FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
April 30, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2005-273
Petitioner	:	A. C. No. 36-08603-64393
v.	:	
	:	Docket No. PENN 2006-199
	:	A. C. No. 36-08603-85019
	:	
ROSEBUD MINING COMPANY,	:	Tracy Lynne Mine
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-70
Petitioner	:	A. C. No. 36-08603-96072 A
v.	:	
	:	
WENDALL W. SCHICK, Employed By	:	
Rosebud Mining Company,	:	Tracey Lynne Mine
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-71
Petitioner	:	A. C. No. 36-008603-96073 A
v.	:	
	:	
ROBERT J. BRINK, Employed By	:	
Rosebud Mining Company,	:	Tracey Lynne Mine
Respondent	:	
ROSEBUD MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2005-264-R
	:	Order No. 7052251; 8/23/2005
	:	
	:	Docket No. PENN 2005-265-R
v.	:	Order No. 7052248; 02/23/2005
	:	
	:	Docket No. PENN 2005-266-R
SECRETARY OF LABOR,	:	Citation No. 7052247; 09/23/2005

MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Tracy Lynne Mine
Respondent	:	Mine ID 36-08603

DECISION AND ORDER GRANTING MOTION TO QUASH SUBPOENA

On March 23, 2007, Rosebud Mining Company (Rosebud) filed a motion to quash a subpoena served upon Rosebud attorney Joseph A. Yuhas. The subpoena sought to compel Mr. Yuhas to appear for a deposition on April 3, 2007, for questioning regarding statements made by Rosebud miners during accident investigation interviews conducted by the Department of Labor's Mine Safety and Health Administration (MSHA) and the Pennsylvania Department of Environmental Protection Bureau of Mine Safety (State) after a fatal roof fall. Rosebud argues that because Mr. Yuhas attended those interviews as counsel for Rosebud, and because discovery of Mr. Yuhas' recollections of these interviews is prohibited under the work product doctrine, as well as under principles enunciated in *Shelton v. American Motors, Inc.* 805 F2d 1323, 1328 (8th Cir. 1986) governing attorney depositions, the subpoena compelling his deposition should be quashed.

On June 10, 2005, a fatal roof fall occurred at Rosebud's Tracy Lynne Mine, located in Armstrong County, Pennsylvania. The roof fall occurred while the fatally injured miner was installing supplemental roof bolts into the mine roof at an underground intersection. MSHA was notified of the accident at approximately 6:10 a.m. on June 10, 2005, and that same day, MSHA initiated an accident investigation and interviewed certain mine employees.

On June 15, 2005, MSHA re-interviewed the mine employees in the presence of a number of other witnesses including MSHA inspectors and State mine personnel. The interviews were not transcribed or recorded. Also present, in addition to the other witnesses, was Mr. Yuhas, Rosebud's attorney. It appears that MSHA investigators now claim that during those interviews, three miner witnesses stated that they observed a defect in the subject roof prior to the fall. MSHA subsequently issued several citations and orders to Rosebud alleging violations of its roof control plan and of the standard governing pre-shift examinations. Rosebud, through its counsel, Mr. Yuhas, contested those citations before this Commission. During discovery, the Secretary deposed the miners that MSHA officials had previously interviewed during the accident investigation. At their depositions, these miners testified that they had not observed such a defect in the subject roof prior to the roof fall.

As previously noted, the Secretary subsequently served Mr. Yuhas with a subpoena seeking his deposition testimony regarding his recollection of the accident investigation interviews that he attended. Specifically, the Secretary stated that she intended to ask Mr. Yuhas "questions under oath regarding public admissions made by employees of Rosebud Mining Company during the accident investigation of the fatal roof fall which occurred...at Rosebud's Tracy Lynne mine." Thus, it is apparent that the Secretary seeks to depose Mr. Yuhas in an effort to support her contentions regarding alleged inconsistencies between miner's statements made during MSHA's accident investigation interviews and their subsequent deposition testimony.

Mr. Yuhas was present at the interviews, however, Rosebud maintains that, as mine safety counsel for Rosebud, he was therefore listening and processing the information disclosed at the interviews for the purpose of advising his client regarding, and in anticipation of, the possibility of litigation regarding the enforcement action such as those which are the subject of the captioned cases. Rosebud argues that because courts have recognized the near impossibility of disclosing an attorney's recollections of oral interview statements without revealing his or her mental impressions or legal theories, such recollections are afforded near-absolute immunity from discovery under the work product doctrine.

Rosebud further argues that the Secretary cannot circumvent the work product doctrine with her assertion that she seeks only factual information from the interviews. It maintains that any purely factual material Mr. Yuhas obtained from the interviews, even were it separable, is still work product and is protected against discovery absent a showing of substantial need for the information and undue hardship in obtaining the equivalent information by another means. Rosebud argues that the Secretary cannot make this showing, because numerous other witnesses, including her own inspectors, state inspectors and the miners themselves, are available to testify about statements given during the interviews to the extent relevant in the proceedings and that Mr. Yuhas' testimony would thus constitute no more than corroborative evidence, insufficient under established precedent to show substantial need or undue hardship.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court established the well-recognized attorney work product doctrine.[1] This doctrine protects against the disclosure of "tangible and intangible" work product created in anticipation of litigation. As stated in *Hickman*, work product is reflected "in interviews, statements, memoranda, correspondence, briefs, mental expressions, personal beliefs, and countless other tangible and intangible ways". This Commission has also recognized that matter covered under the work product doctrine is privileged and protected from discovery by its procedural rules. Commission Rule 56(b), 29 C.F.R. § 2700.56(b); *See, e.g. Secretary v. ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990).

As further stated by the Supreme Court in *Hickman*, the rationale for this long-standing doctrine is that:

> [h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

The doctrine has also been partially codified in Rule 26 (b)(3) of the Federal Rules of Civil Procedure. However, since that rule protects only documents and tangible things, it is not directly applicable to this case.

Hickman, 329 U.S. at 510-11. As a result of *Hickman* and to guard against the unnecessary disruption of an attorney's representation of his client, a two-tiered analysis for determining when information is protected from discovery by the work product doctrine has evolved. *See In Re Cendent Corp. Securities Litigation*, 343 F3d 658 at 663 (3rd Cir. 2003); *Baker v. General Motors Corp*., 209 F.3d 1051, 1054 (8th Cir. 2000).

Ordinary work product, which is limited to factual information, is discoverable only if the party seeking the information has a substantial need for the information and cannot without undue hardship obtain the substantial equivalent of the information by other means. *Baker*, 209 F.3d at 1054; see also Fed. R. Civ. P. 26(b)(3). Core or opinion work product, that which encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" however, is "generally afforded near absolute protection...and is discoverable only upon a showing of rare and exceptional circumstances." *In Re Cendant Corp. Securities Litigation*, 343 F.3d at 663 (internal quotations omitted); *Baker*, 209 F.3d at 1054 (work product based on witness interviews is "opinion work product entitled to almost absolute immunity").

In this regard, the *Hickman* Court stated that "we do not believe that any showing of necessity can be made" to justify production of the attorney's recollections of oral statements made by witnesses, "whether presently in the form of his mental impressions or memoranda." The Supreme Court further stated that such recollections are entitled to heightened protection, because:

> forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness...and forces the attorney to testify as to what he remembers...regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Hickman, 329 U.S. at 512-13; *see also Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (work product based on oral witness statements reveals "the attorneys' mental processes in evaluating the communications...[and] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship"), *In Re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994) (discovery of oral communications made by third parties to attorney allowed "only in a 'rare situation' because of the danger that the attorney's version of such conversations is inaccurate and untrustworthy...[and] will reveal the attorney's mental processes or litigation strategy.").

In accordance with the holding and rationale of *Hickman*, courts have regularly disallowed discovery of attorney recollections of witness interviews made in anticipation of litigation-whether in the form of memoranda or deposition testimony. *See, e.g., In Re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir 1988); *see also In Re Grand Jury Subpoena*, 282 F.3d 156, 160 (2d Cir. 2002); *Shelton*, 805 F.2d at 1328.

Within the above framework of law I find that the testimony the Secretary seeks from Mr. Yuhas clearly falls into the protections of the work product doctrine. Mr. Yuhas, Rosebud's attorney was present at the interviews of the miner witnesses representing the company's legal interests in the event MSHA brought an enforcement action related to the circumstances involved in the roof fall. Any recollection of these interviews would necessarily involve Mr. Yuhas' mental impressions because his memory would likely be limited to what was significant to his representation of Rosebud in this matter. *See, e.g., Shelton*, 805 F.2d at 1329 (attorney's recollection would indicate that "since it was important enough to remember, she must be relying on it in preparing her clients's case."); *see also Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) ("[A] lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case.").

I further find that the Secretary cannot circumvent the work product doctrine by merely asserting that she will not inquire into the mental impressions or work product of Mr. Yuhas. Indeed, as evidenced in the cited cases, it is because of the near impossibility of separating testimony of objective fact from testimony reflecting mental impressions that courts have afforded work product based on oral statements near absolute protection.

Even assuming, *arguendo*, that Mr. Yuhas' testimony could somehow be limited to factual work product without revealing his mental impressions, I find that the Secretary still could not make the required showing of substantial need and undue hardship to overcome the work product protections afforded even factual information. Factual work product is discoverable only if a party can show that (1) it has a substantial need for the information in preparation for its case and (2) that it is unable without undue hardship to obtain the substantial equivalent of the information by other means. *See, e.g., Baker*, 209 F.3d at 1054. Discovery of a witness statement based on allegations of substantial need and undue hardship in otherwise acquiring the information is "generally not allowed if that witness is available to the [requesting] party." See *Baker*, 209 F.3d at 1054. In addition, a party normally cannot show a substantial need for information when "it merely seeks corroborative evidence." *Id.; see Vinson & Elkins, LLP*, 124 F.3d at 1308.

Here, as in *Vinson & Elkins* and *Baker,* the information the Secretary seeks to obtain by deposing Mr. Yuhas is clearly only corroborative evidence. The Secretary apparently believes there are discrepancies between miner statements given during the accident investigation interviews and the miner's deposition testimony. However, there were apparently at least five other witnesses including federal and State investigators present during the interviews who could also provide the Secretary with testimony as to the miners' interview statements. In addition, it is not disputed that the miner witnesses themselves were interviewed by two MSHA special investigators in January 2006 and were also later deposed by counsel for the Secretary in June 2006. Thus, because the purpose for seeking Mr. Yuhas' testimony is only for corroboration of statements of which MSHA is already aware, because other witnesses were present during the interviews and because the witnesses themselves have been available for questioning, there is not substantial need for Mr. Yuhas' testimony, nor would there be undue hardship in acquiring comparable testimony. Under established precedent, the Secretary cannot, in any event, therefore

make the showing required to overcome the work product privilege afforded Mr. Yuhas' recollections of the miners' interview statements.

Under the circumstances, there is no need to discuss Rosebud's proposed alternative rationale, under the *Shelton* case, to protect Mr. Yuhas' recollection of the witness interviews.

ORDER

Rosebud's Motion to Quash the Subpoena of Joseph A. Yuhas is hereby granted.

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Administrative Law Judge
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