FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 2, 2001

GTI CAPITAL HOLDINGS LLC dba	:	CONTEST PROCEEDINGS
ROCKLAND MATERIALS,	:	
Contestant	:	Docket No. WEST 2000-638-RM
	:	Citation No. 7945881; 7/26/2000
	:	
v.	:	Docket No. WEST 2000-639-RM
	:	Citation No. 7945882; 7/26/2000
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2000-640-RM
MINE SAFETY AND HEALTH	:	Order No. 7945883; 7/26/2000
ADMINISTRATION, (MSHA),	:	
Respondent	:	Rockland Materials Pit 1
	:	Mine Id 02-02867

ORDER DENYING ROCKLAND'S MOTION FOR SUMMARY DECISION
ORDER DENYING THE SECRETARY'S CROSS-MOTION FOR SUMMARY DECISION
ORDER DENYING ROCKLAND'S MOTION TO COMPEL PRODUCTION

These proceedings are before me on notices of contest filed by GTI Capital Holdings, LLC, doing business as Rockland Materials ("Rockland") against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act ff 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations and one order of withdrawal (the "citations") against Rockland following its investigation of a fatal accident that occurred at its facility in Phoenix, Arizona. This facility includes a sand and gravel quarry and a concrete batch plant.

Rockland filed a motion for summary decision asserting that MSHA lacked the requisite jurisdiction to issue the citations. Rockland argues that, because the citations were issued at stockpiles for its concrete batch plant, the citations are invalid and should be vacated. It relies upon the language of the Mine Act, the agreement entered into between MSHA and the Department of Labor's Occupational Safety and Health Administration, and case law. The Secretary opposed Rockland's motion for summary decision and also filed a cross-motion for summary decision asserting that the undisputed facts make clear that MSHA had jurisdiction to issue the citations.

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

The Commission has long recognized that summary decision is an "extraordinary procedure." *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission adopted the Supreme Court's holding that summary judgement is authorized only "upon proper showings of the lack of a genuine, triable issue of material fact." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). I believe summary decision is especially inappropriate where the motion raises jurisdictional issues and the parties do not even agree on what facts are correctly before the court.

In these cases, the parties are at odds as to what facts I should consider in analyzing the motions for summary decision. Indeed, Rockland filed a motion to strike the Secretary's opposition to its motion for summary decision on the basis that she relies on facts that, according to Rockland, have not been disclosed by the Secretary in her discovery responses. In response to Rockland's motion to strike, the Secretary states that she relied on facts supplied by Rockland's managers during MSHA's accident investigation. Thus, it has not been shown that there "is no dispute as to any material fact." Neither party established that there is a "lack of a genuine, triable issue of material fact." The parties are not in agreement as to what facts are properly before the court and they also dispute the material facts relied upon in the other party's motion for summary decision. Consequently, summary decision cannot be granted at this time.

Rockland's motion that its reply to the Secretary's opposition to its motion to strike be accepted for filing is **GRANTED**. Rockland's motion to strike the Secretary's opposition to its motion for summary decision is **DENIED**. Rockland's motion for summary decision is **DENIED**. The Secretary's cross-motion for summary decision sustaining MSHA jurisdiction is **DENIED**.

Rockland requests that, in the alternative, I grant its motion to compel the Secretary to respond to its discovery requests. Rockland filed its first set of interrogatories and requests for production on or about October 27, 2000. According to Rockland, the Secretary's responses to this discovery were "entirely non-responsive." (R. Motion to Strike 3).

In her discovery responses, the Secretary invoked the informant's privilege, the deliberative process privilege, the attorney-client privilege, and the work product doctrine. In addition the Secretary attempted to rely on Fed. R. Civ. P. 33. That rule provides that a party may serve no more than 25 interrogatories without leave of the court. The rule further provides

that a party may seek leave of the court to serve more than 25 interrogatories, which leave shall be granted to the extent that it is consistent with Rule 26(b)(2). Rockland served 37 interrogatories in these cases. The parties made attempts to resolve their discovery disputes.

Federal Rule 33 does not apply to Commission proceedings. The Commission's procedural rule provides that parties "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Commission Rule 56(c) provides that, for good cause shown, a judge may "limit discovery to prevent undue delay or to protect a party ... from oppression or undue burden or expense." Consequently, I reject the Secretary's argument that it is not obligated to answer Rockland's interrogatories on the basis that Rockland did not seek leave of the court to file 37 interrogatories. If the Secretary believes that a party's discovery should be limited, she must file a motion under Commission Rule 56(c).

In correspondence dated April 23, 2001, counsel for Rockland states that the Secretary is taking the position that because Rockland's motion for summary decision is pending, she "should not be required to answer interrogatories that go beyond the scope of [Rockland's] motion for summary decision." If that statement correctly states the Secretary's position, it is rejected. The Secretary is obligated to answer all discovery requests including those that go beyond the scope of Rockland's motion for summary decision. In addition, I have denied Rockland's motion for summary decision so the issue is now moot.

Rockland's motion to compel is, in large measure, based on its request to be permitted to file a more detailed response to the Secretary's opposition to its motion for summary decision after it receives complete answers to its discovery. Rockland's motions are intertwined to the extent that Rockland seeks information to respond to the Secretary's opposition to its motions. I have denied both motions for summary decision. For this and other reasons, Rockland's motion to compel discovery response is **DENIED**.

Notwithstanding the above, the Secretary is hereby **ORDERED**, on or before **May 28, 2001**, to supplement its answers to Rockland's first set of interrogatories and requests for production, taking into consideration the court's rulings in this order. The Secretary shall answer each request based on information presently available to her. If the Secretary objects to any request or raises any privileges, she shall clearly state the basis for such objection or privilege. The parties shall make every effort to resolve all discovery disputes without involving the court. Future discovery disputes shall be brought to the attention of this court only if the parties are unable to resolve their differences after making a considered effort to do so. Any pending motions that are not discussed in this order are hereby **DENIED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Mark M. Savit, Esq., Patton Boggs, 2550 M Street, NW, Washington, DC 20037-1350 (Fax and First Class Mail)

Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999 (Fax and First Class Mail)

RWM