FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 25, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2011-2185
Petitioner	:	A.C. No. 46-01968-258310-01
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Blacksville No. 2
Respondent	:	

ORDER ON RESPONDENT'S MOTION TO COMPEL PRODUCTION OF MSHA's SPECIAL ASSESSMENT REVIEW FORM

Before: Judge Moran

Respondent, Consolidation Coal Company, has filed a " Motion to Compel Production of the Special Assessment Review Form." The Motion notes that the Secretary is seeking Special Assessments in this case, but that MSHA has asserted that these documents are privileged. Respondent, acknowledging that the case law among administrative law judges is "mixed with regard to whether the SAR Forms must be disclosed," contends that it "should be able to discover the basis for such [special assessment] requests in order to challenge this at the hearing." Motion at 1. The Court has considered Respondent's Motion and the Secretary's Response in Opposition. Upon such consideration, Respondent's Motion is DENIED.

Extended discussion of this matter is not, in the Court's view, warranted. As the Secretary notes, its role involves proposing penalties, but that it is the Commission that assesses all civil penalties under the Mine Act. In that acknowledged role, the Commission's determination, initially made by the presiding judge, "is an exercise of discretion, bounded by [the] proper consideration [of] the six statutory criteria under Section 110(i) of the Act, through relevant information developed in the course of the adjudicative proceeding." Response at 2-3. To cut to the core, once a matter is before the Commission, no part of Part 100 or that subset within it, special assessments under section 100.5, remains material. Although the Secretary has put forth other, substantial, reasons to deny the Respondent's Motion, the foregoing is sufficient, standing alone, to deny the motion. However, the Court adopts and incorporates the other

well-stated points made by the Secretary in its Response. These appear as "Attachment A" to this Order.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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Attachment "A"

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY HEALTH AND REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT	:	
OF LABOR (MSHA),	:	Docket No. WEVA 2011-2185
Petitioner	:	A.C. No. 000258310
v.	:	Mine: Blacksville No. 2
	:	Mine I.D.: 4601968
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	

PETITIONER'S RESPONSE IN OPPOSITION TO MOTION TO COMPEL DISCOVERY OF RESPONDENT, CONSOLIDATION COAL COMPANY

I. INTRODUCTION

This matter involves five (5) specially assessed violations (two specially assessed 104(d)(2) orders; one regularly assessed 104(d)(2) order; and, two specially assessed 104(a) citations) totaling $47,300.00 that were issued against Consolidation Coal Company's (hereinafter "Respondent") Blacksville No. 2 Mine during five (5) inspection days between the dates of June 22, 2010 and December 6, 2010.

Respondent did not specifically request the Special Assessment Review Forms (hereinafter "SAR Forms") in the Request for Production of Documents. [1]On or about August 23, 2013, Respondent informally requested the SAR Forms relating to the violations at issue in this matter.

For the following reasons, Petitioner respectfully requests that Respondent's Motion to Compel be denied.

[1] Please note, formal discovery was propounded and answered by Rebecca Oblak, Esq. Jim McHugh, Esq. subsequently replaced Ms. Oblak as counsel.

II. ARGUMENT

A. The SAR Forms are not Discoverable

Two independent bases compel this Court to deny Respondent's request for the disclosure of the SAR Forms. First and foremost, the information contained therein is not reasonably calculated to lead to the discovery of admissible evidence insofar as the Court exercises de novo review of all penalty assessments. Secondly, even if the SAR Forms contain relevant information, it is protected from disclosure by the deliberative process privilege.

1. The Information Contained in the SAR Forms is not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Pursuant to FMSHRC's Rule 56(b), 29 C.F.R. § 2700.56(b), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material that is not privileged is subject to discovery, including information that is reasonably calculated to lead to the discovery of admissible evidence. The SAR Forms, however, are not relevant or reasonably calculated to lead to the discovery of admissible evidence.

The special assessment of violations is simply a "process for determining an appropriate civil penalty without using the penalty tables in 30 C.F.R. 100.3." Respondent's Exhibit "4" (MSHA Program and Policy Manual, Volume III, § 100.5). While the Secretary is delegated with the duty of *proposing* penalties for violations of the Mine Act under 30 U.S.C. §§ 815(a) and 820(a), pursuant to Section 110(i) of the Federal Mine Safety and Health Act (hereinafter "the Act"), "[t]he Commission shall have authority to *assess* all civil penalties provided in this Act." (emphasis added). "The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established." Douglas R. Rushford Trucking, 22 FMSHRC 598, 600

(Comm. 2000). As such, Commission judges are not bound by the Secretary's proposed civil penalties. See Claysville Quarry, 32 FMSHRC 242 (ALJ Feldman) (Jan. 2010). Rather, a judge's penalty assessment for a particular violation is an exercise of discretion, bounded by proper consideration for the six statutory criteria under Section 110(i) of the Act, through relevant information developed in the course of the adjudicative proceeding. See Sellersburg Stone Co., 5 FMSHRC 287, 291-92 (ALJ Backley) (Mar. 1983).

Recently, in Pocahontas Coal Co., 2012 WL 1564576 (ALJ Feldman) (Apr. 4, 2012), a copy of which is attached hereto as Exhibit "A," ALJ Feldman directly addressed the issue of whether SAR Forms are relevant. In denying Respondent's Motion to Compel the SAR Forms, ALJ Feldman held that "the Secretary's special assessment criteria . . . is not relevant given the de novo authority of the Commission to assess civil penalties . . . ." Id. at *2; see also, Alcoa World Alumina, LLC, 23 FMSHRC 691, 692 (ALJ Hodgdon) (Jun. 2011) (granting Secretary's motion to quash deposition of "person or persons at MSHA's office of assessments who made the decision regarding the amount of penalty for this case" on the basis that "[s]ince the assessment of a penalty after a hearing is based solely on the information presented during the hearing on the penalty criteria set out in section 110(i), the reasons the Secretary may have relied on in proposing the penalty are not relevant"); Hidden Splendor Resources, Inc., 33 FMSHRC 2345, 2347 (ALJ Rae) (Sep. 2011) (holding that mental impressions contained in SAR Forms are not only privileged, but also irrelevant in the ALJ's de novo determination at hearing). In light of the fact that an ALJ makes his or her own determination as to the proper penalty, the SAR Forms do not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

2. The SAR Forms are Protected from Disclosure by the Deliberative Process Privilege.

Respondent is not entitled to the SAR Forms because these documents are protected from disclosure by the deliberative process privilege. The deliberative process privilege, "attaches to interagency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." In re Contests of Respirable Dust Sample Alteration Cases, 14 FMSHRC 987, 990-93 (Comm. 1992) (hereinafter "Dust Cases") (quoting Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978)). "The privilege protects thoughts, ideas, reasoning, and analyses which lead to a decision of the agency." Hidden Splendor Resources, Inc., 33 FMSHRC at 2347 (citing Kan. State Network, Inc. v. F.C.C., 720 F.2d 185, 191 (D.C. Cir. 1983)). In interpreting the privilege, the Supreme Court has stated that the privilege protects "'the decision making process of government agencies,' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (citations omitted). In order for a document to be privileged under the deliberative process privilege, it must: (a) be "pre-decisional;" (b) pertain to communications between subordinates and supervisors that are antecedent to the adoption of an agency policy; and (c) relate to "deliberative" communications – i.e., the process by which policies are formulated. See Dust Cases, 14 FMSHRC at 992.

The Commission has explained that "purely factual information that does not expose an agency's decision making process does not come within the ambit of the privilege." Dust Cases, 14 FMSHRC at 992. In the event unprotected factual information is combined with protected

information, the party opposing disclosure must show, "that the material is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection." Consolidation Coal, 19 FMSHRC 1239, 1246 (Comm. 1997) (internal citations and quotations omitted).

The Commission has yet to issue a ruling on whether, and to what extent, SAR Forms are discoverable. However, as Respondent points out, there is a split among Administrative Law Judges as to whether the deliberative process privilege applies to these types of documents. See Respondent's Motion at ¶3. While ALJs Melick and Manning have held that the deliberative process privilege does not apply, ALJs Rae and Paez have held otherwise. Compare American Coal Company, 33 FMSRHC 2352, 2353 (ALJ Melick) (Sept. 2011) and CDK Contracting Co., 25 FMSHRC 289 (ALJ Manning) (May 2003) with Hidden Splendor Resources, Inc., 33 FMSHRC at 2347[2] and Humphreys Enterprises, Inc., 2010 WL 5619976 at *5 (ALJ Paez) (Dec. 23, 2010).

It is the Secretary's position that ALJs Rae and Paez properly interpreted the application of the deliberative process privilege. In Humphreys Enterprises, Respondent filed a Motion to Compel the production of the "Possible Knowing/Willful Violation Review Form" (hereinafter "Review

[2] ALJ Rae also independently denied Respondent's Motion for the SAR Forms under the work product privilege, explaining:

> The SAR is a document which contains the selected facts pertaining to a cited violation of a health or safety standard along with the mental impressions, conclusions and opinions of MSHA officials used in the determination to categorize the violations as flagrant, and thus enhancing penalties assessed. While this deliberative process is engaged in at a time when litigation is not pending, it is readily foreseeable that should the special assessment be imposed, the operator is highly likely to contest the penalty. Furthermore, once the enhanced penalty is decided upon, the operator is served with a notice of the proposed penalty and is given 30 days to pay or contest the proposed penalty (citations omitted). **Therefore, this document is prepared in contemplation of litigation and is protected by the work product privilege**.

Hidden Splendor Resources, 33 FMSHRC at 2346 (emphasis added).

Form"), to which the Secretary objected on the basis of the deliberative process privilege. Id. at *1. In denying Respondent's Motion, ALJ Paez recognized that the Review Form typically gathers the inspector's conclusions as to whether a knowing or willful violation occurred, as well as the inspector's superiors' opinions of the inspector's analysis. See id. at *5. ALJ Paez held that "[a]ltogether, the content generated by these questions typically forms pre-decisional communications between the inspector and his superiors prior to the formulation of a conclusion as to whether a knowing or willful violation has occurred. These sections of the form are protected from disclosure under the deliberative process privilege." Id. ALJ Paez further held that, although the Review Form contains factual information, the entire Review Form is privileged because the factual information guides the Secretary's decision-making process as it relates to the determination of whether a knowing or willful violation occurred. Id. Although Humphreys Enterprises involved the deliberative process privilege as applied to the "Possible Knowing/Willful Violation Review Form" as opposed to the SAR Form, the forms are similar in that they both document the inspector's, and his supervisors', opinions as to whether a particular type of violation occurred.

In Coteau Properties Co., 22 FMSHRC 915 (ALJ Zielinksi) (Jun. 2000), Respondent sought certain information gathered during an MSHA special investigation concerning a discrimination claim. The Secretary objected to the request pursuant to the deliberative process privilege. ALJ Zielinski expressly rejected Respondent's attempt to obtain the information, stating that, "the Secretary's decision making process, by which a determination is made whether or not to initiate a discrimination proceeding under the Act, is the type of governmental decision to which the deliberative process privileges applies." Id. Similarly, the determination whether or not to specially

assess a citation is exactly the type of governmental decision to which the deliberative process privileges applies.

Here, the SAR Forms contain not only factual information about the violations at issue, but also the mental impressions, conclusions, and communications between the inspectors and their superiors regarding the appropriateness of the special assessments. The information contained in the SAR Forms consists of pre-decisional communications, as they were exchanged prior to the formulation of MSHA's decision to specially assess the violations. These communications are also deliberative in nature, as they constitute the thoughts, ideas, reasoning, and analyses used by the inspectors and their supervisors in reaching the decision to specially assess these violations. These are precisely the types of communications the deliberative process privilege was meant to protect. Moreover, the factual information contained in the forms is inextricably intertwined with the inspectors' decision-making process of whether the violations warranted special assessment; therefore, SAR Forms, as a whole, are privileged and are not subject to disclosure. See Consolidation Coal Co., 19 FMSHRC at 1246; Humphreys Enterprises, 2010 WL 5619976 at *5.

Lastly, the factual information that Respondent alleges it is seeking has either already been produced through discovery, or will be produced during the depositions of the inspectors. Petitioner has already provided Respondent with, among other things, the inspectors' notes, which set forth in detail the justification underlying the issuance of the citations/orders. In this regard, the production of the SAR Forms serves only to disclose MSHA's decision-making process in concluding that special assessments were warranted. Courts have applied the deliberative process privilege to disclosures of factual information when such disclosures "would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby

undermine the agency's ability to perform its functions." Consolidation Coal, 19 FMSHRC at 1247 (quoting Quarles v. U.S. Dep't of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990)). If this Court orders the SAR Forms to be provided, inspectors and supervisors at MSHA would be discouraged from providing their candid analysis in the future for fear of disclosure.

1. The SAR Forms are not Essential to a Fair Determination of the Case.

The Commission has noted that, even if a claim of privilege is properly asserted, it is qualified and subject to a balancing test. See Humphrey's Enterprises, Inc., 2010 WL 5619976 at *4 (citing Bright Coal Co., 6 FMSHRC 1520, 2523 (1984)). If it is found that "disclosure is essential to the fair determination of a case, the privilege must yield." Id. In order to make that determination, the Court must consider such factors as: (a) whether the Secretary is in sole control of the information; (b) the nature of the violation; (c) possible defenses; and (d) the impact of the information. Id.

In this case, Petitioner has produced or identified the factual bases of the violations at issue. Specifically, Petitioner has produced copies of, inter alia, the citations and the inspectors' notes for the violations at issue. Furthermore, depositions being conducted presently the week of September 16, 2013, during which Respondent will have a full opportunity to explore the factual bases underlying the issuances of the citations. As ALJ Paez held in Humphrey's Enterprises, under these circumstances the factual information sought by Respondent is "reasonably accessible to it," and the information contained in the SAR Forms are not essential to a fair determination of the case. Humphrey's Enterprises, 2010 WL 5619976 at *5.

III. CONCLUSION

For the foregoing reasons, the Secretary requests that the Court deny Respondent's Motion to Compel Discovery.

Respectfully submitted,

Rebecca Simon-Pearson, Attorney

UNITED STATES DEPARTMENT OF LABOR