FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 8, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2024-0018 A.C. No. 01-02901-585006 Docket No. SE 2024-0125 A.C. No. 01-02901-594067
v.	:	
PEABODY SOUTHEAST MINING, LLC, Respondent	:	Mine: Shoal Creek Mine

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY'S MOTION TO COMPEL

Before: Judge Bulluck

This matter is before me upon a Motion to Compel filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Peabody Southeast Mining, LLC ("Peabody"). The Secretary moves for Peabody to produce its Summary of Investigation ("Haney Report") regarding the March 29, 2023 mine fire at Shoal Creek. Peabody contends that the document is protected from discovery by the work product doctrine and the attorney-client privilege.[1]

I. Factual and Procedural Background

The following chronology of events is according to Max Haney, by signed Declaration of July 16, 2024. Following the fire at Shoal Creek on March 29, 2023, outside counsel for Peabody, Arthur Wolfson, sent an email directing Haney, Peabody's Director of Health and Safety for U.S. Operations, to conduct an investigation and report his findings to him. According to Haney, "the purpose of the investigation was to report facts, theories, and impressions for the purposes of potential future litigation," related to both potential MSHA citations as well as other civil litigation. On April 4, Haney emailed a summary of his investigation to Wolfson and, on August 3, he sent

[1] The Secretary's Motion to Compel (with Exs. A through D) and Reply (with Exs. A and B); and Peabody's Response in Opposition to Motion to Compel (with Exs. 1 through 4) and Surreply have been carefully considered in resolving this discovery dispute.

Wolfson the final Report. Haney contends that the Report was not intended for the purpose of complying with 30 C.F.R. §50.11(b). See Peabody Resp. Ex. 1.

Peabody also filed a signed Declaration of William Davis, dated July 8, 2024, providing a summary of his involvement. According to Davis, the on-site Safety and Compliance Manager, he was responsible for completing MSHA's reporting requirements pursuant to section 50.11(b). In the aftermath of the fire, Davis interacted with MSHA personnel investigating the incident. Following the issuance of MSHA's citations and order on August 2, Davis began preparing a report ("Davis Report"), as required by section 50.11(b) and, due to an inadvertent oversight, he did not complete this report until July 3, 2024. See Peabody Resp. Ex. 2.

On March 25, 2024, the Secretary sent Peabody a Request for Production of Documents, including Request No. 12, requesting that Peabody "provide any documents, including but not limited to witness statements, created or gathered by the Respondent during its investigation of the mine fire that occurred on or about March 29, 2023." Sec'y Mot., Ex. A at 7. Peabody's Response on April 26, produced no documents in response to Request No. 12, claiming that "there are no such non-privileged documents in this matter." Sec'y Mot., Ex. B at 17. Peabody's Privilege Log identified two related documents: a Request for Investigation at Counsel's Direction and a Summary of Investigation prepared by Haney. Sec'y Mot., Ex. C. Peabody claims attorney-client and work product privileges over both documents.

The Secretary filed the instant Motion to Compel on June 26, 2024, after conferring with Peabody in an attempt to resolve this dispute. In Peabody's July 16 Response in Opposition to Motion to Compel, Peabody attached a copy of the Davis Report, which it had produced for the Secretary on July 10. The Secretary then filed a Reply to Peabody's Response on July 23, and Peabody filed a Surreply in Support of its Response on July 31. Subsequently, on August 5, Peabody was directed by the undersigned to submit a copy of the Haney Report for the judge's *in camera* review.

II. Discussion

The issue for resolution is whether the work product and attorney-client privileges protect Peabody from disclosing the Haney Report to the Secretary.

A. Work Product Privilege

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects materials prepared in anticipation of litigation from being produced in discovery to the adverse party.[2] In order to be protected by this privilege, the party invoking it must prove that the materials sought in discovery are documents and tangible things, prepared in anticipation of litigation, and by or for another party or by or for that party's representative. Fed.R.Civ.P. 26(b)(3).

If the invoking party establishes that the documents qualify as work product, the burden shifts to the moving party to justify why the documents should be produced. *Id*. The threshold for

[2] The Commission is guided, "so far as practicable," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its Rules. 29 C.F.R. §2700.1(b).

overcoming the work product privilege depends on whether the materials are "core" or "ordinary" work product. Production of core work product, consisting of "mental impressions, conclusions, opinions, or legal theories concerning the litigation," may be compelled only in the rarest of circumstances. *BHP Copper, Inc.,* 38 FMSHRC 893, 895 (Apr. 2016) (ALJ); see *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.,* 967 F.2d 980, 984 (4th Cir. 1992). On the other hand, ordinary work product consists of facts, and may be ordered produced upon the moving party's demonstration of "substantial need" for the materials, and "undue hardship" in obtaining substantially equivalent documents. Fed.R.Civ.P. 26(b)(3)(A)(ii). "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B).

1. The Haney Report was Prepared in Anticipation of Litigation

The key issue here regarding the work product privilege is whether the Haney Report was prepared in anticipation of litigation.[3] The Secretary argues that the factual material derived from the investigation is not privileged because Peabody was obligated to conduct an investigation pursuant to section 50.11(b) and, since there was only one investigation, Haney's Report should not be considered to have been created only in anticipation of litigation. Sec'y Mot. at 5-6. Peabody takes the position that Haney's investigation was separate from the mandated section 50.11(b) investigation, and that the Haney Report includes both core and ordinary work product, and was prepared in anticipation of MSHA and civil litigation. Peabody Resp. at 5-6.

Section 50.11(b) provides that "each operator of a mine shall investigate each accident and each occupational injury at the mine . . . [and] shall develop a report of each investigation." 30 C.F.R §50.11(b). In preparing its report "no operator may use an investigation, or an investigation report conducted or prepared by MSHA . . . ." *Id.* Additionally, the section details nine requirements that the operator must include in its report. *Id.*

I agree with the Secretary's position that Peabody fails to provide evidence that Davis conducted an investigation pursuant to section 50.11(b), and that the resulting Davis Report does even not comply with the regulation. First, neither the Davis nor Haney Declarations attest to any investigation actually being conducted by Davis. Davis's Declaration states only that he prepared a report, and that he "interacted with MSHA personnel in the aftermath of the fire." Peabody Resp. Ex. 2. Absent is any mention of Davis conducting an investigation independent of MSHA, and Davis's Report does not include or reference any supporting material that one would expect as a result of an investigation. Haney's Declaration makes no mention of any Davis investigation, but only attributes to him the responsibility to draft a section 50.11(b) report. Peabody Resp. Ex. 1. These statement undercut Peabody's mere assertion that preparing a report necessarily includes conducting an investigation. See Peabody Surreply at 6. Second, the Davis Report is deficient as a section 50.11(b) report, consisting only of a single page Incident Investigation Report form, with a terse summary lacking specific information required by the regulation. See Peabody Resp. Ex. 4.

[3] The Secretary concedes that the material sought is "a document and was prepared by or for another party or by or for that [party's] representative." The only element in dispute is the "in anticipation of litigation" element. Sec'y Mot. at 5, fn. 1.

Moreover, the Report form fails to include an explanation of the cause of the accident, the names of individuals participating in the investigation, and information on any miner involved. See 30 C.F.R. §50.11(b)(1)-(9). Section 50.11(b) places the responsibility on the operator to conduct a thorough investigation. As contended by the Secretary, the filings only establish that one investigation into the fire was conducted by Peabody, through Haney. I find that Peabody has failed to demonstrate that the Davis Report fulfilled its obligation to investigate the mine fire and provide its factual findings to MSHA upon request.

The Secretary also contends that because Peabody conducted only one investigation, and an investigation was compulsory by regulation, the Haney Report was prepared in the ordinary course of business, rather than in anticipation of litigation. Sec'y Mot. at 5. However, when there is more than one reason why a document could have been created, courts consider the totality of the circumstances to determine whether "it can fairly be said that the document was created because of anticipated litigation . . . ." *In re Grand Jury Subpoena, Mark Torf/Torf Envt'l Mgmt*., 357 F.3d 900, 908 (9th Cir. 2004), citing *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir. 1998). A document is privileged if it "would not have been created in substantially similar form but for the prospect of that litigation." *Id.* On the other hand, if litigation was contemplated but the document would have been prepared anyway in the ordinary course of business, it is not protected. *BHP Copper,* 38 FMSHRC at 896, citing *ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990).

In *BHP Copper*, the judge found that a report prepared in the ordinary course of business was not protected by the work product privilege, despite the operator contemplating its use in litigation. 38 FMSHRC at 896. The operator claimed that it had investigated an accident and prepared a report, because it anticipated a wrongful death action. *Id*. However, the supporting deposition testimony showed that the company had an internal policy requiring an investigation of any accident, detailed procedures for how to conduct it, and also a duty under section 50.11(b) to investigate. *Id*. The judge concluded that the report would have been created in essentially similar form irrespective of the litigation and, therefore, was not protected by the work product privilege. *Id*.

In contrast, the facts here establish that the Haney Report was not created in the ordinary course of business, nor would it have been created in essentially similar form irrespective of anticipated litigation. A significant driver of conducting the Haney investigation was to report facts, theories, and impressions for the purposes of future litigation, including civil litigation involving "breach of contract, libel, defamation, manufacturer's liability, as well as others," which has little, if any, overlap with section 50.11(b) compliance. Peabody Resp. Ex. 1. Haney was also not the usual employee responsible for performing section 50.11(b) investigations at Shoal Creek, and in-house counsel participated in the investigation. Peabody Resp. Ex. 1. Thus, I find that the Haney Report was not prepared in the ordinary course of business, but rather in anticipation of civil litigation, and is protected work product.

2. The Secretary has Demonstrated Substantial Need and Undue Hardship

The inquiry does not end there, however. Factual material contained in the Report, absent legal opinions and mental impressions, may be ordered produced if the Secretary demonstrates a substantial need for the materials, and undue hardship in obtaining their substantial equivalent. See Fed.R.Civ.P. 26(b)(3).

The Secretary asserts that the factual information obtained by Haney's investigation is likely highly relevant to this case, involving allegations regarding the reporting of the fire to MSHA, and Peabody's compliance with its approved ventilation, firefighting, and emergency evacuation plans. Sec'y Mot. at 7. This makes the timing of the fire and the miners' immediate responses to it of particular relevance. To determine the truth as to these facts, it is critical that fact gathering be conducted in the immediate aftermath of the fire. As pointed out by the Secretary, while MSHA often sends its own investigators, the operator is in the best position in the immediate aftermath to gather such facts, interview its employees, and inspect the site to understand the cause, timing, and effects of the fire. Sec'y Mot. at 7. This is chiefly why section 50.11(b) places a duty on the operator to perform a thorough investigation and provide a report of its findings to MSHA. The very reason for section 50.11(b) reports is the Secretary's substantial need for accurate information to ensure compliance with mine safety, and the operator is usually in the best position to provide it. Sec'y Mot. at 7.

The factual information that the Secretary is seeking to obtain should have been provided by the operator through a section 50.11(b) report. Had Peabody complied with this regulation, and conducted an independent investigation, the Secretary would not have any substantial need for equivalent factual materials. Furthermore, the ordinary facts that the Secretary is seeking cannot be obtained without undue hardship. The immediacy of the investigation is unrecoverable, as witness memory is less reliable as well as their availability a year and a half later, and tangible evidence may no longer exist. Peabody contends that MSHA's investigation provides the Secretary with a substantial equivalent to the Haney Report, alleviating any substantial need for production. However, the intent of section 50.11(b), that an operator conduct a separate investigation and report to MSHA, supports that the Secretary is justified in relying on the operator's internal investigation in addition to its own. Accordingly, the Secretary has demonstrated undue hardship and a substantial need for the contemporaneous factual material contained in the Haney Report, that overcomes the protection of the work product privilege.

B. Attorney-Client Privilege

Peabody also contends that the Haney Report includes privileged attorney-client communications. According to Peabody, these communications had been made in confidence between the company and its attorneys for purposes of seeking legal advice. Peabody Resp. at 6-7. The attorney-client privilege applies to communications between company employees and the company's counsel acting in a legal capacity, in order to secure legal advice, and only if employees are aware of that purpose. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). However, the attorney-client privilege only protects disclosure of communications, and not the underlying facts by those who communicated with the attorney. *Upjohn*, 449 U.S at 395; *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009). "A party cannot conceal a fact merely by revealing it to his lawyer." *Upjohn*, 449 U.S. at 395, citing *State ex rel. Dudek v. Cir. Ct.*, 34 Wis.2d 559, 580 (1967). Moreover, because the attorney-client privilege can impede the full discovery of the truth, it must be strictly construed. *Ruehle*, 583 F.3d at 607, citing *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

The Secretary alleges that Peabody is attempting to withhold factual information that it is required by regulation to produce. Furthermore, the Secretary is not interested in any legal advice or

conclusions that the Haney Report may contain, but seeks only the Report's factual materials. Sec'y Mot. at 8. The attorney-client privilege does not protect the underlying facts that Haney collected in the course of his investigation, and Peabody cannot conceal facts or shield documents merely by giving them to its attorney. In this vein, including factual material in a report that also contains privileged communications does not shield those facts from discovery. Therefore, the factual material, gathered as the result of Peabody's ordinary work product, is discoverable.

III. Order

Pursuant to the *in camera* review by the undersigned, Peabody is **ORDERED** to produce a copy of the Haney Report to the Secretary, **redacted to remove only mental impressions, conclusions, opinions, and legal theories of Peabody's representatives** protected by the work product and attorney-client privileges **(highlighted by Peabody in green and blue)**, no later than **August 9, 2024**.

Jacqueline R. Bulluck
Administrative Law Judge

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