counsel attached the material to his letter. *Id.* With regard to the personnel files of employees disciplined, reprimanded or terminated between January 1, 2004, and July 20, 2009, "for engaging in conduct which led to the termination of . . . Gatlin," counsel stated the company objected to the request, "given that no protected activity exists in this case, that the company does not release personnel files as requested absent consent from the individual employee, and that otherwise, no employee other than . . . Gatlin was disciplined, reprimanded or terminated for engaging in conduct which led to his own termination." *Id.* Finally, with regard to the documents relied upon by HCC in its decision to terminate Gatlin, counsel referred MSHA to the documents he attached in response to the government's request for "documents showing disciplinary action that was taken . . . against Gatlin" and to the employee handbook. *Id.*

After counsel's March 18 response, the issues dividing the parties appeared to have been MSHA's request for the personnel files of Gatlin and MSHA's request for the personnel files of employees disciplined, reprimanded or terminated "for engaging in conduct which led to the termination of . . . Gatlin." Sec.'s Mot. for Sum. Decision (March 26, 2009), Exh. 4. The impasse over the files led the district manager to again write to the company's counsel. In a letter dated March 20, the district manager stated that HCC "refuse[d] to produce many documents . . . [MSHA] requested[,] [s]pecifically . . . Gatlin's personnel file and the personnel files of any other employees who were terminated for the reason . . . Gatlin was terminated." *Id.*, Exh. 8. The district manager further stated he expected the files to be provided to the special

investigators on March 23, and he added “we note the tactics used by the company . . . to delay this investigation [and, w]e also note the repeated refusals of the company to provide documents and information to which MSHA is clearly entitled under the Act.” *Id.*

On March 23, counsel for HCC responded, terming “unfounded” the district manager’s allegations of the company’s “repeated refusals to produce documents and information to which MSHA is ‘clearly entitled under the Act.’” Sec.’s Mot. for Sum. Decision (March 26, 2009), Exh. 9. Counsel again advised the district manager that Gatlin’s file would be given to the special investigators once MSHA obtained a consent and release form from Gatlin. Counsel did not mention the request for other files. However, counsel did assert, if MSHA could not inform HCC of Gatlin’s alleged protected activity, then “the agency [had] no case to investigate, no jurisdiction, no entitlement and no basis upon which to make any request.” *Id.*

When Kirby Smith and another special investigator arrived at the mine at 8:00 a.m. on March 23, they reviewed the conveyor belt examination book, apparently the only book in which they were interested. They also asked for the personnel files, which the company refused to produce. Kirby Smith then issued Citation No. 6694904, Order No. 6694905, and Citation No. 6694906 in quick succession, and HCC immediately filed its contests.

PROCEEDINGS FOLLOWING THE CONTESTS

Judge Bulluck was assigned the cases the next day, and she promptly initiated a conference call with counsels. A few days after the March 24 call, HCC sent numerous documents to MSHA via fax, and MSHA abated the order and subsequent citation.⁷

In the meantime, because of the difficulty of contacting the parties and receiving facsimile copies at a remote duty station, the matter was reassigned from Judge Bulluck to me. In a conference call on March 27, the parties agreed abatement of the order and citation, which apparently occurred on March 26, ending HCC’s continuing liability under section 110(b)(1) of the Act for daily penalty assessments. 30 U.S.C. § 820(b)(1). Counsels also reiterated their belief resolution of the contests was appropriate for summary decision. Counsel for the

⁷According to counsel for HCC’s letter of March 26, regarding “Supplemental Document Production to Discrimination Complaint,” submission of the supplemental documents was based on “oral clarifications as to the scope of the request made by counsel for the Secretary in the March 24 [conference call].” *Letter of Marco Rajkovich, Jr., Esq., Counsel for HCC to Teresa Ball, Esq., Associate Regional Solicitor* (March 26, 2009). The documents submitted by HCC included Gatlin’s personnel file (released with the caveat HCC be held blameless should the personal information contained in the file enter the public domain) and the personnel files (with personal information redacted) of four employees. Counsel also stated it was not until the conference call of March 24 that counsels for MSHA made HCC aware that MSHA was seeking the “files of employees who were disciplined for engaging in conduct which **HCC claims** lead to the termination of Gatlin.” *Id.* 2 (*emphasis in original*).

Secretary stated she intended to file a response to HCC's cross-motion, and I advised the parties, once I received it, I would allow counsels ten days to file any additional arguments they wished to make.⁸ Also, counsels led me to understand the abatement of the order and citation obviated the need to expedite the proceedings. Nonetheless, both sides indicated they wanted the issues decided forthwith. At the time, I concurred. On April 2, I issued an order denying HCC's motion to expedite, but stated I would decide the issues promptly. Denial of Motion to Expedite (April 2, 2009). Following this, counsel for the Secretary filed her response to HCC's cross motion for summary decision.

ARGUMENTS FOR SUMMARY DECISION **THE SECRETARY**

The Secretary argues the citations and order were issued because of HCC's intentional refusal to produce documents to which the Secretary "was clearly entitled." Sec's Mot. for Sum. Decision 1. She asserts her actions in issuing the three enforcement actions "were within her investigative and enforcement authority and correct as a matter of law." *Id.* 2.

The Secretary insists section 103(a) (authorizing the Secretary to make "frequent . . . investigations . . . for the purpose of . . . determining whether there is compliance with . . . requirements of this Act"); section 103(h) (requiring operators to "provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act"); and section 108 (allowing the Secretary to seek civil relief when an operator does not, *inter alia*, "permit access to, and copying of, such records as the Secretary . . . determines necessary to carry out the provisions of [the] Act") require HCC to produce the requested files and information. She asserts, when HCC failed to produce the materials, the Secretary had the discretion to proceed against the company either by issuing the subject citations and order, or by seeking relief in federal district court under section 108 of the Act (30 U.S.C. § 818), or by proceeding on both tracks. Sec.'s Mot. for Sum. Decision 6-7.

The Secretary asserts HCC cannot refuse to provide the information because the Secretary lacks a waiver and release from Gatlin and/or the other employees. According to the Secretary, HCC bears the burden of showing the Secretary's investigative authority under section 103(a) and section 103(h) of the Act is subject to any statutory exception requiring the Secretary to obtain waivers and releases, and HCC has not done so. Sec. Mot. for Sum. Decision 7.

Alleging that HCC has engaged in "dilatatory tactics," the Secretary notes, although it had requested interviews with five specific employees on January 26, HCC had, according to the Secretary, "refused to permit these interviews." Sec.'s Mot. for Sum. Decision 8. The Secretary

⁸Counsel for the Secretary's Response was received on April 7. *See* Order Governing Final Submissions (April 7, 2009). On April 17, 2009, HCC filed a Supplemental Response for Summary Decision ("HCC's Sup. Resp.").

asserts HCC's motive is to delay and obstruct the Secretary's investigation by refusing to provide the information to which the Secretary lawfully is entitled.⁹ *Id.* 9.

Finally, the Secretary argues she "has only sought . . . [Gatlin's] files and the files of those employees and former employees whom [HCC] has 'disciplined, reprimanded or terminated . . . for engaging in the conduct which led to the termination of . . . Gatlin'" Sec.'s Mot. for Sum. Decision 9 (*quoting MSHA Letter of February 23, 2009, Carl E. Boone II, District 10 Manager to Marco M. Rajkovich, Counsel to HCC*). She describes her requests as "clear, narrowly drawn and relevant." *Id.* In summarizing her position, the Secretary states she must determine whether Gatlin was treated differently than other similarly situated employees, and that HCC cannot avoid production of lawfully demanded records by making "unsupported and baseless demands for waivers and releases designed for the purpose of impeding the Secretary's investigation." Sec.'s Mot. for Sum. Decision 10.

HCC

HCC asserts Gatlin was terminated on January 8, 2009, for insubordination, because he refused to conduct a required pre-shift examination on January 5. According to HHC, Gatlin refused because he claimed he was "due extra pay." HCC's Resp. to Sec.'s Mot. for Sum. Decision and Cross-Mot. for Sum. Decision ("HCC's Resp.") 2.

HCC acknowledges receipt of a January 26 letter from MSHA to its General Manager requesting interviews with specified HCC personnel. HCC states it previously asked that all requests for information of an investigative nature be directed to its legal department. As a result of the misdirection of the request, on February 6, HCC again asked that inquiries relating to MSHA investigations be sent to its legal department. The company also requested MSHA clarify the nature of the alleged discriminatory conduct. HCC states two weeks passed before MSHA responded. It notes in that response, dated February 23, MSHA ignored HCC's request for clarification and, among other things, requested the disputed personnel files. HCC's Resp. 2-3.

HCC asserts it was not until the March 24 conference call with Judge Bulluck that it understood what it thinks MSHA wanted, that the requested documents were "presumably . . . [those] related to **HCC's reason** for termination of Gatlin, as may be applicable to other similarly disciplined employees, and **apparently not** documents related to **Gatlin's reason** for

⁹However, the lack of interviews with the employees does not appear to have played a role in the issuance of the contested citations and order, since they were abated when HCC produced copies of the requested files, and as it is unclear to me if the employees have yet been interviewed. Indeed, it is unclear if MSHA's request in this regard is outstanding.

why he thinks he was terminated.”¹⁰ HCC’s Resp. 4 (*emphasis in original*). With this understanding, it produced over 106 pages of documents in response to MSHA’s request. *Id.*

HCC argues the contested citations and order must be vacated because MSHA is not entitled to the personnel files it requested. According to HCC, the files are protected by the Fourth Amendment of the Constitution and involve confidentiality and privacy concerns of HCC’s employees. Turning them over without releases could expose HCC to litigation. *Id.* at 5-6. The company insists the government does not have a right to “rummage in any wholesale way or to initiate a general search” for records and documents not required to be kept under the Mine Act. *Id.* at 6 (*quoting Youghioghny and Ohio Coal Co. v. Morton*, 364 F.Supp. 48, 51, n.5 (D. Ohio 1973)). HCC also points to Commission Administrative Law Judge James Broderick’s decision in *Sewell Coal Co.*, 1 FMSHRC 864 (Feb. 1979) in which, according to HCC, Judge Broderick recognized constitutional difficulties prevented MSHA for validly issuing a citation and order when Sewell refused to allow MSHA to inspect personnel files containing accident, injury and illness records and medical and compensation records in order to determine Sewell’s compliance with Part 50 reporting requirements.¹¹ *Id.* at 6-7.

HCC asserts the Commission also recognized in *Peabody Coal Co.*, 6 FMSHRC 183 (February 1984), while records required to be kept under the Mine Act must be available to MSHA, and while an operator has no realistic expectation of privacy for such records, the same is not true if sought-after files contain data not required to be maintained by the Mine Act as well as data open to MSHA. HCC’s Resp. 8. HCC emphasizes that MSHA is requesting the entire files of its employees, and HCC insists the government is not entitled to the entire contents of the files without a warrant. *Id.*; *see also* HCC’s Sup. Resp. 5.

Summarizing its objections, the company again takes issue with the wording of the February 23 request. According to HCC, MSHA actually sought “files evidencing that other employees have been disciplined for similar reasons as the reason that HCC claims it disciplined Gatlin.” HCC Resp. 10. Such evidence, if it existed, would support HCC’s affirmative defense, it would not support the existence of a valid claim. HCC states MSHA should have requested

¹⁰I interpret this to mean HCC did not respond concerning the personnel files other than Gatlin’s, because it thought MSHA wanted the files of those employees who were terminated for the same reason Gatlin believed he was fired, that HCC was unable to tell from Gatlin’s complaint why Gatlin thought he was let go, and that this was one of the reasons why the company made repeated (and unanswered) requests for clarification of Gatlin’s complaint.

¹¹HCC notes its sought-after files contain social security numbers, bank names, account numbers, and health information of its employees and their dependents, all of it information to which MSHA is not entitled without a warrant. HCC’s Resp. 9-10. HCC also notes it ultimately released all information relating to Gatlin, but only after the Secretary assured HCC that Gatlin did not object to his file being produced in its entirety.

“personnel files of individuals who engaged in the same conduct as Gatlin, but were **not** disciplined.” *Id.*; *see also* HCC’s Sup. Resp. 5. HCC concludes by stating that MSHA and Gatlin have no information any employees have been treated disparately, and it asserts Gatlin and the Secretary are engaged in a fishing expedition to see if they can uncover a case without any reasonable cause to believe that discrimination actually has occurred. *Id.* at 10-11.

SECRETARY’S RESPONSE

The Secretary responds that HCC’s contests are “without merit and there are no constitutional matters at issue.” Sec.’s Resp. (April 3, 2009) at 1.

DEFERRAL OF RULING

As I previously noted, in denying HCC’s motion to expedite the proceedings, I stated, “[T]he important issues raised in the parties’ . . . cross-motions . . . will be decided promptly.” Denial of Mot. to Expedite (April 2, 2009). However, after a more complete consideration of the facts and the arguments, I conclude there is no need to rush. The Secretary must propose penalties for the company’s alleged failure to produce the requested materials and for the company’s failing to correct the alleged violation. 30 U.S.C. §§ 820(a), 820(b). In the meantime, the contested enforcement actions have been abated, and the Secretary’s investigation is ongoing. Much may happen between now and the parties’ consideration of the Secretary’s penalty proposals to obviate the parties’ present desire for summary decision. Judicial restraint warrants deferring ruling on an issue until required to do so, and neither party has shown an immediate ruling is needed.

Indeed, upon reflection, the parties may well come to share my doubts as to whether these cases present a desirable basis for resolving the questions at issues. Obviously, the Secretary has a statutory duty to conduct an investigation of Gatlin’s complaint. Obviously, too, HCC has a concomitant duty to cooperate in the investigation. However, the Secretary’s investigation must be “reasonable” (*see* 30 U.S.C. § 813(h)), and part of being “reasonable” when requesting materials is to make sure that which is sought is clearly described. MSHA’s request for, “[t]he personnel files of all employees at the . . . [m]ine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin.” (*MSHA Letter of February 23, 2009, Carl E. Boone II, District 10 Manager to Marco M. Rajkovich, Counsel to HCC*) is far from clear and can be interpreted in a number of different ways, as HCC rightly notes. HCC’s Resp. 4, Exh. 5. Moreover, and as HCC points out, if read literally, MSHA’s request is for files in their entirety. Only later did the Secretary seem to acknowledge private information in the files could be redacted. One might conclude a reasonably conducted investigation would make sure the operator’s right to redact objectionable information was plainly stated from the beginning. Further, MSHA repeatedly ignored, without explanation, HCC’s understandable requests for clarification of a complaint that on its face sets forth no discernable allegations of protected activity. Surely, part of the agency’s duty to conduct a reasonable investigation is to apprise those being investigated of how the law was allegedly broken.

For its part, the company's conduct, too, has been faulty. It did not immediately request a clarification of the district manager's February 23 request for the personnel files, and its objection to the release of Gatlin's file without a waiver, while perhaps technically warranted, seems overly protective.¹² Further, being represented by experienced counsels, the company must have known, without being told, that it is common when materials are requested for the party providing the materials to redact those parts it deems are not properly subject to the request. Apparently, this is what ultimately was done, but only after the threat of daily penalties was made real.

Unfortunately, the entire controversy smacks of "who struck John," with a lack of cooperation and clear, forthright communication on both sides. The parties have ensnared themselves in what is essentially a discovery dispute. Had the same dispute arisen after a discrimination complaint was filed with the Commission, it would have been resolved before a judge without the objector hazarding penalties of up to \$5,000 per day. Had the dispute been taken before a United States federal district court pursuant to section 108 of the Act (30 U.S.C. § 818) it also most likely would have been resolved without a monetary penalty threat.¹³

In my view, when penalties finally are proposed, it will behoove the parties to take into account the state of the Secretary's investigation, the amount of the penalties, the prior missteps on both sides and, working together, to resolve the contest and civil penalty proceedings in one stroke, short of summary decision. The adage "hard cases make bad law" often is misquoted as "bad cases make bad law," and, here, the aphoristic error is entirely apt. This is not to say the parties have raised issues that are incapable of decision. Rather, it is to recognize because issues can be decided does not mean they should be. The flawed context within which these particular issues have arisen suggests a second look at all aspects of the matter may lead the parties to conclude the issues are best reserved for another day and another case.

ORDER

For the reasons set forth above, a ruling on the parties' cross-motions for summary decision **IS DEFERRED** and these contest proceedings **ARE STAYED** pending the filing of an associated civil penalty case or cases by the Secretary. Counsel for the Secretary **IS REQUESTED** to advise me on or before June 1, 2009, and by the first day of each succeeding month, as to the status of the penalty assessment case(s).

¹²If a complaint is filed by the Secretary charging the company with discrimination, the Secretary and the miner are separate parties (29 C.F.R. § 2700.4(a)), but during the investigatory stage of the miner's complaint, the Secretary surely may be assumed to be acting on behalf of the miner.

¹³In fact, it takes little imagination to envision the reaction of a district court judge or federal magistrate if presented with a request for injunctive relief in a discovery dispute the parties should have been able to resolve themselves.

Within 15 days of the date of this Order, counsel for the Secretary **IS ORDERED** to file a copy or copies of the abatement or abatements at issue. If the abatement or abatements do not specify and describe in full the documents HCC filed and MSHA concluded abated the order and citations, within the same 15 days counsels **ARE ORDERED** to submit a written stipulation specifying and describing the documents.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Theresa Ball, Esq., Thomas A. Grooms, Esq., Matt S. Shepherd, Esq., U.S. Department of Labor,
Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Marco M. Rajkovich, Esq., Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True,
PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/ej