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OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 4, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CURTIS LOGSDON, Complainant v. PARK COUNTY GOVERNMENT, Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2016-380-DM MSHA No. RM MD 2016-07 Nine Pit Mine ID 05-04600

ORDER DENYING REQUEST FOR PRODUCTION OF DOCUMENTS

This discrimination case was brought by the Secretary of Labor on behalf of Curtis Logsdon against the government of Park County, Colorado ("Park County") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act") and 29 C.F.R. § 2700.40 et seq. The case is set for hearing on September 13, 2016. On April 19, 2016, Respondent served its First Set of Written Interrogatories, Requests for Production of Documents, and Requests for Admission on the Secretary. The Secretary served his response on May 17, 2016. On July 15, 2016, Respondent filed a motion to compel discovery. I issued an unpublished order disposing of most of the issues raised by the motion to compel on August 1, 2016.

Two of the discovery requests included in the motion to compel sought the production of documents. Park County asked the Secretary to produce (1) the "written notification from the Secretary to Logsdon of his determination that a violation has occurred as described in Section 105(c)(3) of the Mine Act" and (2) the "written determination of the Secretary that a violation has occurred in this matter as described in 29 CFR §2700.40(a) and 29 CFR §2700.41(a)." The Secretary objected to these requests as subject to the work product privilege, the attorney-client privilege, the deliberative process privilege, and the common interest privilege. Resp. Mot. 9.

In my August 1 order, I stated that I was unable to rule on Respondent's motion to compel with respect to these documents because I was not sure what information was contained within them. I ordered the Secretary to provide the documents to me for my *in camera* review. The documents have now been provided and I hold that they are subject to the work product rule, as set forth below. As a consequence, the Secretary is not required to produce them.

In its motion to compel, Park County argued that both documents are "discoverable since they are both relevant and admissible and required by law to be prepared and maintained by the Secretary." Resp. Mot. 9. In response, the Secretary stated that "these documents . . . were clearly prepared within the Solicitor's Office and in anticipation of litigation and, thus, [are] not only protected from disclosure by the work product doctrine, but by the deliberative [process] privilege as well." Sec'y Opposition 4.

The first document requested by Park County is required under the first sentence in section 105(c)(3) of the Mine Act. That sentence states that "[w]ithin 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, *in writing*, the miner . . . of his determination whether a violation has occurred." 30 U.S.C. § 815(c)(3) (emphasis added).

The second document is "the written determination of the Secretary that a violation has occurred" in this matter as described in 29 C.F.R. § 2700.40(a) and 29 C.F.R. § 2700.41(a). Resp. Mot. 9. Commission Procedural Rule 40(a) provides that a discrimination complaint shall be filed by the Secretary if, after an investigation, "the Secretary determines that a violation of section 105(c)(1), 30 U.S.C. 815(c)(1), has occurred." 29 C.F.R. § 2700.41(a). The procedural rule does not require that a document be prepared by the Secretary other than the complaint of discrimination that is filed with the Commission and served on the mine operator. Commission Procedural Rule 41(a) provides that a "discrimination complaint shall be filed by the Secretary within 30 days after his *written determination* that a violation has occurred." 29 C.F.R. § 2700.41(a) (emphasis added).

THE WORK PRODUCT RULE

Although the Commission's Procedural Rules do not specifically set forth a work product rule, the Federal Rules of Civil Procedure guide Commission judges "as far as practicable" on procedural questions "not regulated by the [Mine] Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Federal Rule 26(b)(3)(A) allows a party to withhold otherwise discoverable materials under the work product rule if they are (1) documents or tangible things; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or its representative. Fed. R. Civ. P. 26(b)(3)(A); *see also ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) ("*ASARCO I*").

Commission Judge Alan G. Paez recently summarized the test to be used when analyzing the work product doctrine, as follows:

> Courts apply a "but-for" test to determine whether a substantially similar document would have been created if not for the prospect of particular litigation. *See ASARCO I*, 12 FMSHRC at 2558 ("If . . . [a] document can fairly be said to have been prepared *because of* the prospect of litigation, then the document is covered by the privilege. . . . In addition, *particular* litigation must be contemplated at the time the document is prepared.") (emphasis added); *see also U.S. v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *U.S. v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010). The Commission and its Judges have determined that documents prepared as a result of an MSHA investigation are prepared in anticipation of litigation. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997)[.]

Sec'y on behalf of Villa v. Molycorp Minerals, LLC, 36 FMSHRC 1076, 1078 (April 2014). The work product rule is qualified and documents that otherwise may be withheld under the rule may

be subject to disclosure 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. *Consolidation Coal Co.*, 19 FMSHRC at 1242-43; Fed. R. Civ. P. 26(b)(3)(A)(ii).

1. Notification to Miner Required by Section 105(c)(3)

This document is a letter, dated March 14, 2016, from Michelle A. Horn, counsel for Complainant, to Curtis Logsdon. It states that the Secretary of Labor will be filing a complaint of discrimination against Park County on his behalf. The remainder of the letter is equivalent to an engagement letter telling Logsdon what to expect as the case proceeds and that he has the right to obtain outside representation or the advice of a private attorney if he so choses. The letter contains no factual information about this particular discrimination case and a large part of the letter appears to be boilerplate.

I find that the Secretary is not required to produce this letter because it is subject to the work produce rule. But for the commencement of the present case, the document would not have been written. In addition, there is no information in the document that Park County needs in the preparation of its defense in this matter.

2. The Secretary's Written Determination that a Violation of Section 105(c) Occurred

This document is a legal memorandum entitled "Merits Analysis," dated February 26, 2016, from Michelle A. Horn to the Regional Solicitor and the Associate Regional Solicitor of the Department of Labor. In this memo, Ms. Horn sets forth the reasoning behind her recommendation that the Secretary file a complaint of discrimination on behalf of Curtis Logsdon. Printed across the top of the first page of the memo are the words: "FOR INTERNAL USE ONLY. This document may contain information that is privileged or otherwise exempt from disclosure under applicable law." This document was clearly prepared in anticipation of litigation by the Secretary's attorney. It was only prepared because of the prospect of this particular litigation. *See ASARCO I*, 12 FMSHRC at 2558.

The purpose of the memo is to convince Ms. Horn's supervisors in the Office of the Solicitor to support her conclusion that the Secretary should proceed with this litigation. The memo briefly presents some basic facts, presumably gathered by MSHA's special investigator, but most of the memo consists of a recitation of Commission case law followed by Ms. Horn's analysis of the issues applying this case law. The memo is infused with the "mental impressions, conclusions, opinions, [and] legal theories of [Ms. Horn] concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). It would be difficult to parse out those portions of the memo that discuss the facts from her legal analysis, in part because revealing the facts that are emphasized in the memo would disclose the mental impressions and legal theories of Ms. Horn.

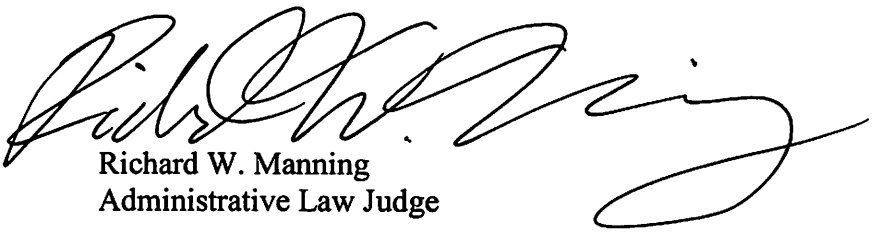
Commission Procedural Rule 56(b) provides that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). The memo is certainly relevant to the issues in this case and the facts contained therein would be admissible at hearing.

Nevertheless, I am not willing to require the disclosure of any part of an internal memo prepared by an attorney in the Office of the Solicitor directed to her supervisors for the purpose of convincing them that a case should be filed before the Commission, including those portions of the memo that set forth the facts that she relied upon. That Commission Procedural Rule 41(a) requires the Secretary to file his discrimination complaint within 30 days after this written determination is prepared is irrelevant to the disclosure issue. *Id.* at 2700.41(a). I find that the memo is protected by the work product rule. In addition, my review of the memo convinces me that Park County would not be able to demonstrate that it has a substantial need for any part of the memo to prepare its case or that it cannot, without undue hardship, obtain by other means the facts that it does not already possess.

My analysis on this issue incorporates some of the principles of the deliberative process privilege. The Commission has held that "public officials are entitled to the private advice of their subordinates and to confer among them themselves privately and frankly, without fear of disclosure[.]" *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 991 (June 1992) (citation omitted). I find that disclosure of any part of the subject memo would not only reveal the Secretary's work product, as that concept is set forth in the Federal Rules of Civil Procedure, but it would also violate the Secretary's reasonable expectation that the advice and recommendations of its counsel will be kept confidential.

ORDER

For the reasons set forth above, Respondent's motion to compel the disclosure of the two documents sought by Park County in Requests for Production Nos. 4 and 5 is **DENIED.**



Richard W. Manning
Administrative Law Judge

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