

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

June 2, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-460
	:	A.C. No. 46-08436-100698
Petitioner	:	
	:	Docket No. WEVA 2007-470
	:	A.C. No. 46-08436-093158
	:	
	:	Docket No. WEVA 2008-889
	:	A.C. No. 46-08436-143554-02
v.	:	
	:	Docket No. WEVA 2008-890
	:	A.C. No. 46-08436-143554-03
	:	
	:	Docket No. WEVA 2008-891
	:	A.C. No. 46-08436-143554-04
	:	
	:	Docket No. WEVA 2008-892
	:	A.C. No. 46-08436-143554-05
PERFORMANCE COAL COMPANY,	:	
Respondent	:	Mine: Upper Big Branch - South

SCHEDULING ORDER

Respondent requested a hearing on the citation(s)/order(s) contained in this docket(s) and the proposed penalty in accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (Mine Act) and 29 C.F.R. 2700.50 *et seq.* A hearing is scheduled for **August 30, 2010** at 8:30 a.m., in Charleston, West Virginia at a location to be determined. A prehearing conference was held in Washington D.C. on May 20, 2010 and the prehearing and scheduling requirements were discussed at that time, and had also been set forth in an earlier notice of hearing. The motion to stay this docket filed by the Secretary was also addressed at the prehearing conference and has been denied.

The case(s) will be heard pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), and the issues include, but are not limited to, whether Respondent committed the violation(s) as alleged in the citation(s)/order(s) and the appropriate penalty to be assessed. Any person planning to attend this hearing who requires special

accessibility features and/or any auxiliary aids, such as sign language interpreters, must inform the commission in advance of these needs. This provision is subject to the limitations of 29 C.F.R. 2706.150(a) and 160(d).

These dockets are set for a trailing docket call and each party should be prepared to proceed at 8:30 a.m. on the day listed herein. If the case is not heard during the week of August 9, 2010, it will automatically move to the next date, September 21, 2010. No case will be rescheduled and all cases will be heard in the order of the dates of the citations/orders, commencing with the docket containing the earliest date. If there are cases that should be heard together or in a certain order, the parties must notify the Court of that fact at the prehearing conference. Every effort will be made to accommodate the witnesses for each docket. Absent good cause shown, no hearing will be continued, and no hearing will be cancelled unless a written settlement motion is filed with the Court.

On or before **July 30, 2010**, the parties shall provide to one another a list of persons with knowledge of each violation and a brief summary of the information they possess and provide copies of all documents created by or in the possession either of the Secretary of the respondent, including photographs, diagrams, maps, pre-shift, on-shift or foundation records, witness statements that are not privileged under the Commission Rule 61, supervisor's or examiner's notes, compilations or summaries of the notes taken by inspectors or respondent's personnel, production reports, walk-around reports, rebuttal forms that are maintained by respondent, and other no-privileged documents whether in hard copy or electronically stored. The Respondent has indicated that an MSHA investigation team has taken the books from the mine, but the operator retained a copy of each and those shall be provided for the one week period prior to and the day of the date of each citation. Each party shall prepare and provide a list of all documents in their possession or control that may be relevant to the inspection but is being withheld, along with an explanation for withholding the document. Any discovery beyond the disclosures will be limited. As required by Commission Rule 2700.10(c), the parties will confer in good faith before the filing of any motion with the Court. The parties are encouraged to schedule a conference call and resolve issues without the necessity of filing a formal motion.

The parties shall provide to one another, on or before **July 30, 2010**, the name, address and telephone number of any expert witness who may be called to testify, along with information about the expert's background and any reports generated by the expert. Each party is limited to one expert for each issue contained in the docket, i.e. one roof control expert, one ventilation expert etc. The parties may take depositions by agreement but the depositions are limited to expert witnesses and fact witnesses regarding any finding of unwarrantable failure, failure to abate, imminent danger, or other matter outside of a 104(a) citation with moderate negligence. The parties may discuss settlement at any time and as many times as they deem appropriate, not only for purposes of settling but for purposes of narrowing the issues for trial. The parties are encouraged to narrow the issues for trial and provide a list of specific matters to be decided at hearing. The parties may be notified that certain matters will be decided on the record and will be given the opportunity to present case law or prehearing statements prior to or at the hearing.

If the cases do not settle on or before **August 20, 2010**, the parties, by that date, shall send to each other and to me, a list of witnesses who may testify (subject to the limitations contained in 29 C.F.R 2700.62, a miner witness), along with their address and position and a brief synopsis of their testimony, a list of expert witnesses and their area of expertise and expected testimony, a list of exhibits which may be introduced, and matters to which the parties can stipulate at hearing. Petitioner shall label exhibits numerically and Respondent, alphabetically.

Margaret A. Miller
Administrative Law Judge

Distribution:

Lucy Chiu, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.
22nd Floor West, Arlington, VA 22209-2247

Carol Ann Marunich, Dinsmore & Shohl, LLP, 215 Don Knotts Blvd. Suite 310
Morgantown, WV 26501

/atc