

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. 6TH FLOOR
WASHINGTON D.C. 20006-3868**

| | | |
|-----------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 98-156-M |
| Petitioner | : | A. C. No. 09-00075-05529 |
| | : | |
| v. | : | |
| MARTIN MARIETTA AGGREGATES, | : | Camak Quarry |
| Respondent | : | |

ORDER TO QUASH AND REVOKE

This case is a petition for the assessment of civil penalties under section 110(a) of the Act. The hearing is scheduled for October 28, 1998.

The Solicitor has filed a motion to quash a subpoena that had been issued to produce Mitchell Adams at the hearing. The operator has filed a motion in opposition. Mr. Adams is an MSHA special investigator in training who participated in the investigation of this matter for the purpose of determining whether action for individual liability should be brought under section 110(c). MSHA has decided not to bring a 110(c) action.

On October 13, 1998, I issued an order directing that Mr. Adams appear for the taking of a deposition. However, in that order I also decided that under Commission precedent MSHA did not have to produce the special investigation report which was privileged. And I noted that any knowledge of special investigators about specific facts was second hand and was available from witnesses closer to the events in question. Finally, I reminded counsel that the deliberative process privilege protected the confidentiality of recommendations and deliberations made by special investigators. On October 21, 1998, Mr. Adams and Mr. Steve Kirkland, the special investigator on the case, were deposed.

In his motion to quash, the Solicitor advises that Mr. Adams is a special investigator in training and that he is scheduled for special training in Denver, Colorado, for the weeks of October 26 and November 2. Attached to the motion is a memorandum dated October 21 to the Solicitor from Terry E. Phillips, the MSHA supervisory special investigator for the Southeastern region. According to Mr. Phillips, the Southeastern region has only one qualified special investigator and the shortage of such investigators is a problem in other MSHA districts. To address this situation, MSHA has set up the course that Mr. Adams is scheduled to attend. Mr. Adams has been in training to become a special investigator and this course is the last critical element in his training necessary to authorize him to conduct investigations on his own. No other classes of this type are scheduled or even planned by MSHA at this time.

In response to the motion to quash, the operator represents that Mr. Adams is a necessary and critical witness for its defense. The operator wishes to have Mr. Adams address the issues of high negligence and unwarrantable failure and in this connection states that many questions about the accident were asked in the special investigation, but not by the inspectors who issued the citations (e.g. who released the brakes of the locomotive and why; and what was the practice and rule at the mine regarding the use of radio communications and setting the brakes).

After carefully considering the motions filed by the parties, I have determined that the motion to quash should be granted. The facts involved in the examples given by the operator, supra, can better be obtained directly from individuals who have first hand knowledge of those matters and who undoubtedly occupy positions of responsibility in the operator's own organization. Insofar as Mr. Adams may have a different view of negligence than the issuing inspectors, it is I who must make the determinations regarding the existence and degree of negligence as well as the propriety of imputation of negligence. The opinions of Mr. Adams who participated in a much later investigation undertaken for different purposes would be of little help to me in reaching conclusions regarding any facet of the negligence issue. In addition, the fact that Mr. Adams has not even completed his training to become a special investigator, further reduces the value and relevance of his opinions.

The foregoing demonstrates sufficient reason to revoke the subpoena so that Mr. Adams may proceed with his scheduled training. 29 C.F.R. ' 2700.60(c).

It is **ORDERED** that the motion to quash be **GRANTED** and that the subpoena previously issued be **REVOKED**.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail & Facsimile)

Leslie John Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Henry Chajet, Esq., Patton Boggs, L.L.P., 2550 M Street, NW., Washington, DC 20037-1350

/gl