

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 GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL DISCOVERY

On August 19, 1992, in compliance with the Commission remand of June 29, 1992, I ordered the Secretary to submit for my in camera inspection documents 17, 119, 142, 160, the December notes of document 407, 476, and 481. The documents were submitted by the Secretary on September 11, 1992. For the reasons which follow, I grant in part and deny in part the Contestants' motion for disclosure.

Document 17 is a memorandum to the file from an Assistant U. S. Attorney dated February 21, 1990, regarding a telephone conversation he had with an attorney for a coal mine operator. The Secretary claims the protection of the work produce doctrine. Clearly the document was prepared by an attorney in anticipation of possible future litigation. It comes within the work product rule. Since it records a conversation with an attorney for a Contestant, it can hardly be argued that Contestants have a substantial need for it and are unable to obtain its substantial equivalent by other means. I will deny its disclosure.

Document 119 is an MSHA internal memorandum dated February 4, 1991, concerning the coal dust sampling investigation. I have previously upheld the Secretary's assertion of the deliberative process privilege. Nothing in the document indicates that it is necessary for Contestants' defense. I will deny disclosure.

Document 142 is a memorandum to the Associate Solicitor and the MSHA Coal Mine Safety and Health Administrator from the Counsel for Trial Litigation and the Chief, Office of Technical Compliance and Investigation dated August 28, 1989. I previously upheld the Secretary's assertion that the document is protected by the work product doctrine. The memorandum concerns in large part the criminal investigation. It proposes alternative strategies for future investigations and legal action. It includes mental impressions, conclusions, and opinions of the Secretary's attorneys. I will deny disclosure.

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Document 160 is an undated memorandum from Assistant Secretary Tattersall to the Secretary concerning the AWC investigation. I upheld the Secretary's assertion of the deliberative process privilege. The document refers to the criminal investigation, and contains proposals for civil enforcement. There is nothing in the document which indicates that it is necessary for the Contestants' defense. I will deny disclosure.

Document 407 (notes for the last week in November 1990 only. My order of August 19 refers to them as December notes) contains calendar entries of Robert Thaxton, a portion of which were excised. The excised notes include the record of a discussion with other MSHA officials concerning potential citations and what further information may be needed. I conclude that the excised portion of the notes is protected by the deliberative process privilege. There is no indication that the notes are necessary for Contestants' defense. I will deny disclosure.

Document 476 includes the excised notes of Robert E. Nesbit dated October 30, 1989, November 7, 1989, November 30, 1989, January 11, 1990, and February 1, 1990. The notes of October 30, 1989 (called pages 5 and 6 by the Solicitor), are contained in two pages and record a meeting between Edward Clair of the Solicitor's Office and eight MSHA officials including Nesbit. Page 5 (called Section 1 by the Solicitor) records Edward Clair's report of a meeting with Department of Justice officials and contains directions for future proceedings. I conclude this page is protected by the attorney-client privilege. Page 6 (Section 2) records what MSHA officials proposed to do regarding future investigations. I conclude that it is protected by the investigative privilege. The notes of November 7, 1989 (page 4), contain suggested investigative steps and procedures. It is protected by the investigative privilege. The notes of November 30, 1989 (page 3), contain names of potential targets of the investigation. It is protected by the investigative privilege. The notes of January 11, 1990 (page 2), contain directions for further investigation. It is protected by the investigative privilege. Nothing in the documents indicates that the excisions are necessary for Contestants' defense. I will deny disclosure.

Document 481 comprises the excised notes of Glenn Tinney introduced at Tinney's deposition. They are contained in ten pages including the cover sheet entitled "AWC - Glenn Tinney Notes." Seventeen excisions were made by reason of claims of privilege and are described and numbered in the letter of November 26, 1991, from Carl Charneski to Henry Chajet. Excision 1 is part of a note dated January 30, 1990. It refers to a plan for investigation of inspector samples following a meeting with MSHA and OIG officials. The Secretary asserts the attorney-client and investigative privileges. I conclude that the excision is protected by the investigative privilege but not by

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the attorney-client privilege. Excision 2 records a telephone call from Thaxton concerning a communication from the U.S. Attorney. The Secretary asserts the attorney-client privilege. I conclude that the excision is protected by the attorney-client privilege. It is a sharing by client representatives (MSHA is the client) of the advice of their attorney. Excision 3 records what a Secretary's attorney did. It does not include any proposals, conclusions, mental impressions, or legal theories. The Secretary asserts the deliberative process and work product privileges. Neither privilege properly fits the excised sentence. I deny the claim of privilege and will order the excised portion of the document disclosed. Excision 4 concerns a request from the Inspector General about inspector samples, and direction from Tinney's superior. It is protected by the investigative and deliberative process privileges. Excision 5 records a discussion among MSHA officials about the processing of AWC samples. It is protected by the deliberative process privilege. Excision 6 contains the names and social security numbers of MSHA inspectors being investigated. It is protected by the investigative privilege. Excision 7 records the advice of the Secretary's attorneys to Tinney concerning the investigation. It is protected by the attorney-client and work product privileges. Excision 8 concerns directions from the Solicitor's Office and Ed Hugler concerning the AWC investigation. It is protected by the attorney-client and work product privileges. Excision 9 records advice from the Solicitor's Office to Tinney. It is protected by the attorney-client privilege. Excision 10 contains further advice from the Solicitor's Office to Tinney. It is protected by the attorney-client privilege. Excision 11 records a communication from Tinney to an OIG official concerning inspector samples. It is protected by the investigative privilege. Excision 12 records a discussion between Tinney and an attorney from the Solicitor's Office concerning the investigation. It is protected by the attorney-client privilege. Excision 13 records a discussion between Tinney and Dr. Myers of West Virginia University concerning Dr. Myers' report. It is protected by the deliberative process and work product privileges. However, for the same reasons that I directed the production of documents 376, 365, 3, and 366 in my order of August 19, 1992, I will direct the disclosure of the material in excision 13. It contains comments on the draft report of Dr. Myers. Excision 14 records advice from the Secretary's attorney and an Assistant U.S. Attorney. It is protected by the attorney-client privilege. Excision 15 records a discussion among MSHA officials concerning the processing of AWC samples. The excision is protected by the deliberative process privilege. Excision 16 records advice from the Secretary's attorneys and discussion of future action. It is protected by the attorney-client privilege. Excision 17 contains a description of options for further AWC activity. It is protected by the deliberative process privilege. I have rejected the claim of privilege for excision 3, and conclude that the information in excision 13 is necessary for

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Contestants' defense. With respect to all the other excisions in document 481, disclosure will be denied.

ORDER

Accordingly, IT IS ORDERED that Contestants' motion for production of documents is GRANTED with respect to excision 3 and excision 13 in document 481. The motion is DENIED with respect to the remainder of document 481 and with respect to documents 17, 119, 142, 160, 407 and 476.

James A. Broderick
Administrative Law Judge