

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-201-M
Petitioner	:	A.C. No. 42-02159-130699
	:	
v.	:	
	:	
GILBERT DEVELOPMENT CORP.,	:	Mine: SR9/ Harrisburg Pit
Respondent	:	

**ORDER DENYING RESPONDENT’S MOTION TO REOPEN RECORD
TO SUBMIT WITNESSES TO POLYGRAPH EXAMINATION**

Respondent filed a motion to reopen the record in this proceeding for the limited purpose of subjecting several fact witnesses to a polygraph examination. It states that it filed the motion because there were so many conflicting facts presented at the hearing. The Secretary opposes the motion because neither the Commission’s procedural rules nor the Federal Rules of Civil Procedure sanction the introduction of post-trial evidence to bolster witness credibility. In addition, she argues that Respondent did not set forth any special circumstances that would justify the use of polygraph testing. For the reasons discussed below, I deny Respondent’s motion.

Commission Procedural Rule 55 empowers Commission judges to, among other things, regulate the course of hearings, rule on offers of proof and receive relevant evidence, and dispose of procedural motions. 29 C.F.R. § 2700.55. This authority can be used, in appropriate circumstances, to reopen the record for the submission of new evidence.

The Commission addressed a motion to reopen the record in *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993). In that case, the mine operator sought Commission review of a judge’s order denying the operator’s motion to reopen the record. Relying on Rule 59 of the Federal Rules of Civil Procedure, the judge denied the motion. On review, the Commission held that the decision to grant or deny a motion to reopen is “committed to the sound discretion of the trial judge.” 15 FMSHRC at 357. The Commission affirmed the judge’s decision and set forth three factors that should be considered. These factors are: (1) the timeliness of the motion; (2) the character of the newly proffered evidence; and (3) the effect of granting the motion. *Id.* See also, *Meek v. Essroc Corp.* 15 FMSHRC 606, 614 (April 1993).

Although the motion in this case was filed soon after the close of the hearing, I find that, based on the character of the newly proffered evidence, the motion should be denied. Four witnesses testified for each party. Both parties were given the opportunity to cross-examine the

opposition's witnesses and to test their credibility. Commission administrative law judges act as the finders of fact in Commission proceedings and, in doing so, make necessary credibility determinations. The judge in this case is charged with making these determinations based on his observations of the witnesses and the testimony presented. The Supreme Court, in *United States v. Scheffer*, questioned the reliability of polygraph evidence. 523 U.S. 303, 309 (1998). In addition, federal courts have expressed their disfavor of the use of polygraph evidence. *See, e.g., United States v. Swazye*, 378 F.3d 834, 837 (8th Cir. 2004) (The court stated that "[w]hen two witnesses contradict each other, juries, not polygraph tests, determine who is testifying truthfully."). Judges act as juries in Commission proceedings. Conducting polygraph tests would "interfere with the [judge's] role in making credibility determinations" and has the potential to raise collateral issues. *SEC v. Kopsky*, 586 F. Supp. 2d 1077, 1080 (E.D. Mo.) (citing the opinion of four justices in *Scheffer*, 523 U.S. at 313-315). The effect of granting the motion would be to further delay the proceedings to allow for the submission of polygraph evidence. This evidence would be of little value, given the unreliability of polygraph tests, and would conflict with and add confusion to credibility determinations made by the judge.

For the reasons set forth above, the motion to reopen is **DENIED**.

Richard W. Manning
Administrative Law Judge

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