FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on Behalf of **ADAM WHITON**, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 2016-0221-DM RM-MD-16-04
v.	:	Mine: The Wharf Mine Mine ID: 39-01282
WHARF RESOURCES (USA), INC., Respondent	:	

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENT'S MOTION TO COMPEL

Before: Judge McCarthy

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Adam Whiton under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act}, 30 U.S.C. § 815(c)(2).[1] The matter is set for hearing in Deadwood, South Dakota on June 14 and 15, 2016, and continuing dates thereafter until completed.

On April 11, 2016, the Respondent filed a Motion to Compel 18 documents withheld during discovery pursuant to the Secretary's privilege log. On April 15, 2016, the Secretary filed an Opposition to Respondent's Motion to Compel. During an April 20, 2016 conference call, I ordered in camera review of the documents at issue.

Commission Procedural Rule 56(b) provides that parties may obtain discovery of any relevant matter that is not privileged. 29 C.F.R. § 2700.56(b). A Commission judge is authorized to exercise wide discretion in ruling on discovery issues and the Commission does not substitute its judgment for that of the judge unless error or abuse of discretion has occurred. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (1992).

Following my in camera review, I grant the motion to compel production of five Memorandums of Interview taken from management agents. The Secretary is **ORDERED** to turn these witness statements over immediately. In all other respects, the Respondent's Motion to Compel is **DENIED**. The remaining seven Memorandums of Interview are subject to the *Jenks* rule. *See generally Jenks v. United States*, 353 U.S. 657, 667-69 (1957); 18 U.S.C. §

[1] On January 21, 2016, I issued an Order of Temporary Economic Reinstatement in Docket No. CENT 2016-0136.

3500.[2]

Documents at Issue

1. MSHA Case Analysis

The first document at issue is an undated Case Analysis, prepared by MSHA analyst, Joel Gerhard, recommending that further action be pursued on Whiton's behalf under section 105(c)(2). The Secretary claims work product, deliberative process, and attorney client privilege. I agree, but need not pass on the latter two privileges.

The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privileged is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC 1239, 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 6-7. Even if Respondent had made such a showing, the document discloses a party representative's mental impressions, conclusions, opinions, and legal theories, and such work product, including the evaluative and analytical discussion of facts inextricably intertwined therein, cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn Co. v. U.S.*, 449 U.S. 383, 400 (1980); Fed. R. Civ. P. 26(b)(3)(B).

2. Special Investigator Dan Scherer's Special Investigative Report

The second document at issue is Special Investigator Dan Scherer's December 10, 2015 Special Investigative Report. The Secretary claims work product, deliberative process, informant, and attorney client privilege. I agree, but need not pass on the latter three privileges. The document is privileged work product that is not subject to disclosure for all of the reasons set forth in 1 above.

3. 12 Memorandums of Interview

The Secretary asserts work product privilege and informant's privilege for each of the 12 Memorandums of Interview documents at issue in his privilege log. The informant's privilege protects the identity of the informant, not his statement, unless disclosure of the contents of the statement would tend to reveal the identity of the informant. *See Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 158 (1986), citing *Roviano v. United States,* 353 U.S. 53, 60 (1957) and 4

[2] The *Jenks* Rule applies to civil proceedings. *See e.g., Thunder Basin Coal Company*, 15 FMSHRC 2228, 2237 (1993); *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); National Labor Relations Board, Division of Judges Bench Book, An NLRB Trial Manual, August 2010, § 8-500.

Moore's Federal Practice ¶ 26.61 [6.-2] (2d Ed. 1981). An informant is any person who has furnished information to a government official to assist in the government's investigation of a possible violation of the law, including the Mine Act. *Bright Coal Co.*, 6 FMSHRC 2520, 2525 (1984). The Memorandums of Interview taken by Special Investigator Scherer include both privileged and unprivileged matter, to wit, the identities of the informants and the substance of their statements. The in camera review ordered properly balances the public interest in efficient enforcement of the Mine Act, the informants' right to be protected against possible retaliation, and Respondent's need to prepare for trial. *Cf., Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 305 (5th Cir. 1972); *Bright Coal,* FMSHRC at 2525.

Applying the *Bright Coal* balancing test, I find the Memorandums of Interview to be relevant and discoverable. I further find them subject to qualified informant and work product privileges at the discovery stage, except for statements taken from management agents with counsel present, which must be turned over immediately. I have considered the discriminatory discharge alleged, the Respondent's defense that Whiton called another miner a derogatory name, the significance of certain informant testimony concerning Whiton's protected activity and Respondent's defense, the possibility of retaliation or harassment against said informants, and the fact that the substantial equivalent of the information elicited by Special Investigator Scherer is available through the same sources based on Respondent's own investigatory prowess. I conclude that the Secretary's need to maintain the privileges to preserve the identity of informants and the work product of its special investigator outweighs the Respondent's need for the information, until witnesses are called at trial.

The Secretary asserts in his Opposition that there are two types of witness interview memorandums. The first are unsigned memorandums, which represent the work product of investigator Scherer and may be withheld from disclosure. *Baylor Mining, Inc.*, 26 FMSHRC 739, 742 (2004)(ALJ).[3] The second are memorandums signed and adopted by the interviewees, which may be disclosed at trial pursuant to the Jenks Act, 18 U.S.C. § 3500. *See Thunder Basin,* 15 FMSHRC at 2237 (1993).

Contrary to the Secretary, I find no difference between the two types of statements in the circumstances of this case. Under the Jenks Act, the term "statement" includes not only a written statement made and signed or otherwise adopted or approved by the witness, but also any " ... other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement ..." 18 U.S.C. § 3500(e)(1) and (2).

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[3] *In Bright Coal*, the Commission found it apparent that the Secretary's underlying motive for invoking the executive and work product privilege was to shield the identity of informants. Accordingly, the Commission found that the memorandum of interview issue should be resolved in straight-forward fashion by addressing the issue solely in the context of the informant's privilege. *See Bright Coal,* 6 FMSHRC at 2520 n. 1. There was no discussion of why the Commission's conclusion regarding the Secretary's motive was apparent.

Three Memorandums of Interview were signed and adopted by the interviewees. Each of the nine unsigned Memorandums of Interview were prepared from notes made by Special Investigator Scherer during and immediately after the interview and Scherer verified that he recorded in summary fashion all pertinent matters discussed with the interviewee. Accordingly, I find that all 12 Memorandums of Interview are "statements" for purposes of *Jenks*.

Five of the nine unsigned Memorandums of Interview were given by management agents, with counsel present. Under these circumstances, Respondent is entitled to a copy of these previous statements in discovery as they are not protected by the work product or informant's privilege. *See* Fed. R. Civ. P. 26(b)(3); *Rovario,* 353 U.S. at 60 (suggesting that informant's privilege is waived once the identity of the informant is disclosed); *Thunder Basin*, 15 FMSHRC at 2236 (informant privilege waived where there is an express identification of the individual as an informant).

With regard to the remaining seven Memorandums of Interview, based on the *Bright Coal* factors balanced above, I find that the Secretary's interest in protecting the identity of its informants and work product outweigh the Respondent's need for the statements of potential government witnesses at the discovery stage. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974). I also note that the contested issues of protected activity, adverse action, nexus, and Respondent's defense are peculiarly within Respondent's knowledge, and if it had no knowledge, there is no prima facie case. Further, Respondent can take its own statements and depose potentially adverse witnesses. "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947)(Justice Jackson concurring).

In the exercise of my discretion, after in camera review, I will order the remaining seven witness statements to be turned over at trial, pursuant to a proper invocation of the *Jenks* rule by Respondent, after each potential witness has testified under direct examination. The Secretary may request appropriate redactions at that time. *See* 18 U.S.C. § 3500(c).

4. Memorandum to File From Special Investigator Scherer Dated November 5, 2015

The Secretary claims that this document is privileged work product. I agree. The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privileged is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Even if Respondent had made such a showing, the document was incorporated into the Special Investigative Report to disclose a particular legal theory and therefore cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn,* 449 U.S.

at 400 (1980); Fed. R. Civ. P. 26(b)(3)(B).

5. Memorandum to File From Special Investigator Scherer Dated November 2, 2015

The Secretary claims that this document is protected from disclosure by work product, informant, and common interest privileges. I need not pass on the latter two privileges. The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privilege is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. See R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Even if Respondent had made such a showing, the Memorandum to File refers to certain documents given to Special Investigator Scherer by complainant Whiton to support the legal theory of the case in the Special Investigative Report and such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn,* 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3)(B).

6. Various Handwritten Notes from Special Investigator Scherer

The Secretary claims that these notes are protected from disclosure by work product, attorney client, informant, and common interest privileges. I need not pass on the latter three privileges. The handwritten notes were prepared by Scherer in anticipation of litigation and the notes record the results of witness leads or interviews conducted during the course of the special investigation. Accordingly, the notes are privileged work product. The work product privilege is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. See R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Respondent can conduct its own expansive investigation, take its own notes from potential witnesses, and depose potentially adverse witnesses. As noted, discovery was hardly intended to enable learned counsel to perform its functions on wits borrowed from its adversary. *Hickman v. Taylor*, 329 U.S. at 516. In the exercise of my discretion following in camera review, I find that the Respondent has failed to demonstrate either the substantial need or the undue hardship necessary to overcome the qualified immunity provided by the work product privilege. *See Brock v. Frank V. Panzarino,* 109 F.R.D. at 160.

7. Typewritten Pages Given by Complainant Whiton to Special Investigator Scherer[4]

The Secretary claims that this document is protected from disclosure by work product informant, and common interest privileges. I need not pass on the latter two privileges, although I note that the document lists informants and potential informants. The document was prepared in anticipation of litigation or for trial on behalf of a party or that party's representative. Accordingly, the document is privileged work product. The work product privilege is qualified and subject to disclosure only upon a showing that the requesting party has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. *See e.g., Consolidation Coal*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3), incorporated by Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b). Respondent makes no such showing. *See* R. Mot. at 10. Further, Respondent has other means to obtain the same or equivalent information without undue hardship. Even if Respondent had made such a showing, the document, apart from the informant and potential informant contact information, was given to Special Investigator Scherer by complainant Whiton to support Whiton's opinion, mental impression, and legal theory about the case. Such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. *Upjohn,* 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3)(B).

ORDER

Respondent's Motion to Compel is **GRANTED** for the five Memorandums of Interview taken from management agents, with counsel present. The Secretary is **ORDERED** to turn these witness statements over immediately. In all other respects, the Respondent's Motion to Compel is **DENIED**. The remaining seven Memorandums of Interview are subject to the *Jenks* rule.

It is **FURTHER ORDERED** that the privileged documents be placed under seal as part of the record for use on any appeal.

SO ORDERED.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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[4] The Secretary's privilege log describes this document as an undated, typewritten page, but the document that was provided for in camera review is a two-page email from Complainant Whiton to Special Investigator Scherer, incorporating the apparent typewritten material.

Distribution: (Electronic and First Class Mail)

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