

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-19
Petitioner	:	A.C. No. 46-08829-11758
	:	
v.	:	Docket No. WEVA 2004-90
	:	A.C. No. 46-08829-17860
BAYLOR MINING INC.,	:	
Respondent	:	Beckley Crystal Mine

**ORDER DENYING SECRETARY'S  
MOTION FOR SUMMARY DECISION**

Docket No. WEVA 2004-19 was initially stayed pending the docketing and assignment of Docket No. WEVA 2004-90 that concerns a 104(d)(1) citation arising out of the same incident. The stay was continued on May 26, 2004, after WEVA 2004-90 was assigned due to scheduling conflicts that prevented an immediate hearing. The Order Continuing Stay noted that the parties agreed that discovery would continue during the pendency of the stay. The Order further noted that if settlement was not reached by August 19, 2004, the parties were to file a motion to lift the stay and to formally schedule these matters for hearing.

On July 8, 2004, Suzanne Brennan, the Secretary's counsel, wrote David Hardy, counsel for the respondent, suggesting July 23, 2004, as the written discovery completion date and the first or second week in August as the period for completing depositions. Brennan noted that this schedule would enable the parties to comply with the August 19, 2004, deadline for moving to lift the stay. On July 23, 2004, the Secretary forwarded her responses to Hardy's interrogatories and request for documents. However, Hardy failed to respond to the Secretary's discovery requests and he did not timely respond to Brennan's July 8, 2004, request to establish a deposition schedule. Brennan avers that she left subsequent telephone messages with Hardy's office that were not returned.

On August 17, 2004, the Secretary filed a Motion for Summary Decision. The Secretary relies on Rule 36 of the Federal Rules of Civil Procedure. Rule 36 provides that matters in requests for admissions are deemed admitted unless they are denied by the party to whom they are served within 30 days after service of the request, or, within a longer period as the court may allow or the parties may agree upon. Having failed to respond to the Secretary's request for admissions, the Secretary argues that the matters therein should be deemed admitted thus removing all genuine issues of fact.

In opposition to the Secretary's motion, Hardy relies on an August 11, 2004, letter from Brennan referencing their "conversation last week regarding scheduling of depositions." In apparent recognition of the Secretary's Motion for Summary Decision sent by Overnight Express Mail on August 17, 2004, responses to the Secretary's written discovery were served by the respondent by facsimile at 6:00 p.m. on August 19, 2004. During an August 23, 2004, telephone conference, counsel for the respondent candidly conceded that he could have been more diligent in responding to the Secretary's July 8, 2004, proposal for completion of written discovery by July 23, 2004.

Turning to the merits of the Secretary's Motion, the rub in the Secretary's reliance on Rule 36 is that the May 26, 2004, Order Continuing Stay, and the telephone conference that preceded it, extended the discovery schedule with the acquiescence of Brennan and Hardy. The Order did not explicitly establish deadlines for written and deposition discovery because the parties represented that they would cooperate with each other.

During the August 23, 2004, telephone conference Brennan indicated that the Secretary may seek additional responses to the respondent's August 19, 2004, answers to discovery. As experience demonstrated the necessity for a formal discovery schedule, the telephone conference established that any supplemental discovery requests must be served by facsimile on or before August 27, 2004. Responses to supplemental discovery must be served by facsimile on or before September 10, 2004. Finally, depositions must be completed by September 17, 2004. Failure to strictly adhere to this schedule will subject the offending party to sanctions under Commission Rule 59, 29 C.F.R. § 2700.59.

It is unfortunate that the parties did not seek to resolve this matter simply and expeditiously in a telephone conference. In view of the above, the Secretary's Motion for Summary decision **IS DENIED**.

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail and Facsimile)

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