FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of the Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

August 29, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-830
Petitioner,	:	A.C. No. 15-08079-210194
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: No. 3 Mine
Respondent.	:	

ORDER DENYING SECRETARY'S MOTION TO LIMIT DISCOVERY

This case is before me upon the Secretary of Labor's ("Secretary") Petition for the Assessment of Civil Penalty, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. The case was assigned to me by Chief Judge Robert J. Lesnick on April 4, 2011.[1] In dispute are five section 104(a) citations issued to Respondent, Excel Mining, LLC ("Excel"), with proposed penalties of $11,158. The Secretary is represented in this proceeding by a Conference and Litigation Representative ("CLR") who filed a Notice of Unlimited Appearance with the petition on April 6, 2010. The CLR is authorized to "represent the Secretary in all matters in this case, including representing the Secretary at a hearing without an attorney from the Office of the Solicitor present." (Notice of Unlimited Appearance at 1.) Excel concomitantly filed its answer to the Secretary's petition along with a request for production of documents and a set of interrogatories on April 19, 2010. In response to these discovery requests, the Secretary filed a Motion to Limit Discovery on May 13, 2010, pursuant to Commission Procedural Rule 56(c), 29 C.F.R. § 2700.56(c).[2] Excel filed a Reply in Opposition to the Secretary's motion on May 17, 2010.

A. Parties' Arguments

[1] Given the more than 500 cases currently pending on my docket, my Prehearing Order issued in conjunction with the Order of Assignment on April 4, 2011, specifically ordered the moving party to alert my office if the case contained any outstanding motions. The Secretary failed in this respect, as her motion was educed during a routine review of the case file.

[2] In proceedings before Commission Judges, parties may obtain discovery, *inter alia*, through interrogatories and requests for production of documents. 29 C.F.R. 2700.56(a). Parties from whom discovery is sought may move to limit discovery to prevent undue delay or "to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c).

The Secretary argues that permitting discovery would "cause undue delay in this proceeding, place undue burden and expense on the Secretary, and therefore not serve the public interest in having these cases resolved expeditiously." (Sec'y Mot. at 1–2.) According to her motion, answering Excel's discovery requests would impose an undue burden on the Secretary. (*Id.* at 2.) The Secretary suggests that Excel will suffer no prejudice if the case proceeded to a hearing without discovery because she has "already offered to provide copies of the inspector's notes along with all other related and non-privileged information available." (*Id.* at 3.) In response, Excel contends that the Secretary has presented "no particular or specific facts to meet her burden of showing good cause for limiting discovery, but relies on conclusory statements and should be denied summarily." (Resp't Reply at 1.) Excel also points out several misrepresentations in the Secretary's motion, which are discussed below in more detail.

B. Commission Procedural Rule 10(c)

Commission Procedural Rule 10(c) states that moving parties (1) "shall confer or make reasonable efforts to confer with other parties" prior to filing any non-dispositive motion, and (2) "shall state in the motion if any other party opposes or does not oppose the motion." 29 C.F.R. § 2700.10(c). Here, the Secretary's motion to limit discovery fails on both counts. First, the Secretary's motion includes no statement regarding Excel's opposition. Second, although the Secretary suggested during settlement negotiations that Excel accept inspection field notes "in lieu of formal discovery," the Secretary "never consulted with Excel regarding the potential filing of this motion." (Resp't Reply at 1 n.1, Exhibit 2.) Such failures contravene Commission Procedural Rule 10(c).

Although the requirements contained in Commission Procedural Rule 10(c) may appear to be minor or overly formalistic, they serve a constructive purpose. The rule forces parties to communicate prior to filing a discovery motion, which typically results in an amicable resolution of the discovery dispute without the need for court intervention. Since the filing of the Secretary's motion, the parties have been at a stalemate for more than a year with no energies exerted towards either settling this case or positioning it for hearing. Compliance with the rule might have avoided this unfortunate result.

C. Other Errors and Deficiencies in the Motion

Although the Secretary's failure to comply with Commission Procedural Rule 10(c) is sufficient grounds to deny her motion, I am troubled by the motion's repeated factual inaccuracies and paucity of legal analysis. First, the Secretary alleges she "already offered to provide copies of the inspector's notes along with all other related and non-privileged information available." (Sec'y Mot. at 3.) Although the Secretary's April 22, 2010 e-mail offered copies of the inspector's notes in lieu of formal discovery during settlement negotiations, the offer made no mention of all other related and non-privileged information. (Resp't Reply at 1 n.1, Exhibit 2.) The Secretary fails to include any specifics regarding a subsequent offer, if any, to provide such additional information.

Second, the Secretary claims Excel requested 115 interrogatory responses and twenty-five answers to produce documents through discovery. (Sec'y Mot. at 2.) However, the Secretary's own appendix to her motion makes plain the extent of this misrepresentation. Even counting subparts, Excel in fact propounded just thirty-three interrogatories and made five requests for documents. (Sec'y Mot. at Attachment A.)

Third, the Secretary alleges that "[l]imiting discovery and requiring the [R]espondent to exchange relevant and non-privileged evidence places no additional burden on [R]espondent and would enhance the opportunity for settlement." (Sec'y Mot at. 3.) Yet the record reveals that the Secretary has filed no document or interrogatory requests with Excel, so no basis exists for "requiring [Excel] to exchange relevant and non-privileged evidence." (*Id.*; Resp't Reply. at 9.) The Secretary's assertion is misplaced and premature at best.

Finally, the Secretary's legal analysis of how limiting discovery would prevent undue delay or protect the Secretary from oppression or undue burden relies almost entirely on conclusory statements. The motion cites no circuit court or Commission precedent—not even a previous Administrative Law Judge order—offering an interpretation of Commission Procedural Rule 10(c)'s undue delay or undue burden or expense standards.

D. Discussion

Based on the above, it appears the CLR replicated the body of a motion from a previous case. While reliance on a previously prepared motion or pleading may be a reality of efficient modern legal practice, litigants remain responsible for ensuring the facts asserted in the "template" actually conform with the facts involved in the case at bar. Commission Procedural Rule 1(b) states that the Federal Rules of Civil Procedure guide Administrative Law Judges "so far as practicable" on "any procedural question" that the Mine Act, the Administrative Procedure Act, and the Commission's own rules do not regulate. 29 C.F.R. § 2700.1(b). Looking to Federal Rules of Civil Procedure 11 and 26 as a guide, representatives are responsible for ensuring the accuracy of their pleadings and responses to discovery requests, and may be liable for sanctions for failure to comply. *See* FED. R. CIV. P. 11(a), (c) and (d); FED. R. CIV. P. 26(g). Without a doubt, legal pleadings and legal analysis cannot, and should not, be paint by numbers.

Perhaps most troubling is that a CLR filed this motion with apparently no legal supervision. The Commission's rules permit non-attorneys to practice before it, *see* 29 C.F.R. § 2700.3(b), and CLR's undoubtedly play a crucial role in efficiently managing the Secretary's caseload. However, an attorney—mindful of his or her duties as an officer of the court—would not have made the multiplicity of factual misrepresentations found in the Secretary's motion. Moreover, I do not believe the Secretary intended for CLR program personnel to make substantive legal arguments like those so thinly analyzed in this motion without attorney supervision. Nor should the Secretary permit a CLR to appear at a hearing without an attorney if the motion before me is indicative of the work product to be expected.

Inaccurate, misleading, and poorly researched pleadings waste the time and resources of parties and Commission Judges alike. Inexperience or unfamiliarity is no excuse. *Cf. Hays v. Sony Corp.*, 847 F.2d 412, 418–19 (7th Cir. 1988) (suggesting that Rule 11 requires a lawyer lacking expertise in an area of law either to associate with a lawyer who does or to "bone up" in recognition that a lack of experience may make error more likely). The Secretary treads too closely to the precipice if she allows CLR's to practice in this manner.[3] She is reminded that Commission Procedural Rule 80(a) states "[i]ndividuals practicing before . . . Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States" —this includes CLR's.

The Secretary should examine or reconsider the appropriate level of attorney supervision applied to CLR's to ensure such error-laden motions do not become MSHA's standard practice.[4]

For the reasons articulated above, the Secretary's motion to limit discovery is hereby **DENIED**. The parties are on notice that the requirements of my April 4, 2011, Prehearing Order, are still in effect.

Alan G. Paez
Administrative Law Judge

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[3] To the extent an attorney ostensibly "supervised" the CLR's submission of the motion in this case, such attorney would be well-advised to consider analogous provisions in the Federal Rules, which permit courts to consider whether "other attorneys" and government agencies should be held accountable for an improper pleading. *See* FED. R. CIV. P. 11(c)(1) (advisory committee notes).

[4] I have this day denied a similar discovery motion filed in Docket No. KENT 2010-928, a case involving the same CLR and operator's counsel and which contained many of the same types of errors and misrepresentations. The Secretary should ensure these types of motions from CLR's do not become a pattern.