

CCASE:  
IN RE CONTESTS OF RESPIRABLE  
DUST SAMPLE ALTERATION  
CITATIONS

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

IN RE: CONTESTS OF RESPIRABLE  
DUST SAMPLE ALTERATION  
CITATIONS

Master Docket No. 91-1

ORDER

On June 29, 1992, the Commission affirmed my orders of September 13, September 27, and October 7, 1991, insofar as they required the production of certain documents claimed to be protected by the deliberative process privilege. It remanded the case to me for a ruling on the documents claimed by the Secretary to be protected by the work product privilege (apparently including document no. 17 concerning which I upheld the Secretary's claim that it was protected by the attorney-client privilege. See fns. 26 and 32 of the Commission Decision). The Commission affirmed my rulings in which I upheld the Secretary's claims of privilege (except with respect to document 17) "without prejudice to Contestant's right to file" a motion for in camera inspection of any particular document. It also directed me to rule on the Secretary's reliance on Rule 6(e) of the Federal Rules of Criminal Procedure as a basis for not disclosing folders 11 and 12 of Document 406.

I. Background

I issued orders on June 30 and July 10, 1992, directing the Secretary to resubmit documents 3, 365, 366, 367, 401, and 424 for in camera inspection, and permitting Contestants to file a motion for in camera inspection of any document concerning which the Secretary's claim of privilege was upheld. I directed the parties to submit memoranda in support of their respective positions on the Secretary's work product privilege claim, and on the applicability of Rule 6(e).

The requested documents were furnished by the Secretary and have been inspected in camera. Both parties filed memoranda of law. Contestants filed a motion for in camera review of documents 111 (p. 9119), 119, 130, 131, 134, 137, 142, 145, 152, 155, 156, 157, 160, 200, 326, 327, 328, 339, 340, 384, 394, 402, 403, 407, 426, 441, 459, 471, 476, and 481.

## II. Work Product Doctrine

The attorney work product doctrine protects from disclosure materials assembled by or for an attorney in anticipation of litigation. Fed. R. Civ. P. 26(b)(3) and (4). It includes documents prepared by other than an attorney. The protected documents may be ordered disclosed only upon a showing that the party seeking discovery has substantial need for them and is unable to obtain their substantial equivalent by other means. "In ordering discovery . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

Documents 367, 365, 3, and 366 (in chronological order) all concern a report of Warren R. Myers Ph.D. and Allen Wells M.S. of the Department of Industrial Engineering, West Virginia University. Document 367 is the draft of a report by Dr. Myers and Mr. Wells dated February 20, 1990, with handwritten comments and questions by an unidentified person (presumably with MSHA) suggesting changes in the report. Document 365 is a letter dated March 16, 1990, to Dr. Myers from Glenn Tinney of MSHA with comments and questions on Dr. Myers' draft report. Document 3 is a second draft of a report of Dr. Myers dated April 11, 1990. Document 366 is a letter from Mr. Tinney to Dr. Myers, May 4, 1990, with further suggestions concerning the report. These documents were all prepared and assembled in anticipation of litigation. Therefore, they come within the work product doctrine. However, Dr. Myers' final report has been disclosed to Contestants. I conclude (as I concluded in ruling on the deliberative process privilege) that fairness to the Contestants necessitates that they be apprised of the draft reports, suggested changes, and revisions that led to the final report. They are not able to obtain their substantial equivalent by other means. The notations, questions, and suggestions made by MSHA personnel do not constitute mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation. Contestants' need for the documents outweighs the Secretary's interest in keeping them confidential.

Rule 26(b)(4)(B) is not applicable because Dr. Myers' final report has been made available in the Document Repository. Contestants are not seeking so much to discover facts known or opinions held by the expert as to learn what went into his opinion which has already been disclosed.

Documents 401 and 424 are related to the Pittsburgh Health Technology Center report. Document 401 contains copies of drafts of the report dated October 1989 describing certain tests performed on coal dust samples, and a memorandum from an MSHA official concerning the report and certain changes in the report.

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Document 424 is a draft largely handwritten by an unidentified author describing tests showing weight differential on filters following certain tests. I conclude that these documents come within the work product doctrine as materials prepared in anticipation of litigation. I further conclude that their disclosure is necessary to Contestants' defense. They do not constitute mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation. Contestants' need for the documents outweighs the Secretary's interest in keeping them confidential.

Document 17 is described as a note to the file dated February 21, 1990, from an Assistant U.S. Attorney, of a telephone conversation with the attorney for a coal mine operator. I treated this as a communication from the U.S. Attorney to MSHA and upheld the Secretary's claim of attorney-client privilege. Apparently (see fns. 26 and 32 of the Commission Decision) the Commission and the Secretary disagree. In order to determine whether it is part of the attorney work product, and, if so, whether Contestants' need for the document outweighs the Government's interest in confidentiality, I will order it disclosed to me for in camera inspection.

### III. Rule 6(e)

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of "matters occurring before [a] grand jury" by a Government employee deemed necessary by a Government attorney to assist in the enforcement of federal criminal law. The Secretary contends that folders 11 and 12 of Document 406, described as interview notes of grand jury witnesses taken at the request of the U.S. Attorney and copies of third-party documents received pursuant to Rule 6(e), may not be disclosed because prohibited by Rule 6(e). The documents are in the possession of Robert Thaxton, who is an agent of the grand jury. Rule 6(e) prohibits the disclosure not only of transcripts of witness testimony, but memoranda summarizing witness testimony, and information which would reveal the identity of witnesses or jurors, the substance of testimony, and the strategy or direction of the investigation. *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856 (D.C. Cir. 1981); 8 Moore's Federal Practice 6.05 [6] (2d ed. 1992). On July 8, 1992, I was informed by counsel for the Secretary that there are continuing grand jury investigations concerning coal mine dust tampering. Since the prohibition of 6(e) is claimed, it is not possible for me to examine the documents in %9Fera. Contestants' remedy, if any, is to apply to the District Court where the grand jury was empaneled for disclosure of the documents. Fed. R. Crim. P. 6(e)(3)(C)(i) and 6(e)(3)(D). I uphold the Secretary's non-disclosure on the basis of Rule 6(e).

IV. Motion for In Camera Inspection

Contestants have requested in camera inspection of 30 documents concerning which I upheld the Secretary's claims of privilege in my orders of September 13, September 27, and October 7, 1991. Contestants assert that in camera review is appropriate to determine whether the claimed privileges apply and whether the subject matter of the documents is such that Contestants' need for the information outweighs the Secretary's interest in non-disclosure. Contestants did not advance any arguments as to their need for any specific documents. Since I have already upheld the claims of privilege in an order which was affirmed by the Commission, I will direct in camera review only if the document description does not tell what the nature of the document is, or if it indicates in some way that the Contestants need it to prepare their defense.

Document 111. Page 9119 of the document contains notes of Ronald Franks dated May 16, 1991, concerning an investigative program being developed involving other potential violations of the dust sampling program. I upheld the Secretary's claim of investigative privilege. The document is dated subsequent to the date of the citations contested herein and there is no showing of need for it by Contestants. The motion will be denied.

Document 119. MSHA internal memo concerning AWC investigation. I upheld the Secretary's claim of deliberative process privilege. To determine whether it is necessary to Contestants' case, I direct that it be disclosed to me for in camera inspection.

Document 130. Letter from U.S. Attorney to MSHA concerning a criminal investigation. I upheld the Secretary's claim of attorney-client privilege. The privilege is not a qualified one. The motion will be denied.

Document 131. Memorandum to the Secretary from the Assistant Secretary dated April 12, 1991, concerning potential agency action subsequent to the contested citations. I upheld the deliberative process privilege and there is no showing of need for the document by Contestants. The motion will be denied.

Document 134. Memorandum from Chief, Office of Investigations, MSHA to Supervisory Special Investigator, December 14, 1990, concerning data for the U.S. Attorney on AWC cases. I upheld the Secretary's claim of investigative privilege. There is nothing in the document description to indicate that Contestants need disclosure to defend their case. The motion will be denied.

Document 137. Memorandum from Robert P. Davis to the Secretary, August 30, 1989, concerning the Peabody investigation.

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I upheld the claim of attorney-client privilege which is an unqualified privilege. The motion will be denied.

Document 142. Memorandum to Associate Solicitor from Counsel for Trial Litigation, August 28, 1989, concerning dust fraud investigation. The work product privilege was upheld. Because the document description is deficient (it does not indicate whether the investigation concerns the criminal or the civil cases), I will order it produced for an in camera inspection.

Document 145. Memorandum to Associate Solicitor from Counsel for Trial Litigation, March 21, 1989, concerning AWC criminal investigation. I upheld the work product privilege. Because the document relates to the criminal investigation, there is no indication that Contestants will need it for their defense in this case. The motion will be denied.

Document 152. An undated list of mine operators and AWC occurrences prepared for the U.S. Attorney. I upheld the attorney work product and investigative privileges. There is no indication that Contestants need the document for their defense. The motion will be denied.

Document 155. List of mine operators with handwritten marks prepared at the direction of the U.S. Attorney. I upheld the work product privilege claim. Since the document is related to the criminal investigation, and there is no indication that it is necessary to Contestants' defense, the motion will be denied.

Document 156. List of mine operators and AWC occurrences prepared at the direction of the U.S. Attorney. I upheld the work product privilege claim. The motion will be denied for the reason given for Document 155.

Document 157. Undated memorandum concerning the criminal investigation and studies to be performed to assist the U.S. Attorney in the criminal investigation. I upheld the work product privilege. The motion will be denied for the reason given for Document 155.

Document 160. Undated memorandum from the Assistant Secretary to the Secretary concerning the AWC investigation. I upheld the deliberative process privilege, but to determine whether the document is needed for Contestants' defense, I will direct that it be produced for in camera inspection.

Document 200. Note to file concerning a FOIA request which includes advice received from the Solicitor's Office. The attorney-client privilege was upheld. This is an unqualified privilege. The motion will be denied.

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Documents 326, 327, 328. These are documents prepared at the request of the U.S. Attorney's Office and are related to the criminal investigation. The attorney work product privilege was upheld. The motion will be denied for the reason given for Document 155.

Document 339. Document titled "AWC Test Case" prepared by Counsel for Trial Litigation. I upheld the work product privilege. There is no indication that the document is needed by Contestants. The motion will be denied.

Document 340. Document titled "Dust Case (Civil)" by attorneys in the Solicitor's Office. I upheld the work product privilege. The motion will be denied for the reason given for Document 339.

Document 384. Notes of Robert Thaxton, March 7, 1990, of a conference call with U.S. Attorney's Office and Solicitor's Office, including discussion of opinions of agency officials and direction of the investigation. The investigative privilege was upheld. The motion will be denied for the reason given for Document 155.

Documents 394, 407, and 426 comprise the calendar entries of Robert Thaxton from October 1989 to January 30, 1990 (Document 426); from January 18, 1990, to November 14, 1990 (Document 394; apparently it overlaps Document 426); and from December 1990 to March 12, 1991 (Document 407). The Secretary provided Contestants with the specific privileges claimed for each entry by an enclosure to a letter dated March 27, 1991.

In Document 426, the October 1989 note section is described as revealing directions on information to gather for the criminal investigation. The entries on October 20, October 31, November 1, November 13, November 14, and November 15, 1989, and January 30, 1990, all have to do with the criminal investigation and the investigatory privilege is claimed. I uphold the claim and there is no showing that Contestants will require these documents for their defense. For the October 20 and November 13 entries the Secretary also asserts the attorney-client privilege. October 20 notes reveal information requested from the U.S. Attorney for the investigation. November 13 notes reveal instructions from the U.S. Attorney on items to prepare for use in the investigation. For the November 15 entry, the Secretary claims the informant privilege since the entry reveals the identity of an informant. She claims the prohibition of Rule 6(e) Fed. R. Crim. P. for the December 5 entry which reveals the pace and tactics of the investigation and grand jury procedures. For the January 6 entry she claims the attorney-client, work product, and investigative privileges. The entry contains instructions from the U.S. Attorney. I uphold the privileges claimed and since there is no showing that Contestants

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will need these documents for their defense, I will deny the motion to produce this document for in camera inspection.

In Document 394, the Secretary claims the investigative privilege for entries on January 18, January 31, February 6, March 5, March 6, March 7, March 8, March 11, March 26, March 27, March 28, May 3, May 14, May 15, May 24, July 12, November 13, and November 14. In addition, she claims the informant privilege for the February 6 and May 15 entries, the attorney-client privilege for the March 5, March 6, and March 26 entries; the work product doctrine for the November 13 and November 14 entries; and the deliberative process privilege for the March 26 entry. Because all the entries are related to the criminal investigation and Contestants have not shown that they are necessary to their defense, the motion will be denied. In addition, I uphold the claim of attorney-client privilege for the March 26 entry.

Document 407 contains December notes for which the Secretary claims the deliberative process and investigative privileges. The entry contains a discussion of civil citations and possible strategies. I will grant the motion to produce this entry for in camera inspection. The February 8, February 20, March 6, and March 12 entries are related to the criminal investigation. Contestants have not shown that these entries are needed for their defense. The prohibition of Rule 6(e) is claimed for the March 12 entry. The motion will be denied as to these entries.

Document 402 is a report prepared for the U.S. Attorney's Office entitled "Tampered Samples Summary for Southern West Virginia." I upheld the work product privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 403 contains notes of a telephone conversation between G. Tinney and Robert Thaxton, concerning the AWC investigation and including opinions and deliberations of the agency and advice from the Solicitor. I upheld the claim of the deliberative process privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 441 is a letter dated April 4, 1989, from Robert Thaxton to the F.B.I. concerning the criminal investigation. I upheld the investigative privilege claim. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Document 459 contains revisions to the first draft of the West Virginia University report (Document 2) with accompanying letter from Dr. Myers. Douglas White (Solicitor's Office) made handwritten notations and interlineations. The Secretary claims



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the attorney-client, deliberative process, and work product privileges. I uphold her claim of attorney-client privilege and will deny the motion to produce the document for in camera inspection.

Document 471 contains notes of Jerry Spicer of March 14, 1991, which were excised because they reveal the timing and progress of a criminal investigation. I uphold the claim of investigative privilege. There is no indication that the document is needed for Contestants' defense. The motion will be denied.

Documents 476 and 481 contain excised notes of Robert E. Nesbit and Glenn Tinney. The Secretary claims the attorney-client, deliberative process, investigative, and work product privileges, but does not describe the documents. I will order both of them produced for in camera inspection.

Therefore, IT IS ORDERED that

1. The Secretary shall produce to Contestants and place in the Document Repository on or before September 15, 1992, Documents 367, 365, 3, 366, 401, and 424.

2. The Secretary shall submit to me for in camera inspection on or before September 15, 1992, Documents 17, 119, 142, 160, the December notes of Document 407, 476, and 481.

3. The motion for in camera inspection of Documents 406 (folders 11 and 12), 111, 130, 131, 134, 137, 145, 152, 155, 156, 157, 200, 326, 327, 328, 339, 340, 384, 426, 394, 407 (except for the December notes), 402, 403, 441, 459, and 471 is DENIED.

James A. Broderick  
Administrative Law Judge