FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 25, 2016

BHP COPPER, INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEST 2013-189-RM
v.	:	Citation No. 8751238; 10/18/2012
	:	
	:	Docket No. WEST 2013-190-RM
SECRETARY OF LABOR,	:	Order No. 8751239; 10/18/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Pinto Valley Operations
Respondent.	:	Mine ID: 02-01049
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2013-636-M
Petitioner,	:	A.C. No. 02-01049-315370
	:	
v.	:	
	:	
BHP COPPER, INC.,	:	
Respondent.	:	Mine: Pinto Valley Operations
	:	
	:	
	:	
TETRA TECH CONSTRUCTION SERVICES,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEST 2013-187-RM
v.	:	Citation No. 8751236; 10/18/2012
	:	
	:	Docket No. WEST 2013-188-RM
SECRETARY OF LABOR,	:	Order No. 8751237; 10/18/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Pinto Valley Operations
Respondent.	:	Mine ID: 02-01049 A0380
	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-587-M A.C. No. 02-01049-315369
v.	:	
TETRA TECH CONSTRUCTION SERVICES, Respondent.	:	 Mine: Pinto Valley Operations

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION TO COMPEL

The Secretary of Labor filed a motion to compel BHP Copper ("BHP") and Tetra Tech Construction Services ("Tetra Tech") to produce their Fatal Accident Report ("ICAM") concerning the September 22, 2012 death of Jon Vanoss in the Pinto Valley Mine, and related investigation documents, including photographs and a videotape. BHP and Tetra Tech refused to produce these materials, and contend that they are protected under the work product and attorney-client privilege doctrines. BHP and Tetra Tech argue that because an attorney directed and participated in the investigation process, the accident report and related documents are protected.

On September 22, 2012, Jon Vanoss, a contract employee with Tetra Tech with six days of experience, began work at Pinto Valley Operations at his normal 6:00 a.m. start time. Tetra Tech was hired by BHP as a Contractor to provide rehabilitation services for the mill and processing equipment. The mine ceased production in February 2009 and began rehabilitation operations in February 2012. On the day of the accident, Vanoss and a co-worker, Edwards, were sent to the fourth floor of the secondary crusher building to perform fire watch duties while welders worked on the chute above them. As a part of the rehabilitation of the building, certain equipment and screens had been removed from the building, leaving a number of large gaps in the floor. Sometime, after lunch, when Vanoss returned to the building alone, he fell through one of the floor openings and was found several hours later 30 feet below. As a result of the fatal accident, MSHA conducted an investigation and issued two citations each to BHP and to Tetra Tech.

MSHA conducted an accident investigation at the site shortly after the incident, as did BHP with the cooperation of Tetra Tech.[1] During the investigation, both MSHA and the mine operator photographed the scene and took witness statements. MSHA issued a report, and that report, along with photographs and other materials have been released to both BHP and Tetra Tech. BHP also drafted a report, along with photos, videotapes and witness statements, but has

[1] There have been some allegations that the accident scene had been altered between the time of the accident and the time MSHA arrived to conduct its investigation.

refused to provide the bulk of that report and its accompanying emails and photos, to the Secretary. On March 22, 2016 the Secretary filed a motion to compel the production of the mine's investigation report and all documents, witness statements, emails and photographs that were a part of that investigation. Both BHP and Tetra Tech responded by arguing that the documents are subject to the work product and attorney client privilege. For the reasons set forth below, I find that the factual information contained in the files must be released to the Secretary, but that any attorney thoughts, advice, or opinions are protected and should not be produced.

Work Product Privilege

Work product privilege protects materials prepared by an attorney in anticipation of litigation from discovery by the adverse party. *See Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). The doctrine is codified in section 26(b)(3) of the Federal Rules of Civil Procedure. Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b) incorporates the Federal Rules of Civil Procedure, as is practicable, on any procedural question that is not regulated under the Mine Act or the Commissions Procedural Rules. *See Secretary v. Consolidation Coal Co.*, 19 FMSHRC 1239, 1242 (July 1997). As the party invoking the privilege, BHP Copper bears the threshold burden to prove that the requested materials are (1) documents and tangible things (2) prepared in anticipation of litigation or trial (3) by or for another party or by or for that parties' representative. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

Here, the Secretary seeks an accident investigation report, referred to as an ICAM, along with all witness statements and emails that relate to the investigation. With regard to accident or investigation reports, the dispositive question is whether the material at issue was prepared in anticipation of a trial or litigation. If the documents serve dual purposes, work product privilege applies to materials that were prepared *because of* the prospect of litigation. *United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998) (emphasis added). BHP asserts that the report and its accompanying documents were prepared at the direction of an attorney and for the purpose of defending both a wrongful death action and any regulatory action taken by MSHA. The Secretary argues that ICAM documents are routine at this mine, and are prepared in most instances where litigation is not anticipated.

If the invoking party demonstrates that the materials qualify as work product, the requesting party bears the burden to justify production of the privileged documents. *See Hickman v. Taylor*, 329 U.S. 495, 512. Two categories of work product require different thresholds of proof. "Core" work product consists of "mental impressions, conclusions, opinions, or legal theories concerning the litigation" and may only be compelled in the rarest of circumstances. *National Union Fire Insurance Company v. Murray Sheet Metal Company Inc.*, 967 F.2d 980, 984 (4th Cir. 1992). "Ordinary" work product consists of facts, and the requesting party may compel discovery through showing (1) a substantial need for the material and (2) an inability to produce the substantial equivalent of the material without enduring undue hardship.

See Hickman v. Taylor, 329 U.S. 495, 509 (1947); *In Re Grand Jury Proceedings, Thursday Special Grand Jury Term*, 33 F.3d 342, 348 (4th Cir. 1994).

The Secretary argues that BHP's ICAM report does not qualify as work product because BHP and Tetra Tech had a legislative duty under 30 C.F.R. § 50.11(b)[2] to perform an accident report for Vanoss' death. In addition, the Secretary points to the internal procedures that BHP and Tetra Tech have had in place since at least 2008. These prior obligations, the Secretary argues, indicate that the accident report withheld was not created because of the prospect of litigation. BHP argues that the investigation was initiated by an attorney and that the report was not one that BHP would do in its normal course of business. However, the depositions testimony attached to the Secretary's motion gives a contrary impression that in fact a similar report is and has been prepared by BHP for a number of incidents at the mine, and they routinely conduct an investigation into an accident in order to prevent future injuries and deaths. While the mine may not have a statutory duty to create the exact report that it did, it does have the duty to investigate any accident or incident at the mine: In this case, the report was a result of that investigation and therefore I find it is not subject to the work product privilege.

BHP argues that the report has two purposes, but that the primary purpose is to prepare for litigation. The mine argues that since BHP contacted its attorney to investigate the accident, it was in anticipation of litigation not only concerning any MSHA citations, but the wrongful death action that was sure to follow. Counsel for the mines directed the investigation and was an active participant. Further, BHP argues that the investigation is separate and apart from its duty to investigate the accident because it was directed by an attorney for the company. However, even if the materials generated serve a function that is separate and apart from litigation, they should only be withheld if they reveal the mental impressions or opinions of an attorney who prepared them. *United States v. Adlman*, 134 F.3d 1194, (2nd Cir. 1998).

BHP's mandatory ICAM procedures have existed since 2008. Moreover, both BHP and Tetra Tech have provided their accident review guidelines in Exhibits 5 and 6. These indicate that both entities have accident reporting procedures in place regardless of whether litigation is anticipated. In addition, BHP has conducted ICAM investigations without the request of counsel for much less serious accidents. The ICAM procedures focus on gathering information to explain technical problems that caused the accidents. Robert Krohn, the mine operations manager, testified that the ICAM practice is a "normal company process" and that anyone receiving it "would know what to do without advice from anybody." (*Secretary's Motion to Compel*. at 9). *National Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980 (4th Cir. 1992). "Materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3)." See also *Secretary v. ASARCO, Inc.*, 12 FMSHRC 2548, 2558

[2] Section 50.11(b) states: "Each operator at a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation."

(Dec. 1990) where the Commission found that an investigation report was work product because the Secretary produced it to determine whether to commence litigation, and therefore was in anticipation of litigation. "If, on the other hand, litigation is contemplated but the document is prepared in the ordinary course of business rather than for purposes of litigation, it is not protected." (*Id.*)

Thus, without a substantial showing otherwise, the ICAM does is not eligible for work product privilege. The emails and other documents associated with the ICAM are also not subject to the work product privilege since they are intimately tied to the investigation and also contain factual information that was incorporated into the final report. However, as discussed below, parts of the investigation report and the documents associated with that investigation may be subject to the attorney-client privilege.

Attorney-Client Privilege

BHP next argues that the information requested by the Secretary, specifically the ICAM report, emails, photos, a videotape, witness statements and other documents associated with the mine's investigation into the fatal accident, are subject to the attorney-client privilege and therefore should not be released. Attorney-client privilege serves to promote full and frank communication between attorneys and their clients. *Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981). The privilege rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation to effectively carry out his or her objectives. *Trammel v. United States*, 445 U.S. 40, 41 (1980).

Yet attorney-client privilege also impedes the full discovery of the truth, and therefore must be strictly construed. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) *citing United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). Attorney-client privilege protects communications between an attorney and their client and does not extend to facts disclosed by the clients while communicating with the attorney. *Upjohn*, 449 U.S. at 395.

Again, BHP and Tetra Tech bear the burden of proving that the accident investigation meets the eligibility requirements for attorney-client privilege. BHP and Tetra Tech must show that:

> (1) [the] asserted holder of the privilege is or sought to become a client, (2) person to whom communication was made (a) is a member of the bar of a court, and (b) in connection with this communication is acting as a lawyer; (3) 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 service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or a tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See Secretary of Labor O/B/O Charles Scott Howard v. Cumberland River Coal Co., 34 FMSHRC 311, 314 (Jan. 2012) (ALJ); *citing Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) (citations omitted). The Secretary, in its motion to compel, suggests a different test, promulgated by the 9th Circuit in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) which uses a substantially similar 8-part test. However, the Commission has consistently relied on the 4th Circuit test and therefore it is relied upon here.

BHP and Tetra Tech together argue that BHP engaged outside counsel to provide legal advice as to the regulatory actions that may follow as well as the wrongful death action based upon the death of Vanoss. The emails, slides and other information were created with counsel and for counsel to aid him in providing legal advice to his clients. In addition, MSHA conducted its own investigation and received volumes of documents and has not shown a need for the information gathered by the attorney for the mine operator.

The Secretary argues that the primary purpose of the ICAM report is to determine what caused an accident and identify corrective actions to prevent reoccurrence. With this purpose in mind, the Secretary asserts that BHP provided no evidence indicating that the ICAM report intended to seek legal advice. The Secretary further argues that BHP asserted privilege based on the fact that the attorney directed and participated in the accident investigation yet, attorney-client privilege requires that the client communicate facts to the attorney, and he responds with legal advice and in his capacity as their attorney. The Secretary asserts that the report contains no legal advice. In addition, the ICAM procedure in Exhibit 6, as well as Robert Krohn's testimony, indicate that multiple parties receive copies of the ICAM report. If an individual outside of the employ of BHP or Tetra Tech received a copy, the dispersal may qualify as a waiver of attorney-client privilege.

Attorney-client privilege applies to communications between company employees and the counsel for the company acting in a legal capacity, in order to secure legal advice, and only if employees were aware of that purpose. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The courts have also determined that the underlying facts are separate and may not be withheld based upon the attorney client privilege. *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009). Here, emails were sent to any number of people; information was provided and shared, not always with an attorney; and the report was disseminated to managers at both BHP and Tetra Tech. The fact that emails were directed to or copied to an attorney does not alone make them privileged. Further, documents that contain factual information may not be privileged. *Laws v. Stevens Transport, Inc.*, 2013 WL 941435, (S.D. Ohio, 2013).

A number of Courts have determined that confidential communications made to attorneys "hired to investigate through the trained eyes of an attorney" are privileged, *In re International Sys.*, 91 F.R.D. at 557, the same is not true for the entire investigation file. Courts have consistently recognized that investigation may be an important part of an attorney's legal services to a client. *See, e.g.,* *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir.1996); *Dunn v.*

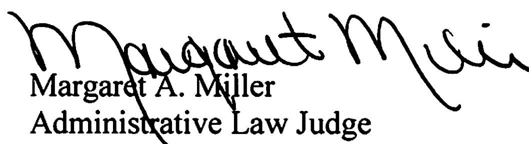
State Farm Fire & Casualty Co., 927 F.2d 869, 875 (5th Cir.1991) (applying Mississippi law); *In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir.1979); *Diversified Indus. v. Meredith*, 572 F.2d 596, 606-10 (8th Cir.1977) (en banc hearing 1978); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 91 F.R.D. 552, 557 (S.D.Tex.1981), *vacated on other grounds*, 693 F.2d 1235 (5th Cir.1982); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 599-611 (N.D.Tex.1981). *Upjohn* made "clear that fact finding which pertains to legal advice counts as professional legal services." Rowe, 96 F.3d at 1297 (internal citations omitted). Further, the 4th Circuit has found that an attorney did not act solely as an investigator when hired by the state Attorney General, but also as an attorney and therefore could invoke the privilege. *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997).

However, neither the attorney-client nor the work product privilege protects underlying facts. As the Supreme Court explained in *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981), the client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. Thus, "a party cannot conceal a fact merely by revealing it to his lawyer." Id., 449 U.S. at 396, 101 S.Ct. at 686.

I agree with BHP that many of the communications between the mine operators and the attorney are protected by the attorney-client privilege, and particularly conversations that involve or include legal advice or the attorney's impressions or legal strategy. To that extent, emails and documents that contain any deliberation, attorney opinion, comment, legal strategy or mental impression are protected and need not be produced. However, given the nature of this case, and the importance of having all facts available to all parties, any documents that contain factual information must be produced, after protected information is redacted. All photographs, whenever taken, must also be produced. There are not sufficient facts in the file to determine whether or not the video made after the investigation is subject to any privilege, or is even relevant to the MSHA matter as opposed to the wrongful death case, and therefore it is not included in this decision.

ORDER

BHP and Tetra Tech are hereby ORDERED to provide a copy of the ICAM report, along with any emails, photographs, witness statements or other documents related to the ICAM report that contain any factual information. The operator may remove from any document any deliberation, opinion, comment, legal strategy or mental impression of any attorney or a representative of the attorney. The documents shall be produced within ten days of the date of this order.



Margaret A. Miller
Administrative Law Judge

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