FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 26, 2004

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2003-150-R
v.	:	Order No. 7670455; 06/26/2003
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2003-151-R
MINE SAFETY AND HEALTH	:	Order No. 7670457; 06/27/2003
ADMINISTRATION (MSHA),	:	
Respondent	:	No. 5 Mine
	:	Mine ID 01-01322

DENIAL OF MOTION FOR FOR PROTECTIVE ORDER

The Secretary of Labor has moved for a protective order barring the depositions of three employees of her Mine Safety and Health Administration (MSHA). For reasons that follow, the motion is **DENIED**.

PROCEDURAL BACKGROUND

In Docket No. SE 2003-150-R, Jim Walter Resources, Inc. (JWR) seeks review of Citation No. 7670455 pursuant to Section 105(d) of the Mine Act (30 U.S.C. § 815(d)). In Docket No. SE 2003-151-R, JWR seeks review of subsequently issued Order No. 7670457. Citation No. 7670457 was issued on June 26, 2003, by MSHA Inspector Stephen Harrison. The inspector cited JWR for a violation of 30 C.F.R. § 75.334(b)(1) at its No. 5 Mine. The citation alleges that "the bleeder system for the I-panel was not being maintained in a manner to continuously dilute and move methane-air mixtures and other gases . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine" (Citation 1). The citation further states that the finding of violation is based on a review of the mine examination books for the longwall panel and bleeder split and on methane readings recorded therein over a 16-day period (June 17, 2003 through June 25, 2003). The readings "taken collectively indicate that the bleeder system can no longer handle the current methane liberation" (Citation 2).

Section 75.334(b)(1) requires the bleeder system for a longwall "to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases from the worked-out area away from active workings and into a return air course." Inspector Harrison

cited the violation at 7:00 p.m. He gave JWR until 6:00 p.m. the following day to abate the violation (Citation 1-2).[1]

On June 27, Harrison returned to the mine. He determined that the citation had not been abated and, at 7:45 p.m., he issued Order No. 7670457. The inspector stated on the order that JWR had "failed to make improvements to enhance the effectiveness of the longwall bleeder system," in that the system continued "to liberate high quantities of methane" and could not "continuously dilute the m[e]thane to safe operating levels" (Order). The order was issued pursuant to Section 104(b) of the Mine Act (30 U.S.C. § 814(b)), which requires an inspector to issue an order when he or she determines a violation has not been abated within the period of time set for abatement and that the abatement time should not be further extended.

JWR filed the contests, contending it had not violated section 75.334(b)(1). JWR asserted the methane readings which the inspector used were under the methane level prohibited by law. Although the citation noted an "upward trend" in methane, JWR maintained "An 'upward trend' that does not reach the lawful limit cannot be the foundation of a valid citation or order" (Notice of Contest 2-3). It further argued that at the time it was cited, there was full compliance with the mine's approved ventilation plan. In addition, JWR took issue with the inspector's findings regarding S&S, gravity and the company's negligence (Id. 3-4). Finally, JWR asserted the inspector did not "articulate a reasonable abatement action and did not establish a reasonable time period for JWR to abate the alleged violative conditions" (Id. 4).

The contests were assigned to then Commission Administrative Law Judge Irwin Schroeder, and Judge Schroeder ordered the parties to submit, inter alia, a summary of their legal arguments, a list of exhibits to be offered in evidence, and a list of witnesses to be called, with a summary of the testimony to be given by each witness (Prehearing Order). Pursuant to the order, the Secretary listed six witnesses. In addition to Inspector Harrison, she included the chief of the ventilation division of MSHA Safety and Health Technologies Center, who would testify regarding his inspection and investigation of the cited area and his resulting evaluation of the evaluation of the cited bleeder system; an MSHA ventilation specialist who accompanied the chief of the division during the chief's inspection, who would testify regarding his observations during the inspection; the Assistant District Manager of MSHA District 11, Gary Wirth, who would testify regarding his contact with JWR concerning compliance with section 75.334(b)(1) and his contact JWR regarding its abatement efforts after the citation was issued; and two MSHA inspectors who also inspected the cited area, who would testify regarding the results of their inspection. The Secretary further stated that she would call several miner witnesses (Sec's Response 4-6).

With regard to the citation, the Secretary maintained the primary issue was whether JWR

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[1] Harrison also found the violation was a significant and substantial contribution to a mine safety hazard (S&S), that it was reasonably likely to result in lost workdays or restricted duty for ten miners and that it was the result of JWR's moderate negligence.

violated the standard and argued JWR did so when it failed to maintain an effective bleeder system to continuously dilute and move methane-air mixtures away from active workings. The Secretary asserted that "compliance with this standard requires more than simply directing air into a bleeder system if that system is not sufficient or is not effective to move methane . . . out of worked-out areas and away from active workings" (Sec.'s Response 7).

With regard to the order, the Secretary maintained that the issues were whether JWR took "substantial steps to abate the violation" and whether it "showed a lack of good faith in attempting to come into compliance" (Sec.'s Response 7).

JWR responded to Judge Schroeder's order by naming ten persons from mine management who would testify that the conditions described by Inspector Harrison were inaccurate and/or exaggerated, that the cited bleeder system was adequately controlling the air passing through the area and was continuously moving methane-air mixtures in "substantial compliance" with applicable regulations, that the inspector improperly designed the violation S&S, that the inspector failed to provide a reasonable abatement period and that the on-site conditions did not support Harrison's gravity and negligence findings (Preliminary Statement 4-5).

A hearing was scheduled for December 2, 2003, and the parties began discovery.[2] As part of its discovery effort, JWR noticed its intent to depose Chris Weaver, MSHA Investigation Specialist, Coal Mine Safety and Health, Arlington, Virginia; John Langston, MSHA's Assistant Administrator of Coal Mine Safety and Health, Arlington, Virginia; and Richard Gates, MSHA's District Manager of District 11, Birmingham, Alabama, and the Secretary moved for the protective order at issue.

The Secretary would have me bar the depositions on several grounds. She asserts that none of the three men have firsthand, direct knowledge of the facts related to the issuance of the citation and order.[3] Consequently, in the Secretary's view, nothing about which the proposed deponents can be questioned is relevant to the issues in the cases.

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[2] Subsequently, the hearing was continued to allow more time for discovery. A short time later, Judge Schroeder left the Commission, and the cases were reassigned to me.

[3] The Secretary states that Langton and Weaver are based in Arlington, Virginia, that Langton never has been to the No. 5 Mine and that Weaver's primary connection to the cases was to contact "John Urosek and William Spens, two MSHA employees, and [facilitate] their travel to the . . . mine to aid in the investigation of the adequacy of the ventilation and in the effort to abate the hazardous levels of methane on the . . . [l]ongwall" (Motion 6-7). The Secretary states that Gates's connection with the citation and order was "to consult with his inspection staff and to advise them regarding the proper courses of action" (Id.7).

The Secretary also asserts discussions between the proposed deponents and MSHA personnel are protected by the work product and deliberative process privileges (Motion 8) and that Langton's and Gates's official positions (she terms them "high government officials") exclude them from being deposed except under extraordinary circumstances, which do not exist here (Id.).

JWR responds that its intent to depose Langton, Weaver and Gates is based upon statements made by Wirth when he was deposed by JWR. JWR notes that Wirth stated he called Weaver the night the citation was issued and that Weaver reviewed the language of the citation with Wirth (Contestant's Response 1, citing Exh. C 173-174). In a sworn declaration submitted by the Secretary, Weaver adds that he and Wirth "discussed various legal and factual issues, including courses of action to solve the methane problems on the . . . [l]ongwall [panel]" (Motion, Exh. D 2). Weaver also acknowledges that Wirth sent him a "draft copy of the citation . . . for my review" (Id.).

JWR also notes Wirth's statement that once the citation was issued, JWR's written abatement proposal was sent by fax to MSHA headquarters in Arlington, Virginia, and that Wirth discussed the proposal with Langton and Weaver (Contestant's Response, Exh. C 195). Wirth described the decision to issue the order as a "collaborative decision" involving Wirth, Harrison, Gates, Langton and Weaver. (He also thought Urosek and Calhoun "probably" were involved (Id. 237)). In a sworn statement submitted by the Secretary, Langton agreed that he was contacted by Wirth and Gates "about issuance of the citation and order" and that his discussions "involved expressions of opinion, recommendations and proposed courses of action to take after the facts were provided to me by . . . Wirth" (Motion, Exh. C 2). Likewise, Gates agreed he, too, consulted with Wirth and Harrison "about circumstances relating to the hazardous conditions that existed on the [l]ongwall [panel], about . . . options for clearing up these conditions and about necessary enforcement actions to insure compliance and abatement" (Id., Exh. E 3). Like Langton, he stated that his discussions "involved expressions of opinion, recommendations and proposed courses of action based on the facts provided to me by . . . Wirth and . . . Harrison (Id. 4).

Finally, JWR asserts that UMWA leaders "pressured" MSHA to issue the citation and order, that Langton, Weaver and Gates have explicit knowledge of the pressure and that a "proper subject of inquiry is when how . . . [they] gained this knowledge" (Contestant's Response 3). JWR argues it needs to be able to conduct "reasonable discovery" into the issue of whether the citation and order were the result of bad faith or arbitrary action on MSHA's part (Id.).

RULING

I.

ARE THE PROPOSED DEPONENTS LIKELY TO HAVE RELEVANT INFORMATION?

In general, JWR is entitled to all relevant factual information in possession of the Secretary that has properly been requested through discovery, unless disclosure is barred by a privilege. Therefore, the first question is whether any of the proposed deponents are in possession of information relevant to the issues in the contests.

In both proceedings, the primary issue is whether the conditions observed and cited by Inspector Harrison constituted a violation of Section 75.334(b)(1). Relevant information would be the conditions observed by the inspector and others as reflected in the language of the contested citation. Equally relevant would be the reasons why the inspector and others believed the conditions constituted a violation of the standard.[4] If the decision to issue the citation was based in part on Wirth's consultation with Weaver, then the role Weaver played in drafting the language that reflects the conditions would be relevant to the issue of whether the citation as issued reflects a violation of the standard.[5] Weaver may be deposed about his consultation with Wirth, his input into the language of the citation, his opinion as to whether the conditions constituted a violation, and his input and opinions about other findings on the face of the citation, unless such information is protected by privilege.

In addition, in his sworn statement, Langton agreed Wirth had contacted him regarding the issuance of the citation (and the order) and that they had discussed the facts and the courses of action to take (Motion, Exh. C 2). To the extent their discussions involved the existence of the alleged violation and setting of the abatement time, they are relevant and Langton may be deposed about them, unless such information is protected by privilege.

According to Langton, he and Gates also discussed issuance of the citation and the "proper courses of action to take" (Motion, Exh. C 2). To the extent these discussions involved the existence of the alleged violation, they are relevant and Gates may be deposed about them, unless such information is protected by privilege.

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[4] See Contestant's Response, citing C 173-174 (Wirth's description of his consultation with Weaver.

[5] The Secretary's contention that the men cannot be deposed because they do not have "firsthand, direct knowledge of the facts" is rejected (Motion 7). Such knowledge may have a bearing on the weight assigned to their information, but, it is not a sine qua non for relevance.

If a violation existed, then the next primary issue is whether the time set for abatement was reasonable and if the Secretary abused her discretion in failing to extend that time (Energy West Mining Company, 18 FMSHRC 565, 568 (April 1996)). Abuse of discretion is determined by considering factors such as the degree of danger an extension would have caused miners, the diligence of JWR in attempting to meet the time originally set for abatement, and the disruptive effect an extension would have had on operating shifts (see, e.g., Clinchfield Coal Co., 11 FMSHRC 2120, 2128 (November 1989)).

Wirth stated in his deposition that the decision to issue the order, and, hence, the decision, that it was not reasonable to further extend the time for abatement was "collaborative" and involved, among others, Weaver, Langton and Gates (Contestant's Response, citing C 237). Weaver's role, if any, in deciding the time should not be further extended is relevant to the issue of the validity of the order and, unless barred by privilege, is subject to discovery. Moreover, since Wirth included Gates and Langton among the "collaborators" in the decision to issue the order (see Contestant's Response C 237) – a role strongly implied by Langton's and Gates's statements (Motion, Exh. C 2, E. 3) – the parts they played, if any, in deciding the time for abatement was reasonable and should not be further extended are relevant and, unless barred by privilege, are subject to discovery.[6]

II.

IS THE INFORMATION PROTECTED BY PRIVILEGE?

The Secretary argues that the work product and deliberative process privileges protect the proposed deponents' "mental impressions, consultative conversations and expressions of regulatory concern" (Motion 8). The Secretary asserts that "the only basis JWR can have in seeking to depose Langton, Gates and Weaver is to inquire into the decision-making processes and procedures of these officials . . . and to inquire as to the nature and substance of their consultations with subordinates and fellow enforcement personnel. These inquiries are prohibited under the deliberative process privilege" (Id. 14-15).

The "deliberative process" privilege protects,

> the "consultative functions" of government "by maintaining the confidentiality of 'advisory opinions,' recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." The privilege attaches to inter- and intra-agency communications that are part to the

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[6] As noted, JWR also seeks to question Langton, Weaver and Gates as to their "explicit knowledge of UMWA pressure," pressure that it alleges may underlie issuance of the citation and order (Contestant's Response 3). Such questions are irrelevant to the fundamental issues in the case and are not subject to discovery.

> deliberative process preceding the adoption and promulgation of an agency policy.

Jordan v. United States Depart. of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (citations omitted). For the privilege to apply, the communications between subordinates and superiors must be "antecedent to the adoption of an agency policy" and the communications must be "deliberative," which means they "must be related to the process by which policies are formulated" (Id. 774). The purpose for the privilege is to allow "government officials freedom to debate alternative approaches in private" (In re Sealed Case, 121 F3d 729, 737(D.C. Cir. 1997).

Given these principles, to the extent the proposed deponents' communications involve the actual issuance of the citation and order, the communications are not protected. As has been noted, there is reason to believe that Weaver, Langton and Gates communicated about and participated in the actual issuance of the citation. If so, they were part of the decision-making process based on the particular circumstances at the mine as they understood them. If JWR can question Harrison and Wirth about the reasons for issuing the citation, I see no reason why JWR cannot likewise question Wirth, Langton and Gates regarding their roles.

The same is true regarding Weaver, Langton and Gates and the collaborative role they played in determining that the order should be issued. According to Wirth, they were components of the decision-making process to not further extend the time for abatement, a process based on the conditions and circumstances at the mine as they understood them. JWR questioned Harrison and Wirth about the reasons for issuing the order, and I see no reason why JWR cannot also question their collaborators about their participation in the decision.

I reject the Secretary's privilege argument because I conclude there is a difference between the process of adopting a policy and the process of implementing the policy based on particular conditions and circumstances. Questioning Weaver, Langton and Gates about communications that lead directly to the issuance of the citation and order does not impinge upon the freedom of MSHA officials to debate alternatives. Rather, it is questioning that is sui generis to the particular circumstances and conditions that resulted in the specific contested enforcement actions, and, in my view, it should be allowed.

III.

ARE DEPOSITIONS BARRED BECAUSE THE PROPOSED DEPONENTS ARE HIGH GOVERNMENT OFFICIALS?

The Secretary argues that the proposed deponents are exempt from deposition by virtue of the official positions they hold. However, and with all due respect to the proposed deponents, they are not the type of "top government officials" to whom the protection usually is extended (see, e.g., Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982), cert. denied sub nom Schenberg v. Bond, 459 U.S. 878 (1982) (seeking to depose state governor); Kyle Engineering Co. v.

Kleppe, 600 F.2d 226, 231-232 (seeking to depose administrator of a federal agency); Warren v. Camp, 396 F.2d 52, 56 (6th Cir. 1968) (seeking to depose Comptroller of the Currency). Moreover, the information about which they may be questioned cannot be obtained elsewhere, but, rather, concerns their communications with Harrison and Wirth and with one another that lead directly to the citation and order at issue. In sum, given the direct roles the proposed deponents may have played with respect to the issuance of the citation and order, no reason is apparent to me why they should not be deposed.[7]

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[7] Certainly, the depositions will not be unduly burdensome, in that JWR has offered to travel to Arlington, Virginia, to depose Langton and Weaver. Gates's office is located in Birmingham, Alabama, and he will be no more inconvenienced than were Wirth and Harrison, who already have been deposed.