

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

October 2, 2003

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 2003-173  
Petitioner : A.C. No. 46-08402-03562 A  
v. :

RICKY BRYSON, Employed by :  
ELK RUN COAL COMPANY, :  
Respondent : Black Knight II

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 2003-174  
Petitioner : A.C. No. 46-08402-03564 A  
v. :

CLIFFORD MASSIE, Employed by :  
ELK RUN COAL COMPANY, :  
Respondent : Black Knight II

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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 2003-178  
Petitioner : A.C. No. 46-08402-03563 A  
v. :

GARY LILLY, Employed by :  
ELK RUN COAL COMPANY, :  
Respondent : Black Knight II

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**ORDER DENYING MOTION TO EXCLUDE WITNESS**

On September 25, 2003, Petitioner filed a motion to exclude the testimony of Mr. Gary Hartsog at the hearing now scheduled for October 21, 2003. On September 26, 2003, I convened a telephone conference to hear arguments from both sides on this motion.

From the arguments of counsel it is clear to me that the Petitioner seeks to exclude the testimony of Mr. Hartsog as a sanction for alleged discovery irregularities by the Respondents.

The alleged irregularities fall in the general class of failure to respond completely to written interrogatories intended to elicit information on an expert witness. Because of normal delays in the discovery process, answers to written interrogatories were not exchanged until 30 days before the scheduled hearing and two weeks before the scheduled depositions. According to counsel, the expected testimony of the Respondents' expert will focus on a diagram of roof bolt placement. The diagram was not furnished with the answers to written interrogatories. Respondents' answers to written interrogatories identified in a very general way the material the expert is expected to rely upon in offering an opinion but did not identify any document in which the expert's opinion and the reasons for that opinion were set forth.

Inquiry of Respondents' counsel as to the expert opinion to be obtained from Mr. Hartsog produced only vague generalizations. Whether Mr. Hartsog will be able to provide expert testimony consistent with the *Daubert* requirements is not clear. Counsel for Respondents has agreed to provide additional material to Petitioner's counsel on an expedited schedule to assist her in preparing for the depositions. I note that the Federal Rules of Civil Procedure, Rule 26(a)(2)(C) provide that names of experts as witnesses shall be disclosed no less than 90 days before the hearing date unless the court orders otherwise. In this instance, no court order on timing of discovery was entered.

Discovery is intended to assist the parties and the Judge in assembling a record adequate and appropriate for reaching a reasoned decision. I believe for me to exclude now the testimony of Mr. Hartsog from the hearing as a sanction for discovery irregularities described above would not serve the intended purpose of discovery. The Petitioner's motion is denied without prejudice to a renewal of the motion at the hearing in light of the actual experienced difficulties in conducting a deposition under the circumstances.

Irwin Schroeder  
Administrative Law Judge

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