

CCASE:
ASARCO V. SOL (MSHA)
DDATE:
19890712
TTEXT:

~1573

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ASARCO, INCORPORATED,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. SE 88-82-RM
Citation No. 3252969; 7/16/88

Docket No. SE 88-83-RM
Citation No. 3252970; 7/16/88

Immel Mine
MINE ID 40-00170

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

ASARCO, INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. SE 89-67-M
A. C. No. 40-00170-05520

Immel Mine

ORDER

I.

On April 12, 1989, the Secretary (Petitioner) served ASARCO (Respondent) with a Deposition Notice and Request for Production of Documents. The Notice requested the Respondent to designate representatives to testify, in essence, as to the Tennessee Mines Division's history of compliance with various standards of the Federal Mine Safety and Health Act and applicable regulations, as well as its safety policies and procedures, management structure and responsibility for determining electrical maintenance procedures and policies, and the factual events leading up to the death of Ronald Miller on July 15, 1988, and ASARCO's actions immediately following the fatality. In addition, Petitioner requested depositions be taken of certain enumerated individuals including Fred Cain, John Ellis, John Jacques, Don Walter, and Jim Bales.

On April 21, 1989, Respondent filed a Motion for Protective Order. In its Motion, Respondent seeks protection from the depositions of a corporate designee along with the following individuals Cain, Ellis, Walter, Bales and Jacques. In essence,

~1574

Respondent indicates that its "would be," corporate designee Donald R. Ledbetter was deposed on October 12, 1988, and testified regarding all the matter requested by Petitioner, and that Petitioner extensively cross-examined him, and that deposing another corporate representative would "contribute nothing to resolving the Secretary's questions" Respondent also alleges, in essence, that nether Cain, Ellis, Walter, Bales, nor Jacques have personal knowledge of the circumstances of the incident in question nor could they testify as to ASARCO's relevant electrical policies and procedures.

On May 12, 1989, Petitioner filed a response to Respondent's Motion for a Protective Order. Along with its response it attached a copy of Ledbetter's Deposition.

On May 15, 1989, Respondent filed a statement in which it indicated that, pursuant to an understanding it reached with Petitioner's Counsel, its reply to Petitioner's opposition to its Motion for Protective Order would be filed on or before May 31, 1989. On June 1, 1989, Respondent's reply to the Secretary's response to its Motion for Protective Order was filed.

The subject citations which are being contested by Respondent in the above captioned cases, allege violations of 30 C.F.R. 5712017 and 5712019, and that the violations therein resulted from Respondent's high negligence. Accordingly, it is clear that an examination of Respondent's representatives with regard to the matters set forth in Petitioner's Motion, is relevant to these proceedings. It is manifest that an examination with regard to the events leading up to the cited incident and ASARCO's actions immediately following the incident, as well as an examination as to Respondent's policies and procedures and management structure as well as its history of compliance with various regulations, would be relevant to the issue of its negligence, which is a factor to be considered in determining the amount of a penalty to be assessed, should it be found that Respondent has violated a mandatory safety standard. Thus, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Respondent shall designate a representative or representatives to testify as to the matters set forth in paragraph 1.(a-d) and produce the documents set forth in paragraphs i, ii, and iii of Deposition Notice and Request for Production of Documents. The fact that Ledbetter had already been deposed by Respondent, and cross-examined by Petitioner, shall not serve to deprive Petitioner of its right to prepare for trial by examining Respondent's representatives who have knowledge of the matters set forth in paragraph 1 of Petitioner's Notice.

Aside from asserting that Cain, Ellis, Jacques, Walter, and Bales ". . . represent an apparent chain of authority of ASARCO's Immel Mine, one leading ultimately to Ronald Miller, the miner

~1575

who was killed," Petitioner does not set forth any facts to support a conclusion that an examination of these individuals would be relevant to the subject matter involved in the pending action. Indeed, there are no facts presented to conclude that an examination of these individuals is reasonably calculated to lead to a discovery of admissible evidence. Respondent has asserted that the enumerated individuals, in essence, do not have knowledge of the matters set forth in Petitioner's Notice. However, aside from its own assertion, there are no affidavits setting forth any facts to support these assertions. I thus conclude that there are not sufficient facts set forth before me to conclude that an examination of the above enumerated individuals would be relevant to the subject matter at hand. However, should it appear from the deposition of the individual or individuals designated by Respondent, and examined pursuant to this Order, that other individuals have knowledge of the matters sought to be deposed as set forth in Petitioner's Notice, then Petitioner shall be afforded the right to depose these individuals.

Inasmuch as Petitioner, in its response to Respondent's Motion, indicated that it has withdrawn the request made in its Notice that Larry E. Thomas be present at the time of a requested inspection of the mine and accident site, it appears from Respondent's reply that it no longer objects to Petitioner's request to inspect and photograph the mine and accident site. Accordingly, this request is GRANTED and it is ORDERED that Respondent permit the Petitioner to inspect the subject mine and accident site, and photograph the same, and such inspection is to be performed at a time to be agreed upon by Counsel for both Parties. It is further ORDERED that Respondent shall produce for deposition all individuals having knowledge of the matter set forth in paragraph 1 of Petitioner's Notice, and these individuals shall produce all documents referred to in paragraph 1 of Petitioner's Notice. The depositions are to be taken within 10 days of this Order, unless the Parties agree upon an extension, at a site to be mutually agreed upon.

II.

On March 9, 1989, Respondent served upon Petitioner a First Set of Interrogatories requiring an answer and response on or before 15 days after service. On April 21, 1989, Respondent filed a Motion for an Order to Compel Answers to Interrogatories. On May 12, 1989, Petitioner filed its Answers to Respondent's First Set of Interrogatories. In its Answer it objected to a number of the Interrogatories. On June 1, 1989, Respondent filed a Motion to Compel Answers to Interrogatories. Petitioner did not file any response to this Motion.

~1576

a. Interrogatory No. 2

Interrogatory No. 2 requests as follows:

Please state the names, addresses, and employment positions of each person assisting in any way, directly or indirectly in the preparation of the answers to these Interrogatories, and state the answer(s) which each person so listed has assisted in preparing.

Petitioner in its response has indicated that a Mr. Daugherty in answering the Interrogatory was assisted by an attorney for the Secretary and "These communications are privileged pursuant to the attorney-client privilege." It should be noted that Respondent does not seek to discover any communications between the attorney for the Secretary of Labor and his client. The Interrogatory merely request the identification of any person assisting in the preparation of Answers to the Interrogatories. As such a response to Interrogatory No. 2 does not violate an attorney-client privilege and should be answered.

b. Interrogatory No. 7

Interrogatory No. 7 requires the listing by name of each person the MSHA Inspectors contacted in the course of the MSHA investigation prior to and after the issuance of each of the citations in issue. Petitioner as a response indicated that "Contacts after the initiation of these proceedings would be privileged as 'work product' under Rule 26(b)(3), Fed. R. Civ. P."

This Interrogatory, in essence, seeks the identity of persons contacted by an MSHA Inspector, rather than material prepared by Counsel in preparation of trial. As such, the listing of names would be beyond the "work product" protection (see cases cited in Moores Federal Practice at 26-354, 355).

In its Answer, Petitioner further indicates that "consultation with miners and informants would be nondiscoverable except as provided under Commission Rule 59." In this connection, Respondent has requested that information requiring informants be provided 2 full days before the hearing pursuant to 29 C.F.R. 2700.59.

Section 2700.59, supra, prohibits the disclosure of names of miners who are informants, except in "extraordinary circumstances." Respondent has not alleged any extraordinary circumstances herein. Accordingly, in complying with Interrogatory No. 7, Petitioner shall not divulge names of informants who are miners. Also, pursuant to Section 2700.59, supra, Petitioner, in answering Interrogatory No. 7, shall, 2 days prior to the hearing, disclose the names of miners who are expected to testify at the hearing.

~1577

c. Interrogatory No. 11

Interrogatory No. 11 requests as follows:

Please state, if not in writing and subject to one of the following requests for production, MSHA's policy or policies regarding (a) findings of high negligence; (b) interpretation of 30 C.F.R. 57.12017; and (c) interpretation of 30 C.F.R. 57.12019.

Petitioner's response to this interrogatory was as follows: "None." Respondent in its Motion argues as follows: "It is unclear whether 'none' means none exist, or none exist other than those in writing and not produced pursuant to the request for production." Accordingly, Respondent's position, in the interests of justice, is sustained, and Petitioner shall clarify, in its response to Interrogatory No. 11, whether MSHA does not have any policy with regard to matters referred to in Interrogatory No. 11, or whether it does not have any such policy other than those in writing and not produced pursuant to the request for production.

d. Interrogatory No. 14

Interrogatory No. 14 which was objected to by Petitioner on the ground that it was not relevant nor would it lead to relevant evidence, requires the identification of individuals who initiated, consulted on, and/or participated in the special assessment of civil penalties relating to the citations in issue and a description of their roles in the assessment process. Respondent's position is that the request for these names is relevant as they are the ones who determined the penalty which is a relevant issue to the case at bar. Inasmuch as the Commission has the authority, de novo, to assess all civil penalties provided for in the Federal Mine Safety and Health Act of 1977, based upon factors enumerated in section 110(i), supra, it is clear that the identity of individuals who participated in the special assessments of civil penalties would not be relevant to a decision by the Commission. Such a decision, on the issue of a penalty is to be based upon the factors in section 110(i) of the Act, which have to be established in an evidentiary hearing. Further, aside from indicating that those who participated in the special assessments are the very ones who determined the penalty found by MSHA herein, Respondent has not articulated in what fashion the identity of these individuals would be reasonably calculated to lead to the discovery of evidence which would be relevant to the establishment of any of the factors set forth in section 110(i) of the Act, and thus a resolution of the issue of a penalty to be set by the Commission. (c.f. see cases cited in Moores Federal Practice, supra, at 26-96.) As such, the objection of Petitioner to Interrogatory No. 14 is sustained.

~1578

e. Interrogatory No. 16

Interrogatory No. 16 requests as follows:

Identify the individuals who initiated, consulted on and/or participated in the special investigation of the alleged violations which are at issue in this proceeding and describe each of their roles in the special investigation.

Petitioner has objected to this Interrogatory on the ground that it is not relevant nor would it lead to relevant evidence. In the alternative Petitioner asserts that in order to avoid the appearance of impropriety and protect the rights of the individuals who may be targeted for investigation under criminal provisions of the Act, it has kept the civil proceedings segregated from any criminal investigation.

Respondent has alleged, that the investigation involved the same subject matter as that involved the incident proceeding. This allegation has not been contested by Petitioner. Further, Petitioner has indicated that the criminal investigation has been completed. Also, importantly, it is clear that the Petitioner's interest in avoiding ". . . the appearance of impropriety and protect the rights of those individual who may be targeted for investigation under criminal provisions of the Act," would not be thwarted by identifying individuals who "initiated, consulted on, and/or participated," in the special investigation. Respondent has not requested, and no identification shall be allowed, of any list or identification of those individuals who may be the target of or subject of the investigation. Hence, Petitioner shall answer this Interrogatory.

Thus, it is ORDERED, that within 10 days of this Order, Petitioner shall serve Respondent with a full and complete answer to Interrogatories 2, 7, 11, and 16. It is further ORDERED that Petitioner's objection to Interrogatory No. 14 is sustained.

It is ORDERED that, with regard to Interrogatory No. 7, Petitioner shall not divulge names of informants who are miners. Also, pursuant to section 2700.59, supra, Petitioner, in answering Interrogatory No. 7, shall 2 days prior to the hearing, disclose names of miners who are expected to testify at the hearing.

III.

On March 9, 1989, Respondent served Petitioner with a Request for Production. On April 21, 1989, Respondent filed a Motion for Order to Compel Document Production. On May 12, 1989, Petitioner

~1579

filed its Responses and Objections to Respondent's Request for Production of Documents. On June 1, 1989, Respondent filed a Motion to Compel Production of Documents.

In essence, Respondent's requests one through four require the production of documents pertaining to Petitioner's enforcement policies for Respondent's mine including documents exchanged between various MSHA personnel, contacts between MSHA personnel and Respondent with regard to its violations and documents received by MSHA personnel or provided by these personnel to various investigative agencies concerning alleged violations or mining practices of Respondent. Also requested were any documents pertaining to the initiation, criteria, review, and processing of special assessment violations during the past 2 years. In Respondent's Motion to Compel Production of Documents it indicates that the latter request (request No. 3) seeks not all individuals special assessment documents "but rather the policies underlining them."

In essence, Petitioner refuses to respond to these requests on the ground that it does not have any enforcement policies peculiar to one operator, and if it did have such policies they would not have any relevance to the instant, de novo, proceeding. In addition, Petitioner argues that the requests are so broad "as to be impossible to comply with," and as to be "unduly burdensome."

In general, in order to eliminate surprise and allow the Parties to adequately prepare for trial, in general, the rules of discovery should be broadly applied (see, *Hickman v. Taylor*, 329 U.S. 495 (1947)). Further, Rule 26(b)(1), supra, provides for the discovery of material which is "relevant to the subject matter." It is not necessary for the matter sought to be discovered to be admissible in evidence as long as it is reasonably calculated to lead to the discovery of admissible evidence (see cases cited in *Moore's Federal Practice*, supra, at 26-96). In this connection, Respondent has alleged that the information sought is ". . . essential to explore and expose bias, undercover the bases for agency's actions and reveal potential exculpatory information." Respondent has also indicated that request No. 3 does not require the production of all individual special assessment documents, but is limited to the production of policies underlining them. Accordingly, I conclude that the information sought in requests 1 - 4 are relevant.

Petitioner in its objection to request No. 2 argued that the request seeking documents made from contacts with MSHA personnel and "hourly personnel," regarding Respondent's operations seeks documents which "will or could identify miners" in violation of

~1580

Rule 59. Thus, in complying with request No. 2 the Petitioner shall not disclose, until 2 days before the hearing, the name of any miner who was expected to testify at the hearing, nor shall it disclose the name of any informant who is a miner, unless the Respondent establish the existence of "extraordinary circumstances."

Respondent also requested documents initiating the special investigation, documents initiating and relating to the special assessment, and relating to the special investigation of the events of July 15, 1988. Petitioner essentially argued that these requests are overly broad and that the matters sought to be disclosed are not relevant. In addition, with regard to the request for production of documents relating to the special investigation of the events of July 15, 1988, Petitioner incorporated the objections that it had made to Interrogatory No. 16, *infra*, and indicated in addition that the documents are protected as a "work product" of the Secretary's employees.

Respondent has argued that the material requested in request Nos. 5 to 9, i.e. the investigatory and assessment files specific to the citations at issue, ". . . are essential to testing the accuracy of witnesses' perceptions; to probe the truthfulness of witnesses; to question memory; to explore and expose bias; to uncover the basis for opinions and actions; and, to reveal potentially exculpatory information which may aid a respondent, such as ASARCO, in the preparation of its case." Petitioner has not filed any response to Respondent's Motion to Compel and thus has not rebutted Respondent's assertions. As such, I conclude that the material sought to be discovered is relevant.

Petitioner has not definitively indicated that the material sought by Respondent in request No. 9 was prepared in anticipation of litigation. Also the material sought would not impede the investigatory process as Petitioner, in its objection to Interrogatory No. 16, filed May 12, 1989, indicated that although the investigation was "not technically closed," the Solicitor had been informed that the investigation "has been completed." Accordingly, Respondent shall comply with this request.

It is ORDERED that, within 10 days of this Order, the Petitioner shall respond to Interrogatories 1 through 13, 15, and 16 and Request for Production of Documents 1 through 9 served by Respondent on March 9, 1989.

Avram Weisberger
Administrative Law Judge
(703) 756-6210