FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 15, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of Jose A. Chaparro, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. SE 2010-434-DM SE MD 2010-02
v.	:	Mine: CAB Aggregates
COMUNIDAD AGRICOLA BIANCHI, INC., Respondent,	:	
Reynat Jimenez, Respondent,	:	
Manuel Menéndez Respondent,	:	
Eduardo Martínez Respondent	:	

ORDER

Before: Judge Barbour

Order Denying Respondents' Motion to Dismiss,

On October 07, 2010 Respondents filed a Motion to Dismiss. The Secretary filed a responsive motion on October 13, 2010. Respondents make two arguments in their Motion to Dismiss. First, the Respondents argue that the claims against Reynat Jimenez, Supervisor of the Mine; Manuel Menéndez, President of Communidad Agricola Bianchi, Inc. ("CAB"); and Eduardo Martínez, Chairman of the Board of Directors for CAB as individuals; should be dismissed because these individuals are neither "operators" nor "persons" under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815, 820. Respt. Mt. to Dismiss 6. The Secretary contends that the individual respondents are "operators" or "persons" under the

Mine Act. *See* Sec. Opp'n To Respt. Mt. to Dismiss 5. The Secretary also argues that Respondents' Motion to Dismiss should be denied because it is actually a motion for summary decision and does not meet the summary decision standard set forth in Commission Rule 67. *Id*.

The Federal Rules of Civil Procedure provide guidance on the standard for motions to dismiss since the Commission's procedural rules do not supply a standard. *See* 29 C.F.R. § 2700.1(b)(2008). A 12(b)(6) motion to dismiss for failure to state a claim raised in a motion rather than in a pleading, as was the case here, is treated as a motion for summary judgment. Fed. R. Civ. P. 12(c). In order to prevail on summary decision under Commission Rule 67 Respondents must demonstrate that there is no genuine issue of material fact and that Respondents are entitled to judgment as a matter of law. I find that the Respondents' motion is actually a Motion for Summary Decision and that the motion does not meet the summary decision standard because there is a genuine issue of material fact regarding whether Mr. Jimenez, Mr. Menéndez, and Mr. Martínez are "operators" or "persons" under the Act. For the reasons stated above, I deny Respondents' Motion to Dismiss. However, this order does not foreclose litigation of this issue at the hearing. The Secretary is still required to demonstrate that Mr. Jimenez, Mr. Menéndez, and Mr. Martínez are "operators" or "persons" within the meaning of the Act.

Second, Respondents argue that the Secretary's July 26, 2010 Motion for Leave to Supplement and Amend the First Amended Complaint was untimely filed. Respt. Motion to Dismiss 5. However, I already found the Secretary's motion to be both timely and non-prejudicial when I granted the motion in my July 14, 2010 Order and Respondents have not given me cause to revisit that ruling.

Secretary's Motion in Limine to Admit into Evidence the Deposition Transcripts of Reynat Jimenez, Eduardo Martínez, and Manuel Menéndez and Respondents' Request to Admit into Evidence the Deposition Transcript of Jose A. Chaparro

On October 04, 2010 the Secretary filed a Motion in Limine to Admit the Deposition Transcripts of Reynat Jimenez, Eduardo Martínez, and Manuel Menéndez. In the motion the Secretary requests that their deposition testimony be admitted both against them as individual respondents and against CAB. Sec. Mot. in Limine 2. She argues that Rule 32 of the Federal Rules of Civil Procedure permits the use of depositions against a party or its agents for any purpose and that use of the depositions would make the hearing more efficient by eliminating the need for certain testimony. Respondents contend in their responsive motion that admitting the deposition testimony would be inefficient, but request that if the deposition testimony of Jimenez, Martínez, and Menéndez is admitted the deposition testimony of Jose A. Chaparro also be admitted. Respt. Resp. Mot. 3. On October 14, 2010 the Secretary orally advised the Court that she opposes the Respondents' request to admit the deposition testimony of Chaparro.

It is not unusual in a proceeding such as this for a party to use deposition testimony for impeachment purposes, and, of course, the parties may avail themselves of the opportunity throughout the course of the forthcoming hearing. What is unusual is to enter a deposition into evidence. In fact, the Federal Rules of Evidence, which frequently guide Commission proceedings, in general allow the admission of such testimony into evidence only if the moving party can show the declarant is unavailable as a witness. Fed. R. Evid. 804(b). Here, each of the deponents apparently is available to testify in person, and it is well established that in person testimony, if available, is preferred to deposition testimony. Being guided by these principles, I conclude that the parties' motions to admit the deposition transcripts as evidence should be denied, and that the case should proceed in the normal manner with both sides presenting their cases through the direct testimony of witnesses before the presiding judge. For this reason, I deny the Complainant's motion and the Respondents' request.

Respondents' Motion in Limine and [sic] to Take Administrative Notice of Puerto Rico Statute

On October 14, 2010 Respondents filed a Motion in Limine and [sic] to Take Administrative Notice of Puerto Rico Statute. In the motion Respondents requested that I take judicial notion of the three Puerto Rican statutes cited in his motion. The Secretary orally advised the Commission that she opposes the Respondents' Motion in Limine. The Secretary's objection is noted, but I have determined that the court will take judicial notice of these laws as requested by the Respondents. The relevancy, if any, of these laws to the issues at hand and their effect, if any, on the applicability of Mine Act, remains an open question.

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David F. Barbour
Administrative Law Judge

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