

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 2, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-403-M
Petitioner	:	A.C. No. 45-03455-58446
v.	:	
	:	
WASHINGTON ROCK QUARRIES, INC.,	:	King Creek Pit
Respondent	:	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL DISCOVERY

In this civil penalty proceeding, the Secretary of Labor, on behalf of her Mine Safety and Health Administration, petitions for the assessment of a civil penalty of \$625.00 against Washington Rock Quarries, Inc. (WRQ). The Secretary alleges the company violated a mandatory safety standard, 30 C.F.R. § 56.3130, at its King Creek Pit when it failed to employ mining methods suitable to maintaining the stability of a high wall at the pit. WRQ denies the violation, as well as Secretarial allegations regarding the gravity of the violation, the violation's significant and substantial nature and the alleged negligence of the company. A hearing was scheduled to begin on May 10, 2006. On April 19, 2006, at the joint request of counsels, it was rescheduled to begin on August 15, 2006. The order rescheduling the hearing stated in part, "All discovery in this matter shall be completed on or before July 17, 2006." (Order Rescheduling Hearing and Discovery (April 19, 2006)).¹

The pretrial preparations of the parties have been dogged by various discovery disputes, some of which are ongoing. In the most recent dispute, Counsel for the Secretary moves to compel WRQ to take certain specific actions. Counsel wants the company to supplement its answer to one of the Secretary's interrogatories, to make its proposed expert witness available for deposition on one of three specified dates, and to produce documents referenced in the expert's report.

For the reasons set forth below, counsel for the Secretary's motion is **GRANTED IN**

¹ Previously, discovery was ordered to be completed by April 10, 2006, but the deadline was waived to allow the Respondent to depose two persons the Secretary listed as possible witnesses, an MSHA inspector and an expert witness. See Order Granting Motion to Permit Discovery (April 6, 2006).

PART and DENIED IN PART.

The Motion As It Relates To The Secretary's Interrogatory

In Interrogatory No. 5, the Secretary asks WRQ to “identify . . . all individuals you intend to call as a witness at the hearing” and to provide “a detailed summary of each individual’s anticipated testimony.” Sec’s Mot. to Comp. Disc., Exh. 1 at 2. The Secretary moves that WRQ be required to answer separately and fully this interrogatory. The request is based upon that fact that although WRQ has identified four individuals it may call as witnesses^[2] it has not, in the Secretary’s view, adequately summarized their anticipated testimony.

In describing the anticipated testimony, the company has stated that one of the individuals “may testify about [WRQ’s] mining methods and training, prior MSHA inspections, and other facts and circumstances relevant to the citation at issue,” and that the other three may testify to these matters as well as to “conversation[s] with the MSHA inspector.” Sec’s Mot. to Comp. Disc. 7.

Counsel for the Secretary notes that Commission Rule 58 places WRQ under an obligation to answer the interrogatory “separately and fully.” 29 C.F. R. §2700.58(a). Counsel complains that the answers given are so general that without supplemental answers it will be necessary to depose the four witnesses. However, with appropriately supplemented answers, all parties may be saved the expense and time of depositions. Sec’s Mot. to Comp. Disc. 2-3.

Counsel for WRQ responds that it has not yet decided whom it intends to call as a witness; nor has it determined what testimony will be elicited. “Nevertheless, in an attempt to provide full disclosure, [WRQ has] provided [the Secretary] with the universe of persons that [WRQ] might call and [has] described as best it could what might be their testimony.” Resp. Mot. to Comp. Disc. 2. In doing so, WRQ maintains it has complied with the interrogatory and that it “cannot provide information that it does not have.” *Id.*

Ruling

_____ Counsel for the Secretary’s interrogatory requesting the name and contact information of those individuals WRQ intends to call as witnesses, is a proper interrogatory, and counsel for WRQ’s response providing the names and contact information of four persons, all or any of whom it might call, is a proper response. In answering, WRQ has identified its possible witnesses. Given this response, WRQ may not call witnesses outside the universe of named persons without good cause shown, and without counsel for the Secretary having full opportunity

² The individuals are Harry Hart, Lance Precour, Al Evans and Gordon Trolley. Sec’s Mot. to Compel Disc., Exh. 1.

to depose such additional witness or witnesses.³

In response to the interrogatory's request to provide a "detailed summary of each individual's anticipated testimony," WRQ has provided only the most general information regarding the subject areas about which the individuals may testify. The answers may reflect the state of the WRQ's case preparation at this point. However, the answers are so broad as to provide the Secretary with little or no knowledge of how to adequately prepare for the individuals' possible testimony. Therefore, within 20 days of the date of this order, WRQ **IS ORDERED** to supplement its answers to the interrogatory by summarizing the testimony the witnesses might give and by identifying the key facts about which the witnesses if called may testify.

Upon receiving the supplemental answers, counsel for the Secretary should promptly decide whether or not he wishes to depose the named individuals. If he believes depositions are in order, he and counsel for WRQ must together act to ensure the depositions are completed on or before **July 17, 2006**.

Motion As It Relates to WRQ's Expert Witness _____

The Secretary moves that WRQ be ordered to make its expert witness, Stephen Dmytriw, available for deposition on May 8, 9 or 10, 2006. Sec's Mot. to Comp. Disc. 4-5. The Secretary states that the deposition previously was scheduled to take place on May 10, but that counsel for WRQ recently stated he is not available on May 10 and that he does not know when Mr. Dmytriw will be available for deposition. *Id.* 4.

³ As noted previously, under the revised hearing schedule, discovery in this matter must be completed by **July 17, 2006**. This means that absent extraordinary circumstances and for good cause shown all depositions must be completed by that date.

Ruling

The motion is **DENIED**. Counsels are experienced and able. They have a duty to cooperate with one another and with the judge to insure a just result. Asking the judge to micromanage a matter they should be able to agree upon is demeaning to themselves and to their clients. There is more than adequate time between now and the conclusion of discovery for counsels to find a mutually acceptable date for the deposition of Mr. Dmytriw. Therefore, within ten days of the date of this order, Counsels **ARE ORDERED** to confer and to agree upon a date and time when the deposition can be taken. (If counsels are unable to agree, I will set an arbitrary date, time and place.)⁴

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

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⁴ Counsel for the Secretary also requests WRQ be ordered to provide copies of documents referenced in Mr. Dmytriw's expert report. Sec's Mot. to Comp. Disc. 3. Counsel for WRQ replies that the documents have since been provided and the issue is moot. Resp. to Mot. to Comp. Disc. 3-4. Counsel for WRQ is taken at his word. The part of the motion requesting an order requiring the delivery of specified documents **IS DENIED**.