

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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October 15, 1999

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of LEWIS FRANK BATES,	:	
Complainant	:	Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723
	:	
SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of EARL CHARLES ALBU,	:	
Complainant	:	Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723

## ORDER GRANTING RESPONDENT'S MOTION TO COMPEL

These discrimination proceedings are scheduled for hearing on November 2, 1999, in Charleston, West Virginia. Before me for consideration are the respondent's motion to compel, conveyed during the course of a telephone conference with the parties, and the Secretary's written opposition to the respondent's motion. The respondent seeks to discover any written statements prepared by Mine Safety and Health Administration (MSHA) investigators that were signed by the complainants in these discrimination proceedings.

The Secretary opposes discovery of such statements asserting that the statements are protected by the work product privilege.<sup>1</sup> Specifically, the Secretary seeks to protect from disclosure "summaries of the [complainants'] statements written by [MSHA special investigator] Meadows and then signed by the [complainants] as being accurate." *Sec.'s opposition to motion to compel*, p.2 (footnote omitted).

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<sup>1</sup> During the conference call, the Secretary also cited the informant's privilege as a basis for withholding disclosure. However, as the complainants' identity is known to the respondents, the Secretary no longer asserts the informant's privilege.

## The Work Product Privilege

As a threshold matter, I do not believe that the work product privilege applies to a statement obtained by an MSHA investigator that has been signed by a party. The Secretary cannot prevent disclosure by asserting the signed statement is really the investigator's work product because it is only the party's acknowledgment of the accuracy of what the investigator heard the party say. A party's signed statement is what it is. Consequently, the respondent's motion to compel shall be granted because a party's signed statement is not protected by the work-product privilege.

However, assuming for the sake of argument that the work-product privilege applies, this privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.*,<sup>12</sup> FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:

1. documents and tangible things;
2. prepared in anticipation of litigation or for trial; and
3. by or for another party or by or for that party's representative.

It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' If the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.' *Id.* at 2558 (citations omitted).

The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege. Assuming the signed statements are protected under the work-product privilege 'as tangible documents prepared by or for the Secretary in anticipation of litigation,' the analysis shifts to whether the respondent has a substantial need for the complainant's statements, and whether depriving the respondent of these documents would constitute an undue hardship. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2d Cir. 1992).

I am not convinced by the Secretary's suggestion that the respondent can obtain the equivalent information through other sources, such as deposing the complainants. The signed statements provided to the MSHA investigator by the complainants are unique in that the specific content of those statements serves as the basis for the Secretary's initiation of the subject 105(c)(2) discrimination proceedings. There is no assurance that the complainants' deposition testimony will be consistent with the earlier statements they provided to MSHA. In short, the respondents have a compelling need to examine the accuracy and truthfulness of these statements in preparation for trial.

Significantly, even if a witness's signed statement is protected under another privilege, such as the informant's privilege, in a criminal proceeding, such statements are routinely disclosed at trial. *See Jencks v. United States*, 353 U.S. 657. 667-69 (1957); 18 U.S.C. § 3500 (Jencks Act). In this regard, the Commission has noted, in National Labor Relations Board (NLRB) administrative proceedings, the NLRB itself provides at trial, for cross examination purposes, a witness's prior statements relative to the subject matter of his testimony. *See Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company*, 15 FMSHRC 2228, 2237 (November 1993), referring to 29 C.F.R. § 102.118(b)-(d) (NLRB "Jencks" procedure).

It is unfortunate that the government would seek to withhold from disclosure the signed allegations that serve as the basis for these proceedings. If there is any material in the signed statements that should be redacted on the basis of another privilege not yet asserted by the Secretary, the Secretary should seek to protect such material from disclosure.

### **ORDER**

In view of the above, **IT IS ORDERED** that the Secretary provide to the respondent, **on or before the close of business on Wednesday, October 20, 1999**, by facsimile and regular mail, all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters.

Jerold Feldman  
Administrative Law Judge

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