

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004

April 4, 2014

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of JOSE VILLA

Complainant,

v.

MOLYCORP MINERALS, LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2013-1097-DM
WE MD 13-16

Mine ID 04-02542
Mt. Pass Mine and Mill

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

This discrimination proceeding is before me under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On August 29, 2013, the Federal Mine Safety and Health Review Commission ("Commission") received a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of the complaining miner, Jose Villa. The Commission received an answer from Molycorp Minerals, LLC ("Respondent" or "Molycorp"), on September 27, 2013. Thereafter, Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on November 7, 2013. This case is currently set for hearing on June 18–20, 2014, in or near San Bernardino, California.

On January 21, 2014, Molycorp filed a Motion to Compel, and the Secretary filed his Opposition to Respondent's Motion to Compel on January 31, 2014. In a March 6, 2014, conference call with my Law Clerk, Paul Veneziano, the parties confirmed that they had not yet resolved the issues underlying the pending motion. On March 10, 2014, counsel for Molycorp sent an e-mail attaching a chart entitled "Additional Information from Secretary Concerning Document Production." On March 14, 2014, I permitted the Secretary to file a surreply to Molycorp's March 10, 2014, e-mail. The Secretary filed his surreply on March 21, 2014.

I. FACTUAL BACKGROUND AND ISSUES TO BE DECIDED

On October 1, 2013, Molycorp requested the production of documents, requested admissions, and submitted interrogatories. (Mot. at Ex. 1.) The Secretary provided responses to Molycorp's discovery requests on November 15, 2013, along with privilege log consisting of a table of withheld documents and a table of redacted documents. (Mot. at Ex. 2, Ex. 3.) On November 26, 2013, the Secretary provided additional redacted documents. (Mot. at 2.)

Based on the Secretary's discovery responses and privilege log, Molycorp identified nine documents it believes should have been produced in their entirety, excluding the informants' names. (Mot. at 2, 4; Opp. at 5.) The Secretary has provided redacted copies of eight documents and withheld the ninth. (Opp. at 5.) Those documents include:

Redacted Documents:

1. May 8, 2013 – Memorandum of Interview (Informant) conducted by MSHA
2. May 18, 2013 – Memorandum of Interview (Informant) conducted by MSHA
3. May 22, 2013 – Memorandum of Interview (Informant) conducted by MSHA
4. April 12, 2013 – Unsigned Statement from Informant
5. May 5, 2013 – Unsigned Statement from Informant
6. May 6, 2013 – Signed Statement from Villa
7. April 22, 2013 – Signed Statement from Villa
8. May 22, 2013 – Memorandum of Interview (Villa) conducted by MSHA

Withheld Document:

9. May 28, 2013 – Memorandum to File

Respondent's motion contends that the Secretary has not properly asserted privileges that justify his redactions and withholding of documents. (Mot. at 12–16, 18–19.) Molycorp also suggests that if the informant's privilege applies, the Secretary should produce the redacted and withheld materials because Respondent's need for the information outweighs the Secretary's need to maintain the privilege to protect the public interest. (Mot. at 6, 16–18.) Respondent asks that I order the Secretary "to produce the disputed documents in a complete and unredacted form with the exception of individual names of informants." (Mot. at 4.)

The Secretary asserts the work product privilege as a basis for redacting or withholding the first five above-listed documents, a portion of the eighth document, and the entire ninth document. (Opp. at 17–19.) The Secretary also claims that the informant's privilege applies to all of the redacted documents. (*Id.* at 7.) Finally, the Secretary argues that Molycorp has not shown that its need for the redacted documents outweighs the Secretary's interest in maintaining the privilege.¹ (*Id.* at 14–15.)

The following issues are before me: (1) whether the work product privilege applies to the seven documents for which the Secretary asserts the privilege; (2) whether the informant's privilege applies to the redacted documents; (3) whether the redacted material would tend to reveal the informants' identity; and (4) whether Molycorp's need for the redacted information outweighs the Secretary's interest in maintaining the privilege.

¹ The Secretary also argues that Respondent has not made the showing of substantial need and undue hardship necessary to overcome the work product privilege. (Opp. at 19–20.) Yet, Molycorp claims only that the Secretary has not properly asserted the work product privilege. (Mot. at 18–19.) Thus, I need not determine whether Respondent demonstrated a substantial need and undue hardship.

II. PRINCIPLES OF LAW

A. Work Product Privilege

Although the Commission's Procedural Rules do not specifically enumerate a work product privilege, 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) allows parties to withhold otherwise discoverable materials under the work product privilege 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 for that party's representative. Fed. R. Civ. P. 26(b)(3); *see also ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) ("*ASARCO I*").

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 a MSHA investigation are prepared in anticipation of litigation. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997) (indicating that a special investigator's memoranda were prepared in anticipation of litigation); *ASARCO I*, 12 FMSHRC at 2558 (concluding that a special investigator's notes were prepared in anticipation of litigation because "[a] major function of an MSHA special investigation is to determine whether litigation should be commenced . . ."); *see also Baylor Mining, Inc.*, 26 FMSHRC 739, 742 (Aug. 2004) (ALJ) (finding investigator's documents, signed and unsigned miner witness statements, and memoranda of interviews to have been prepared in anticipation of litigation); *Sec'y of Labor on behalf of Jenkins v. Durbin Coal*, 22 FMSHRC 1135, 1137–39 (Sept. 2000) (ALJ) (determining that witness statements, memoranda, notes, and reports had been prepared in anticipation of litigation when collected as part of a section 105(c) investigation of a discrimination complaint).

B. Informant's Privilege

Under the informant's privilege, the Secretary may "withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA]." *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1984); *see also* 29 C.F.R. § 2700.61 (prohibiting Commission Judges from disclosing or ordering disclosure of an informant's name to an operator "except in extraordinary circumstances.") Informants are people who have "furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." *Id.* at 2525. The informant's privilege protects from disclosure material that "tend[s] to reveal an informant's identity." *ASARCO, Inc.*, 14 FMSHRC 1323, 1330 (Aug. 1992) ("*ASARCO II*"). The Secretary must demonstrate why disclosure would tend to reveal the miner's identity, but his burden "is not necessarily high" and may be satisfied by an affidavit "setting forth how or why disclosure . . . would tend to reveal the identity of an informant." *Id.* at 1329–30.

A requesting party may overcome the informant's privilege if, in the totality of the circumstances, the information is "essential to fair determination." *Bright Coal*, 6 FMSHRC at 2526. To do so, the requesting party must demonstrate that its need for the information outweighs the Secretary's need to maintain the privilege to protect the public interest. *Id.*

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Work Product Privilege

The Secretary asserts the work product privilege as to seven different documents, including: three memoranda of interviews with miner informants dated May 8, May 18, and May 22, 2013; two unsigned statements from informants dated April 12 and May 5, 2013; the withheld May 28, 2013, memorandum prepared by MSHA; and a portion of the memorandum of interview with Villa that the Secretary claims contains only the "investigations, impressions, strategy, and methods for obtaining information." (Opp. at 17–19.) Respondent contends that the Secretary has not properly asserted the work product privilege. (Mot. at 19.) However, Molycorp states only that "the information provided is inadequate to properly assert [the work product privilege] and "[I]ittle to none of the required information has been provided."² (*Id.*) Looking at the redacted documents (Opp. at Ex. 1), I determine that each redacted item is a document that was prepared by or for the Secretary's representative. Likewise, the Secretary's privilege log and motion make clear that the withheld memorandum is a document MSHA prepared on May 28, 2013. Accordingly, the only question remaining is whether the redacted and withheld documents were prepared in anticipation of litigation.

Six of the documents—the May 8, May 18, and May 22 memoranda of interviews with informants, portions of the May 22 memorandum of interview with Villa, the May 5 unsigned statement, and the withheld May 28 memorandum—were created after Villa filed his formal 105(c) complaint with MSHA on April 29, 2013. MSHA routinely undertakes section 105(c) investigations to determine whether the Secretary should bring a discrimination case on behalf of the complaining miner. Thus, "but for" Villa's complaint and MSHA's section 105(c) investigation, none of these documents would have been created. Accordingly, I conclude that these six items were prepared in anticipation of litigation and constitute the Secretary's work product.

However, the April 12, 2013, unsigned statement significantly predates Villa's complaint. The Secretary has not adequately explained how the author prepared this statement in anticipation of litigation except to say "the underlying issues surrounding Villa's discrimination complaint were already coming to a head." (Opp. at 18–19.) None of the cases the Secretary cites involve materials prepared *before* a discrimination complaint has been filed. Although an

² Molycorp points to *Greyeagle Coal Co.*, 35 FMSHRC 3321, 3325, 3330 (Oct. 2013) (ALJ), for the proposition that boilerplate objections are insufficient to properly assert a privilege. (Mot. at 18.) I do not find this case analogous. In *Greyeagle Coal*, the objecting party provided no privilege log to go along with its written assertion of privilege. 35 FMSHRC at 3330. Here, the Secretary has identified the nine documents he has either withheld or redacted. (See Mot. at Ex. 2, Ex. 3.)

investigation may have already begun, I cannot conclude that this statement was prepared in anticipation of litigation based on the information the Secretary has provided.

B. Informant's Privilege

1. Whether the Informant's Privilege Applies

In this case, the Secretary has asserted the informant's privilege as to the eight redacted documents he provided. (Opp. at 6–7.) Given my conclusion *supra* Part III.A, I need not revisit them to decide if the informant's privilege applies. I must only determine whether the informant's privilege applies to the April 6, 2013, unsigned statement and Villa's signed statements dated April 22 and May 6, 2013.

Molycorp contends that the Secretary has not provided sufficient information to show the informant's privilege applies to these documents.³ (Mot. at 14–15.) In response, the Secretary represents that the informants in this case “furnished information” in connection with “a possible violation of the Mine Act.” (Opp. at 7 (quoting *Bright Coal*, 6 FMSHRC at 2525).) He also avers that the miners in this case “spoke to the Secretary in confidence, currently work for Respondent, [and] seek to remain confidential” and states that “one has expressed particular concern about becoming the target of Respondent's retribution.”⁴ (Opp. at 3).

Looking at the unredacted portions of these three documents, each includes details regarding the incidents in question and miners present. These facts support a finding that unnamed witnesses possessed information to share with MSHA. Moreover, the Secretary's counsel has affirmed in his Opposition that the redacted portions involve details from (or regarding) miners that provided materials to MSHA during the section 105(c) investigation. In view of counsel's responsibilities under Commission Procedural Rule 6 and Federal Rule of

³ Pointing to *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993), Respondent contends that the Secretary must demonstrate the informant in question provided information with “some expectation of confidentiality.” (Mot. at 8.) Yet, it is unclear why Molycorp believes *Landano* is applicable. *Landano* examined Exemption 7(D) of the Freedom of Information Act (FOIA). 508 U.S. at 171. Although the informant's privilege and Exemption 7(D) each allow the government to withhold information derived from confidential sources, it is not clear that they are coterminous in scope. The FOIA is a broadly applicable statute meant to facilitate *public* access to government records rather than an evidentiary privilege between parties in litigation. Moreover, Respondent overreads *Landano*. Based on the volume and variety of the FBI's information sources, the Court refused to infer that *all* FBI investigative sources were confidential but noted that an implied assurance of confidentiality *could* be inferred from the character of the crime being investigated. *Id.* at 175–76, 179–80. Here, the potential for retaliation makes an inference of confidentiality appropriate.

⁴ The Secretary also indicates his willingness to “submit an affidavit *in camera* review” if I require “additional information regarding the application of the informant's privilege to the materials. (Opp. at 3 n.1.)

Civil Procedure 11, I also determine that an affidavit will not be necessary in this case because a sworn statement of the same will add nothing to my analysis. *See* 29 C.F.R § 2700.6(b) (a person’s signature on a document certifies, to the best of the person’s knowledge, information, and belief, that the document is well grounded in fact); Fed. R. Civ. P. 11(b)(3) (an attorney signing a pleading is certifying, to the best of the attorney’s knowledge, information, and belief, that factual contentions have evidentiary support).

Based on the foregoing analysis, I conclude that the informant’s privilege applies to each of these three redacted documents.

2. Whether the Redacted Information Would Tend to Reveal the Identity of the Informants

Having determined that the informant’s privilege applies to these three documents, I must also decide whether the redacted information would tend to reveal the informant’s identity.

First, Villa’s statement from April 22, 2013, indicates that he and another miner expressed safety concerns. (Opp. at Ex. 1.) The Secretary represents that the only information that has been redacted are the “names and phone numbers of the miner witnesses.” (*Id.* at 9.) Looking at the redacted version of the statement, it appears contact information was redacted from the list of people with knowledge of the incident. (*Id.* at Ex. 1.) Undoubtedly, contact information would reveal the informant’s identity. Thus, I determine that the Secretary has properly redacted such information.

Second, the only information redacted from Villa’s May 6, 2013, statement are his answers when asked whether he knew of any other miners who had been disciplined for making safety complaints, the reason for those safety complaints, and the date of the complaints. (*Id.* at Ex. 1.) Such details would reasonably allow Molycorp to identify the names of possible informants. I therefore determine that the Secretary has properly redacted that information.

Third, the Secretary has redacted only small portions of the April 12, 2013, unsigned statement, which relays an account of the “buggy” transportation argument involving Villa. (*Id.* at Ex. 1.) The Secretary avers that only the informant’s name, phone number, and three sentences of context have been removed. (*Id.* at 9.) According to the Secretary, those sentences reference where the informant was sitting on the small bus. (*Id.*) Molycorp claims the Secretary’s reliance on the “universe of persons with” being “small” is insufficient to support the privilege. (Mot. at 15 (citing *ASARCO II*, 14 FMSHRC at 1329).)

However, in *ASARCO II* the Commission held only that the Judge had not committed a “clear abuse of discretion” in ordering disclosure where the Secretary had relied on the “limited universe of employees” but presented no “facts to the judge to establish her claim.” 14 FMSHRC at 1329–30 (citations omitted). Here, looking at the redacted statement itself, the informant provides some context about his identity in his references to “up front,” “our crew,” “our foreman,” and “our union.” (*Id.* at Ex. 1.) Based on this review, I determine that any further context would allow Molycorp to use the redacted information to deduce the identity of the informant involved. Thus, I conclude that the Secretary’s redactions here are proper.

3. Whether Respondent Has Demonstrated a Need for the Redacted Documents That Outweighs the Secretary's Interest in Maintaining the Privilege

Molycorp argues its defenses rest “on fact-specific determinations concerning both the alleged discriminatory conduct and the related events pertaining to Respondent’s affirmative defenses.” (Mot. at 17.) Respondent claims that contemporaneous witness observations “are vital to assessing the accuracy and validity of the claims on both sides of the case,” and contends that the proximity in time to the incidents suggests that the redacted information is unavailable from any other source. (*Id.* at 17–18.) Finally, Molycorp suggests that passage of time will have degraded the memories of the informant witnesses. (*Id.* at 18.)

For his part, the Secretary argues that Molycorp has not met its burden of demonstrating the documents to be essential to a fair determination of the matter. (Opp. at 14.) Specifically, the Secretary states that Respondent has access to substantially the same information. (*Id.* at 15.) The Secretary also notes that Molycorp’s discovery responses suggest “it has spoken to multiple employees about the same incidents, and may or may not have spoken to the informants already.” (*Id.* at 15.) In addition, I note the Secretary’s representation that “the need for protection as informants is critical, as the miner informants still work for Respondent.” (*Id.* at 8.)

Molycorp has not met its burden in this case for two reasons. First, Respondent’s argument that the redacted information may be “vital” to its case is counterbalanced by the high stakes involved for these particular informants. *See Bright Coal*, 6 FMSHRC at 2524 (“The presence of an employment relationship . . . with the greater opportunity for retaliation that it provides, is a relevant factor to be considered in conducting the balancing test . . . for determining whether the privilege must yield in a particular case.”) The precarious position of informants is a weighty concern, and the informant’s privilege provides a critical protection against possible retaliation.

Second, Molycorp has not demonstrated that the passage of time limits its access to the redacted information. Respondent notably makes no mention of its own investigation—evidence which might have shown informational discrepancies with the redacted documents. Nevertheless, a full year has not yet passed since the incident in question. Molycorp has failed to show that witness recollections will have been so degraded that it will not have access to the same information. *Cf. ASARCO II*, 14 FMSHRC at 1323, 1331 (relying on operator’s ability to conduct depositions more than four years after an accident as a rationale for concluding the operator had access to the same information).

Based on the factors before me in this case, I determine that Molycorp has not demonstrated the redacted information is essential to a fair determination of the claims. Thus, I conclude that Respondent has not overcome the informant’s privilege.

IV. ORDER DENYING MOTION

In view of the above, the Secretary has properly asserted the work product or informant's privilege as to each of the nine documents at issue, and Respondent has not met its burden of overcoming those privileges. Accordingly, it is hereby **ORDERED** that Molycorp's Motion to Compel is **DENIED**.



Alan G. Paez
Administrative Law Judge

Distribution (Via Electronic Mail & U.S. Mail):

Natalie Nardecchia, Esq., U.S. Department of Labor, Office of the Solicitor, 350 S. Figueroa Street, Suite 370, Los Angeles, CA 90071
(nardecchia.natalie@dol.gov)

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 Eighteenth Street, Suite 2150, Denver, CO 80202
(lbeverage@jacksonkelly.com)

Dana M. Svendsen, Esq., Jackson Kelly PLLC, 1099 Eighteenth Street, Suite 2150, Denver, CO 80202
(dmsvendsen@jacksonkelly.com)

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