

CCASE:
CONTESTS OF RESPIRABLE DUST
SAMPLE ALTERATION
CITATIONS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

IN RE: CONTESTS OF RESPIRABLE DUST
SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING MOTION FOR RECONSIDERATION
ORDER UPHOLDING CLAIM OF PRIVILEGE FOR
CERTAIN DOCUMENTS
ORDER TO PRODUCE CERTAIN DOCUMENTS

On October 4, 1991, counsel for Kentucky Carbon Corp., et al., filed a "renewed" motion to compel production of documents in accordance with my orders issued September 27, 1991. The Secretary on October 4, 1991, filed a motion for reconsideration of my order of September 27, 1991, insofar as that order required the Secretary to produce Documents Nos. 3, 5, 201, 203, 350, 353, 365, 366, 367, 401 and 424. The Secretary submitted each of these documents for my in camera inspection.

I have considered the two motions and have reviewed the documents submitted for in camera inspection. On the basis of that consideration and review, the Secretary's Motion for Reconsideration is GRANTED.

In my order issued September 13, 1991, I indicated that following a determination of the propriety of the Secretary's claims of privilege, I would determine whether privileged documents should be ordered disclosed because Contestants' need for the documents outweighed the Secretary's interest in keeping them confidential. Order of September 13, 1991 at 8-9, 17. My order of September 27, 1991, to produce certain documents concerning which I upheld the claim of privilege was not issued sua sponte as the Secretary asserts, but pursuant to the motions to compel production filed July 26, 1991, August 13, 1991 and August 19, 1991. Contestants have asserted that the documents in question directly relate to the central issue of this case, that they are exclusively in the possession of the Government, and that they consist largely of factual material. The Secretary has not denied the first two assertions, but has, at least with respect to certain of the documents, denied that they are largely factual. Since I have now examined all the withheld documents in camera, I can decide whether they are exclusively factual or are deliberative.

I

On reconsideration of my order of September 27, 1991, the following documents need not be produced.

Document No. 5. This is a draft report of PHTC dated June 1991 entitled Investigation of Dust Deposition Patterns on Respirable Coal Mine Dust Samples, consisting of 102 pages. I erroneously concluded that this document was a preliminary draft of a completed study. On review, it is obviously part of a continuing study. It is privileged as part of the deliberative process, and the needs of the Contestants do not outweigh the Secretary's interest in confidentiality.

Document No. 201. This is a memorandum from the MSHA Chief Division of Health to District Managers dated May 7, 1991 and, as the Secretary points out in her argument, involves the current development of a new investigative program in the dust sampling area. The document is privileged as part of an investigative effort which is continuing. The operators' need for this document does not outweigh the Secretary's interest in confidentiality.

Document No. 203. This is a memorandum of a telephone instruction March 21, 1990, from Glen Tinney, Arlington Health Division, entitled "New Void Code AWC--abnormal white center." The Secretary's motion states that this document, like document 201, involves "the current development of a new investigative program concerning other potential violations of the dust sampling program." On the basis of this representation, the operators' need for the document does not outweigh the Secretary's interest on confidentiality.

II

On reconsideration of my order of September 27, 1991, the Secretary is ORDERED to produce the following documents by placing them in the Document Depository on or before October 15, 1991.

Documents 3, 365, 366 and 367. These documents are a draft report of investigation by Warren R. Myers, Ph.D. and Allen Wells, M.S., of the Department of Industrial Engineering, West Virginia University concerning "Mine Compliance Sampling Filter Abnormalities" dated February 15, 1990, with handwritten comments apparently inserted by MSHA personnel (367), letters from Glenn Tinney (MSHA) to Dr. Myers, March 16, 1990 and May 4, 1990 with comments on the draft reports of Dr. Myers (365, 366), and a letter from Dr. Myers to Glenn Tinney, April 11, 1990, with responses to Tinney's comments on the first draft report (3).

As the Secretary noted in her Motion, I held that all of

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these documents fell within the deliberative process privilege. The question remains whether they are discoverable because the operators' need for the documents outweighs the Secretary's interest in keeping them confidential. The litigation before the Commission involves the Government's charge that the mine operators tampered with respirable coal mine dust samples. This contention is based in part on the study and report prepared by West Virginia University. I conclude that fairness to the operators (and in the Commission's interest in fairly deciding these cases) demands that they be apprised not only of the final report, but also of the deliberations, Government suggestions, changes and revisions that led to the final report. I do not believe that the disclosure of these documents will compromise governmental policy deliberations. The operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

Documents 350 and 353. Document 350 is a computer printout showing the number and percentage of "tampered" samples from over six hundred mines. Robert Thaxton in an affidavit August 30, 1990, states that this document was prepared at the request of the U.S. Attorney for the Southern District of West Virginia. There is nothing in the document that refers to any criminal investigation and nothing limiting it to such an investigation. Document 353 is a computer printout of the number of tampered samples at different mines in different MSHA districts as of October 13, 1989. Mr. Thaxton's affidavit states that the content and organization of the document are related to criminal investigations. But again there is nothing in the document to show that it is part of, or limited to, a criminal investigation. The documents are entirely factual. I conclude that the need of the operators for this information outweighs the Secretary's interest in confidentiality.

Documents 401 and 424. Document 401 is 74 pages in length and includes drafts of the 1989 PHTC report. Document 424 is a draft "List of Tables" with handwritten changes and notations showing results of dust filter testing as part of the PHTC 1989 report. For the reasons given above with reference to Documents 3, 365, 366 and 367, I conclude that the operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

James A. Broderick
Administrative Law Judge