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CCASE:
RESPIRABLE DUST SAMPLE
ALTERATION CITATIONS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

Master Docket No. 91-1

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL TESTIMONY OF ROBERT THAXTON

On October 7, 1991, Contestants Kentucky Carbon, et al. filed a motion for an order compelling Robert Thaxton to testify regarding certain matters at his reconvened deposition. Thaxton's deposition was taken in Washington, D.C. between July 24 and July 29, 1991. On October 18, 1991, Contestants Great Western, et al. filed a motion to compel Thaxton's testimony. On October 28, 1991, the Secretary of Labor (Secretary) filed a Memorandum in opposition to Contestants' motions. On October 28, 1991, the Office of Inspector General, U.S. Department of Labor (OIG) filed a motion for leave to file a special appearance to oppose the motion to compel. On October 29, 1991, I issued an order granting the OIG leave to enter a special appearance and I received its memorandum in opposition to the motion to compel. On November 12, 1991, Contestants Great Western et al, filed a reply to the OIG's memorandum. On November 20, 1991, I issued an order staying action on the motion to compel pending Commission action on interlocutory review of my order of October 7, 1991. On March 17, 1992, the OIG filed a motion to withdraw its motion to oppose Contestants' motions to compel on the ground that its employee integrity investigation involving MSHA employees has been closed. The OIG's motion is GRANTED.

On June 29, 1992, the Commission issued its decision on interlocutory review of my discovery orders of September 13, 1991, September 27, 1991, and October 7, 1991. Therefore my stay order is VACATED.

During the 4-day deposition of Robert Thaxton, counsel for the Secretary interposed 54 objections to questions and instructed Thaxton not to answer. The motion to compel in section VI, entitled Specific Instructions to Withhold Testimony, lists 19 (A through S) questions to which Contestants seek to compel answers. The objections to two of them (L and P) have been withdrawn by the Secretary and the OIG respectively. Of the 17 remaining questions, 13 are objected to because disclosure is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure, or the information is protected by the investigative

privilege; for some of the 13 and for the remaining four, the Secretary claims the attorney-client privilege, the deliberative process privilege, or the attorney work product doctrine.

I. Rule 6(e)/Investigative Privilege

Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides in part that "an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) ["such government personnel . . . as are deemed necessary by an attorney for the government to assist . . . in the performance of such attorney's duty to enforce federal criminal law"] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules . . . . A knowing violation of Rule 6 may be punished as a contempt of court." The Secretary refers to Robert Thaxton as "an agent of the grand jury." Thaxton, in an affidavit attached to the Secretary's opposition, states that he has been an agent of grand juries since approximately March 1989, and that he has heard grand jury testimony, prepared analyses and data for presentation to the grand juries, and has learned the identity of witnesses before the grand juries. It is clear that he is a Government employee deemed necessary by a Government attorney to assist the attorney in enforcing federal criminal law. Therefore he is prohibited from disclosing "matters occurring before the grand jury." Such matters include transcripts of witness testimony, memoranda summarizing witness testimony or outlining future witness testimony, and information which would reveal what is expected to occur before the grand jury in the future. 8 Moore's Federal Practice 6.05[6] (2d ed. 1992) (citations omitted). The scope of the mandated secrecy is broader than the evidence presented to the grand jury and encompasses "the disclosure of information which would reveal "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like."' Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 869 (D.C. Cir. 1981) (citing SEC v. Dresser Industries, Inc., 628 F.2d at 1382). However, the mere fact that material has been presented to the grand jury does not automatically exempt the material. "[T]he touchstone is whether disclosure would "tend to reveal some secret aspect of the grand jury's investigation . . . . "' Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987). See Nervi, F.R.Cr.P. 6(e) and the Disclosure of Documents Reviewed by a Grand Jury 57 U. Chi. L. Rev. 221 (1990).

There is a qualified common law privilege against disclosure of information in law-enforcement investigatory files. The privilege is qualified in that once it is established, the court must balance the public interest in nondisclosure against the need of the litigant for access to the privileged information. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336

(D.C. Cir. 1984); In re Dept. of Investigation of City of New York, 856 F.2d 481 (2d Cir. 1988).

As stated above, the motion to compel seeks to compel answers in 19 specific instances where Thaxton was instructed to withhold testimony. This order adopts the Contestants' listing (A through S) of the contested instructions to withhold.

A. The question (Tr. 93-94) asked whether the investigation that resulted in the plea by Peabody Coal Company "is . . . an ongoing investigation?" Whether a criminal investigation is "ongoing" is protected by the investigatory privilege. Since the question relates to a company other than Contestants, they have not shown a need for the privileged information. The objection is sustained and the motion to compel is denied.

B and C. The questions (Tr. 98-103) first asked why the witness is maintaining the 6000 filters on which no AWC determinations have been made. Thaxton replied that he could not answer because of the ongoing investigative work. He was then asked in what districts the U.S. Attorneys worked who instructed him not to answer. The Secretary objected on the grounds of investigative privilege and the prohibition of Rule 6(e). Thaxton and the Secretary seem to be asserting that the reason for maintaining the 6000 non-cited filters is related to the criminal investigation. If so, it is privileged and Contestants have not shown a need for the information. In his affidavit Thaxton stated that the 6000 filters have been maintained for criminal investigative purposes. I accept this representation. If Contestants wish to compel further disclosure, their remedy is in the District Court where the grand jury sat. Rule 6(e)(3)(C)(i) and 6(e)(3)(D), F.R.Cr.P. The identification of districts in which the U.S. Attorneys are located is clearly privileged and probably protected by Rule 6(e). The objections are sustained and the motion to compel is denied.

D. The questions had to do with Thaxton's direct knowledge of the use of a dust pump by mine operators to create reverse air flow in filters in the cited dust samples. (Tr. 174-176). The witness replied that he was advised by the U.S. Attorney's office that he could not answer. The implied representation is that Thaxton's knowledge of the use of a dust pump by mine operators, if he has such knowledge, comes from matters occurring before a grand jury. Accepting his representation, I conclude that he is precluded by Rule 6(e) from answering the question. The motion to compel is denied.

F. The question was whether the witness shared information obtained during the course of his AWC investigation for MSHA with the grand jury or the U.S. Attorney's office. (Tr. 224-227). The Secretary objected on the basis of the 6(e) prohibition, and because of the investigatory privilege. Clearly whether Thaxton

"shared" information with the grand jury is subject to the 6(e) prohibition. Thaxton's disclosure to the U.S. Attorney's office is protected by the investigatory privilege and Contestants have shown no need for disclosure of such information. The motion to compel is denied.

G. The questions were how the witness knew whether any of the methods he described were used to create AWCs and whether he has any information "from witnesses" who have observed these methods used to create the appearance on the dust samples "that have been indicted." (Tr. 255-257). It is the Secretary's position that the information called for in the first question "could only have been obtained as an agent of a grand jury." I accept this representation, and therefore conclude that the witness is precluded from answering by Rule 6(e). The second question is not clear but seems to be seeking the same information. The motion to compel is denied.

I. The question was whether either of the studies and reports from West Virginia University or the Pittsburgh Health Technology Center were "prepared for the criminal investigation regarding Peabody Coal Company." (Tr. 340). The Secretary objected on the basis of the investigatory privilege. The question clearly seeks information concerning a criminal investigation. As such, the information is privileged. Contestants have shown no need for the information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

J. The question was whether the reports referred to above were "made exhibits for the grand jury." (Tr. 341). The question clearly seeks to learn matters occurring before the grand jury. Disclosure is prohibited by Rule 6(e). The motion to compel is denied.

K. The question was whether a coal mine inspector who provided information concerning equipment which could be found on mine property which could cause air movement was "a coal mine inspector who had appeared in front of a grand jury." (Tr. 501-504). Again, this information clearly comes under the prohibition of Rule 6(e). The motion to compel is denied.

N. The question was what information MSHA was "gathering" which prevented it from notifying mine operators "of the validity (invalidity ?) of their samples." (Tr. 606). The Secretary asserts the investigative privilege. The privilege applies, but I conclude that it is outweighed by the Contestants' need for the information. The Contestants state that "the information gathered regarding the cited samples is the issue in this litigation." The motion to compel is granted. Thaxton will be required to answer the question in his rescheduled deposition.

Q. The question was which U.S. Attorney or Assistant U.S. Attorney requested Thaxton to perform certain work. (Tr. 572). This information is protected by the investigative privilege and Contestants have not shown any overriding need for it. The motion to compel is denied.

R. The questions were whether Thaxton "shared with the grand jury" information developed at the request of the U.S. Attorney's offices relating to AWCs, and whether he notified Peabody Coal prior to March 19, 1990, that the filters being submitted by them were being reviewed for AWC determination. (Tr. 712, 715). The Secretary objected to both questions on the ground that disclosure of the information was prohibited by Rule 6(e). The first question is obviously within the prohibition of 6(e). The motion to compel is denied. The second question is unrelated to the grand jury and not covered by 6(e). The motion to compel is granted, and Thaxton will be required to answer the question in the rescheduled deposition.

S. The question was why an Assistant U.S. Attorney needed to understand the characteristics of AWCs in dust samples. (Tr. 563-564). The Secretary asserted the investigative privilege and the deliberative process privilege. I sustain the objection related to the former and deny her claim of deliberative process privilege. The information sought was part of the criminal investigation. Contestants have not shown a need for the information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

II. Attorney-Client Privilege/Work Product Doctrine

The attorney-client privilege protects from discovery confidential communications from client to attorney. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). The attorney work product doctrine protects from disclosure information gathered by or for an attorney in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947); Rule 26(b)(3) F.R.Civ.P. A party seeking disclosure of factual materials within a protected document or protected information may obtain them upon a showing of substantial need, but is not entitled to disclosure of "mental impressions, conclusions, opinions, or legal theories of an attorney." Rule 26(b)(3).

E. The question was whether the witness intends to do any additional testing with any of the 11,000 filters (viewed by Thaxton for "final determination on AWC phenomenon"). (Tr. 209-211). The Secretary objected on the grounds that the information sought was protected by the attorney-client privilege and the attorney work product doctrine. Since the question has no reference to a communication from client to attorney, it is clearly not covered by the attorney-client privilege. Thaxton's

intent to do further testing is not obviously related to anticipated litigation or to an attorney's work file. The objections are overruled, and Thaxton will be required to answer the question during the rescheduled deposition.

H. The question was what "things" (referring apparently to tests for AWC) have been referred for additional testing. (Tr. 301-303). The Secretary objected because of the work product doctrine, and argues that an answer would necessarily reveal the mental impressions, legal theories, and trial preparation of the Secretary's attorneys. I disagree. The witness may answer the question without in any way referring to or revealing such impressions and theories. The objection is overruled, and Thaxton will be required to answer the question during the rescheduled deposition.

III. Deliberative Process Privilege

The deliberative process privilege protects deliberative communications between subordinates and supervisors within the government preceding the adoption and promulgation of an agency policy. Jordan v. U.S. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). It does not include purely factual material. Schwartz v. Internal Revenue Service, 511 F.2d 1303 (D.C. Cir. 1975).

M. The question was what was discussed at meetings with attorneys from the Solicitor's office and the U.S. Attorney's office concerning the rationale for not issuing citations in instances where Thaxton found violations. (Tr. 535-538). The Secretary objected on the ground that the information was protected by the deliberative process privilege. The question seeks information of meetings and discussions concerning agency action. I conclude that because of the breadth of the question, it necessarily seeks to learn of deliberations concerning agency policy. Contestants have not shown need for this information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

O. The question was in what "cases" did Thaxton give information to Ed Hugler concerning the different classification of AWCs. (Tr. 565). The Secretary objected on the basis of deliberative process privilege. However, the question appears to ask for factual information and, to the extent it does, the information is not privileged. The objection is overruled and Thaxton will be required to answer the question during the rescheduled deposition.

ORDER

Accordingly, the motion to compel is granted in part and denied in part. The parties are directed to reschedule Robert Thaxton's deposition and he is directed to answer the questions in accordance with the above opinion.

James A. Broderick
Administrative Law Judge