

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, Suite 9500
WASHINGTON, D.C. 20001

October 23, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of Billy R. Begley,	:	Docket No. KENT 2002-195-D
Complainant	:	PIKE CD 2001-08
v.	:	
	:	Red Star No. 1 Mine
COASTAL COAL CO., LLC.,	:	Mine ID 15-18306
Respondent	:	

**ORDER DENYING RESPONDENT’S MOTION TO COMPEL
AND
DIRECTING THAT DOCUMENTS BE PLACED UNDER SEAL**

Respondent has moved to compel production of portions of the MSHA investigative report, notes of witness interviews and memoranda of witness interviews that were not produced in response to its discovery requests. The Secretary asserted that the documents, and portions of documents withheld were protected from disclosure by the work product, investigative file, deliberative process and informant’s privileges. The Secretary opposed the motion. A telephonic discussion was held on October 17, 2002, which clarified the issues.

The Secretary, in essence, had waived the work product privilege. She produced unredacted copies of memoranda of interviews of Respondent’s management employees, the miner-complainant’s statements, and most of the investigative report. The report consists almost entirely of essentially verbatim recitals of memoranda of witness interviews. The portions of the investigative report that were withheld consisted of information tending to identify miner informants, which was withheld on a claim of the informant’s privilege, and the evaluation and recommendation of the MSHA investigator, which was withheld on a claim of the deliberative process privilege. The informant’s privilege protects from disclosure the identity of the informant, not the contents of a statement except those portions that would tend to identify the informant. *See Sec’y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984). The deliberative process privilege protects from disclosure pre-decisional deliberative information. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992). Neither privilege protects factual information that can be segregated from the protected information.

As stated in Respondent’s motion and clarified by counsel during the telephonic discussion, Respondent does not seek to compel production of material that is legitimately protected by either privilege. Respondent seeks only factual information related by witnesses or contained in the investigative report. The dispute has condensed down to a question of whether

the Secretary's redactions to the investigative report were properly made.

In order to assure that the Secretary had withheld only information protected by the respective privileges, I directed that unredacted copies of the investigative report and miner witness statements be submitted for *in camera* review. The Secretary promptly responded to the directive and submitted documents contained in three attachments. Attachment "A" consisted of the Secretary's Supplemental Response to Respondent's First Request for Production of Documents, including a redacted copy of the investigative report and unredacted copies of memoranda of interviews of management employees. Attachment "B" consisted of an unredacted copy of the investigative report. Attachment "C" consisted of unredacted memoranda of interviews of four miner witnesses.

I have reviewed the documents submitted and am satisfied that the Secretary's redactions to the investigative report were entirely proper. The memoranda of interviews of the miner witnesses were included, virtually verbatim, in the report, and the only portions withheld were those identifying, or tending to identify, the miner informants. The only other redactions consisted of certain organizational information, and the evaluation and recommendation of the investigator.

ORDER

Respondent's motion to compel is **DENIED**. Attachments "B" and "C" to the Secretary of Labor's Response to the Bench Order on the Respondent's Motion to Compel Discovery shall be **FILED UNDER SEAL and shall not be disclosed except on order of the Commission or a reviewing court.**

Michael E. Zielinski
Administrative Law Judge

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