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 8, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2006-172-M A.C. No. 01-00043-32236
v.	:	
LEHIGH CEMENT COMPANY, Respondent	:	Leeds Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2006-173-M A.C. No. 01-00043-49139
v.	:	
GARY STRUNK, employed by LEHIGH CEMENT COMPANY, Respondent	:	Leeds Plant

ORDER DENYING MOTION FOR SUMMARY DECISION

In these civil penalty cases, the Secretary is petitioning to assess Lehigh Cement Corporation (Lehigh) a civil penalty of $6,000 for an alleged violation of 30 C.F.R. § 56.14100(b), a mandatory safety standard requiring defects on any equipment that affect safety to be corrected in a timely manner to prevent the creation of hazards to persons (Docket No. SE 2006-172-M). The alleged violation is set forth in Citation No. 6092574, which was issued on September 11, 2003.[1] The citation was issued pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). In addition to alleging the violation, the Secretary also alleges the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Lehigh's unwarrantable failure and high negligence.

[1] The citation originally alleged a violation of 30 C.F.R §56.14102, a mandatory standard requiring braking systems on railroad cars and locomotives to be maintained in functional condition. On November 29, 2006, the citation was amended to allege a violation of section 56.14100(b). Order (November 29, 2006).

The citation states in part:

> There is a severe oil leak on the locomotive. Oil was running out onto the walkway for the locomotive and down the wheel and brakes on the right side. Oil has accumulated on the tracks where the locomotive must operate. The operator of the locomotive stated that the stopping distance of the locomotive has been compromised due to oil on the wheels, brakes and rails. Trucks must cross the tracks on a regular basis. The locomotive operator said some trucks would cross too close to the moving locomotive. The locomotive operator had given information about the excessive oil leak to the shipping supervisor who issued a work order on April 19, 2003 for the repair of the oil leak. The mobile equipment supervisor was called and informed of the leak. He said the locomotive repair was beyond his department's capability and the problem was given to the purchase manager to get bids for the repair. The failure of management to correct the severe oil leak constitutes more than ordinary negligence and the management has engaged in aggravated conduct making this violation an unwarrantable failure to comply with a mandatory standard.

Citation No. 6092574.

The Secretary also is petitioning for the assessment of an individual civil penalty of $1,000 against Gary Strunk, Lehigh's assistant plant manager (Docket No. SE 2006-173-M).[2] The Secretary charges Strunk knowingly authorized, ordered, or carried out the violation alleged in Citation No. 6092574. Strunk answered by denying he committed a knowing violation and by asserting no basis exists for assessing a civil penalty. Answer and Affirmative Defenses of Respondent 1.

Lehigh and Stunk are represented by the same counsel. On November 20, 2006, the Commission's chief judge assigned the cases to me. In the meantime, counsel for the Secretary and counsel for Lehigh and Strunk jointly moved for consolidation of the cases for trial and decision. I granted the motion on December 13, 2006. I also ordered counsels to consult to determine if the cases could be settled and to report the results of their discussions to me by January 19, 2007. Subsequently, counsel for the Secretary reported a settlement was not

---

Although the Secretary refers to Mr. Strunk as the plant manager, counsel for Lehigh and Strunk states Mr. Strunk is the assistant plant manager. Respondent's Opp. to Sec.'s Mot. 1 n. 1.

possible, and on February 7, 2007, I scheduled the cases to be heard on June 7, 2007, in Birmingham, Alabama.

DISCOVERY DISPUTE

The petitions were filed in September 2006. They were timely answered in October. On November 6, 2006, the Secretary served discovery requests on Lehigh, including interrogatories, requests for production of documents and requests for admissions. The Commission's rules required the discovery requests to be responded to fully and in writing within 25 days of service unless the party initiating discovery agreed to a longer time. 29 C.F.R. § 2700.58. On November 11, 2006, counsel for the Secretary agreed to an e-mail request from Respondents' counsel to respond by December 15, 2006. Affidavit in Support of Motion 1. The responses were not furnished by December 15. On December 21, 2006, and January 4, 2007, counsel for the Secretary sent e-mail requests for the promised responses. The first request resulted in counsel for Lehigh and Strunk stating he would "get . . . [the responses] out shortly" and the second request resulted in counsel stating, "I have them to get out to you today." *Id.* 3.

The responses were not received; so on January 17, 2007, counsel for the Secretary moved for summary decision in both cases. Counsel for the Secretary asserted there were no genuine issues as to any material facts and the Secretary was entitled to judgment as a matter of law. In counsel's view, the "undisputed facts" warranting summary decision resulted from the Secretary's request for admissions, which, lacking a response, were deemed admitted. The Secretary pointed to Fed.R.Civ.P. 36(a), which provides that if a party fails to respond to a request for admissions, the matters set out in the request are deemed admitted.

Counsel for Lehigh and Strunk asked for and was granted an extension of time in which to respond to the motion. Counsel noted in the request that "coincidentally" he had "served full and complete discovery responses" on the same day counsel for the Secretary filed her motion for summary decision. Letter of Thomas Benjamin Huggett (February 9, 2007). The extension of time was granted.

Not surprisingly, when counsel ultimately responded, he opposed the motion. First, counsel pointed out the Secretary's discovery requests were related to the case against Lehigh and not to the case against Mr. Strunk.[3] Thus, in counsel's view, there is no basis to conclude there are "undisputed facts" regarding the Secretary's claims concerning Strunk, and Strunk's denial of the alleged violation as stated in his answer remains extant, as does his denial of any basis to assess a civil penalty. Answer and Affirmative Defenses of Respondent 1. Counsel also noted the Secretary's counsel did not file a motion to compel Lehigh to answer the discovery prior to filing the motion for summary decision. Finally, counsel stated Lehigh has answered the

---

In fact, counsel is correct in this regard. The Secretary's requests for admissions are addressed to Lehigh only, and Docket No. SE 2006-172-M is the sole case referenced in the caption.

discovery requests and he asserts the Secretary has not been prejudiced by the company's delay in responding. Respondents' Opp. to Sec's. Mot. 3-4. [4]

RULING ON MOTION

The motion **IS DENIED** for several reasons. First, and as pointed out by counsel for the Respondent, it is denied with regard to Docket No. SE 2006-173-M because there has been no showing the Secretary initiated discovery in the case. Therefore, were I to accept the Secretary's argument Fed.R.Civ.P. 36(a) applied, I would not find its application appropriate in Mr. Strunk's case. In other words, I would not find at this point in the proceeding there are undisputed facts in Docket No. SE 2006-173-M.

Second, with regard to Docket No. SE 2006-172-M, there is no doubt counsel for Lehigh has been slipshod in meeting his discovery obligations. He failed to answer the discovery requests by the due date imposed under the Commission's rules, and, to the obvious frustration of counsel for the Secretary, he failed to meet subsequent dates counsel imposed upon himself. I sympathize with counsel for the Secretary and I note, in addition to counsel for Lehigh's delay and repeated requests for more time, in each instance it was counsel for the Secretary who had to take the initiative and request information regarding the status of the discovery responses.

This stated, counsel for Lehigh has noted correctly the liberal nature of discovery in Commission proceedings, one effect of that liberality being a reluctance on the part of the Commission's judges in the absence of prejudice strictly to enforce the discovery timelines set forth in the Commission's rules. In addition, counsel also has noted correctly the lack of a motion to compel on the part of counsel for the Secretary. While such a motion is not always required, where a party seeks summary decision based on a failure to respond to discovery, a "best practice" in Commission litigation is to seek an order to compel. The point, after all, is to use discovery to prepare for trial, not to circumvent it.

Here, because Lehigh now has answered the Secretary's discovery requests, because there has been no showing of prejudice to the Secretary due to the delay in Lehigh's answers and because there has been no prior motion to compel on the Secretary's part, the motion with regard to Docket No. SE 2006-172-M also **IS DENIED**.

The parties are reminded the cases are set to be heard on June 7, 2007, in Birmingham. Unless extraordinary circumstances arise prior to that time, the trial will not be delayed. In fact, it may be moved to an earlier day in the week, if the judge's docket allows. Counsels are

---

[4] Counsel for Lehigh also stated in the motion, "To the extent the timeliness of the responses established the initial response, Lehigh Cement respectfully requests that its affirmative answers to the Admission be accepted as an amendment." Respondents' Opp. to Sec's Mot. 4. Since I do not find the lack of a timely response determinative of the facts, I need not rule on this request.

expected to cooperate with one another and to meet their professional responsibilities so as to be prepared for trial on all of the issues no later than May 17, 2006, and counsels must advise me on or before that date if the cases are settled without having to do so on the record in Birmingham.

David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution:

Dana L. Ferguson, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

Thomas Benjamin Huggett, Esq., Morgan, Lewis 7 Bockius, LLP, 1701 Market Street, Philadelphia, PA 19103-2921

/ej