

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

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February 22, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2017-0546
Petitioner,	:	A.C. No. 04-01299-437883
v.	:	
	:	Docket No. WEST 2017-0685
ORIGINAL SIXTEEN TO ONE MINE INC,	:	A.C. No. 04-01299-445257
Respondent.	:	
	:	Docket No. WEST 2018-0100
	:	A.C. No. 04-01299-450097
	:	
	:	Mine: Sixteen to One Mine
	:	

**ORDER**

Before: Judge Moran

These consolidated cases are before the Court upon petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.<sup>1</sup> On January 29, 2017 the parties informed the Court of a dispute that has arisen during the discovery process.

On that date, the Conference and Litigation Representative, (“CLR”), Mr. Randy Cardwell,<sup>2</sup> sent an email to the Court informing that he “requested the following information from Mr. Miller, per the Prehearing Orders as described under § 2700.105 Disclosure of Information by the Parties:

Citation No. 8785581: Please provide the Respondents policies and procedures regarding the use of self-rescuers, and any training documentation, which would indicate that miners were trained in the use of self-rescuers.

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<sup>1</sup> These matters are currently set to be heard commencing April 17, 2017 in Nevada City, California. All three dockets have been designated for simplified proceedings pursuant to 30 C.F.R. § 2700.102.

<sup>2</sup> It is the Court’s understanding that Attorney Isabella M. Finneman has or will file a notice of appearance for these dockets, as the CLR has not sought the Court’s permission to practice regarding these dockets, per 29 C.F.R. §2700.3(b)(4). The Court construes the CLR’s informal request as seeking factual information from the Respondent.

Citation No. 8785582: Please provide any information the Respondent may have regarding any requests made to have the Speedair air compressor inspected.

In looking at the termination for the Speedair air compressor, the compressor was removed from the mine site, was there a reason as to why the Respondent chose to remove the compressor? Instead of having it inspected.

Citation No. 8879879: Please provide any records which would show when the W65 Self- Rescuer unit EN8047 was weighed, dating back to when it was assigned.

Citation No. 8879886: Please provide any information which would indicate how the inside of the magazine was kept suitably dry.

Citation No. 8879887: Please provide any information indicating when the Cobra blasting caps and the Dyno Nobel Nonel shock tube detonators were purchased and delivered to the mine site.

Cardwell email to the Court January 29, 2018

Each of these dockets has been designated for Simplified Proceedings. The provision cited by the CLR, § 2700.105, titled, “Disclosure of information by the Parties,” provides, in relevant part,

(a) Within 45 calendar days after a case has been designated for Simplified Proceedings, the parties shall provide any information in a party's possession, custody, or control that the disclosing party or opposing party *may use to support its claims or defenses*. Any material or object that cannot be copied, or the copying of which would be unduly burdensome, shall be described and its location specified. Materials required to be disclosed include, but are not limited to, inspection notes from the entire subject inspection, rebuttal forms, citation documentation, narratives, photos, diagrams, preshift and onshift reports, training documents, mine maps, witness statements (subject to the provisions of § 2700.61), witness lists, and written opinions of expert witnesses, if any.

29 C.F.R. § 2700.105 (emphasis added).

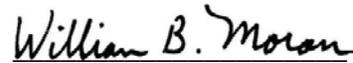
The Court, noting that, per 29 C.F.R. 2700.107, discovery is not permitted except as ordered by the administrative law judge, finds that the information sought by the CLR constitutes discovery.<sup>3</sup>

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<sup>3</sup> For example, the CLR’s request for any information the Respondent may have regarding any requests made to have the Speedair air compressor inspected will only come into play if the Respondent is asserting this as a defense or in mitigation. Several of the requests, such as the information how the magazine was kept suitably dry, may simply be addressed through the

**That said, the Court advises the Respondent that the determination in this Order comes with an important caveat.** Through experience in other hearings, the Respondent is well aware of the importance of each side disclosing information intended to be used at the hearing. In the past, with this Respondent, the Court has been lenient in permitting the Respondent to submit documents in its defense at, or very near to, the commencement of the hearing. However, it will not allow that practice to continue to occur. Therefore, it is in the *Respondent's interest* to disclose any such information per the prehearing exchange date. Of course, this applies to both sides. As the Court has informed the Respondent on other occasions, modern litigation avoids such late disclosure of information in order to prevent surprise. The idea is that both sides put their cards "face up" so to speak, in order to provide for a fairer and more accurate determination of the issues in dispute. Both sides are hereby **ORDERED** to respond to the Court acknowledging receipt of this Order and to their understanding of the consequences of failing to provide to one another information intended for their respective petition or defense.

**SO ORDERED.**

  
William B. Moran  
Administrative Law Judge

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Secretary's cross-examination, if such matters come up. The Respondent (and the Secretary) are again advised to pay attention to the caveat in this Order.

Distribution:

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