

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 6, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

COEUR ALASKA, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-346-M
A.C. No. 50-01544-370187

Docket No. WEST 2015-401-M
A.C. No. 50-01544-373015

Docket No. WEST 2015-422-M
A.C. No. 50-01544-373488

Docket No. WEST 2015-470-M
A.C. No. 50-01544-375449

Mine: Kensington

**ORDER GRANTING RESPONDENT'S
MOTION TO COMPEL MSHA SPECIAL ASSESSMENT REVIEW FORMS**

Before: Judge Simonton

These cases are before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Chief Judge assigned these matters to me on June 22, 2015 and distributed the court's standard prehearing order to both parties. Within, the parties were instructed that,

... they shall provide a copy of all relevant, discoverable documents that relate to each citation/order including, but not limited to, copies of inspection notes, citation documentation, narratives, photos ... Notes taken during or shortly after the inspection that contain factual information are not privileged and must be disclosed as a part of the exchange of information.

Prehearing Order, 1.

On September 17, 2015, the Respondent moved to compel the production of MSHA's special assessment review forms ("SAR forms") for the six specially assessed citations contained in the above dockets. Resp. Mot., 1. The Secretary opposed the motion, stating that the SAR forms contain the "pre-decisional" thoughts, opinions, and recommendations of MSHA personnel and are protected by deliberative process privilege. Sec'y Ans., 4-5 (citing *Jordan v.*

U.S. Dept. of Justice, 591 f.2d 753, 772 (D.C. Cir. 1978); *In re Contests of Respirable Dust Sample Alteration Cases* 14 FMSHRC 987, 990-93 (June 1992)(“Dust Cases”); *Consolidated Coal*, 19 FMSHRC 1239, 1246 (July 1997).

On September 28, 2015, I ordered the Secretary to submit the SAR forms for my *en camera* review to determine whether the SAR forms contained information protected by the deliberative process privilege. Order for En Camera Review.¹ Within that order, I acknowledged the current split in ALJ ruling on this issue. *Id* at 2. However, I also highlighted several of my colleagues’ findings upon actual review of SAR forms that,

The forms contain no meaningful discussion of the pros and cons of specially assessing the cited standards and no exegesis of the policy reasons behind the Secretary's choices.

Consol, 2012 WL 4753924, *2 (July 2012)(ALJ Barbour)(finding that SAR forms were not protected by deliberative process); see also *Traylor Mining*, 37 FMSHRC 1373, 1373 (June 2015)(ALJ Manning)(stating that disclosure of SAR forms would not expose the Secretary’s deliberations in any meaningful way).

After *en camera* review, I conclude that the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 do not contain any deliberative content. On the first substantive section of the form, the inspector summarizes the facts of the citation at the beginning of the SAR form and recommends the citation for special assessment. On the second portion of the form, a series of supervisors either approve or disapprove the special assessment designation with very brief one or two sentence statements.

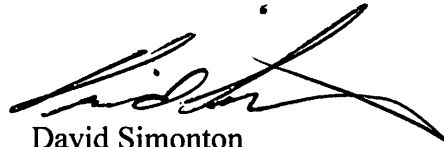
All of the information contained on these forms is strictly factual in nature, comprised primarily of concise descriptions of the alleged violation’s gravity and the operator’s negligence. None of the information on the submitted forms reveal broad policy considerations or the “deliberative” nature of the agency’s decision making process. Accordingly, the forms are not protected by the deliberative process privilege and must be disclosed. *Dust Cases*, 14 FMSHRC at 1993 (“purely factual information that does not expose an agency’s decision making process does not come within the ambit of privilege”).

Although not critical to my ruling, I must note that for at least one citation, Citation No. 8611880, there is a unique fact listed in the inspector’s summary within the SAR form that is not fully described in either the original citation or the Special Assessment Narrative form. Regardless of whether or not this or other facts are available through other disclosures, the Respondent is entitled to the full factual basis upon which the special assessment was issued so that it may mount a complete defense to both the fact of violation and the assessed penalty. See *Traylor Mining* 37 FMSHRC 1373 (stating that any significant deviation from the Secretary’s penalty assessment must be explained by the ALJ); see also *Sellersburg Stone*, 5 FMSHRC 287, 293 (Mar. 1983); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Mize Granite Quarries Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012).

¹ I incorporate all observations, findings, and references of the September 28 Order within this ruling. A copy of the September 28 Order has been attached for record purposes.

ORDER

The Secretary is ordered to provide complete copies of the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 to the Respondent without delay.



David Simonton
Administrative Law Judge

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September 28, 2015

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
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Docket No. WEST 2015-470-M
A.C. No. 50-01544-375449

Mine: Kensington

**ORDER TO SECRETARY TO SUBMIT
SPECIAL ASSESSMENT REVIEW FORMS FOR EN CAMERA REVIEW**

Before: Judge Simonton

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Chief Judge assigned this matter to me on June 22, 2015 and distributed the court's standard prehearing order to both parties. Within, the parties were instructed that,

... they shall provide a copy of all relevant, discoverable documents that relate to each citation/order including, but not limited to, copies of inspection notes, citation documentation, narratives, photos ... Notes taken during or shortly after the inspection that contain factual information are not privileged and must be disclosed as a part of the exchange of information.

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personnel and are protected by deliberative process privilege. Sec'y Ans., 4-5 (citing *Jordan v. U.S. Dept. of Justice*, 591 f.2d 753, 772 (D.C. Cir. 1978); *In re Contests of Respirable Dust Sample Alteration Cases* 14 FMSHRC 987, 990-93(June 1992)("Dust Cases"); *Consolidated Coal*, 19 FMSHRC 1239, 1246 (July 1997).

The Secretary correctly notes that Commission ALJs have issued divergent rulings on whether the SAR should be disclosed during discovery. Sec'y Ans., 3-4. One ALJ has ruled that SAR forms are wholly irrelevant as Commission ALJs have de novo authority to determine the appropriate penalty. *Pocahontas Coal Co., LLC*, 34 FMSHRC 903(April 2012)(ALJ Feldman).

Four other ALJs have found that the SAR forms are protected by the deliberative process and or work product privilege and denied respondents' motions to compel. *Big Ridge, Inc.*, 34 FMSHRC 2999 (Nov. 2012)(ALJ McCarthy); *Consolidation Coal*, 2013 WL 6529531 (Sept. 2013)(ALJ Moran); *Hidden Splendor Resources, Inc.*, 2011 WL 4542166 (Sept. 2011)(ALJ Rae); *Humphrey's Enterprises, Inc.* 2010 WL 5619976 (Dec. 2010)(ALJ Paez).

However, an equal number of ALJs have ruled that the SAR forms are not protected by the deliberative process privilege and granted respondents' motion to compel. *American Coal Co.*, 36 FMSHRC 1311, n. 22 (ALJ Zielinski)(May 2014); *Consolidation Coal Co.*, 2012 WL 4753924 (July 2012)(ALJ Barbour); *Bridger Coal*, slip-op. WEST 2009-110 (May 2011)(ALJ Manning); *American Coal Co.*, 33 FMSHRC 2352 (September 2011)(ALJ Melick); *CDK Contracting Co.*, 25 FMSHRC 289 (May 2003)(ALJ Manning).

Most recently, ALJ Manning has observed,

The SAR forms that I have seen do not contain any information that is useful or that is at all deliberative. Typically, the MSHA inspector writes down a few of the facts set forth in his citation or in his inspection notes as justification for his special assessment recommendation and then his supervisor indicates on the form that he agrees with the recommendation. MSHA officials further up the chain of command may provide their initials signifying their agreement. The SAR form typically repeats facts written elsewhere that the inspector would like MSHA to consider when reviewing his recommendation that the penalty be specially assessed. The comments by MSHA supervisors are brief and simply agree with the inspector's recommendation. ...

Given the nature of the SAR form, it is difficult to understand why either party believes it is important to the resolution of the issues in this case. If I were to require the Secretary to provide a copy of the SAR form to Traylor Mining, it is unlikely that Traylor would gain any information that it does not already have and the Secretary's deliberations would not be exposed in any meaningful way. These disputes over the discoverability of the SAR form can be characterized as much ado about nothing.

Traylor Mining, 37 FMSHRC 1373, 1373 (June 2015)(ALJ Manning)(Denying motion to compel SAR form, but barring the Secretary from introducing any factual evidence at hearing not otherwise disclosed in other documents).

I share my colleague's skepticism regarding the need for court intervention on this matter. However, the Respondent correctly notes that the burden for withholding an otherwise relevant document rests with the party withholding the information and must be supported by more than a bald assertion of privilege. Resp. Mot., 2 (citing *Root Neal & Company*, 21 FMSHRC 835, 836 (ALJ July 28, 1999); 6 Moore's Federal Practice (3d) § 26.47(1)(b)).

In this case, the Secretary's assertion that the SAR forms are advisory rather than fact based is contrary to an ALJ's previous findings after *en camera review* that,

The Court finds nothing in the SAR Forms that requires protection. The forms contain the facts upon which the special assessments are based, facts that for the most part are already known to the company; e.g., that a cited standard is targeted by the Rules To Live By initiative, that a specific condition is considered to be obvious, that a specific condition is considered to be highly dangerous, that the mine has an especially adverse history of violations of the cited standard. The forms contain no meaningful discussion of the pros and cons of specially assessing the cited standards and no exegesis of the policy reasons behind the Secretary's choices.

Consol, 2012 WL 4753924, *2 (July 2012)(ALJ Barbour).

Furthermore, the SAR forms are directly related to the penalty assessment of an individual citation. Thus, the SAR forms do not appear comparable to the type of secondary documents the Commission has previously found related to matters of pre-decisional agency policy. See *Dust Cases*, 14 FMSHRC 993-997 (upholding ALJ determination that deliberative process privilege applied to advisory letters concerning preliminary report conducted by extra-agency University (see specifically *In RE; Dust*, 13 FMSHRC 1573, 1581, 85 (ALJ Broderick)(Sept. 1991)); *Consol*, 19 FMSHRC 1246 (holding that deliberative process privilege applied to MSHA employee questionnaire used for internal review of agency conduct and formulation of policy changes following MSHA investigation of fatal mine explosion).

Nevertheless, as the Secretary has asserted that the SAR forms in this case contain protected records of the agency's decision making process, the Secretary is ordered to submit the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 for my *en camera review*.¹

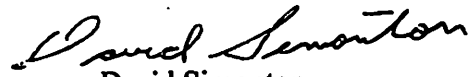
During *en camera review* I will determine whether the contents of these SAR forms concern pre-decisional issues of agency policy, whether the contents are factual or advisory in nature, and whether any facts contained in the forms are so inextricably intertwined with

¹ This court is generally reluctant to order *en camera review* to resolve a discovery dispute. However, this measure is consistent with previous ALJ rulings and necessary to resolve the matter without relying upon assumptions on the contents of these specific SAR forms. *Consol*, 2012 WL 4753924.

deliberative material that the facts cannot be disclosed in a redacted version. *Consol*, 19 FMSHRC 1246. After making those determinations, a final order on the motion to compel will be issued promptly.

ORDER

The Secretary is ordered to submit the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 by hard copy, under seal, to the court's office no later than October 2, 2015.


David Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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