FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 26, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. M-CLASS MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2013-47 A.C. No. 11-03189-300361-01 Docket No. LAKE 2013-123 A.C. No. 11-03189-303475 Mine: MC #1 Mine

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

Before: Judge Miller

These cases are before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent, M-Class Mining, filed a Motion to Compel. Subsequently, the Secretary filed a Response to the Motion. For the reasons set forth below, I **DENY** Respondent's Motion.

The above captioned dockets include four 104(d)(2) orders issued to M-Class in June and August of 2012. Respondent represents, in its motion, that the parties reached a settlement of one of the four orders. Three orders remain in dispute.

In April of 2013 M-Class learned that MSHA was conducting a 110(c) special investigation into the facts and circumstances surrounding the three remaining orders. These cases were stayed until April 1, 2014 in hope that MSHA would be able to complete its investigation and the 110(c) matter could be consolidated with these cases. However, MSHA was unable to complete the investigation prior to the expiration of the stay, and these matters were set for hearing on July 23, 2014. On May 1, 2014 I issued an Order Denying Motion to Extend Stay explaining that MSHA had ample time to complete its investigation given that the citations and orders had been issued approximately two years prior. The Secretary, in his response to M-Class's Motion to Compel, indicates that the investigation remains "open" but does not explain the status of the case.

Prior to the stay of these matters, in December of 2012, M-Class filed discovery requests with MSHA seeking "all documents relating to the . . . special investigation of the incident(s) that is (are), in part, the subject of this matter including but not limited to, copies of . . . investigators' notes; photographs; transcripts of interviews; tapes of interviews, memoranda; reports and draft reports, notes, correspondence and records of any other MSHA personnel." Mot. Ex. 1 p. 7. The Secretary objected to the "vague, overly broad and burdensome" request, which "seeks to discover information protected by the confidential informant privilege, attorney-client privilege, attorney work product privilege and deliberative process privilege." Mot. Ex. 2

p. 11. The Secretary also responded that the special investigation being undertaken as a result of the violative conditions found by the MSHA Inspectors was currently open and active, and therefore, the documents related to the special investigation would not be produced. *Id.* at 11-12.

On June 3, 2014 M-Class filed the Motion to Compel in which it seeks to have the court compel the Secretary to "complete responses to *Respondent's First Set of Interrogatories and Requests for Production of Documents* and to authorize the deposition of Special Investigator Robert Bretzman." Mot. 1. M-Class argues that, while the Secretary asserts that various privileges apply to the documents sought, he does not specifically identify those documents and fails to identify the basis for non-disclosure of the documents in the special investigation file. *Id.* at 3. Further, Respondent argues that, because the Secretary has not produced a privilege log, it is "left to speculate what MSHA is withholding and cannot evaluate the appropriateness of MSHA's objects." *Id.* at 4. Respondent states that the Secretary's assertion of a blanket privilege is inappropriate and that it is well-settled law that certain documents associated with a Section 110(c) investigation are discoverable and a blanket refusal to produce any material from the file is inappropriate. In making its argument, Respondent relies in part on Judge Feldman's decision in *Root Neal & Company*, 21 FMSHRC 135 (July 1999) (ALJ) in which he directed the disclosure of certain documents after the 110(c) investigation had been completed and a decision made that an agent case would not be pursued by MSHA. I am not bound by the decisions of other administrative law judges but, nevertheless, I find that Judge Feldman's case is distinguishable from the instant matter. *Id.* at 838. Here, the investigation has not been completed and MSHA has not yet determined whether it will pursue charges.

On June 9, 2014 the Secretary filed a response to the motion. The Secretary asserts that the 110(c) "investigation is currently open, and until such time as the results are reviewed, finalized, and the decision is made whether to proceed with a case against Respondent's agents personally, the Secretary argues that the information contained in the Special Investigator's file is subject to privileges outlined in the Secretary's response" to Respondent's discovery request. Sec'y Response 2. The Secretary also argues that special investigations are conducted by MSHA in anticipation of litigation and, accordingly, a privilege attaches to the information sought by Respondent. *Id.* Further, because Respondent cannot demonstrate that it is unable to gather substantially the same information by other means without undue hardship, the Secretary need not turn over any of the documents sought. *Id.* at 2-3. The Secretary also notes that, because the investigation remains open, counsel for the Secretary is not in possession of any of the requested documents, and only has the documents pertaining to the orders at issue in LAKE 2013-47 and LAKE 2013-123, all of which have been provided to Respondent in preparation for the hearing into the orders in question. *Id.* at 3. Finally, the Secretary notes that, at present, the issue of "whether . . . agents of Respondent willfully disregarded the standards is not before this court[.]" *Id.* Rather, the only issues before the court are whether the alleged violations occurred and if the violations constituted an unwarrantable failure to comply. Based on the foregoing, the Secretary asserts that privilege protects the documents sought, and, because any deposition testimony from Investigator Bretzman would be related to protected documents, the deposition is unnecessary. *Id.* at 4.

Commission Procedural Rule 56 permits discovery by a number of methods, including production of documents and deposition. 29 C.F.R § 2700.56(a). The rule further provides that

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) (emphasis added). In the event a party fails to respond to a discovery request, or objects to a request, the party seeking discovery may petition the court to compel the non-moving party to respond. 29 C.F.R § 2700.59.

Respondent, M-Class, has petitioned the court to compel the Secretary to produce (1) documents generated as part of MSHA's special investigation into potential 110(c) charges against an agent of Respondent, and (2) the special investigator for deposition. As the Secretary notes, the investigation into the 110(c) matter is ongoing, and is a separate matter from the violations that are at issue in this case. I agree with the Secretary that the documents contained in the special investigation file are subject to the work product, deliberate process and informant privileges. I also find that the deposition of the special investigator is not appropriate given that the information he has gathered is subject to the same privileges. Further, I find that, given the questioned relevance of the information sought as it relates to this proceeding, the fact that the investigation has not been completed, and the ability of the Respondent to obtain substantially the same information on its own accord, the Respondent's motion should be denied. Finally, I noted that, unlike a FOIA request, there is no requirement that a party responding to discovery prepare a privilege log and particularly prepare a privilege log for a file that is not a part of the cases at issue here.

It is important to distinguish this penalty proceeding against the mine operator from potential 110(c) proceedings against agents of the mine. While run-of-the-mill penalty proceedings against mine operators are initiated for, among others, the purpose of obtaining judgments against operators for violations of the Act, 110(c) proceedings are initiated for the purpose of obtaining judgments against individual agents of a mine. Unlike standard penalty proceedings, 110(c) charges are preceded by a special investigation conducted by a MSHA Special Investigator. Generally, the investigation is initiated following the issuance of citations or orders to the mine operator. The investigation commonly includes interviews of employees of the operator, some of whom may be confidential miner informants. Often, a representative of the mine is present for statements given to the investigator that are not subject to the informant's privilege, and most information obtained through these interviews is available to the mine operator. The investigation eventually results in a report and MSHA decision whether to file 110(c) charges. The special investigation into whether to charge agents is conducted for the sole purpose of determining whether the agents should be assessed a separate penalty and, therefore, is undertaken wholly in anticipation of that litigation. While the two proceedings are frequently consolidated and heard at the same time, MSHA is often slow in completing its investigation and, in order to keep the facts and evidence associated with the original violation from becoming stale, the underlying orders are sometimes heard on their own as any other penalty case. See e.g., *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999)

The instant proceedings involve petitions for penalty filed by the Secretary against Respondent for four alleged violations of mandatory standards. While the Secretary acknowledges that a 110(c) investigation has been undertaken, the investigation is not complete and MSHA has yet to reach a decision whether to charge individual agents of the mine. As a result, at present, no 110(c) proceeding exists and consolidation of the issues is impossible. In

the event the Secretary completes the special investigation and an agent case is filed with the Commission, it is possible that the 110(c) proceeding could be consolidated with the above captioned dockets and at that time, the special investigation file may be subject to discovery requests However, until that occurs, the scope of this proceeding is limited to operator liability for the four alleged violations contained in the above captioned dockets. Therefore, discovery of the special investigation file and deposing the special investigator has no place in this case. Instead this is a normal penalty case and, based on the Secretary's representation to the court, all documents relevant to the underlying orders have been produced by the Secretary.

The Secretary has asserted that multiple privileges attach to the requested materials. I agree. First, I find that the work product privilege attaches to the investigatory file documents sought by the Respondent. In *Asarco Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990) the Commission explained that the work product privilege is a "qualified immunity against discovery." A party may withhold otherwise discoverable materials if they are (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that party's representative. *Id.* at 2558; Fed R. Civ. P. 26(b)(3). Here, the materials sought by M-Class meet all three elements of the test.

The materials sought by M-Class are documents and tangible things prepared by a party to the case. The discovery request seeks, in pertinent part, "all documents relating to the . . . special investigation of the incident(s) that is (are), in part, the subject of this matter including but not limited to, copies of . . . investigators' notes; photographs; transcripts of interviews; tapes of interviews, memoranda; reports and draft reports, notes, correspondence and records of any other MSHA personnel[.]" Mot. Ex. 1 p. 7. The Commission has acknowledged that it is not required that the materials "be prepared by or for an attorney." *Asarco Inc.*,12 FMSHRC 2548, 2558 (Dec. 1990). Clearly the items sought are documents and/or tangible things produced by the special investigator or other representative of the Secretary. I find that the materials meet the first and third elements of the work product test.

The materials sought were prepared in anticipation of litigation. The phrase "prepared in anticipation of litigation" was defined in *Hickman v. Taylor*, 329 U.S. 495, 505(1947) where the court framed the issue as being "the basic question" of whether one party's counsel may "inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation." The Commission has stated that a "major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) . . . of the Mine Act." *Asarco Inc.*,12 FMSHRC 2548, 2559 (Dec. 1990). Accordingly, materials generated in the course of the special investigation are prepared in anticipation of litigation. Here, the materials contained in the special investigation file were generated, and are possibly still being generated, in anticipation of potential charges against individual agents of the mine. The Commission has recognized that, where "two cases are closely related," the "documents prepared for one case have the same protection in a second case." *Id.* While MSHA has yet to decide whether to pursue an agent case, given that any potential agent case will stem from the facts and circumstances surrounding the orders at issue in this proceeding, these cases are clearly "closely related." As a result, the protection afforded the materials in the special investigation file, which were generated in anticipation of a 110(c) proceeding, extends to the instant proceeding, thereby satisfying the second element of the work product test.

While the materials satisfy the Commission's three part test, they may be subject to discovery "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). I find that no such showing has been made. Respondent speculates that the information in the file would be beneficial "at trial for impeachment and refreshing recollection." Mot. 6. The Commission has acknowledged that "by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a 'substantial need' for purposes of the work-product privilege." *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997). Further, and as noted by the Secretary, the discoverable information contained in special investigation reports consists of interviews of employees of the mine operator; information which is certainly possible for the mine operator to obtain on its own accord. I find that Respondent has not demonstrated a substantial need for the material in the special investigation file, and the contents of the file are protected by the work product privilege. Moreover, I find that the special investigator's deposition testimony "would only be relevant insofar as being related to the documents" which I have already found to be subject to work product privilege. Accordingly, I refuse to compel the Secretary to produce Special Investigator Bretzman for deposition.

I note that, presumably, the special investigation file includes documents related to the underlying orders at issue in the above captioned cases. While that information may be in the special investigation file, the Secretary represents that all information pertaining to the orders at issue in these dockets has already been turned over to Respondent. As a result, I need not compel production of those documents, which are likely to be duplicative of those already in the possession of Respondent. To the extent that the Secretary has not turned over discoverable documents generated prior to the initiation of the 110(c) investigation, he is ordered to do so.

I also find that the informant privilege applies to the materials sought by M-Class. In *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1982) the Commission recognized that the informant privilege allows the Secretary to "withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA]." *See* 29 C.F.R. § 2700.61 (requiring that a judge "shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.") In *Asarco Inc.*, 14 FMSHRC 1323, 1329-1330 (Aug. 1992) the Commission explained that the privilege protects from disclosure material that "tend[s] to reveal an informant's identity." Here, the Secretary has asserted that the information contained in the special investigation file is protected by the informant's privilege. As previously stated, special investigation files routinely contain interviews and statements of miner informants. Undoubtedly, interviews and statements of miner informants, as well as reports mentioning the names of those informants, would reveal the informant's identity and are subject to the privilege.

The informant privilege may be defeated if a judge conducts a balancing test and determines that the "respondent's need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest," *Bright Coal Co.* at 2526. I find that Respondent has failed to make such a showing. Factors to be considered in conducting this

balancing test "include whether the Secretary is in sole control of the requested material or whether . . . [M-Class] ha[s] other avenues available from which to obtain the substantial equivalent of the requested information." *Id.* I have already explained that the discoverable information contained in special investigation files consists of interviews of employees of the mine operator; information which is certainly possible for the mine operator to obtain on its own accord. As a result, I find the balance does not tip in favor of disclosure of the information. Moreover, to reiterate, the Secretary represents that information in the 110(c) investigation file is not being relied upon to support the Secretary's penalty case against the mine operator. Respondent speculates that the information in the file would be beneficial "at trial for impeachment and refreshing recollection." Mot. 6. However, I find that the need to impeach or refresh the recollection of potential witnesses does not overcome the Secretary's need to maintain the privilege to protect the public interest and is not "essential to fair determination." *Bright Coal Co.* at 2526.

The 110(c) special investigation has not been completed, MSHA has not decided whether to charge an agent of the operator, and the issue of agent liability is not before me. Given the objective of 110(c) investigations and the government's interest in the investigation not being obstructed, it would be inappropriate for the court to compel the production of the investigation documents and deposition of the special investigator prior to the conclusion of the investigation. Moreover, it would be inappropriate for the court, prior to the completion of the investigation, to order an *in camera* review of the documents for the purpose or analyzing whether privilege attaches.

With the scope of this proceeding in mind, I find that, based on the information presently before me, it is unlikely that the documents and deposition testimony sought in Respondent's Motion to Compel are relevant to the above captioned proceeding, and that, even if they are relevant, as discussed above, they are subject to the work product and informant privileges. All information necessary for the successful defense of the orders at issue in this case has been provided by the Secretary and is otherwise available to the operator through the mine. Additionally, when a mine operator challenges a citation or order, I assume that they do so in good faith and that they have investigated the matter and are aware of all of their defenses to the citation or order. A special investigation into the actions of an agent of the operator will not alter or add to the reasons the mine has for contesting the underlying orders.

The threshold issue of any discovery dispute is whether or not the information sought is relevant. Rule 56 makes clear that, even in the event that evidence is not privileged, it must still be relevant in order to be discoverable. Here, the information sought by Respondent is related to the issue of agent liability. The issue of agent liability is not before me and, therefore, MSHA's investigatory documentation and the investigator's deposition testimony, which presumably would not include first-hand knowledge of the events in question, is unlikely to be relevant to the underlying orders at issue.

Finally, while I find no merit to the Secretary's argument that the file is not in the hands of the attorney for MSHA, I find, as discussed above, that the file is subject to privilege and is not required to be disclosed. The file contains a separate and distinct investigation, and that investigation occurred after the violations that are alleged in this case were issued. While the file

is in the hands of the Secretary, it does not, as noted, contain information that is being withheld, that would be relevant to the underlying citations at issue in this case. The mine operator can be prepared for hearing based upon the files in these cases and the information disclosed by the Secretary without the disclosure of any further material that was gathered solely for the purpose of determining whether or not a separate penalty should be assessed against an agent of the operator. However, that file and information contained therein may be required to be disclosed when and if an agent case is filed.

Respondent's Motion to Compel is **DENIED**.

Margaret A. Miller
Administrative Law Judge

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