

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

**JUL 20 2017**

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

v.

LARRY ANDERSON, formerly employed  
by AK COAL RESOURCES INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 2017-109  
A.C. No. 36-10041-431766A

Mine: North Fork Mine

**ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S  
MOTION FOR PROTECTIVE ORDER  
ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S  
MOTION FOR PROTECTIVE ORDER LIMITING DEPOSITION**

Before: Judge Andrews

On June 5, 2014, citations were issued at AK Coal Resources. A 110(c) investigation into Respondent, Larry Anderson, began shortly after the citations were issued, and the investigation concluded on January 31, 2017. Respondent was notified of the civil penalties proposed against him on February 21, 2017. On April 12, 2017, Respondent filed his answer and served the Secretary with discovery requests. Interrogatory requests and documentation production occurred on May 8, 2017, and May 31, 2017. On June 7, 2017, Respondent served the Secretary with a Notice of Deposition, proposing a deposition date for an unnamed MSHA official on July 14, 2017. On June 12, 2017, Respondent served an Amended Notice of Deposition for Cajetan Stepanic proposing a deposition date on July 27, 2017.

On June 22, 2017, the Secretary filed a Motion for Protective Order requesting the undersigned preclude the respondent from taking the deposition of an unnamed MSHA official as described in Respondent's Notice of Deposition. The Secretary contends that the information sought by Respondent in the deposition is irrelevant and protected by the government officials privilege, deliberative process privilege, investigative process privilege, attorney-client privilege and attorney work product privilege. On June 30, 2017, Respondent filed a Response in Opposition to the Secretary's Motion for Protective Order & Motion to Compel Deposition. Respondent contends that the information sought in the deposition is relevant, is not protected by the privileges asserted, and is necessary for a fair determination in this case.

On July 11, 2017, the Secretary filed a Motion for Protective Order Limiting Deposition of Supervising Special Investigator J. Cajetan Stepanic by precluding the Respondent from asking questions regarding the special-investigation process and communications between Supervisor Stepanic and MSHA's Technical Compliance and Investigations Office ("TCIO"). The Secretary contends that some of the documents and information sought may be irrelevant and protected by the deliberative process privilege, the investigative process privilege, the attorney-client privilege, and the attorney work product privilege. Respondent filed a Response in Opposition to the Secretary's Motion for Protective Order Limiting Deposition & Motion to Compel Deposition on July 14, 2017. Respondent contends that the deposition is relevant, the documents requested are not privileged, and the information sought is necessary for a fair determination in this case.

The Respondent's request for a deposition with an MSHA official covered "(1) The review process with TCIO for Section 110(c) investigations; (2) The staffing and workload of TCIO in the period June 6, 2014-December 2016; and (3) The process of review of the investigation concerning the Respondent within TCIO during the period June 6, 2014 to December 11, 2016."

## **I. Discovery**

Under Commission Rule 56, "parties 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). The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and have narrowly construed the claim of privilege. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Secretary of Labor on behalf of Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (1984). The party asserting a privilege has the burden to demonstrate that relevant material is not subject to discovery. *In re: Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

The Secretary contends that a deposition is not appropriate for the unnamed MSHA official because the information sought by Respondent is not relevant and is covered by several privileges: (1) the qualified immunity for government official's privilege, (2) the deliberative processes privilege, (3) the investigative process privilege, (4) the attorney-client privilege, and (5) the attorney work product privilege.

The Secretary also argues that limited deposition is appropriate for Supervisor Stepanic because at least some of the information sought is privileged and irrelevant. For Supervisor Stepanic's deposition, the Secretary argues all of the privileges above except the qualified immunity for government official's privilege.

## **II. Relevance**

The Secretary argues that the information sought by Respondent in the depositions at issue is not relevant, and thus, Respondent should not be allowed to depose the MSHA official and should be limited in his deposition of Supervisor Stepanic. The Secretary cites the general 5 year statute of limitations for civil penalty proceedings, 28 U.S.C. § 2462, stating that the present 110(c) case falls within the statute of limitations and so any questions about the timeliness or

work load of MSHA and TCIO specifically is irrelevant to claims and defenses in this action. The Secretary further points to section 105(a) of the Mine Act, which provides that “[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a *reasonable time* after the termination of such inspection or investigation, notify the operator...of the civil penalty proposed...” 30 U.S.C. § 815(a). The Secretary argues that the investigation period by TCIO and the Office of Assessments was reasonable in this case, and so a deposition on these issues would be irrelevant.

Respondent is argues that the timeline for the investigative process was unreasonable under section 105(a) of the Act and could lead to dismissal. Respondent specifically cites to the MSHA Handbook’s proposed timelines, to argue the unreasonableness of the investigative timeframe. This Court agrees with Respondent that a deposition concerning the issues of time and workload may be relevant, or may at least lead to relevant information for a defense. Thus, a deposition shall not be barred due to irrelevance for the unnamed MSHA official or Supervisor Stepanic.

### **III. Qualified Immunity for Government Officials Privilege**

The Secretary asserted a Qualified Immunity for Government Officials Privilege in its first Motion for Protective Order barring a deposition of the MSHA official.

This privilege prevents parties from deposing high-ranking government officials, unless rare circumstances exist. *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. 1990). The Commission has upheld that high level officials are protected from compulsory testimony so that their jobs are not constantly interfered with by the discovery process. *Newmont Gold Company*, 18 FMSHRC 1304, 1307 (July 1996) *citing Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990). I do not find that the unnamed MSHA official is the type of high level government official that requires this protection. The Secretary has not met its burden in demonstrating that a high-ranking government official would be required to be deposed by Respondent’s Fed. R. Civ. P. 30(b)(6) Notice of Deposition. This Court does not have sufficient evidence that several individuals from MSHA, who do not maintain this qualified immunity could satisfactorily provide the necessary information allowed by this Court and requested by Respondent.

### **IV. Deliberative Process Privilege**

The Commission has upheld a deliberative process privilege which “attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.” *In re: Contests of Respirable Dust Sample Alteration Citations*(“*Dust Cases*”), 14 FMSHRC 987, 992 (June 1992) quoting *Jordan v. United States Dep’t of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978). Pre-decisional communications that are deliberative, which means that they “must actually be related to the process by which policies are formulated” are protected. *Id.* (quoting 591 F.2d at 774).

“The privilege protects thoughts, ideas, reasoning, and analyses which lead to a decision of the agency.” *Hidden Splendor Resources, Inc.*, 33 FMSHRC 2345, 2347 (Sept. 2011) citing *Kan. State Network, Inc. v. F.C.C.*, 720 F.2d 185, 191 (D.C. Cir. 1983). The Supreme Court has

held the privilege protects “the decision making process of government agencies,’ and focus[es] on documents ‘reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted) citing *Stiftung v. V. E. B. Carl Zeiss*, 40 F.R.D. 318, 324 (May 1966).

The Commission held that “purely factual information that does not expose an agency's decision making process does not come within the ambit of the privilege.” *Dust Cases*, 14 FMSHRC at 993. If factual information is combined with protected information, the party opposing disclosure must demonstrate, “that the material is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection.” *Consolidation Coal*, 19 FMSHRC 1239, 1246-47 (1997) citing *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992).

The Notice of Deposition for the unnamed individual states that the covered topics at deposition would be the review process with TCIO for Section 110(c) investigations, the staffing and workload of TCIO June 6, 2014-December, 2016, and the review process of the investigation concerning the named Respondent within TCIO June 6, 2014-December 11, 2016.

This Court agrees with the Secretary that any advisory opinions, recommendations by TCIO and MSHA fall under this privilege and the MSHA official cannot be deposed concerning this information. Thus, the requested information concerning TCIO's 110(c) review process and the review process for the named Respondent are part of the deliberative process, as they involved communications, analyses and recommendations concerning a 110(c) citation. However, Respondent may request information regarding any underlying facts, dates, and the staffing and workload of TCIO.

The Notice of Deposition for Supervisor Stepanic requests that he be “prepared to produce any notes or documents... related to the investigation conducted concerning...the process of investigation, and any communications between Mr. Stepanic and TCIO concerning the status and timing of review by TCIO.”

This Court finds that any communications regarding the review process, recommendations and analyses are privileged, and Supervisor Stepanic is not required to answer questions or produce documents related to these requests. However, any information regarding underlying facts, as well as the status and timing of review by TCIO is not privileged.

### **Overcoming the Privilege**

The deliberative process privilege is qualified and is subject to the balancing test set forth in *Bright Coal Company*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. This case states that when “disclosure is essential to the fair determination of a case, the privilege must yield.” *Bright Coal Co.*, 6 FMSHRC at 2523 citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). This test analyzes if “if the Secretary is in sole control of the material sought, and whether the party seeking disclosure has other

avenues available to it to obtain the material.” *Dust Cases*, 14 FMSHRC at 988. The party seeking disclosure has the burden of proving that the information requested is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526.

This Court does not find that the Respondent has demonstrated an essential need for fair determination of this case that outweighs the privilege supporting MSHA’s ability to analyze each case, make recommendations and communications concerning the case before a final decision is made. Additionally, Respondent has not shown that deliberations and recommendations made during the investigation are necessary to a fair determination in this case. Thus, the information and documents requested in both depositions, of the MSHA official and Supervisor Stepanic that fall under the deliberative process privilege has not been overcome by the needs of Respondent.

#### **V. Investigative Process Privilege**

The Commission has held that an “official information” privilege or investigative process privilege may be used to prevent the unwarranted disclosure of documents from law enforcement investigatory files, as well as testimony about that information. *Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237-38 (Nov. 1993); *Dust Cases*, 14 FMSHRC at 1008-09. This privilege is qualified and is subject to a “balancing of the government’s interest in non-disclosure and the operator’s need for information prior to hearing.” *Thunder Basin Coal Co.*, 15 FMSHRC at 2238

Any testimony and documents requested regarding TCIO’s investigative process is also protected by the Investigative Process Privilege. Hence, any questions or document requests of the MSHA official or Supervisor Stepanic regarding the investigatory process are protected and Respondent has not demonstrated that it has a need for this information in defending the 110(c) investigation or pursuing a defense of an unreasonable timeline for prosecution. Again, any information regarding underlying facts and investigation dates may be discoverable and are not covered by this privilege.

#### **VI. Attorney-Client Privilege**

The attorney-client privilege is a client’s privilege meant to encourage communication between attorneys and clients. *BHP Copper Inc.*, 38 FMSHRC 1579, 1583 (June 2016)(ALJ). citing *Upjohn v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege requires that the party claiming the privilege is:

- (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.

*BHP Copper Inc.*, 38 FMSHRC at 1583 citing *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998).

The Supreme Court has also held that the attorney-client privilege protects communications made during an internal investigation made to ensure compliance with a law. *Upjohn v. United States*, 449 U.S. at 392.

The Secretary argues that the Office of the Solicitor is involved in advising MSHA and TCIO during the investigation review process. Further, the Secretary contends that the topics Respondent intends to cover in the depositions at issue necessarily include the Solicitor's involvement.

This Court finds that the investigations made by MSHA may be covered by the attorney-client privilege, as they involve an investigation by MSHA, the party, issuing a citation that is to be prosecuted by the Secretary of Labor. However, this Court disagrees that all facts and dates are part of the Attorney-Client Privilege and cannot be discoverable. The Commission has repeatedly held that any underlying facts concerning a case are discoverable; therefore, the MSHA official and Supervisor Stepanic may be deposed on facts and dates related to the 110(c) case at issue. Nevertheless, any confidential communications made in preparation for litigation are not discoverable, and the witness may not be deposed on any attorney-client communications.

## **VII. Work Product Privilege**

The Commission has held that the attorney work product privilege is a qualified immunity against discovery. *Asarco, Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990). A party may withhold discoverable materials if they are documents and tangible things that are prepared in anticipation of litigation or for hearing by or for another party or that party's representative. *Asarco, Inc.*, 12 FMSHRC at 2558 (Dec. 1990).

The Secretary argues that Respondent's request that the MSHA official or Supervisor Stepanic be prepared to produce any notes or documents she intends to rely on at the deposition is barred by the work product privilege. This Court agrees that many documents relied on by the deposed will involve documents prepared by the Secretary of Labor in preparation for hearing. Any documents prepared in anticipation of litigation are protected by this privilege and the witnesses may not be compelled to produce such documents.

Nonetheless, this Court disagrees that all documents relevant to questioning is privileged. Documents concerning underlying facts and the relevant timelines may be produced and are not privileged.

## **VIII. Conclusion**

Thus, this court **GRANTS** in part and **DENIES** in part the Secretary's Motion for Protective Order for the unnamed MSHA Official, limiting the deposition to facts, dates, and times concerning the 110(c) citation.

This Court also **GRANTS** in part and **DENIES** in part the Secretary's Motion for Protective Order Limiting Deposition of Supervisor Stepanic. Respondent may depose the witness solely on facts, dates, and times relevant to the 110(c) citation.



Kenneth R. Andrews  
Administrative Law Judge

Distribution:

Anthony Fassano, U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall West, Suite 630E, The Curtis Center, Philadelphia, PA, [fassano.anthony.m@dol.gov](mailto:fassano.anthony.m@dol.gov)

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222, [rhmoore@jacksonkelly.com](mailto:rhmoore@jacksonkelly.com)