FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 7, 2000

KEYSTONE CEMENT COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 99-137-RM
	:	Citation No. 4439698; 2/9/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 99-138-RM
ADMINISTRATION, (MSHA),	:	Order No. 4439699; 2/9/99
Respondent	:	
	:	Keystone Cement
	:	Mine ID No. 36-00125
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-29-M
Petitioner	:	A.C. No. 36-00125-05571
v.	:	
	:	
KEYSTONE CEMENT COMPANY,	:	
Respondent	:	Keystone Cement Co.

ORDER DENYING MOTION TO COMPEL

During the course of discovery the Secretary has revealed to Keystone Cement Company (Keystone) the names of all of her potential witnesses and has produced the notes of interviews that have been conducted, redacting in each case however the identity of each interviewee asserting, *inter alia*, the government informant's privilege. Keystone seeks, by motion to compel, the disclosure of the identity of each interviewee and identification with his corresponding statement.

The informant's privilege is the well-established right of the government to withhold from disclosure the identity of any person who provides information about violations of the law to law enforcement officials. *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Secretary v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (November 1984). The purpose of the privilege is two-fold: to protect the public interest, by maintaining a free flow of information to the government concerning possible violations of the law, and to protect persons supplying that information from retaliation. *Bright*, 6 FMSHRC at 2522-2523 (quoting *Roviaro*, 353 U.S. at 59).

Keystone argues that by revealing the names of all her potential witnesses, the Secretary has in fact waived the informer's privilege. While it is true that the informer's privilege

technically extends only to the identity of an informer and not to a known informer's statement Keystone does not yet know whether the persons identified as witnesses are "informants" *per se*. This is because Keystone does not know whether any of these witnesses spoke disparagingly or in an incriminating manner about Keystone or others and are thus in need of the protection afforded by the informant's privilege. This distinction was noted in *Martin v. Albany Business Journal Inc.,* 780 F.Supp. 927 (N.D.N.Y. 1992), citing *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 at 306 (5th Cir. 1972):

> Knowing the identity of persons who have given statements to the Secretary is not equivalent to knowledge of which of those persons were informers within the context of the privilege. Only when the content of the statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorably. In short, if the employee is not known to the defendant as an informer but merely as a statement giver, then disclosure of the statement might reveal him as an informer. 459 F.2d at 306.

As the court noted in the *Martin* case, disclosure of the identity of the statement givers in association with their statements would reveal for the first time whether any of those witnesses were "informers," i.e., speakers who implicated as opposed to mere "statement givers." As that court stated, such a disclosure would defeat the very purpose of the informant's privilege. Since Keystone does not know which of the witnesses were "informers" as that term relates to the informer's privilege there has been no waiver of the informer's privilege as to their identification with particular statements.

Keystone argues that the privilege is, in any event, qualified and must yield where disclosure is essential to the fair determination of a case. *Bright*, 6 FMSHRC at 2523 (quoting *Roviaro*, 353 U.S. at 60-61). The burden of proving facts necessary to show that the information sought is essential to a fair determination rests however with the party seeking disclosure. *Secretary v. Asarco, Inc.*, 12 FMSHRC 2548, 2555 (December 1990) (quoting *Bright*, 6 FMSHRC at 2526). In *Asarco*, the Commission reiterated its holding in *Bright*, stating that the informant's privilege is "well-established, but qualified," and that it is "applicable to the furnishing of information to government officials concerning possible violations of the Mine Act." *Asarco*, 12 FMSHRC at 2553.

The privilege is overcome only by a showing that the opposing party's need for the information outweighs the government's need to maintain the privilege to protect the public interest. *Bright*, 6 FMSHRC at 2526. Therefore, the opposing party must demonstrate special circumstances or a substantial need for the information sought. Factors to be considered in determining whether the information sought is essential to a fair determination include: (a) whether the Secretary is in sole control of the requested material; (b) whether the material sought is already within the control of the party seeking it; and (c) whether that party had other avenues available from which to obtain the substantial equivalent of the requested material. *Bright*, 6

FMSHRC at 2526.

In this regard Keystone makes the following representations:

> In this case, Keystone will be unable to depose several key eyewitnesses to the case, the former Murray's Contracting employees, without knowing which employees gave which statements to MSHA. Simply put, this information is critical which eyewitnesses saw which events at the time of the accident [citation ommitted]. Keystone does not have alternative means of obtaining the same information-the Murray's Contracting employees were the only witnesses to the events. Moreover, Murray's Contracting has ceased operations and its employees may not be accessible to Keystone as trial witnesses. Given that those individuals' recollections may be offered at trial by MSHA as hearsay testimony, it is all the more critical for Keystone to be able to evaluate the nature of such initial statement. Therefore, even if, *arguendo*, a legitimate claim for privilege existed, Petitioner's need for this information outweighs the Secretary's need to protect it.

I find Keystone's claims to be overstated. Keystone has been provided the identities of all witnesses including the former Murray Contracting employees and is free to interview and/or depose those persons. In addition, the witnesses are subject to the court's jurisdiction by subpoena so that Keystone's claims that certain persons may not be accessible as trial witnesses is without substance. Finally, since Keystone has in its possession all of the statements that have taken from the "informants," and states that it will be deposing the MSHA inspectors, it now has or will have available what may be anticipated at trial as hearsay testimony. Keystone may explore those statements in any event during interviews of the named witnesses. Under the circumstances I do not find that such circumstances exist as would warrant the disclosure of the privileged information.

If, during trial, Respondent can demonstrate prejudice by the failure to have had the information now sought, an appropriate request for continuance would be considered by the trial judge at that time.

ORDER

The Respondent's Motion to Compel is denied.

Gary Melick
Administrative Law Judge
703-756-6261

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