

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 20, 1995

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 94-72, etc.
Petitioner :
v. :
BUCK CREEK COAL, INC., :
Respondent :

ORDER GRANTING OBJECTION TO DEPOSITION
ORDER TO PRODUCE DOCUMENTS FOR IN CAMERA INSPECTION

The Secretary, by counsel, has filed a motion objecting to the Respondent's taking the deposition of MSHA Supervisory Special Investigator Michael G. Finnie. Buck Creek has filed an opposition to the Secretary's motion and, further, requests that the cases against Buck Creek be dismissed for the Secretary's failure to make Mr. Finnie and MSHA District Manager Rexford Music available for deposition. In addition, Buck Creek has filed a motion to compel production of documents which the Secretary opposes.¹

Objection to deposition

The Secretary originally objected to Mr. Finnie's deposition in May 1995 solely on the grounds that he was a manager without first-hand knowledge of the facts underlying these cases. I denied the motion holding that A[t]he fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence.@ *Buck Creek Coal, Inc.*, 17 FMSHRC 845, 849 (Judge Hodgdon, May 1995).

In renewing his objection, the Secretary now asserts that

¹ Buck Creek filed the original of its opposition and motion at the Commission office in Washington, D.C. Commission Rule 5(b), 29 C.F.R. ' 2700.5(b), provides that after a judge has been assigned to a case and before he issues a decision, Adocuments shall be filed with the Judge.@

Mr. Finnie is a supervisory special investigator who is an agent of two grand juries, one investigating Buck Creek and the other investigating Pyro Mining Co., and as such he has been instructed by the U.S. Attorney, pursuant to Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, that he cannot disclose anything learned in the criminal investigations. The Secretary further avers that:

Mr. Finnie's only knowledge of Buck Creek that could be relevant to the matters before the ALJ is based upon the criminal investigation of Buck Creek Coal, Inc., and the civil special investigations that are ongoing or have been completed by other inspectors. The special investigation cases are not before this court and involve individuals employed by Buck Creek Coal, Inc. Mr. Finnie supervises the investigations and does not conduct the investigations.

(Sec. Mot. at 2.)

Buck Creek implies that since a ruling has already been issued permitting the deposition of Mr. Finnie, the Secretary cannot object again. Furthermore, it contends that the discovery it seeks through the deposition is relevant because:

Buck Creek intends to explore the Petitioner's enforcement policies pertaining to Buck Creek's mine or similar types of mines, including communications between Buck Creek's and Petitioner's personnel relative to the citations at issue. Also, Buck Creek intends to inquire about the bases of and underlying policies for the Petitioner's actions. Ultimately, Buck Creek expects to show a lack of factual foundation for the citations and the Petitioner's bias and actual motivation in this entire matter.

(Resp. Opp. at 4.) Buck Creek does not explain what it specifically expects to find out from Mr. Finnie nor does it address the Secretary's new arguments.

The Commission has noted that A courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable in the parallel criminal case@ and stated that the A judge has the power to impose limitations on the time and subject matter of discovery, which would permit the civil matter to proceed without harming the criminal case.@ *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 504 (April 1995) (citations omitted). In this connection, the Fifth Circuit Court of Appeals has admonished that A the trial judge in the civil proceeding should [not] ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought.@ *Campbell v. Eastland*, 307 F.2d 478, 487 (1962). Some courts have gone so far as to stay all discovery proceedings until the criminal case is concluded. *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966).

In his response to Respondent's opposition to the renewed objection to Mr. Finnie's deposition, the Secretary states that Mr. Finnie was scheduled to be deposed on June 19, 1995, along with several other individuals, and that the A depositions of all the individuals could not be taken due to a lack of time and not the refusal of the Secretary to cooperate.@ (Sec. Resp. at 3.) Another round of depositions was apparently scheduled for the week of August 21, but Mr. Finnie was not among those scheduled. On September 14, counsel for the Respondent advised that he desired to take Mr. Finnie's deposition on September 18 and 19. It was at this point that the Secretary raised his renewed objection.

There does not appear to be any lack of cooperation or bad faith on the part of the Secretary in scheduling Mr. Finnie's deposition. Nor does there appear to be any reason why the Secretary cannot renew his objection to the deposition based on new information. Further, I note that numerous MSHA officials have already been deposed by the Respondent and the Secretary has only renewed an objection to one individual.

When the objection to taking Mr. Finnie's deposition was denied previously, it was because the Secretary had not provided an adequate reason for not permitting the deposition. This time he has. Mr. Finnie did not issue any of the citations in the cases before me and apparently did not participate in the investigation leading to the issuance of the citations. He is,

however, heavily involved in the criminal investigation. Therefore, I find that the conjectural possibility that he may be able to provide some information on the citations in issue is far outweighed by the harm that could result to the criminal case if his deposition is permitted.

Accordingly, I **GRANT** the Secretary's motion objecting to the taking of Mr. Finnie's deposition and **ORDER** that he may not be deposed until after the disposition of the criminal matters. In view of this ruling, the Respondent's motion to dismiss is **DENIED**.²

Motion to Compel

Buck Creek requests that the Secretary be compelled to provide: (1) **A**inspectors' notes prepared during Buck Creek inspections in which no citations were issued by that inspector,**@** (2) **A**eleven (11) pages of conference worksheets,**@** (3) **A**twenty-five (25) memoranda relating to special investigations and potential Section 110(c) civil knowing/willful violations**@** and (4) the investigative files in eight Section 110 cases. In his response to the motion, the Secretary states that the inspectors' notes were produced on October 10, 1995, **A**except those documents which relate to the criminal investigation of Respondent.**@** With respect to the remaining documents, the Secretary asserts that they come within the **A**work-product privilege**@** set out in Rule 26(b)(3) of the Federal Rules of Civil Procedure and that, in addition, 12 of the 25 memoranda and six of the eight Section 110 case files relate to the criminal investigation.

² It appears that the deposition of Mr. Music is scheduled for October 26 and 27, 1995.

The Secretary's claims cannot be properly considered without an inspection of the documents in question. Accordingly, counsel for the Secretary is **ORDERED** to provide me with a copy of each contested document for my *in camera* consideration by **November 3, 1995**. After I have inspected the documents I will issue a ruling on the Respondent's motion to compel.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Dept of
Labor, 230 S. Dearborn St., Chicago, IL 60604 (Certified Mail)

Henry Chajet, Esq., Patton Boggs, L.L.P., 2550 M St., NW.,
Washington, DC 20037 (certified Mail)

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