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ASARCO v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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ASARCO, INCORPORATED,
CONTESTANT
v.

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

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

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.

CIVIL PENALTY PROCEEDING

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

Immel Mine

ASARCO, INCORPORATED,
RESPONDENT

ORDER ON REMAND

Before: Judge Weisberger

I.

On December 26, 1990, the Commission vacated an Order I had issued dated September 22, 1989, in which it was held that various excised portions of six documents were not protected by a privilege as alleged by the Secretary of Labor (Secretary), but should be produced as requested in Discovery Motions filed by Asarco, Inc. (Asarco). (Secretary v. Asarco, Inc., 12 FMSHRC 2548 (Dec 1990)). In essence, the Commission remanded for further consideration, the issues of the applicability of informant's attorney-client, and work product privileges.

In a telephone conference call with Attorneys for both Parties, Counsel indicated that they would not seek an evidentiary hearing pursuant to the Commission's remand, but, instead, sought to file Briefs. Asarco filed its Brief on Remand on March 14, 1991. The Secretary had requested an extension of

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time to file its Brief and the request, not opposed by Asarco, was granted. The Secretary filed a Reply Brief on Remand on April 24, 1991. (Footnote 1)

II.

Disposition of Issues

a. Informer's Privilege

1. Exhibit B

Exhibit B attributes a statement to an individual identified by his job category and the fact that he was not present at the time of the accident. In the Secretary on Behalf of George Roy Logan v. Bright Coal Company, Incorporated and Jack Collins, 6 FMSHRC 2520, at 2523 (1984), the Commission indicated as follows: "The burden of proving facts necessary to support the existence of the informers' privilege rests with the Secretary. Secretary of Labor v. Stephenson Enterprises, Incorporated, 2 BNA OSHC 1080, 1082 (1974), 1973-74 CCH OSHD par. 180277 at 22, 401, aff'd, 578 F.2d 1021 (5th Cir. 1978)." In meeting this burden the Secretary has not proffered any evidence, but has merely asserted, in its Brief before the Commission, that the identity of an informer can be provided by the content and context of the statement, and that this is especially so in the instant case ". . . where the universe of persons with knowledge about relevant events is relatively small."

The statement does not indicate whether the person who made it is a present or former employee of Respondent, or whether the individual is an independent contractor. Petitioner has not alleged, nor does the record contain any indication of the number of persons in the job category of the person who made the statement at issue. Nor is there any indication of the number of persons who performed the same task. Hence, I conclude that it has not been established that the informer's identity would be revealed by allowing discovery of the statement at issue. Hence, the Secretary shall divulge paragraph 1 on page 2 of Exhibit B.

2. Exhibit I

With respect to Exhibit I, on its face, an informer is clearly identified by name. The Commission, in its Decision, supra, at 2555, referred to Bright, supra, at 2526, wherein the Commission stated that ". . . important factors to be considered when evaluating whether the documents sought are essential include, whether the Secretary is in sole control of the requested material or whether the material which Respondent seeks is already within their control, and whether Respondents other avenues available from which to obtain the substantial equivalent of the requested material." (emphasis added). Expanding on this direction, the Commission in remanding this issue for further consideration, stated as follows: "One of the factors that the judge should consider in balancing the interests of the Parties, should be whether Asarco could obtain substantially similar information from other sources. The judge should determine whether the information excised by the Secretary is essential to a fair determination of the issues and he should clearly articulate the basis for his conclusion." (Asarco, 12 FMSHRC supra, at 2556).

In reconsidering Exhibit I, based upon the above directive from the Commission, I find that the excised statements describe the event, which apparently gave rise to the Citations at issue. As such, these statements are essential to a fair determination of the issues.

Respondent does not argue either that the Secretary is in sole control of the requested material, or that it does not have any other avenue available to obtain the requested material. Indeed, although it is reasonably likely that the informer could give relevant testimony, it would appear that there are no facts alleged to indicate that the class of persons having personal knowledge of the event that gave rise to the Citations at issue, is so large and unidentifiable as to preclude Respondent from taking statements from its own employees who witnessed the event at issue. Accordingly, inasmuch as there are no facts alleged to establish a hardship on Asarco's part in taking statements from those of its employees who had personal knowledge of the events at issue, in this context it is clear that the Secretary's interest in maintaining the secrecy of the informer outweighs Asarco's need to obtain this information from the Secretary. Accordingly, Respondent does not have a right to discover the fourth page of Exhibit I.

3. Exhibits E, F, and G

Exhibits E, F, and G contain detailed, extensive statements provided to MSHA personnel by miners employed by Respondent who are identified by name. As such, the statements are to be considered given by informers and as such, subject to a

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qualified privilege. The Commission, in its Decision, Asarco, 12 FMSHRC supra, at 2556-2557, stated that on remand I ". . . should consider whether Asarco could obtain substantially similar information from other sources, and whether these documents are essential to a fair determination of the issues."

The Commission, in Bright, supra, elaborated on these factors as follows: "Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which Respondents seek is already within their control, and whether the Respondents had other avenues available from which to obtain the substantial equivalent of the requested material." (Bright, supra, at 2526). (Emphasis added). Although the individuals whose statements are the subject of Exhibits E, F, and G, are employees of Asarco, and presumably under its control, and hence subject to questioning and the taking of depositions, the material consisting of a transcription of their detailed extensive statements, is unique, closely related in time to the instance at issue, and within the sole control of the Secretary. Although Asarco might, by way of a deposition, have access to information within the knowledge of these persons, it does not have another avenue available to obtain the transcripts of the detailed statements which is the material that is the subject matter of Exhibits E, F, and G. Hence, access to the transcription of these statements would enable Asarco to use the material to refresh the recollection of a witness or to attempt to impeach the credibility of a witness by way of a prior inconsistent statement.

In further evaluating whether these documents are essential to a fair determination of the issues, as required by the Commission's Remand, I considered the circumstances involved herein as well as the violation charged and possible defenses (See, Bright, supra, at 2526, quoted by the Commission in Asarco, 12 FMSHRC supra at 2553). One of the Citations in issue herein, Citation 3252969, alleges a violation of 30 C.F.R. 57.12017. Section 57.12017, supra, in essence, provides that power circuits shall be deenergized before work is done on such circuits. It also requires that switches shall be locked out, or other measures taken to prevent power circuits from being energized without the knowledge of the individuals working on them. Specifically, the issued Citation alleges that an employee was electrocuted while cleaning insulators on a disconnect, and that the top terminals on the disconnect were not deenergized. In the narrative findings for a special assessment, appended to the petition for assessment of the civil penalty, it is alleged that the violation resulted from Asarco's negligence, in that the foreman had discussed the job with the victim before he started to work, and gave no safety instructions. It further is alleged

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that "Evidence gathered during the investigation of the fatal accident indicated that similar work on energized equipment was the common practice at this mine."

Petitioner also issued a citation alleging a violation of 30 C.F.R. 57.12019, which requires that suitable clearance is to be provided at stationary electrical equipment or switch gear. Specifically, the issued citation alleges that suitable clearance was not provided at the rear of the mine feeder transfer switch cabinet where the decedent had been working ". . . in that the bottom off the access panel was setting against the bottom of the transfer cabinet with the top leaning against the rib." (Sic.) The narrative findings allege that ". . . the safety director was present and saw the violation, but took no action." In its Answer, Asarco asserts that it provided suitable clearance and followed proper procedures, and "did not know and had no reason to believe that a trained and experience election, fully aware of the circumstances and hazards, would work on or contact the energized components of the equipment involved." Asarco also argues that any violation did not result from negligence on the part of Asarco.

Exhibit E contains statements with regard to instructions, if any, given the decedent. In addition, the statement discusses past work practices. As such, it has a significant bearing on the issues raised by the pleading. In the same fashion, Exhibit F contains statements as to what was stated on the morning of the accident by a supervisor, as well as statements made by the miner who had been electrocuted with regard to his knowledge of hot contacts. This exhibit also contains statements relating to the removal of the panel in question. Similarly, Exhibit G contains statements with regard to location of the panel and whether it should have been completely removed. Also, Exhibit G contains the opinion of the informer, as to how the job should be done safely and to the degree of supervision provided workers in similar situations.

Hence, Exhibits E, F, and G contain statements that have a crucial bearing on issues raised by the citations at issue and possible defenses. As such, it is concluded that Asarco has a high degree of need to discover these exhibits.

Thus, considering all of the above, I conclude that Asarco's need for Exhibits E, F, and G out weighs the Secretary's need to maintain the informer's privilege.

4. Exhibit K

The second and third paragraphs on page 4 of Exhibit K contain statements attributed to two persons, one of whom is identified by name, and the other by a description that could easily lead to his identification. The statements themselves

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were not deleted from the documents served on Asarco by the Secretary. Considering the factors set forth in Bright, supra, I note that Asarco, in its Brief, does not allege that it has any need for the name of the declarant in each incident to prepare a possible defense, nor does it argue that the release to it of the declarant's name is essential to a fair determination of the issues. Accordingly, Asarco is not entitled to discovery of the excised names on pages 4 and 5 of Exhibit K.

The deleted material on page 8 of Exhibit K, subsequent to the words "1556 hrs telephoned" contains a discussion that the interviewer had with a miner, but the essence of the conversation did not involve discussion of any issues relating to the alleged violations herein or the negligence, if any, of Asarco in connection with these violations. Accordingly, applying the balancing test set forth in Bright, supra, I conclude that these statements do not relate to any possible defense, and as such Asarco need to obtain such information is outweighed by the informer's privilege, and hence Asarco does not have any right to discover this material.

Page 9 of Exhibit K contains information relating to attempts by a special investigator to contact various individuals. Asarco, in its Brief, has not alleged any need to obtain this information, or specifically how it would relate to the preparation of any possible defense. Thus, considering the factors set forth in Bright, supra, and applying the balancing test described therein, it is concluded that the release of these deletions is not required.

The first three lines in the second paragraph, page 9, following the words "at motel. Spoke," do set forth any statement made by either the interviewer or the two miners named therein, but indicate where they will be the following night. Such information would not appear to be helpful in any possible defense and would not be of assistance in resolving the issues herein. As such, applying the balancing in the test set forth in Bright, supra, it is concluded that these lines were properly deleted.

The first word on the next line is to be deleted, as it identifies an informer. However, the balance of that line and the next three lines contain a statement with regard to the reaction of miners to statements of MSHA officials, and there is no indication that this information is available to Asarco by other sources. Hence discovery is allowed.

Deleted material under the heading "10/26/88" on pages 9, 10, and 11 contain names of informers, as well as the arrangements the interviewer made to interview them and the interview procedure. This information alone is not necessary for possible defense, nor is it essential for a fair determination of

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the issues. Accordingly, applying the principles announced in *Bright*, supra, the Secretary's need to insure the informer's privilege outweighs Asarco's need for this information, and hence discovery is not allowed.

The deleted material under the heading 10/27/88 on page 10, is a notation of a contact the interviewer had with an individual, and that the interviewer decided not to meet with this individual. Inasmuch as no information was solicited from this individual, it can not be seen how the deleted material would be of assistance to Asarco in any possible defense regarding the issues framed by the pleadings. Accordingly, utilizing the balancing test set forth in *Bright*, supra, discovery of this material is denied.

The first four lines that are deleted on page 12, refers to an inquiry by Mr. Chajet, as to whether the interviewer wanted talk to "X", and the interviewer's response. This excised statement lists the name of a possible informer, but does not indicate the substance of any conversation. As such, the only purpose of disclosure would be to compel the Secretary to reveal the name of a possible witness or informer. It has not been established that Asarco's need for this information outweighs the Secretary's interest in maintaining the privilege. Hence, this material was properly deleted.

On page 12, the deleted material after the words "2025 hrs telephoned," contains the name of an informer, but does not contain any information relevant to the issues framed by the pleadings. However, the first six words of the seventh line of that paragraph, as well as the quoted phrase at the end of this paragraph contain information that might lead to a possible defense, without identifying the source of this information. It is difficult to see how Asarco could obtain this information without discovery. Hence, applying the factors enunciated in *Bright*, supra, discovery of this deleted material, is to be allowed to the extent set forth above.

Material excised from the middle of page 23 contains a list of questions prepared for an informer. These relate to the event that gave rise to the issuance of one of the citations in issue. The deleted statements on page 24 and the first two lines on page 25 contain the informer's responses. In order for Asarco to be able to discover these specific statements, it would need not only the identity of the informer, but also the specific questions asked. Hence, the responses to these specific questions are only to be in the custody of the Secretary, and not obtainable by Asarco without discovery. Further, inasmuch as the information relates to the circumstances surrounding the violative condition alleged in Citation 3252970, the information

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would be relevant in resolving the issues and might lead to a possible defense. Accordingly, applying the criteria set forth in Bright, supra, this information is subject to discovery.

The deleted material on page 23, after the words "1915 hrs telephoned," and the last three lines of this page contain the name of an informer whom the interviewer attempted to contact. There was no contact made at the time and hence, this information is not relevant to any possible defense, and is not essential to any determination of the issues, and hence under the criteria set forth in Bright, supra, is not subject to discovery.

The deleted material at the bottom of pages 25, 26, and 27 identifies individuals who were interviewed by an investigator, but does not give any facts concerning either questions to them or their responses. Asarco has not alleged that it has any need for the names of the Secretary's informers. Divulging this material would only provide their names, and no other information which would be helpful in preparing a possible defense or in determining the issues presented herein. Accordingly, this material was properly deleted.

b. Work Product Rule

The deleted material on pages 3 and 4 of Exhibit K are notes that MSHA Special Inspector Robert Evert made while interviewing MSHA Supervisory Inspector Craig concerning the Asarco latter's conversations about this case with one of the Secretary's attorneys. The Commission, in its Decision, 12 FMSHRC supra, applied Fed. R. Civ. P. 26(b)(3), and held that the material in question is a document which was prepared by a Party or its representative, i.e., Evert. It further found as follows: "The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation." Asarco, 12 FMSHRC supra, at 2559. The Commission indicated that it would thus appear that the excised portions of Craig's statements met the immunity tests set forth in Rule 26, supra. In vacating the portion of my Order of September 22, 1989, that held that the excised portions were not within the scope of the work product rule, the Commission stated as follow: "However, the judge may have considered relevant factors or the nuances not fully reflected in his prior order." (Asarco, 12 FMSHRC supra, at 2559). The Commission remanded the issue for "further consideration consistent with this Decision." (12 FMSHRC, supra, at 2559.)

Upon further consideration, I concur in the findings of the Commission that the immunity tests set forth in Rule 26, supra, have been met. Any relevant factors or nuances that I considered in my original Order are, upon reconsideration, of a lesser significant than the Commission's rationale for its holding that the various criteria set forth in Rule 26(b)(3) have been met.

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Accordingly, it is concluded that the excised portions in Exhibit K are within the work product rule, and not subject to discovery.

c. Attorney - Client Privilege

On remand of this issue and upon further consideration, I note that the solicitor related to Craig what another individual had told him, and the Solicitor also asked a question of Craig. Neither of these communications are mental impressions, conclusions, opinions, or legal theories. As such these communications are in confidence and protected. (See, *Hickman v. Taylor* 329 U.S. 495 (1947)).

Inasmuch as the material excised from pages 3 and 4 consist of statements covered by the attorney-client privilege and passages protected by the work product rule, they were properly excised and not subject to discovery.

ORDER

It is ORDERED that, within 10 days of this Order, the Secretary shall serve the Operator with the following: (a) Paragraph 1 on page 2 of Exhibit B; (b) Exhibits E, F, and G; (c) the last four lines of the second paragraph of page 9, Exhibit K, with the exception of the first word in the fourth line of this paragraph which is to be deleted; (c) the list of questions deleted from page 23, the responses on page 24, and the first two lines on page 25; (d) the first six words of the seventh line of the third paragraph of page 12 Exhibit K and the phrase quoted at the end of that paragraph; and (e) the list of questions deleted from page 23, and the responses on page 24, and the first two lines on page 25.

Avram Weisberger
Administrative Law Judge
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Footnote starts here:-

1. Petitioner also filed a Motion to Strike Proffered Evidence to strike the affidavits marked Exhibits 1 and 2 attached to its Brief, and "other matters cited or referenced in the Brief which are not part of this remand." None of this material was relied on by me in making any of my rulings, *infra*, and did not form the basis for any of my rulings. Accordingly, the Motion is DENIED.