**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

October 25, 2013

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. WEVA 2012-664 |
| | : | A.C. No. 46-01602-278315 |
| v. | : | |
| GREYEAGLE COAL COMPANY, Respondent. | : | Mine: Mine #1 |

**ORDER TO COMPEL RESPONSE TO SECRETARY OF LABOR'S INTERROGATORIES AND DOCUMENT REQUESTS**

This case is before me upon the March 19, 2012, Petition for the Assessment of Civil Penalty the Secretary of Labor ("Secretary") filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on December 7, 2012, and attached a copy of my Prehearing Order. The Secretary has filed a motion to compel, and Greyeagle Coal Company ("Greyeagle Coal" or "Respondent") filed a response.

## I. PROCEDURAL HISTORY

The Secretary's petition seeks a $4,592.00 civil penalty assessment against Greyeagle Coal for two alleged violations of safety and health regulations at Mine #1. (Pet. at 1–3, Ex. A.) On February 28, 2013, counsel for the Secretary, Benjamin Chaykin, filed a Motion to Compel ("Mot."), asking that I require Greyeagle Coal to "provide complete, verified answers" to his First Set of Interrogatories and First Request for Production.[1] (Mot. at 1.)

At my direction, Law Clerk Paul Veneziano held a conference call with Messrs. Chaykin and Phillips to attempt an amicable resolution to the Secretary's motion. Based on this call, Mr. Chaykin agreed to allow Mr. Phillips until March 22, 2013, to supplement Greyeagle Coal's discovery responses or file a Response in Opposition to the Secretary's Motion to Compel. On March 25, 2013, Mr. Chaykin informed Mr. Veneziano that the Secretary wished to proceed with the pending motion to compel. That same day, Mr. Chaykin e-mailed Mr. Phillips, indicating that he believed "more information was required" and detailing areas he felt were deficient. On

[1] Counsel for the Secretary, Benjamin Chaykin, served the Secretary's First Set of Interrogatories and First Request for Production on August 8, 2012. Greyeagle Coal's counsel, Jeffrey Phillips, served answers and responses to the interrogatories and request for documents on September 7, 2012, and supplemented the response on October 24, 2012. On February 8, 2013, Mr. Chaykin outlined what he saw as deficiencies in the responses and supplements. Greyeagle Coal also made supplementary responses on March 22, March 27, and April 11, 2013.

April 5, 2013, Mr. Chaykin filed the Secretary's Renewed Motion to Compel ("Mot. II"), and Greyeagle Coal filed its Response to Secretary's Renewed Motion to Compel on April 12, 2013 ("Resp. to Mot.").

## II. ISSUES

### A. Factual Background

According to the Secretary, the citations in this case —

> were issued in connection with MSHA's investigation of a July 11, 2011 methane explosion accident at Mine No. 1's Return Air Shaft. Reportedly, Greyeagle was informed by a WV OMHST inspector that metal grating over the Return Air Shaft at Mine No. 1 needed to be repaired to prevent persons from falling into the shaft. Greyeagle directed two miners (Dewayne Marcum and James Branham) to perform welding to repair this grating. . . . Then, an explosion occurred due to the ignition of methane emanating from the return mine shaft, throwing Marcum and Branham a distance of approximately thirty-five (35) feet due to the force of the explosion.

(Mot. at 1–2.) The Mine Safety and Health Administration ("MSHA") issued two citations alleging "significant and substantial" ("S&S")[2] violations of the Secretary's safety and health regulations and characterizing Greyeagle Coal's violative conduct as highly negligent in one case and moderately negligent in the other. (Mot. at 1–2; Citation No. 8116915; Citation No. 8116916.)

One of the welders, Marcum, has also filed a civil suit in West Virginia state court for injuries he claims to have suffered when the mine's methane exploded as he completed welding work to repair the mine shaft's metal grating. (Mot. II at 3, Ex. C.)

### B. Issues To Be Decided

The Secretary contends that Greyeagle Coal's responses to Interrogatory Nos. 2, 4, 6, and 9 and Document Request No. 2 are insufficient. (Mot. II at 1–3.)[3] Greyeagle Coal, however,

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[2] The S&S terminology derives from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] The Secretary also requests that I compel Greyeagle Coal to provide contact information for "all persons with knowledge of the cited condition," including Marcum and Branham (Mot. II at 2), but I note Greyeagle Coal's April 11 supplement provided contact information for all of the individuals listed in its responses to Interrogatory Nos. 9 and 11, including Marcum and Branham. (*Id.* at 5, Ex. 2.)

claims its "discovery answers are reasonable and appropriate" given the proposed penalty and issues presented in this case. (Resp. to Mot. at 7.) Notably, however, Greyeagle Coal makes no mention of an undue delay to the progress of this case.

Based on the parties' arguments, the following issues[4] are before me: (1) whether Greyeagle Coal must identify the Greyeagle or Alpha Natural Resources[5] employee or employees who assigned Marcum and Branham to perform welding work at the accident site; (2) whether Greyeagle Coal must identify documents responsive to Interrogatory Nos. 2, 4, and 6; (3) whether Greyeagle Coal must identify and produce documents relating to Marcum's civil lawsuit; and (4) whether Greyeagle Coal must produce documents relating to the deficiency of the mine shaft grating, work orders or related records of work assignments to welding employees to repair the grating, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA's investigation of the accident and issuance of Citation Nos. 8116915 and 8116916.

## III. PRINCIPLES OF LAW

### A. Scope of Discovery

Commission Procedural Rule 56 allows parties to use depositions, written interrogatories, requests for admissions, and requests for documents or objects to obtain discovery of "any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence."[6] 29 C.F.R. §§ 2700.56(a)–(b). A party served with

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[4] In their filings, both the Secretary and Greyeagle Coal discuss the jurisdictional assertions Greyeagle Coal included in its Answer and Interrogatory and Request responses. (Answer at 3; Mot. I at 3; Resp. to Mot. at 2, 5; Mot. II at Ex. A.) I note that MSHA has a Mine ID assigned to Greyeagle Coal's Mine #1, and the body of the citations suggest that Marcum and Branham were working onsite. To date, Greyeagle Coal has made no motion to dismiss this case for lack of subject matter jurisdiction. In fact, Greyeagle Coal's own filing denies any reliance on jurisdiction as a basis for refusing to provide the requested materials. (Resp. to Mot. at 5.) Thus, I need not determine whether MSHA properly exercised jurisdiction.

[5] According to Greyeagle Coal's March 22 supplement, Alpha Natural Resources "assumed control of the Greyeagle Coal Company in a merger with Massey Energy Company on June 1, 2011 . . . ." (Mot. II at Ex. A.)

[6] Federal Rule of Evidence 401 defines evidence as relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. The Federal Rules of Evidence are not mandatory in Commission hearings but may "have value by analogy." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1136 n.6 (May 1984). If anything, the definition of "relevance" in the scope of discovery is broader than "relevance" for the admittance of evidence at trial. *See In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1189–93 (10th Cir. 2009) (discussing the meaning of relevance in the scope of discovery). Thus, evidence that would be considered relevant under the Federal Rules of Evidence will satisfy the definition of relevance for the purpose of discovery.

interrogatories and requests for production must answer within 25 days of service and must state the basis for any objections in its answer. 29 C.F.R. §§ 2700.58(a), (c).

For procedural questions "not regulated by the [Mine] Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act," the Federal Rules of Civil Procedure guide Commission Judges as "far as practicable." 29 C.F.R. § 2700.1(b). Guidance, though, does not require strict adherence. *See Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989) (observing "[Commission] Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be 'guided' by a particular Federal Rule of Civil Procedure.")

Like the Commission's rules, the Federal Rules of Civil Procedure establish a broad discovery regime. *See Schlagenhauf v. Holder*, 379 U.S. 104, 114–15 (1964) ("We enter upon determination of this construction with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment' to effectuate their purpose that 'civil trials in federal courts no longer need to be carried on in the dark.'") (quoting *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). Notwithstanding recent changes intended to involve courts' fine tuning of overabundant discovery, Federal Rule 26(b)(1) continues to authorize parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location or persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1). Like the Commission's rules, the Federal Rules' regime also specifies that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence." *Id.*

B. Limitations on Discovery

1. Undue Burden or Expense

Commission Judges may "limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense" for "good cause shown."[7] 29 C.F.R. § 2700.56(c). The Commission has not defined "good cause" or "undue delay," but Commission Judges have relied on Commission Rule 56(c) to limit needless, hypothetical, or unrelated discovery. *See Marfork Coal Co.*, 28 FMSHRC 742, 743 (Aug. 2006) (ALJ) (limiting "needless

[7] Although Greyeagle Coal points to the standard outlined in Federal Rule 26(b)(2)(C), I note that the Commission Rules and Federal Rules are in tension regarding the limitation of burdensome discovery: whereas Commission Rule 56(c) is permissive, Federal Rule 26(b)(2)(C) is mandatory. *Compare* 29 C.F.R. § 2700.56(c) ("Upon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge *may* . . . limit discovery . . . .") (emphasis added) *with* Fed R. Civ. P. 26(b)(2)(C) ("On motion or on its own, the court *must* limit the frequency or extent of discovery . . . .") (emphasis added). Because Commission Rule 56(c) specifically regulates the procedural question of limiting discovery on the basis of an undue burden, I need not apply the Federal Rule. However, as with the Federal Rules of Evidence, I find Federal Rule 26(b)(2)(C) valuable by analogy.

discovery" in the interest of efficient use of judicial resources and avoiding undue burden or expense where contest cases had been stayed pending civil penalty proceedings and settlement discussions might obviate the need for discovery); *Eagle Energy, Inc.*, 21 FMSHRC 109, 113 (Jan. 1999) (ALJ) (refusing request for *in camera* review of documents claimed to be protected by the work product doctrine where requesting party made no "threshold showing identifying the nature of the information to be discovered."); *Newmont Gold Co.*, 18 FMSHRC 1709, 1713–14 (Sept. 1996) (ALJ) (limiting the scope of permissible deposition questions to prevent "broad, complicated, or lengthy hypothetical questions of . . . witnesses that do not relate directly to the facts at issue . . . ."). However, a party objecting to a discovery request on the basis of burden or expense must demonstrate such a burden or expense. *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Jan. 1998) (ALJ) (rejecting a motion for a protective order because the Secretary failed to show the deposition sought would expose the witnesses or MSHA to an undue burden); *Newmont Gold Co.*, 18 FMSHRC 1304, 1306–07 (July 1996) (ALJ) (refusing to protect certain MSHA officials from deposition because the information sought from those officials was very specific, meaning the depositions would be short and not overly burdensome); *Hays v. Leeco, Inc.*, 12 FMSHRC 907, 908 (Apr. 1990) (ALJ) (finding the benefit of a site visit outweighed the cost to the operator of "several man hours" spent escorting complainant's attorney around the mine site).

2. Privileged Documents

Commission Rule 56(b) excludes privileged material from the scope of discovery. *See* 29 C.F.R § 2700.56(b). Parties objecting to interrogatories and requests for documents must "state the basis for the objection" in its answer or response. 29 C.F.R. § 2700.58(a), (c). The Federal Rules also limit discovery to "nonprivileged" matter.[8] Fed. R. Civ. P. 26(b)(1). However, parties withholding otherwise discoverable information or documents on the basis of privilege or "protection as trial-preparation material" must expressly make such a claim and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A). Blanket or "boilerplate" objections do not satisfy a party's burden to specify the information or items withheld in a manner enabling other parties to assess the claim. *See Remington, LLC*, 33 FMSHRC 2027, 2029 (Aug. 2011) (ALJ) (noting that "if some of the requested information is privileged the burden is on the party asserting the privilege to identify it" and ordering a response to a request for production where the withholding party provided a boilerplate response stating the request exceeded the scope of Federal Rule of Civil Procedure 26(b) and implicated the attorney-client privilege, the work product privilege, and self-critical examination privilege); *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir.) ("We hold that

[8] Unlike the "undue burden" rules outlined above, the Commission Procedural Rules do not differ from the Federal Rules regarding the assertion of privilege. Both sets of rules require the withholding party to explain the basis for refusing to comply with discovery; the Federal Rules simply provide more specific details about what the withholding party must do to effectively assert a claim of privilege. Accordingly, the Federal Rules requirement that withholding parties describe the documents, communications, and tangible thing not produced informs what is required under the Commission Rule.

boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege."), *cert denied*, 546 U.S. 939 (2005).

## IV. ANALYSIS & DISCUSSION

### A. Scope of Discovery

Each of the Secretary's Interrogatories and Requests relates to the parties or actors involved in the accident underlying the two citations before me in this case. Moreover, each response may shed light on the parties' claims and defenses. First, Interrogatory No. 6 specifically requests that Greyeagle Coal identify any person with knowledge of facts pertaining to the degree of negligence attributable to the operator for each contested citation. Despite Greyeagle Coal's contention that Gary Hatfield advised Greyeagle Coal personnel to complete the welding work (Resp. to Mot. at 5), the identity of the Greyeagle Coal or Alpha Natural Resources employee(s) who instructed Marcum and Branham to complete these repairs is relevant and will very likely bear on any such determination.[9] *See, e.g.*, *Whayne Supply Co.*, 19 FMSHRC 447, 451–53 (Mar. 1997) (refusing to impute a miner's conduct to the operator where the miner was not a supervisory employee). This identifying information will also allow the Secretary to depose the witness or witnesses, which may lead to a fuller presentation of the facts in this case.

Likewise, Interrogatory Nos. 2, 4, and 6 request Greyeagle Coal to identify documents that reference or relate to facts regarding the cited violations at issue, the S&S designations for those citations, and the degree of negligence attributable to the operator, respectively. Each of these subjects will be relevant to any penalty I assess. Indeed, they underlie the factual burdens that will be at issue at hearing. Identifying these documents may also allow the Secretary to specifically request the documents and elicit relevant testimony during deposition or at hearing, again leading to a fuller presentation of the facts underlying the citations in this docket.

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[9] Greyeagle Coal's Response suggests that it has properly provided this information, "expressly stat[ing] that Gary Hatfield advised Greyeagle Coal Company personnel to complete the work that was earlier ordered to be done by the West Virginia Department of Environmental Protection." (Resp. to Mot. at 5.) However, according to Greyealge Coal's April 11 supplement, "Gary Hatfield was an environmental compliance manager for Rawl Sales & Processing Company." (*Id.* at Ex. 2.) Yet one of the documents Greyeagle Coal included in its March 27 supplement lists Hatfield as an "Authorized Representative" for Greyeagle Coal, while still another seemingly indicates that Hatfield, Marcum, and Branham were employees of Rawl Sales. (Mot. II. at Ex. C). Greyeagle Coal's discovery responses and filings, therefore, do not make clear what type of relationship Hatfield or Rawls Sales have with Greyeagle Coal or Marcum or Branham. Even assuming Hatfield, Marcum, and Branham are each Rawl Sales employees, Greyeagle Coal's answer to the interrogatory *does not* specify which of *its* employees or its parent's employees instructed or authorized Marcum and Branham to complete the welding work.

The documents related to Marcum's civil suit are similarly relevant or likely to result in relevant evidence. According to its March 27 supplement, Greyeagle Coal and Hatfield are named defendants in Marcum's civil suit. (Mot. II at Ex. C.) The depositions, exhibits, and other discovery in Marcum's case, therefore, seem likely to address many of the same facts underlying the accident that are the bases of the citations before me and the severity of injuries suffered. Moreover, Hatfield—the party Greyeagle Coal specifically identified in its Interrogatory responses as having "advised" Greyeagle Coal personnel to complete the welding work—is also a named party. His depositions or filings, specifically, may clarify his relationship with Greyeagle Coal, his conversations with its employees, and ultimately, the level of negligence attributable to the mine operator in this case. Similarly, these documents may lead to the discovery of relevant evidence in future document requests or depositions in this case.

Finally, the documents related to the grating deficiency, work orders or related records, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA's investigation of the accident and citations may each relate to the underlying violations themselves, their gravity, or the negligence attributable to Greyeagle Coal. As stated above, these documents may bear upon facts of consequence in the case before me.

Accordingly, the requested information and documents will either be relevant, admissible evidence or likely to lead to discovery of admissible evidence. I therefore conclude that each of the Secretary's discovery requests at issue fall comfortably within the liberal discovery regimes set out in the Commission Procedural Rules and the Federal Rules of Civil Procedure.

B. Undue Burden

In arguing that the Secretary's discovery requests are unduly burdensome, Greyeagle Coal makes two arguments. First, it references the proposed penalty of $4,592.00. Second, Greyeagle Coal notes that it has supplemented its responses four times and contends the Secretary "has belabored the alleged discovery dispute long enough." (Resp. to Mot. at 6.) In its responses to Interrogatory Nos. 2, 4, and 6, Greyeagle Coal also included: "OBJECTION. This interrogatory exceeds the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure. It is overbroad [and] unduly burdensome . . . ." (Mot. II at Ex. A.)

However, nowhere does Greyeagle Coal detail the burden or expense involved in responding to the Secretary's discovery requests. Indeed, Greyeagle Coal provides *no* specifics about the burden or expense involved in identifying the Greyeagle or Alpha Natural Resources employee or employees who assigned or approved Marcum and Branham's welding work at the accident site, identifying documents responsive to Interrogatory Nos. 2, 4, and 6, or producing documents regarding the grating deficiency, work orders or related records, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA's accident investigation and citations.[10] Lacking any details regarding the costs or burdens of

[10] I note that Greyeagle's answer to Document Request No. 2 also objected to the request as "exceeding the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure" and characterized the request as "vague and ambiguous as 'logbook entries' are undefined." (Mot. II at Ex. A, Ex. C.) Yet, the Secretary's March 25, 2013, e-mail to

producing this information, I therefore determine that Greyeagle Coal has not demonstrated an undue burden or expense for any of these three types of requested items.

Similarly, Greyeagle Coal's bald contention that it is unduly burdensome or expensive to identify and produce relevant documents and discovery responses related to Marcum's West Virginia civil suit does not demonstrate an undue burden or expense. Marcum's case involves both Greyeagle Coal and Hatfield. Though Greyeagle Coal provides no details regarding the costs it would incur in responding to this request, it *does* point to the size of the proposed penalty and the Secretary's ability to order depositions transcripts from the court reporter. Greyeagle Coal also argues that it "should not be forced to expend time and money having counsel in this case (who is not counsel in the Bruce Marcum lawsuit) review the entire file of the civil lawsuit, determine what is 'relevant' to this instant MSHA case and produce that information, at the Respondent's own cost and expense." (Resp. to Mot. at 7.) Given the juxtaposition, Greyeagle Coal might be implying that the costs of producing these documents amounts to some significant portion of the $4,592.00 proposed penalty.

Granted, having a second law firm review the case file for the Marcum civil case may be an added expense. Nevertheless, it is unclear why Greyeagle Coal believes it should be exempt from turning over these documents simply because Greyeagle does not wish its counsel to spend time and money reviewing its own files from the Marcum civil suit. Greyeagle Coal is entitled to employ more than one attorney or one firm; that it chose to do so, however, does not free Greyeagle Coal from its discovery obligations. Under the Commission Procedural Rules, parties have a duty to provide requested documents. These same Procedural Rules permit me to limit discovery when a party has demonstrated undue burden or expense, but I do not need to limit discovery simply because a party will expend additional time and money having a different attorney get up to speed on the documents in its possession and with which another retained attorney is already familiar. *Cf. Burns*, 164 F.R.D. at 592–93 (rejecting party's objections to discovery as overbroad, vague, and unduly burdensome because they were not sufficiently specific and characterizing the "considerable time, effort and expense consulting, reviewing and analyzing 'huge volumes of documents and information'" involved in "answering the interrogatories" as "an insufficient basis to object.") In this case, Greyeagle Coal has simply failed to demonstrate that having its attorneys review files already in its possession is an undue burden or expense.

Even under the standard for limiting discovery outlined in Federal Rule 26(b)(2)(c), I would not be required to limit the Secretary's requested discovery in this case.[11] I am unable to

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Greyeagle's counsel outlined the type of documents the Secretary sought. (Mot. II at Ex. D.) Greyeagle's Response to the Secretary's Renewed Motion to Compel, however, does not explain how this request is unduly burdensome or expensive.

[11] Federal Rule 26(b)(2)(C) requires courts to "limit the frequency or extent of discovery otherwise allowed" if the court determines:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient,

weigh meaningfully the cost and likely benefits of the requested discovery because Greyeagle Coal provided no details regarding the burden or expense involved in providing the requested information. Moreover, Greyeagle Coal provided neither specifics to establish the discovery sought was unreasonably cumulative nor details regarding more convenient, less expensive or less burdensome alternative sources to obtain the requested information.[12]

Finally, though I recognize that counsel for Greyeagle Coal has made four supplemental responses to the Secretary's requests, a party's burden to respond to discovery is not incremental or optional. It is unclear why Greyeagle Coal would spend time making four separate responses when the materials the Secretary seeks in this motion to compel were described by the Interrogatories and Requests. Perhaps Greyeagle Coal hoped its seriatim responses would satiate the Secretary without incurring the expense required to respond fully. They did not. Regardless, Greyeagle Coal's four separate discovery supplements do not, in themselves, demonstrate that the Secretary has had an ample opportunity to obtain the information by discovery. I determine that Greyeagle Coal has not demonstrated any of the three prongs outlined in Federal Rule 26(b)(2)(C), and I conclude that the totality of the circumstances would not require me to limit the Secretary's discovery under the Federal Rules.

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> less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). The totality of the circumstances determines whether to limit discovery. *See, e.g., Patterson v. Avery Denison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002). A party objecting to the breadth of discovery on the basis of disproportionate burden or expense must specifically demonstrate such a burden or expense. *See, e.g., Sullivan v. StratMar Sys., Inc.*, 276 F.R.D. 17, 19–20 (D. Conn. 2011) (rejecting discovery objection where the party "merely declared the cost of producing the requested documents would 'surpass by a large margin any amount [the requesting party] could reasonably hope to recover" in the action, but provided no evidence or details regarding its costs).

[12] Greyeagle Coal provided docketing and court reporter contact information for Marcum's West Virginia civil suit and contends the Secretary would be able to "order the deposition transcripts from the court reporter." (Resp. to Mot. at 6–7, Ex. 1.) However, Greyeagle Coal's argument conspicuously ignores the "discovery responses, documents, [and] witness statements" related to Marcum's civil suit that the Secretary requested. (*Id.* at 6–7.) The court reporter, therefore, would not be an alternative source for those documents, let alone a more convenient, or less burdensome or expensive one. Greyeagle Coal also failed to demonstrate how or why simply having Greyeagle Coal provide copies of the deposition transcripts would be inconvenient, burdensome, or expensive.

For the reasons above, I determine Greyeagle Coal has failed to demonstrate any undue burden or expense. Lacking good cause, I conclude that I need not limit the Secretary's Interrogatories or Document Requests.

C. Privileged Documents

Interrogatory Nos. 2, 4, and 6 ask Greyeagle Coal to provide factual information regarding several topics, to identify all persons having knowledge about those facts, and to identify all documents that make reference to or in any way relate to those facts. In its answers, Greyeagle Coal objects that each of these interrogatories "implicate[] the attorney-client privilege and work product doctrine."[13] (Mot. II at Ex. A.) Greyeagle Coal's answer to Document Request No. 2 also claims that request "implicates the attorney [sic] client privilege and/or work production doctrine." (*Id.*) In a footnote specifically referencing the Marcum civil suit documents, Greyeagle Coal also indicates: "At least some of these requested documents may be protected by the attorney-client privilege and/or the work product doctrine." (Resp. to Mot. at 7 n.4.) However, in none of these supposed assertions of privilege has Greyeagle Coal provided any details describing "the nature of the documents, communications, or tangible things not produced," let alone done so "in a manner that . . . will enable other parties to assess the claim." *See* Fed. R. Civ. P. 26(b)(5)(A).

Rather than satisfying its burden, Greyeagle Coal has chosen to provide no details regarding any documents it has withheld. Its assertions of privilege epitomize the non-specific, boilerplate recitations that courts disfavor and find insufficiently descriptive to assert a privilege effectively. Without such information, neither the Secretary nor the Court can evaluate the applicability of the claimed privilege or protection. I determine, therefore, that Greyeagle Coal has not properly asserted the claimed privileges.

[13] I note that Greyeagle Coal provided identically worded objections to Interrogatory Nos. 11 and 12. (Mot. II at Ex. A.) I find the repeated use of this boilerplate language troubling, particularly considering Administrative Law Judge Barbour's rejection of nearly identical language as insufficient to satisfy the burden of asserting the privileges identified. *See Remington, LLC*, 33 FMSHRC 2027, 2029 (Aug. 2011) (ALJ). More troubling still, the firm involved in Judge Barbour's case is the same firm representing Greyeagle Coal in the case before me. The Secretary has not asked that I determine Greyeagle Coal's privileges to have been waived and I am not inclined to do so *sua sponte*. However, counsel for Greyeagle Coal, as well as his firm, should be on notice that failure to properly assert privilege claims may result in a waiver of privilege. *See Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1149 (discussing cases and adopting a three part "holistic" test for when a privilege should be waived if a privilege log is not produced); *see also* Fed. R. Civ. P. 26 advisory committee's note (1993 Amendments) (Subdivision (b)) (requiring notification when withholding materials subject to a discovery request on the basis of privilege or work product protection and noting that failure to provide notice may result in Rule 37(b)(2) sanctions and a waiver of the privilege.)

## V. ORDER

Based on the foregoing reasoning, the Secretary's Renewed Motion to Compel is **GRANTED**. It is hereby **ORDERED** that Greyeagle Coal shall (1) identify the Greyeagle or Alpha Natural Resources employee or employees who assigned, approved, or authorized Marcum and Branham's welding work at the accident site; (2) identify documents responsive to Interrogatory Nos. 2, 4, and 6; (3) identify and produce documents relating to Marcum's civil lawsuit; and (4) produce documents relating to the deficient grate, work orders or related records of work assignments to employees to repair the grating, internal documents or notes relating to the accident at issue, or internal documents or notes relating to MSHA's investigation of the accident and issuance of Citation Nos. 8116915 and 8116916.

WHEREFORE, it is further **ORDERED** that Greyeagle Coal, to the extent it claims any attorney-client privilege or work product doctrine protection, identify any documents withheld and provide sufficient details to permit the Secretary to evaluate the applicability of the claimed privilege or protection.[14]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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[14] A detailed, document-by-document privilege log may not be required in every scenario. *See* Fed. R. Civ. P. 26 advisory committee's note (1993 Amendments) (Subdivision (b)) (discussing a party's duty to "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection" but noting "[t]he rule does not attempt to define for each case what information must be provided . . . ."). Many courts have nevertheless found them useful. Given the lack of details Greyeagle Coal has provided in "asserting" its privileges and protections thus far, Respondent may be well advised to consider providing a privilege log.