

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004-1710  
Phone: (202) 434-9933 | Fax: (202) 434-9949

February 22, 2017

BING MATERIALS	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEST 2016-514-RM
	:	Order No. 8989250; 05/11/16
v.	:	
	:	Docket No. WEST 2016-515-RM
SECRETARY OF LABOR,	:	Order No. 8989249; 05/11/16
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2016-516-RM
Respondent.	:	Order No. 8989248; 05/10/16
	:	
	:	Docket No. WEST 2016-517-RM
	:	Citation No. 8989247; 05/10/16
	:	
	:	Mine: Bing Materials
	:	Mine ID: 26-00430

---

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2017-0068
Petitioner,	:	A.C. No. 26-00430-422508
	:	
v.	:	
	:	
BING MATERIALS,	:	
Respondent.	:	Mine: Bing Materials
	:	

**ORDER DENYING MOTION TO COMPEL**

Before: Judge Moran

On January 30, 2017, Respondent Bing Materials (hereinafter “Bing” or “Respondent”) filed a Motion to Compel the Secretary to answer the Respondent’s First Set of Interrogatories (“First Interrogatories”) in this matter. On February 6, 2017 the Secretary filed a response in opposition. For the reasons that follow, as Respondent’s First Interrogatories makes 42 inquiries, not the presumptive 25, the Respondent’s motion is **DENIED**.

## Background

For context, the Court briefly summarizes the four matters at issue in this litigation. Each matter involved the same mine, “Bing Materials,” and each was issued by the same MSHA Inspector, Kimberly Hakala. In sequence, they began with a section 104(d)(1) citation issued on May 10, 2016, Citation No. 8989247, involving numerous alleged safety defects on a crane, in violation of 30 C.F.R. §56.14100(b). Next was a section (d)(1) order, No. 8989248 issued the same day, shortly after the aforementioned citation. That Order alleged a failure to provide new task training for the operator of the same crane identified in the (d)(1) citation, in violation of 30 C.F.R. §46.7(a). The following day, May 11, 2016, Bing was issued another (d)(1) order, No. 8989249, alleging a violation of the standard prohibiting intoxicating beverages in or around the mine’s office, in violation of 30 C.F.R. §56.20001. Later that same day, a third (d)(1) order was issued to the mine, Order No. 8989250, alleging that the mine owner had not received required new miner training, per 30 C.F.R. §46.5(a).

Respondent served the Secretary with its First Interrogatories regarding Penalty Docket No. WEST 2017-0068 on December 5, 2016.<sup>1</sup> The First Interrogatories presents 42 questions.<sup>2</sup> The Secretary indicated that it did not intend to answer more than 25 interrogatories on the grounds that parties before the Commission are presumptively limited to serving 25 interrogatories upon an opposing party by Rule 33(a)(1) of the Federal Rules of Civil Procedure.<sup>3</sup> Although the parties attempted to resolve their discovery dispute through a

---

<sup>1</sup> This Order only addresses the “First Interrogatories,” which were filed in connection with WEST 2017-0068. On January 7, 2017, the Respondent then separately served the Secretary with its First Set of Interrogatories *for each of the associated contest proceedings*; 18 interrogatories for Contest Docket No. WEST 2016-0514-RM; 19 interrogatories for Contest Docket No. WEST 2016-0515-RM; 12 interrogatories for Contest Docket No. WEST 2016-0516-RM; and 19 interrogatories WEST 2016-0517-RM. The four contests involve the same citation and orders set forth in the civil penalty proceeding and the contest interrogatories appear to be essentially redundant to those presented in the “First Interrogatories” for the civil penalty proceeding addressed in this Order, WEST 2017-0068. On January 18, 2017, the Secretary filed a Motion to Consolidate the four contest proceedings and the civil penalty proceeding, as set forth in the caption. An Order, granting consolidation, was issued by the Court on February 3, 2017.

<sup>2</sup> A few of the 42 interrogatories have subparts. In calculating the limit of 25 written interrogatories, discrete subparts are counted as separate questions. The term “discrete subparts” has been interpreted “as meaning that ‘interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question.’” *Safeco of America*, 181 F.R.D. 441 (1998) quoting *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684, at 685 (D.Nev.1997) (“*Kendall*”), in turn quoting *Ginn v. Gemini, Inc.* 137 F.R.D. 320, 322 (D.Nev.1991). Another expression of the test is “to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question?” *Kendall* at 685.

<sup>3</sup> F.R.C.P. Rule 33, “Interrogatories to Parties,” provides in relevant part, “Unless otherwise

discussion on January 6, 2017, they have not been able to reach an agreement on this matter. The Secretary has objected to each of Bing's interrogatories, employing identical language in summarizing its dispute – that parties are limited to 25 interrogatories, absent the opposing party's agreement to answer more than that number or upon leave of the Court allowing additional interrogatories, neither of which has occurred in this litigation.

As noted by both parties, the Commission's Procedural Rules do not directly address the issue of if and when a party may serve its opponent with more than 25 interrogatories. Absent clear direction from the Procedural Rules, the Court is "guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b). As the Respondent acknowledges, Procedural Rule 1(b) affords the Commission discretion to decide the extent to which it will be guided by the Federal Rules of Civil Procedure. Respondent's Motion at 4, citing *Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989). In its Order in *Kirk Fenoff*, this Court addressed a similar motion from a party seeking to compel a response to more than 25 interrogatories. *Kirk Fenoff & Son Excavating*, 36 FMSHRC 3339 (Dec. 2014) (ALJ Moran). In that instance, the Court found that the moving party must present "a particularized need for each additional interrogatory beyond the permitted maximum of 25." *Id.* at 3343. This showing is required to balance the moving party's interest in broad disclosure against the countervailing considerations of undue burden, expense, or delay.

Bing alleges that *all* 42 interrogatories are "warranted" on the basis that the citations and orders at issue were designated by MSHA as S&S, high negligence, and reasonably likely to lead to a fatal injury, making these "not run-of-the-mill enforcement actions." Respondent's Motion to Compel at 5-6. The Court is not persuaded by Bing's attempt to differentiate the circumstances in *Kirk Fenoff* from those at issue here.<sup>4</sup> The designations it refers to are not unusual in citations or orders issued under the Mine Act. The Respondent may not gain a "blanket" approval of some 17 additional interrogatory questions with vague and generalized assertions of necessity.

On the topic of burden, Bing alleged that the Secretary will not face an undue burden if required to respond to its interrogatories — because the Secretary has had notice of Bing's intention to contest the four citations and orders at issue for several months. The Secretary replied that answering all of the interrogatories will require a duplicative effort on the part of MSHA Investigator Hakala, who will soon be deposed on the same subject matter at issue in the

---

stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2)."

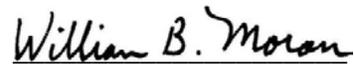
<sup>4</sup> As the Secretary correctly points out and, as the summary above notes, the four alleged violations at issue in these consolidated cases are not all factually independent from one another. Although they do allege violations of different standards under the Mine Act, the Secretary has asserted that there will likely be common issues of fact because the alleged violations concern the same mine, the same management, and a single inspection that took place during two consecutive days in May 2016. There is no basis, if Respondent is suggesting it, that 25 interrogatories may be propounded for each citation or order.

interrogatories. Secretary's Response to Bing Materials' Motion to Compel at 9. Further, *the extent of time that has elapsed since the Secretary had notice of the Respondent's intention to contest the enforcement actions at issue* is not a recognized basis for an exception to the presumptive 25 interrogatory limit.

The procedure to be employed is for the Respondent to identify its 25 questions by interrogatory and then await the responses to those. Thereafter, upon evaluating the responses, if the Respondent believes it is warranted, it may seek leave to propound additional interrogatories. In that event the Secretary will then have an opportunity to respond to such requests and the Court will then rule upon those issues.

Accordingly, for the reasons stated, the Respondent's Motion is **DENIED**.

So **ORDERED**.



William B. Moran  
Administrative Law Judge

Distribution:

Jason Nutzman, Counsel for the Respondent, 707 Virginia Street East, Suite 1300, Charleston, WV 25301, Jason.Nutzman@dinsmore.com

Isabella Finneman, Senior Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 90 Seventh Street, Suite 3-700, San Francisco, CA 94103, Finneman.Isabella@DOL.gov