

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-18
Petitioner	:	A.C. No. 46-09230-197161
	:	
v.	:	Docket No. WEVA 2010-494
	:	A.C. No. 46-09230-197160
	:	
	:	Docket No. WEVA 2010-611
	:	A.C. No. 46-09230-208527
	:	
REMINGTON, LLC,	:	
Respondent	:	Mine: Winchester Mine

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY OF LABOR’S MOTION TO COMPEL

The Petitioner, the Secretary of Labor, has moved to compel the Respondent, Remington LLC, to respond to several interrogatories in the Secretary’s first set of interrogatories and to produce certain documents requested in the Secretary’s first request for production of documents. According to the Secretary, the Respondent has objected to the interrogatories and provided incomplete information or claimed the requested information is unavailable.

The Secretary requested production of examination reports for several parts barns, examination reports for the main mine fan and all Winchester Mine examination reports from June 4, 2009 to July 18, 2009. Sec’y Mot. to Compel 6. The Respondent replied that it had been unable to locate the requested documents. The Secretary requests that I draw an adverse inference from the absence of these documents. Sec’y Mot. to Compel 9. The Respondent argues that it is under no obligation to retain the records requested by the Secretary for any period of time and that the Company generally only keeps such records for a year. Opp’n to Mot. to Compel 1.

The Company has stated it no longer has the records requested by the Secretary and I cannot order a party to produce something it does not have. Nor can I penalize the Company by drawing an adverse inference from their absence when the Secretary has failed to offer evidence the Company had an obligation under the Mine Act to maintain the requested records.

Accordingly, the Motion to Compel is **DENIED** with regard to Requests for Production 5 and 6 in Docket No. WEVA 2010-18.

The Motion to Compel is **DENIED** with regard to Requests for Production 5, 6 and 7 and with regard to Interrogatory 6 in Docket No. WEVA 2010-494.

The Motion to Compel is **DENIED** with regard to Requests for Production 8 and 9 in Docket No. WEVA 2010-611.

The Secretary has requested verification of Respondent's responses to her interrogatories. Sec'y Mot. to Compel 6. Respondent's counsel signed its responses to the Secretary's interrogatories and to the Secretary's requests for production. The Secretary has failed to explain what additional verification is sought. Therefore, the Secretary's request is **DENIED**.

INTERROGATORIES, ANSWERS AND RULINGS

A. WEVA 2010-18

Interrogatory 2. If you are contending that the assessed penalty will have an effect on Respondent's ability to continue in business, state all the facts that support that contention.

Answer. Any civil penalty will have some impact on an operator's ability to continue in business.

The Secretary argues if the Respondent contends the penalty will effect its ability to continue in business then the Respondent must provide supporting evidence. Sec'y Mot. to Compel 4. In its responsive motion the Respondent states that it will not argue at trial that the assessed civil penalties for these citations "will be the final weight on the scale that forces it to go out of business." Opp'n to Mot. to Compel 3.

The Respondent's answer is unresponsive. It is unclear from the general statement made by the Respondent in its answer or from its responsive motion whether it contends that the penalty will effect Respondent's ability to continue in business. If the Respondent intends to argue the assessed civil penalties will affect its ability to continue in business it should provide the requested information. If the Respondent does not intend to make such a contention it should clearly state this in its answer. The Respondent is **ORDERED** to respond to the interrogatory as written.

B. WEVA 2010-611

Interrogatory 14. Identify the individual(s), including title(s), responsible for examining the continuous miner referenced in Citation # 8097554 at the Winchester Mine during the month of November 2009.

Response. Respondent does not have sufficient knowledge to respond to this interrogatory. Respondent reserves the right to supplement this response should information responsive to this request be located.

The Respondent states in its responsive motion that it searched its records, but was unable to find the requested information. Resp. Motion 4. As stated earlier, I cannot order the Respondent to disclose information it does not have. Accordingly, the Secretary's Motion to Compel is **DENIED** with respect to Interrogatory 14.

REQUESTS FOR PRODUCTION OF DOCUMENTS, RESPONSES AND RULINGS

A. WEVA 2010 - 494

Request 2. All statements taken by Respondent in relation to the contested Citations.

Response 2.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request implicates the attorney-client privilege, the work product doctrine, and the self critical examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this request that may be legitimate, respondent states that is unaware of any such statements. Respondent reserves the right to supplement this response.

The Secretary argues any privileged information should have been identified in a privilege log. Sec'y Mot. to Compel 5. The Respondent contends that the Company's employees have discussed the citations with counsel. Opp'n to Mot. to Compel 2. Respondent argues it should not be required to produce a privilege log including this information. *Id.*

The Respondent's answer is unresponsive. Respondent states in its responsive motion that the Company should not be required to provide a privilege log but has failed to make an argument in support of its position. As I stated in my July 28, 2011 order in response to a similar discovery issue, if some of the requested information is privileged the burden is on the party asserting the privilege to identify it. The information sought by the Secretary must be disclosed. The Respondent is **ORDERED** to respond to the request for production.

B. WEVA 2010-611

Request 2. All statements taken by Respondent in relation to the contested citations.

Response.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, it implicates the attorney-client privilege, the work product doctrine, and the self critical examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this interrogatory that may be legitimate, respondent states: see attached exhibits.

The Respondent is **ORDERED** to respond to the request for production for the same reasons as Request 2 in Docket No. WEVA 2010-494.

Request 7. All documents related to the training of miners at the Winchester Mine for the year of 2009.

Response.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, it implicates the attorney-client privilege, the work product doctrine, and the self critical examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this request that may be legitimate, the Respondent will provide relevant training records in a supplemental filing.

The Secretary states that the training records have not been produced. The Respondent is **ORDERED** to provide the records.

All outstanding discovery must be completed for the above-captioned dockets by September 23, 2011.

David F. Barbour
Administrative Law Judge

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