FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
October 9, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-24-D
ON BEHALF OF	:	NORT CD 2000-04
DONNIE LEE LOWE,	:	
Complainant	:	
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	VP #8 Mine
Respondent	:	Mine ID 44-03795

ORDER GRANTING, IN PART,
AND
DENYING, IN PART, MOTION TO COMPEL

This case is before me on a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent filed a request for production of documents with the Secretary. Citing the "work product" and "informant's" privileges, the Secretary declined to furnish MSHA's investigative report as well as 21 exhibits which accompanied the report. Consequently, the Respondent has filed a Motion to Compel disclosure of the documents. Relying on the privileges previously asserted, the Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

The Secretary has provided the disputed documents for my *in camera* review. In addition, counsel has furnished suggested redactions to documents, should I order their disclosure. At the outset, the following general observation is made. This case, which could involve a substantial civil penalty, is being brought by the U.S. Government.[1] Clearly, the parties are not equal in terms of resources. With that in mind, the Secretary would be better served by erring on the side of disclosure than by claiming every possible privilege. Nonetheless, while the Secretary can choose not to assert a privilege, I cannot, but must apply the law as it is invoked.

The Commission has held that in order for material sought in discovery to be protected by the "work product" privilege, it must be: (1) tangible documents and things, (2) prepared in

[1] The civil penalty could be as high as $55,000.00. The Secretary has not yet filed the amended complaint, promised in the original complaint filed on April 20, 2001, to state the amount of civil penalty being sought in the case.

anticipation of litigation or for trial, and (3) by or for another party or by or for that party's representative. *Asarco, Inc.*, 12 FMSHRC 2548, 2558 (December 1990) (*Asarco I*). Island Creek argues that the documents in question were not prepared in anticipation of litigation, but rather were prepared in the ordinary course of business as required under the Act.[2] The Company further asserts that the one year delay between MSHA's investigation and the filing of the complaint with the Commission indicates that the investigation was not in anticipation of litigation. Contrary to these claims, however, I find that the "work product' privilege does apply to MSHA's investigation.

In *Asarco I*, the Commission held that a 110(c) special investigation, 30 U.S.C. § 820(c), is undertaken in anticipation of litigation. *Id.* at 2559. In so holding, the Commission stated that:

> A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed.

Id. Similarly, in this case, a major function of an MSHA investigation is to determine whether litigation should be commenced under section 105(c). At the beginning of the investigation, the investigator did not know whether charges would be filed in the case. Nevertheless, the purpose of her investigation was to allow the Secretary determine whether a case should be filed.

Accordingly, I find that MSHA's investigation was carried out in anticipation of litigation. Further, I do not find that the delay between the investigation and the filing of the complaint changes that conclusion. Therefore, I conclude that the "work product" privilege applies to the 105(c) investigation in this case.

Turning to the documents themselves, I find that the Final Report of Discrimination Investigation and the accompanying chronology are clearly covered by the "work product" privilege as they are documents prepared in anticipation of litigation by the Secretary's investigator.

---

[2] Section 105(c)(2), 30 U.S.C. § 815(c)(2), requires that once the Secretary receives a complaint of discrimination, she "shall cause such investigation to be made as [s]he deems appropriate."

Exhibits 4-10, 14-18 and 25-27 are statements of miner witnesses.[3] These statements, taken by the investigator during the investigation, are also covered by the "work product" privilege. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986).

Exhibits 13, 19-22 and 24 are each entitled "Memorandum of Interview" and consist of memoranda of statements of miner witnesses prepared by the investigator "after refreshing [her] memory from notes made during and immediately after the interview." These, too, clearly come with the "work product" privilege. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997).

Having found that all of the documents are entitled to "work product" immunity, "they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3)." *Asarco I*, 12 FMSHRC at 2558. While the company may meet the first part of the test, it has failed to demonstrate that the second part is applicable.

Island Creek has not specifically claimed, much less made any attempt to show, that it has a substantial need of these materials in preparation of its case. Nonetheless, it is apparent from the statements that they go directly to the alleged discrimination in this matter. Therefore, I will assume for the purposes of this order, that the Respondent meets the substantial need prong of the test.

The company has failed, however, to demonstrate, that it cannot obtain, without undue hardship, the substantial equivalent of the materials by other means. It asserts that: "In this case, Ms. Hall conducted an investigation over discreet events that occurred over a year and a half ago. Island Creek has no way to obtain the same or substantially similar information to that collected by Ms. Hall in her routine, contemporaneously-conducted investigation." (Motion at 3.) If all that is necessary to obtain documents that are otherwise not discoverable is to show a lapse of time between the preparation of the document and the time it is sought, the privilege would be eviscerated. Clearly, more is required.

The Respondent has access to the same individuals with knowledge of the alleged discrimination as did Ms. Hall and can question them in the same manner, under *subpoena*, if necessary. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (August 1992) (*Asarco II*). Other than a lapse in time, Island Creek has made no showing that it attempted to question witnesses and they could not remember what happened, that some witnesses are not longer available, that it would have to

---

[3] Counsel for the Secretary's states, in his reply, that: "None of the Exhibits at issue contain a statement which was either prepared or signed by a witness." (Sec. Reply at 2.) This is plainly incorrect.

go to unusual expense to obtain the information contained in the documents or that some other *actual* reason prevents the company from obtaining this information.

The courts have held that "broad unsubstantiated assertions of unavailability or faulty memory are not sufficient" to meet the undue hardship test. *In re Intl. Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982). Island Creek has not even made that specific of a claim. Accordingly, I conclude that it does not meet the undue hardship test and that the documents, with the exception of Exhibits 14-18, need not be disclosed.[4]

With regard to Exhibits 14-18, which are statements of Island Creek managerial employees, as the Respondent has correctly pointed out, Fed. R. Civ. P. 26(b)(3) provides that: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Since Island Creek, the party, is a corporation, it follows that it may obtain statements of its agents without the required showing of substantial need and undue hardship.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent Exhibits 14-18. In all other respects, the Motion to Compel is **DENIED** and the Secretary need not disclose the investigative report and chronology and Exhibits 4-10, 13, 19-22 and 24-27.[5] It is **FURTHER ORDERED** that the documents provided for my *in camera* review shall be sealed subject to review only by the Commission or other appellate body.[6]

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

[4] Having found that the "work product" privilege applies to all of the documents at issue, I do not reach the Secretary's assertion of the "informant's privilege."

[5] The Respondent will be receiving the names of the Secretary's miner witnesses on December 11, 2001. At that time, counsel for the company should also receive all statements made by those miners who will be witnesses. *Asarco II*, 14 FMSHRC at 1331.

[6] The redacted copies of the exhibits will be returned to counsel for the Secretary.

Distribution: (Certified Mail)

Alfred R. Hernandez, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Eric R. Thiessen, Esq., Penn, Stuart & Eskridge, P.O. Box 2288, Abingdon, VA 24212

/nt