FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5268

June 24, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-636-M A.C. No. 02-01049-315370
v.	:	
BHP COPPER, INC., Respondent.	:	Mine: Pinto Valley Operations
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 DENYING MOTION FOR RECONSIDERATION
ORDER DENYING MOTION TO CERTIFY

Before: Judge Miller

These cases are before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). The cases involve a fatal accident that occurred at the Pinto Valley Mine on September 22, 2012. In response to the accident, Respondent BHP Copper, Inc. ("BHP") conducted an internal investigation into the accident, in which Respondent Tetra Tech Construction Services ("Tetra Tech") also participated pursuant to a common interest agreement. On March 21, 2016, the Secretary filed a motion to compel production of the mine's fatal accident report and related documents. I granted in part and denied in part the Secretary's motion to compel in an order dated April 25, 2016. On April 29, 2016, BHP filed a motion requesting that I stay the order and reconsider it, or, in the alternative, certify the order for interlocutory review by the Federal Mine Safety and Health Review Commission. Tetra Tech joined in the motion. I stayed the order in an email to the parties on May 2, 2016, pending further review. The Secretary filed a response in opposition to BHP's motion, and BHP filed a reply.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

BHP argues that reconsideration is appropriate because the order is contrary to law. The order requires BHP to provide any documents containing factual information, with any deliberation, attorney opinion, comment, legal strategy, or mental impression redacted. Order at 7. BHP argues that this conclusion erroneously applies the Supreme Court's holding in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and is contrary to Ninth Circuit precedent in *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1493-95 (9th Cir. 1989). It further argues that it is uncertain how to comply with the order to the extent that it is required to separate facts from opinions. Finally, BHP further argues that my conclusion that the materials sought were prepared in the ordinary course of business and thus not protected by the work product privilege is contrary to law. It argues that this conclusion ascribes a single purpose to the documents, which is inappropriate under Ninth Circuit precedent.

The Secretary argues that reconsideration is not warranted because there has been no change in controlling law, the order did not contain a clear error of law, and the order will not result in any injustice. The Secretary argues that the order correctly applies the holding in *Upjohn* that "a party cannot conceal a fact merely by revealing it to his lawyer." 449 U.S. at 396. The Secretary also argues that the conclusion that the materials in question were not protected by work product privilege was correct.

II. LEGAL STANDARD

The Commission has held that reconsideration of a final order is appropriate if the Commission has "overlooked or misapprehended significant facts or legal arguments." *Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001). Similarly, reconsideration of a final judgment in federal court is appropriate only if the court is "presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (emphasis omitted) (interpreting Fed. R. Civ. P. 59(e) regarding alteration of a judgment).

Regarding intermediate orders, Federal Rule of Civil Procedure 54(b) provides that

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Accordingly, a showing of clear error or a change in law may not be necessary for modification of an interlocutory order. *See Agapito Assocs., Inc.*, 30 FMSHRC 1187, 1188-89 (Dec. 2008) (ALJ) (deciding that an *Island Creek* showing was not necessary for reconsideration of an order denying a motion to stay).

III. DISCUSSION

A. Work Product Privilege

BHP asks that I reconsider my conclusion that the materials addressed in the motion to compel, an accident investigation report and related documents, were not protected by the work product privilege. BHP asserts that its investigation of the accident that killed Jon Vanoss was conducted in preparation for litigation. However, BHP also had a regulatory obligation to investigate the accident. The Secretary's regulations require that "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 accident." 30 C.F.R. § 50.11(b). In addition, BHP had an internal policy requiring an investigation after any accident at the mine. The issue in this case is whether the work product doctrine limits discovery of materials that were prepared in anticipation of litigation but also pursuant to a regulatory requirement or internal business policy.

The Supreme Court has recognized that in order to effectively prepare a case, a lawyer must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393 (1947). Accordingly, the Federal Rules of Civil Procedure limit discovery of "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" unless the party seeking to discover the materials demonstrates a substantial need. Fed. R. Civ. P. 26(b)(3); *see also United States v. Nobles*, 422 U.S. 225, 237-38, 95 S. Ct. 2160, 2170 (1975) ("The Court therefore recognized a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'")

Materials that are prepared in anticipation of litigation as well as for another purpose are often referred to as having a "dual purpose." Courts that have addressed the issue of work product protection of these materials have adopted the "because of" test. *See, e.g., United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *United States v. Adlman*, 134 F.3d 1194, 1203 (2d Cir. 1998); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). Under this test, materials should be considered "prepared 'in anticipation of litigation,' and thus within the scope of [Rule 26(b)(3)], if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Adlman*, 134 F.3d at 1202 (internal quotations omitted) (citing 8 Charles Alan Wright et al., *Federal Practice & Procedure* § 2024 (1994)). In *Adlman*, the Second Circuit explained further that:

> Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision. Conversely, it should be emphasized that the "because of" formulation ... withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.

Id.; *see also Richey*, 632 F.3d at 568 (holding that an appraisal report required by the IRS for a tax deduction was not covered by the work product doctrine because the report would have been prepared even in the absence of litigation).

The Ninth Circuit addressed a situation similar to the one at hand in *Torf*, which involved a "dual purpose" investigation conducted in part because of regulatory requirements. *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900 (9th Cir. 2004). An agent of the company's attorney had conducted an investigation into hazardous substances at the company's plant in response to a request from the EPA as well as in preparation for litigation with the government. *Id.* at 904. A grand jury later sought to subpoena documents produced as part of the investigation. *Id.* The Ninth Circuit held that the documents were protected by the work product doctrine because the litigation purpose of the documents "so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Id.* at 910. In reaching its conclusion, the court emphasized that the company had hired an attorney "only after learning that the federal government was investigating it for criminal wrongdoing" and that it was not "assigning an attorney a task that could just as well have been performed by a non-lawyer." *Id.* at 909.

In this case, the company had a clear regulatory obligation to conduct an investigation of the accident and produce a report. The company also had a policy requiring an investigation of any accident, and detailed procedures for how to conduct the investigation. Thus, I find that BHP's accident report "would have been created in essentially similar form irrespective of the litigation." *See Adlman*, 134 F.3d at 1202. I also find that this case is distinguishable from *Torf*. While in that case the company hired an attorney only after learning that the government was investigating it, here the company contacted its attorney soon after learning of the accident. Further, I find that unlike in *Torf*, the investigation here was "a task that could just as well have been performed by a non-lawyer." *See Torf*, 357 F.3d at 909. The deposition testimony submitted by the Secretary indicates that investigations were at times conducted without the supervision of an attorney. Sec'y Ex. 7 at 129. The only exception to this is notes by the attorney or his agents regarding legal strategy, which could not have been produced by a non-attorney and would not have been produced but for anticipated litigation. *See Upjohn Co. v. United States*, 449 U.S. 383, 400 (Jan. 1981) ("Rule 26 accords special protection to work product revealing the attorney's mental processes.") Accordingly, I find that, with the exception of those notes, the materials relating to the investigation were not protected by the work product doctrine.

B. Attorney-Client Privilege

In my initial order, I concluded that parts of the investigation report and related materials were protected by the attorney-client privilege, but that factual matter contained in the documents was not privileged. BHP asks that I also reconsider this conclusion.

Materials for which BHP claims attorney-client privilege include the incident report summarizing findings of the investigation; drafts of the report; slide presentations, memoranda, and flow charts summarizing the report; memoranda to and from counsel regarding the

investigation; notes taken by counsel regarding the accident; emails to and from counsel relating to logistics, procedures, and legal strategy for carrying out the investigation; and emails to and from counsel discussing the findings of the investigation.

The attorney-client privilege is intended to "encourage full and frank communication between attorneys and their clients." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation" to enable the lawyer to effectively advise and advocate for the client. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

To successfully assert attorney-client privilege, the party claiming the privilege must demonstrate that

> (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.

Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998).

The Secretary argues that BHP has not proven part 3(c) of the test with regard to most of the documents requested because the accident investigation was not conducted for the purpose of obtaining legal advice, but rather to determine the cause of the accident and identify measures to prevent a recurrence.

In *Upjohn*, the Supreme Court ruled that attorney-client privilege extended to communications made during an internal investigation conducted to ensure compliance with the law. 449 U.S. at 392. The Court noted that "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.'" *Id.* As in the area of work product privilege, communications made to an attorney can often have more than one purpose. To resolve the issue of whether such communications are covered by the attorney-client privilege, courts apply the "primary purpose test." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). The D.C. Circuit has described the test as asking "whether obtaining or providing legal advice was *one of* the significant purposes of the attorney-client communication." *Id.* (emphasis added); *cf. United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (finding that privilege did not apply because communications were "not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value" of property). In *Kellogg*, the court concluded that communications made as part of an internal investigation were privileged because one of the significant purposes of the investigation was to

obtain or provide legal advice, even though the investigation was also conducted as part of a compliance program required by federal regulations. *Id.*

I find that, while the investigation at issue was conducted in part for business reasons, it was also done for the purpose of obtaining legal advice. The investigation was led by counsel, and the attorney claims that he provided legal advice as a part of that investigation.

However, it is not clear from the record that all of the documents withheld were communications by a client to counsel. In *Upjohn*, the Court made clear that the attorney-client privilege extended only to "the responses to the questionnaires" the attorney had sent to employees "and any notes reflecting responses to interview questions." 449 U.S. at 397. In this case, many of the documents at issue were written by the attorney and his investigation team rather than by clients. *See, e.g.*, Privilege Log ¶¶ 1, 9-16. These documents are protected only insofar as they reflect statements by employees or managers given directly to counsel or his agents seeking legal advice and documents that include that legal advice. Conclusions or impressions of the attorney, including attorneys' notes, are protected by the work product privilege as discussed above. Any emails from clients to counsel regarding the investigation are protected if the statements relate to the procurement of legal advice, but emails that simply include an attorney as one of many recipients are not protected. The work of an attorney in giving advice and legal conclusions and impressions is protected by privilege, but the facts of the case are not, and may not be shielded by privilege.

IV. INTERLOCUTORY REVIEW

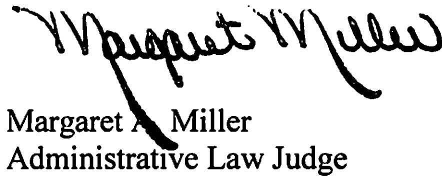
BHP asks that if I deny its motion for reconsideration, I certify the April 25 Order for interlocutory review by the Commission. Commission Rule 76 provides that the judge should certify a ruling for interlocutory review if the ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1).

I find that a controlling question of law is involved: whether materials relating to a mine's internal investigation of an accident are protected by the attorney-client privilege or work product doctrine. However, the resolution of this question will not materially advance the final disposition of this proceeding. BHP states that an Arizona state court has ruled in related civil litigation that BHP's investigation materials are protected from discovery under state law. Nevertheless, the issue is not dispositive as to the entire case. The parties have already engaged in extensive discovery for a case that involves only two citations. The case is set to be heard nearly four years after the subject accident occurred. Appellate review of this issue would merely delay the proceeding further.

V. ORDER

For the reasons above, Respondent's Motion for Reconsideration is hereby **DENIED**. Respondent's Motion for Certification for Interlocutory Review is also **DENIED**. Consistent with the April 25 Order, BHP and Tetra Tech are **ORDERED** to provide all requested documents to the Secretary except for documents that include the impressions, thoughts and

conclusions of Respondent's attorneys. Reports, slide presentations, drawings, photographs, memoranda, fact statements and other materials summarizing the findings of the investigation must be provided. Statements by employees and management to counsel seeking advice or advice from the attorney, contained in the documents may be redacted. Discussions of legal strategy by counsel may also be redacted.



Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Certified Mail)

Norman E. Garcia, U.S. Department of Labor, 90 7th Street, Room 3-700, San Francisco, CA 94103

Demian Camacho, U.S. Department of Labor, 350 South Figueroa Street, Suite 370, Los Angeles, CA 90071

Michael C. Ford, Snell & Wilmer, LLP, One Arizona Center, 400 East Van Buren Street, Suite 1900, Phoenix, AZ 86004

Peter S. Gould, Squire Patton Boggs (US), LLP, 1801 California Street, Suite 4900, Denver, CO 80202