FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 30, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-68-M
Petitioner	:	A. C. No. 54-00297-11648
v.	:	
	:	
MASTER AGGREGATES TOA BAJA CORP.,	:	Cantera Master Aggregates
Respondent	:	

ORDER DENYING MOTION TO PERMIT SUPPLEMENTAL RESPONSE TO SECRETARY'S SECOND REQUEST FOR ADMISSIONS

On March 23, 2006, Respondent filed a motion captioned Supplemental Response to Secretary's Second Request for Admissions in which it seeks to amend, without explanation or justification, its response to the Secretary's Second Request for Admissions (Request No. 5).

Said Request No. 5 states as follows:

> Request No. 5: On November 13, 2002, Jeffrey Albrecht did not examine ground conditions at the base of the highwall, the site of the fatality, prior to the accident.

In its initial response filed December 1, 2005, Respondent states as follows:

> Response to Request No. 5: Master Aggregates objects to Request No. 5 on the ground that it is vague and ambiguous, as it is not known what is meant by the phrase "prior to the accident." Subject to the foregoing objection, however, and without waiving the same, Master Aggregates states that for the purposes of the above-captioned administrative proceedings only, Request No. 5 is admitted [emphasis added].

On March 23, 2006, following hearings on March 8-9, 2006, Respondent filed the motion at bar seeking to amend its response to read as follows:

> Response to Request No. [5]: Master Aggregates objects to Request No. 5 on the ground that it is vague and ambiguous, as it is not known what is meant by the phrase "prior to the accident." Subject to the foregoing objection, however, and without waiving the same, Master Aggregates states that for the purposes of the above-captioned administrative proceedings only, Request No. 5 is denied [emphasis added].

The Secretary objects to the present motion arguing that it is untimely and prejudicial. More particularly the Secretary argues as follows:

> Respondent initially served the Secretary with its response to Secretary's Second Request for Admissions on December 1, 2005. Since that date, the Secretary has used Respondent's admission in response to Request No. 5 to support her Opposition to Respondent's Motion for Partial Summary Decision and Cross-Motion for Partial Summary Decision dated February 2, 2006. The Secretary also listed Respondent's admission in response to Request No. 5 in her Prehearing Statement dated February 16, 2006. At no time between December 1, 2005, and March 7, 2006, did the Respondent allege that its admissions in response to Request No. 5 was inaccurate or a misstatement of the facts. The Secretary is prejudiced by Respondent's tardy contention, first made at trial on March 8, 2006, that it made in [sic] an error in responding to Request No. 5 of Secretary's Second Request for Admissions. Respondent had ample time to review this admission before trial, particularly since the Secretary called Respondent's attention to the particular admission at issue in two separate filings. Respondent instead chose to wait until trial before changing its answer, thus depriving the Secretary of any opportunity to conduct further discovery on this material point.

In a response to the Secretary's opposition to the motion, Respondent argues that the Secretary would not be prejudiced should the motion be granted because it had informed the Secretary on the date of hearing on March 8, 2006, of its intention to change its response to Admission Request No. 5 from "admitted" to "denied," and because the Secretary had the opportunity to examine the witness, Mr. Albrecht, at his deposition and at trial regarding any perceived discrepancies. Respondent further asserts, but without explanation, that the initial response to Request for Admission No. 5 was the result of an "error by counsel."

The appropriate framework for resolving the issue presented is provided by the Federal Rules of Civil Procedure, applicable hereto by Commission Rule 1(b), 29 C.F.R. § 2700.1(b). Fed. R. Civ. P. 26 (e)(2) imposes an ongoing and broad reaching duty to correct disclosures and to seasonably amend a prior admission if the party believes that the response is incorrect in a material sense. Under Fed. R. Civ. P. 37(c), if a party, without substantial justification, fails to amend a prior response to discovery as required by Rule 26(e)(2), a party may not use the undisclosed information as evidence at trial unless the failure to disclose was harmless. See *7 Moore's Federal Practice* § 37.60 (Matthew Bender, 3d ed.)

Respondent has failed to provide any explanation to justify its failure, until the day of trial, to notify the Secretary of its proposal to assert a denial in place of an admission made in discovery three months earlier regarding a material issue in the case. The question of whether Mr. Albrecht inspected the highwall on the day of the fatal accident is, of course, at the very core of the case. Respondent has also failed to adequately explain why the initial response to the request for admissions was made as it was. Merely alleging that it was due to "error by counsel" is insufficient. Respondent, who has the burden of proving the basis for its motion, failed to question Mr. Albrecht at hearing regarding the basis for the alleged error. The attorney who made the alleged error could also have testified to explain the circumstances (though would then have been required to withdraw from representation).

Moreover, I do not find that the failure to have provided timely disclosure was harmless. The Secretary clearly placed significant reliance on the admission, using it, without objection, in the motions for partial summary decision, and obviously intending to use it at trial. Learning, on the day of trial, only moments before the commencement of trial, that Respondent was seeking to deny what had been relied upon to be a critical admission, denied the Secretary a reasonable opportunity to obtain alternative evidence.

Under all the circumstances, I find that the requested change from an admission to a denial, in the response to Admission Request No. 5 may not be used as evidence in the case at bar. Accordingly, the Respondent's Motion to Permit Supplemental Response to Secretary's Second Request for Admissions, is denied.

Gary Melick
Administrative Law Judge
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