

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

August 8, 2006

MARFORK COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-666-R
	:	Citation No. 7253941; 05/17/2006
	:	
v.	:	Docket No. WEVA 2006-667-R
	:	Citation No. 9967710; 05/18/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2006-668-R
ADMINISTRATION, (MSHA),	:	Citation No. 9967723; 05/18/2006
Respondent	:	
	:	Brushy Eagle
	:	Mine ID 46-08315
	:	
	:	Docket No. WEVA 2006-669-R
	:	Citation No. 7239937; 05/16/2006
	:	
	:	Docket No. WEVA 2006-670-R
	:	Citation No. 7239939; 05/16/2006
	:	
	:	Docket No. WEVA 2006-671-R
	:	Citation No. 7239935; 05/16/2006
	:	
	:	White Queen
	:	Mine ID 46-08297

ORDER CONTINUING STAY
ORDER DISMISSING MOTION FOR PROTECTIVE ORDER
AND
ORDER RESCINDING DISCOVERY

The Secretary's Motion to Stay these contest matters was granted by Order on July 21, 2006, because the contestant did not oppose the Secretary's motion. The Order permitted the parties to engage in discovery during the pendency of the stay.

On July 27, 2006, Contestant's counsel served on the Secretary a Notice of Depositions, accompanied by subpoenas issued by Contestant's counsel, seeking to compel the attendance of MSHA inspectors Albert Clark, Gerald Cook and James Wilson at a deposition at 9:00 a.m on August 7, 2006. On August 3, 2006, the Secretary's counsel responded that he was not in agreement with the Contestant's unilateral deposition schedule. Upon learning of the Secretary's objections, in an August 3, 2006, facsimile, Contestant's counsel cautioned the Secretary's counsel that he "could be subjecting the Secretary to sanctions" if he disregarded the subpoenas and did not avail the MSHA inspectors for deposition on August 7, 2006. In the August 3, 2006, correspondence, the Contestant claimed its desire for expeditious depositions was motivated by a desire to complete discovery within 40 days of its initiation as specified in Commission Rule 56(e), 29 C.F.R. § 2700.56(e).¹

On August 4, 2006, the Secretary filed a Motion for a Protective Order. Commission Rule 57(b) provides that the judge shall specify the time, place and manner of taking depositions if the parties are unable to agree. 29 C.F.R. § 2700.57(b). Thus, the unilateral deposition date is contrary to the Commission's Rules. It follows that the Secretary's disinclination to attend is not a sanctionable event. Consequently, the parties were advised during a August 4, 2006, telephone conference that the Secretary's Motion shall be dismissed as moot.

Although the July 21, 2006, Order permitted discovery despite the stay, I now believe that discovery while these matters are stayed for consolidation with the civil penalty proceedings is neither wise nor an efficient use of judicial resources. In instances where contests are stayed, postponing discovery until the civil penalties are proposed facilitates settlement discussions and may obviate the need for discovery. In order to avoid the undue burden or expense that may result from needless discovery, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), discovery shall be limited to periods when these matters are not on stay.²

¹ The time constraint in Rule 56(e) is routinely extended by agreement of the parties or by order of the judge.

² An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty. A contest may not be used solely for the initiation of discovery when, as in the current case, the operator elects to forgo its right to an early hearing, instead opting to await the civil penalty proceeding.

In view of the above, **IT IS ORDERED** that the Secretary's Motion for a Protective Order **IS DISMISSED** as moot.

IT IS FURTHER ORDERED that the stay in these contest proceedings **IS CONTINUED**.

IT IS FURTHER ORDERED that the provision in the July 21 Stay Order permitting discovery **IS RESCINDED**.

This order supercedes the directive given to the parties during the August 4, 2006, telephone conference concerning their submission of stipulated satisfactory deposition dates on August 14, 2006, for the purpose of judicial establishment of discovery schedules in these matters.

Jerold Feldman
Administrative Law Judge

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