

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 24, 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) on
behalf of JUSTIN HICKMAN,
Complainant,

v.

HUBER CARBONATES, LLC,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. LAKE 2018-0387-DM
MSHA No. NC-MD-18-06

Mine: Quincy Plant
Mine ID: 11-02627

ORDER GRANTING EXTENSION OF TIME TO RESPOND

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case was assigned to me on September 20, 2018.

On October 19, 2018, Respondent, Huber Carbonates, LLC, filed a Motion for Declaratory Judgment. In their motion, Respondent requested an order from the Commission requiring Complainant to return to Respondent an email dated August 8, 2018 and bar its use in this or any other proceeding under the Federal Mine Safety and Health Act of 1977. Respondent alleges the email is protected by attorney-client privilege and was inappropriately obtained by Complainant. Respondent alleges that the email was drafted by outside counsel and addressed to Respondent’s in-house counsel and management. The email included language labeling it “ATTORNEY-CLIENT PRIVILEGED COMMUNICATION” and a footer reiterating this point and requesting its return should any party receive it in error. Respondent further alleges that one of its employees, included on subsequent responses to the original email, forwarded the email to another employee discussed in the email on August 16, 2018. That employee then forwarded the email to Eric Reno, an MSHA Special Investigator, who served as the lead investigator in the present discrimination proceeding. Subsequently, Respondent made unsuccessful attempts to request the return of the email from Complainant.

On September 11, 2018, a Temporary Reinstatement hearing was held in St. Louis, Missouri. In that hearing, this same issue was raised by Respondent. Hr’g Tr. 10-12, Sept. 11, 2018. At the hearing, Respondent noted that Mr. Reno received the email. Complainant

explained the email was not reviewed by MSHA attorneys, nor used in preparation for the hearing, but instead was placed in a confidential file for the time being.

On October 19, 2018, Complainant filed a Motion for Extension of Time to Respond to Respondent's Motion for Declaratory Judgment, in which it requests additional time, until November 16, 2018, to respond to Respondent's motion. Complainant justifies this request by arguing Respondent has asked for extraordinary and unprecedented relief when they request a bar on the use of the email in any proceeding hereafter. In addition, Complainant argues that Respondent's motion raises novel issues related to the applicability and waiver of attorney-client privilege in the context of governmental privileges, specifically the government informant's privilege. Complaint has informed Respondent of their motion and reports that Respondent opposes the motion.

Complainant has possessed the email in question for a considerable period of time and has been aware of its potentially-privileged nature. Furthermore, Complainant has known of Respondent's objection to Complainant's continued possession of the email, as Respondent made these objections known during the Temporary Reinstatement hearing. This knowledge has provided Complainant ample time to formulate a response to the attorney-client privilege contest. However, due to time taken by the court to consider this motion, the Secretary's Motion is **GRANTED** in part. The Secretary is **ORDERED** to submit his Response to Respondent's Motion for Declaratory Judgment by November 5, 2018.

Due to the relevance of the email in consideration of Respondent's Motion for Declaratory Judgment, Respondent is **ORDERED** to provide the email document under seal for *in camera* review.



Priscilla Rae
Administrative Law Judge

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