

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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June 22, 2015

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

v.

TRAYLOR MINING, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-351-M
A.C. No. 05-00413-341975 X940

Bulldog Mine

ORDER DENYING MOTION TO COMPEL

This case is set for hearing in Denver on June 30, 2015. The Secretary is proposing a penalty of \$52,500 for a citation issued under section 104(d)(1) of the Mine Act under his special assessment regulation at 30 C.F.R. § 100.5. The citation was issued as a result of an injury-accident at the Bulldog Mine. On or about June 15, Traylor Mining filed a motion to compel asking that I order the Secretary to produce his special assessment review (“SAR”) form for the citation as it requested during discovery. On June 18, the Secretary filed a response in opposition to the motion claiming that the SAR form is protected by the deliberative process privilege.

Traylor Mining is seeking the SAR form, in part, with respect to its allegation that the Secretary abused his discretion in proposing a special assessment. This issue has been brought before the Commission’s administrative law judges many times in the past. *E.g. CDC Contracting Co.*, 25 FMSHRC 289, 290 (May 2003) (ALJ Manning); *Aggregate Indus.* 25 FMSHRC 88, 89-90 (Feb. 2003) (ALJ Manning); *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ Zielinski); *Hidden Splendor Resources, Inc.*, 33 FMSHRC 2345 (Sept. 2011) (ALJ Rae); *Pocahontas Coal Co.*, 34 FMSHRC 903 (April 2012) (ALJ Feldman). 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.

In many cases before me in which the Secretary has proposed a penalty that was specially assessed, the Secretary has attached the SAR form to the petition for assessment of civil penalty, making the form available to the mine operator. The Secretary’s belief that the information in the SAR form should be protected by the deliberative process privilege is applied inconsistently at best and seems to suggest that the Secretary is not particularly concerned about any “deliberations” contained therein.

As noted by the Secretary in his opposition, facts are not protected by the deliberative process privilege. The Secretary alleges that he has provided Traylor Mining with the all the factual information that is contained within the SAR form. Moreover, the Secretary maintains that the privilege applies to “disclosures of factual information when such disclosures ‘would expose the agency’s decision-making process in such a way as to discourage candid discussion with the agency and thereby undermine the agency’s ability to perform its functions.’” Sec’y Opposition at 4 quoting *Consolidation Coal Co.*, 19 FMSHRC 1239, 1247 (July 1997) (internal citations omitted). The Secretary has not demonstrated that providing the SAR form to Traylor Mining would in any way undermine MSHA’s ability to perform its functions in this case or in future cases.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. § 2700.56(b). Facts that are related to the information the Secretary considered in proposing a special assessment may be relevant and are not privileged. *See generally, Pocahontas Coal Co.*, 37 FMSHRC ____, slip op. at 6-8, WEVA 2014-1028, 2015 WL 3443490 (May 22, 2015) (ALJ Miller) (reconsideration denied June 18, 2015). As a general matter, the Secretary cannot withhold purely factual portions of the SAR form simply on the basis of his representation that Traylor Mining already received the same information in a different format.¹

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.

In several orders discussing this same issue I have stated that because the Commission assesses penalties de novo, the Secretary’s assessment process is “totally irrelevant.” *CDC Contracting Co.*, 25 FMSHRC 289, 290 (May 2003). I was wrong in reaching this conclusion. Clearly, section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). The Commission has consistently held, however, that the Secretary’s penalty proposal must be considered by the judge. The Commission recently summarized this obligation, as follows:

While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the

¹ The Secretary also states that deposing the inspector “would have provided Respondent the ability to obtain factual information sought from the privileged SAR form through non-privileged means.” Sec’y Objection at 6. While conducting a deposition of the issuing inspector might sometimes be advisable, the Secretary cannot force a mine operator to bear the expense of a deposition to obtain facts that are available by simpler, less expensive means. If these facts may be obtained through the deposition of the inspector, then the Secretary should be able to produce the facts in the SAR and redact any alleged nonfactual portion, if necessary.

Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

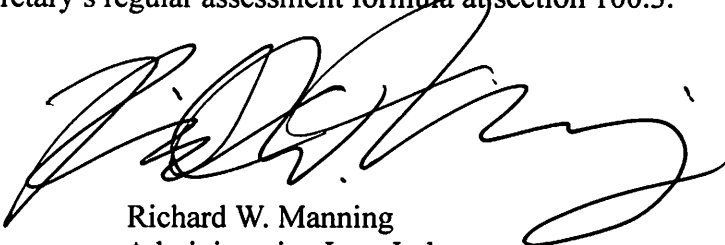
Mize Granite Quarries Inc., 34 FMSHRC 1760, 1763 (Aug. 2012). Thus, if I decide that the Secretary is unable to justify the \$52,500 proposed penalty, I must explain the basis for any significant deviation from that penalty.

If the Secretary would like me to consider his specially assessed penalty proposal, the Secretary must justify his decision to propose the penalty at the hearing. The Secretary bears the burden of establishing facts to justify the higher than normal penalty in this case. Special assessments are reserved for "particularly serious or egregious violations." *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (DC Cir. 1989).

In light of the above, especially the Secretary's representation that he has provided Traylor Mining with the all the factual information contained in the SAR form, I enter the following **ORDER**:

1. Traylor Mining's motion to compel is **DENIED**; the Secretary is not required to provide a copy of the SAR form to counsel for Traylor Mining. The Secretary will not be permitted to introduce the SAR form at the hearing, but shall bring a copy of the SAR form to the hearing. If the Secretary presents facts at the hearing related to the proposed special assessment and Traylor Mining contends that these facts were not disclosed during discovery, I may ask the Secretary to provide me with a copy of the SAR form for my *in camera* review. If the disputed facts are contained in the SAR form and I am convinced that the information was not otherwise provided by the Secretary during discovery, I may strike from the record the evidence presented by the Secretary concerning the proposed penalty on the basis that the Secretary failed to provide Traylor Mining with these facts during discovery. In the alternative, the Secretary may provide counsel with a PDF copy of the SAR form by no later than 3:00 p.m. Mountain Time on Tuesday, June 23.

2. At the hearing, the Secretary **SHALL** advise me what the penalty would have been if it had been calculated using the Secretary's regular assessment formula at section 100.3.


Richard W. Manning
Administrative Law Judge

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