FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

November 14, 2014

SCOTT MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER DENYING RECONSIDERATION OF ORDER QUASHING SUBPOENA

This matter is before me based on a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.[1]

Alicia McGlothlin, the wife of the Complainant, is an employee of the Russell County, Virginia, Treasurer's Office. The Respondent seeks reconsideration of a November 7, 2014, Order quashing a subpoena it served on the Treasurer's Office. The subpoena sought to obtain e-mails concerning this discrimination matter sent by Mrs. McGlothlin from her office computer that were reportedly deleted. Specifically, the subpoena sought to obtain the deleted material from the office's e-mail account server, including all archived and hard drive backup data.

The November 7, 2014, Order, which is incorporated by reference, determined, *inter alia*, that the information sought was unreasonably cumulative and duplicative in view of the fact that through discovery the Complainant provided available e-mails sent by Mrs. McGlothlin.

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[1] Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

Moreover, the Order, citing pertinent Commission rules, as well as the Federal Rules of Civil Procedure, concluded that seeking to forensically recover database information from the Treasurer's Office was an unduly burdensome discovery request. *See* 29 C.F.R. §§ 2700.56(b), (c); Fed. R. Civ. P. 26(b)(2)(B), (C)(i).

The Respondent filed a Motion to Reconsider the Order Granting Motion to Quash Subpoena on November 12, 2014. In support of its reconsideration request, Dominion represents that it has been unable to ascertain "when and how [McGlothlin] filed his Part 90 election." Dominion now also represents that, during the course of discovery, it determined that a Mine Safety and Health Administration ("MSHA") investigator had made reference to an e-mail received from Mrs. McGlothlin: which has not been produced; which may have been deleted; and which may be relevant to determining the date of McGlothlin's Part 90 application.

As an initial matter, Dominion's assertion that a deleted e-mail may be relevant to determining the date of McGlothlin's Part 90 application is speculative and does not outweigh the burden of the Treasurer's database retrieval. Moreover, the attorney-client privilege protects confidential client communications when:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Sec'y of Labor on behalf of Howard v. Cumberland River Coal Co., 34 FMSHRC 311, 314 (Jan. 2012), *citing Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998).

While not an attorney, the role of an MSHA investigator is to provide an opinion on the merits of a discrimination complaint which is provided to the Solicitor's Office in contemplation of potential litigation. Consequently, the MSHA investigator may be deemed to be a "subordinate" of an attorney, whose communications with a prospective complainant are protected under the attorney-client privilege.[2]

[2] I do not view previous e-mails to MSHA produced during discovery, if any, as a waiver of the attorney-client privilege. Furthermore, this privilege applies regardless of whether the communications are made directly to the MSHA official, or by a spouse on the complainant's behalf.

ORDER

In view of the above, **IT IS ORDERED** that Dominion's reconsideration request of the November 7, 2014, Order quashing the subject subpoena **IS DENIED**.

Jerold Feldman
Administrative Law Judge

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