

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2014

AUSTIN POWDER COMPANY,
Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

AUSTIN POWDER COMPANY,
Respondent

CONTEST PROCEEDING

Docket No. PENN 2012-116-R
Citation No. 7040091;01/20/2012

Mine ID: 36-00884 E24
Mine: River Hill Coal Company

CIVIL PENALTY PROCEEDING

Docket No. PENN 2012-172
A.C. No. 36-00884-281523 E24

Mine: River Hill Coal Company

**ORDER REQUIRING JOINT STIPULATIONS AND RESUBMISSION OF MOTIONS
AND EXHIBITS FOR SUMMARY DECISION**

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties submitted cross-motions for summary decision on May 16, 2014 and responses on June 11, 2014. In total, the motions consisted of over 1,180 pages, including exhibits and briefs, in addition to seven full length DVDs. This volume of information is generally not appropriate for motions for summary decision. In addition, the parties did not submit a set of stipulated facts. Instead, the Secretary filed a 55 page statement consisting of 181 facts.

In its response, the Respondent states that the Secretary ignored specific facts. The Secretary has alleged numerous facts such as a unity of corporate ownership between Austin Powder Company and each of its subsidiaries which Respondent has refuted. Thus, it appears that there are disagreements regarding facts that are material to a determination of whether the parent corporation and this particular subsidiary at issue here are a unitary operator; the very issue upon which the parties seek a summary decision.

In a conference call, the Respondent stated that it did not stipulate to the set of facts that the Secretary submitted, but that it would not object to the facts if the judge reviewed the underlying documents that the Secretary stated his facts were based on. This would effectively require me to carefully review each exhibit (1000+ pages and seven DVDs), make a determination as to what information in each is material to the issue at bar, cross-reference it with the Secretary's list of unstipulated facts and then cull through the Respondent's motion and brief to determine whether they are in agreement with those facts. Essentially, the parties seek the court to do their homework for them.

In addition, the parties submitted motions that contained information and arguments seeking a determination on whether all of Respondent's subsidiaries should be considered a unitary operator with Austin Powder Company.¹ I do not have broad and unfettered jurisdiction to consider or decide whether all of Austin Powder's subsidiaries share a similar parent-subsidiary relationship and whether they should be considered a unitary operator. These motions for summary decision arise as a result of a partial settlement of the underlying citation accepted by a former ALJ of this Commission.² Reserved was the issue of whether the parent company's size and points for past violations should be considered in proposing the appropriate penalty for the citation issued to the River Hill Coal Company. Only this particular issue, involving the River Hill Coal Company mine, is before me, and only information about this mine and its corresponding subsidiary, Austin Powder Northeast, LLC, and its relationship with Austin Powder Company will be considered in ruling on these cross-motions.

Respondent has focused on the manner in which MSHA made its determination under the *Berwind Natural Resources*³ decision to determine whether this subsidiary should have an independent mine id number. It appears that Respondent would seek a determination whether MSHA acted arbitrarily or capriciously in making this determination although it correctly acknowledges that I do not have jurisdiction to make such a determination. This information is therefore irrelevant and will not be considered by me.⁴

¹ There are several other dockets involving violations issued to other Austin Powder subsidiaries that are assigned to other ALJs and are not before me.

² Judge William Steele issued a Decision Approving Partial Settlement on May 2, 2013. He has since retired and this docket was reassigned to me on January 2, 2014.

³ See *Berwind Natural Resources Corp, et al*, 21 FMSHRC 1284 (1999).

⁴ The Secretary had filed a motion *in limine* to exclude evidence of MSHA's determination that Austin Powder and its subsidiaries constituted a unitary operator. The motion was denied by Judge Steele for several reasons, generally related to the fact that such evidence may be helpful to him at trial and there being no risk of prejudice in a bench hearing. I find that the consideration of this evidence on cross-motions for summary judgment relating solely to the issue of the appropriate penalty for this citation is overly burdensome, irrelevant, and as stated above, raises an issue beyond my jurisdiction herein.

WHEREFORE, it is **ORDERED** in accordance with the guidelines provided above that the parties shall cull out the relevant facts from each of the documents, DVDs etc. submitted with their respective motions and reduce them to a Joint Stipulation of Material Facts citing the specific supporting exhibit by number and page or DVD number. The joint stipulated facts shall pertain only to this mine and Austin Powder Northeast, LLC and its relationship to the parent company. It is **FURTHER ORDERED** that any information included in any motion not set forth in the stipulated facts is also referenced by exhibit number, page and line number. It is **FURTHER ORDERED** that the parties resubmit supporting documents, DVD's etc. that are relevant only to the relationship between this cited mine, Austin Powder Northeast, LLC, and Austin Powder Company. It is **FURTHER ORDERED** that each party shall resubmit its motion in support of summary decision based on the joint stipulated facts and that the motions shall be no more than 30 pages in length. The joint stipulated facts, motions and exhibits shall be submitted within 3 weeks (21 days) of this order. Extensions will not be granted absent good cause.



Priscilla M. Rae
Administrative Law Judge

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