

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**1730 K. Street, N.W., 6<sup>th</sup> Floor  
Washington, D.C. 20006**

February 11, 2000

SECRETARY OF LABOR,	:	SPECIAL PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. S. 2000-1
v.	:	
	:	
STERLING VENTURES, LLC,	:	
and CHRIS PULLIAN	:	
Adverse Parties	:	

**ORDER GRANTING MOTION TO PERPETUATE TESTIMONY**

Counsel for the Secretary is seeking an order granting her the right to take the testimony of Placido (Carlos) Lino, an employee of Sterling Ventures, LLC d/b/a/ Sterling Materials (Sterling). The testimony relates to circumstances surrounding a fatal accident that allegedly occurred at Sterling’s mine on December 21, 1999. The accident took the life of a miner who was working with Lino. According to the Secretary, Lino and the victim were shoveling spilled material onto a conveyor belt, Lino was called away for a few moments, and the victim was pulled into the belt’s tail pulley.

The Secretary investigated the accident and interviewed Lino, who is a citizen of Mexico. The Secretary issued citations and an order to Sterling. She also interviewed Lino’s and the victim’s foreman, Chris Pulliam. According to Pulliam’s counsel, during the course of the interview representatives of the Secretary candidly advised Pulliam he might be subject to proceedings brought by the Secretary under section 110(c) of the Act for knowing violations of mandatory safety standards.

Sterling did not challenge the validity of the citations and the order, and the Secretary has yet to initiate a penalty proceeding against Sterling or Pulliam. Nevertheless, because she believes that "Lino may return to Mexico at any time and most likely will be outside of the subpoena power of the Commission before any discovery can be commenced in any anticipated litigation", the Secretary requests that she be permitted to depose Lino as soon as possible and prior to the initiation of any proceeding (Sec. Mem. at 6).

The Secretary's request was received on February 1, 2000. Because it did not initiate a proceeding nor relate to one that was pending, it was assigned a special docket number (Docket No. S 2000-1). Counsels then were contacted by telephone. Counsel for Pulliam was not available, but counsel for Sterling stated that he would file a response and that he would consult with counsel for Pulliam about whether he (counsel for Pullian) would file one as well.

Today, February 11, 2000, at 10:30 a.m., counsel for the Secretary advised me via a conferenced telephone call that certain "developments" necessitated an expeditious ruling. Counsel for Sterling added that the company discovered that Lino's Social Security number did not "match" his name and that information Lino filed with the Immigration and Naturalization Service did not appear to be accurate. Counsel for Sterling stated that the company was required to advise Lino of this, to suspend him from employment, and to give him time to correct or supplement his records. Counsel for the Secretary voiced concern that upon being suspended Lino might immediately leave either the country or the jurisdiction.

I asked counsels for Sterling and Pulliam to file by facsimile copy and as expeditiously as possible responses to the Secretary's request. Counsels and I agreed to talk again in an hour, at which time I would rule orally on the request and following which I would issue a written ruling.

Counsel for Sterling's response was received. In it counsel opposed the Secretary's request. Counsel for Pulliam's written response was not received prior to the 11:30 a.m. follow-up conversation, but in the conversation counsel for Pulliam orally stated his opposition to the request and expressed his concerns should the request be granted.<sup>1</sup>

Counsels for Sterling and Pulliam believe that I am without jurisdiction to order the deposition because no "proceeding" is pending before the Commission. They maintain section 113(d)(1) and 113(d)(2) of the Act (30 U.S.C. §823(d)(1) and §823(d)(2)) when read together confine the Commission's authority to "proceedings instituted before the Commission" (Response of Sterling 1-2), and they argue that there is no provision in the Commission's rules for the imposition of an order prior to the institution of a proceeding.

Counsel for the Secretary notes that Commission Rule 1(b) (29 C.F.R. §2700.1(b)) requires the Commission and its judges to be "guided" by the Federal Rules of Civil Procedure on any procedural question not regulated by the Act, and she argues that although the order she seeks is not provided for by the Commission's rules, it is allowed by Rule 27 of the Federal Rules (Sec.'s Mem. 2-6).

As I orally explained to counsels, I agree with the Secretary. While it is true the Commission's rules state they are applicable to "proceedings before the . . . Commission" (29 C.F.R. §2700.1(a)), they also state that they must be "construed to secure . . . just determination[s]" (29 C.F.R. §2700.1(c)). The situation before me is extraordinary, and a just

---

<sup>1</sup> Counsel for Pullium's response was received following the conversation.

determination well may be thwarted if the Secretary is not afforded the opportunity to prevent Lino's testimony from being lost. Federal Rule 27 provides a means for doing just that by allowing for the perpetuation of testimony in "any matter that may be cognizable". Guided by Rule 27, I conclude these principles can be applied in an unusual situation such as this where a matter presently is not able to be brought before the Commission.

Under Rule 27, the unique nature of the right to depose a person before an action begins requires the moving party to meet five demanding conditions, all of which the Secretary successfully has established (See Sec's Mem. 2-3).<sup>2</sup> Accordingly, I conclude the Secretary's petition should be and is **GRANTED**.

### **ORDER**

Therefore, it is **ORDERED** that the Secretary be allowed to depose Lino regarding the dates of his employment at Sterling, the nature and extent of his duties, his knowledge of his and of other miners' training while employed, his knowledge of the events and conditions surrounding the alleged accident of December 21, 1999, and any supplementary matters necessary for establishing such facts.

In issuing this order I note the concern of counsels for Sterling and Pulium that prior to the deposition they be afforded copies of notes in the Secretary's possession regarding the Secretary's interview(s) with Lino and copies of any other records that may bear upon the content of the interview(s). They stated that such information is necessary if due process is to be afforded their clients. The problem was discussed with counsel for the Secretary, and she has agreed to provide such copies, reserving her right(s) of privilege.

---

2

- 1.) The petitioner must show it expects to be a party to an action but is presently unable to bring it or cause it to be brought;
- 2.) The petitioner must state the subject matter of the expected action;
- 3.) The petitioner must state the facts which the petitioner desires to establish by the proposed testimony and the reasons for perpetuating it;
- 4.) The petitioner must name or describe the person the petitioner expects will be the adverse party and must give the address of the person so far as is known; and
- 5.) The petitioner must state the name and address of the person to be examined and the substance of the testimony the petitioner believes will be elicited (See Fed. R. Civ. P 27(a)(1)).

Further, I note that counsel for the Secretary requested and counsel for Sterling orally agreed to advise Lino that he can expect to be served with a subpoena and to be deposed regarding the subject accident.

David Barbour  
Chief Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Via Fax and Certified Mail)

Marcus P. McGraw, Esq., Greenbaum, Doll & McDonald, 333 West Vine Street, Suite 400, Lexington, KY 40507 (Via Fax and Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., 841 Corporate Drive, Suite 101, Lexington, KY 40503 (Via Fax and Certified Mail)