FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 6, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	MASTER DOCKET WEVA 93-146-B
	:	Blacksville No. 1 Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER GRANTING IN PART AND DENYING IN PART CONSOLIDATION COAL COMPANY=S MOTION TO COMPEL DISCOVERY

Background:

These civil penalty proceedings were filed by the Secretary with this Commission on March 9, 1993, but were thereafter stayed at the request of the Secretary because of a related criminal investigation. By letter dated December 21, 1994, the Secretary advised that the criminal investigation had been concluded and that, while the basis for the stay was no longer applicable, because of other significant litigation the attorneys for both parties were involved in and, because of the extensive discovery the parties anticipated in these proceedings, the parties were seeking a further delay in trial scheduling.

The cases were subsequently scheduled for trial on August 15, 1995, but the parties again requested a continuance because of the need for additional discovery and the Acomplex nature of the issues involved@. Hearings were accordingly rescheduled to commence on October 31, 1995, in several of the related cases. The instant cases are among those for which the parties requested an additional continuance because of the severability of the issues and limited availability of expert witnesses. Hearings in the instant cases were then rescheduled to commence on December 12, 1995.

Further continuances were necessitated by the disruption caused by several budgetary shutdowns of the government. Hearings were thereafter rescheduled to commence on March 5, 1996. However, on February 22, 1996, Consolidation Coal Company (Consol) moved pursuant to Commission Rule 59, 29 C.F.R. ' 2700.59, for an order compelling discovery and it was necessary to again postpone trial. Two of the four categories of information requested in that motion remain at issue, i.e. Aall documents prepared by MSHA Investigator George Bowman concerning

the investigation of the Blacksville No. 1 Mine explosion@ and Aall documents prepared, used or reviewed in connection with the drafting of the ›Internal Review of MSHA=s Actions at the Blacksville No. 1 Mine= report published on August 17, 1993". (See Consolidation Coal Company=s second motion to compel discovery filed on May 10, 1996).

1. Documents prepared by Investigator Bowman:

Deputy Associate Solicitor Thomas Mascolino states in his memorandum accompanying the Secretary=s response to the Motion to Compel Discovery that some of the documents prepared by Investigator Bowman were being withheld from the Secretary at the direction of the U.S. Attorney for the Northern District of West Virginia pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. The Secretary accordingly maintains that those documents are not in his Apossession, custody, or control@ and are not therefore within the scope of Rule 34 of the Federal Rules of Civil Procedure. The Secretary further notes that Consol may obtain those documents by filing an appropriate motion under Fed.R. Crim. P.6(e)(3)(D) with the Office of the United States Attorney for the Northern District of West Virginia. The Secretary=s position in this regard is supported by law and is accordingly upheld.

The Secretary has also provided the undersigned with what has been designated as all remaining documents prepared by MSHA Investigator Bowman, for in-camera review of the Secretary=s claimed privilege under the work product rule. The documents, five memoranda of interviews (and the notes of one interviewee), contain only the reported statements of the interviewees and do not contain any mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. The work product privilege has been codified in the Federal Rules of Civil Procedure, Rule 26(b)(3), which provides in relevant part:

> . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party=s representative (including the other party=s attorney, consultant, surety, indemnitor, insurer, or agent) 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Commission has explained that the work product privilege offers qualified immunity against discovery for materials that are:

1. documents and tangible things;
2. prepared in anticipation of litigation or for trial; and
3. by or for another party or by or for that party=s representative.

Secretary of Labor v. ASARCO, 12 FMSHRC 2548, 2558 (December 1990) (*citing* 8 C. Wright & A. Miller, *Federal Practice and Procedure* ' 2024, pp. 196-97 (1970); 6 J. Moore, J. Lucas & G. Grotheer, *Moore=s Federal Practice* & 26.64 (2d ed. 1989)). The Secretary claims in this case that the subject memoranda constitute (1) documents and tangible things, (2) prepared in anticipation of litigation, and (3) by or for another party or by or for that party=s representative. As noted, the subject memoranda may nevertheless be subject to discovery Aupon a showing that the party seeking discovery has substantial need . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.@ *Id. at 2558.*

The Secretary claims that all of the interviewed individuals provided testimony to the accident investigation team in the presence of Consol=s counsel and representatives. He notes that Consol was therefore aware of these witnesses and could have questioned or deposed each of them. The Secretary further notes that two of the five individuals interviewed by Bowman were management officials for Consol, i.e. Russell DeBlossio and Van Wayne Pitman. The Secretary advises that the work notes taken by DeBlossio, which were included with investigator Bowman=s memorandum, have been available to Consol from the outset of the proceedings and the Secretary would, in any event, produce a copy of those notes upon request.

Finally, the Secretary notes that two of the remaining three individuals interviewed by Bowman have been listed as trial witnesses by the Secretary and that Consol has not taken their depositions. He notes, moreover, that their initial statements to the accident investigation team have already been provided to Consol. In conclusion, the Secretary argues that because Consol had been able to obtain the substantial equivalent of these materials through other means the files herein should be protected under the work product rule and that Consol=s request for production of these documents should be quashed.

Consol argues on the other hand that the Bowman memoranda of interviews should not, in any event, be protected because they were not prepared Ain anticipation of litigation@ as required by the work product rule. In *Asarco,* however, at page 2559 the

Commission noted that a special investigator does not know at the outset of his investigation whether charges will be filed in that particular case but nevertheless the purpose of his investigation may be deemed to be in anticipation of litigation.

Consol maintains, in essence, that it has a substantial need for the memoranda of interviews to compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements. Clearly Consol could not make such a critical comparison without the subject memoranda. Accordingly, whether or not the work product privilege applies to the subject documents, Consol has a substantial need for those documents and has no other way of obtaining the precise information. The Secretary is therefore directed to produce copies of the subject documents to Consol within ten (10) days of this order.

(2) The internal review files:

Consol further seeks in its motion to compel discovery Aall remaining documents prepared, used or reviewed in connection with the drafting of the ›Internal Review of MSHA=s Actions at the Blacksville No. 1 Mine= report published on August 17, 1993, which the Secretary has withheld from discovery.@ According to Consol fifty-five files of documents from the special investigation remain at issue for in-camera evaluation of the Secretary=s various claims of privilege. These have been identified in the Secretary=s AVaughn@ index as File Numbers: 2(b), 4, 5, 8(b), 12(a), 14, 16(b), 20, 21, 24(a), 24(b), 29, 31, 33, 35, 37, 39, 63(a), 66, 67, 69(b), 70(b), 71, 74, 75, 76, 77, 79(b), 81(b), 88, 91(a), 91(b), 96(a), 96(b), 97, 103(b), 103(c), 103(j), 103(k), 103(m), 103(n), 103(o), 103(q), 103(r), 105, 106, 107, 109, and 110.

The framework for discovery before this Commission is set forth in Commission Rule 56(b), 29 C.F.R. ' 2700.56(b). That rule provides that Aparties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.@ ARelevance@ for purposes of my in-camera examination of these documents in this discovery setting was framed by Consol in its first motion to compel discovery and in the following terms:

> The Secretary apparently takes the position that the interviews given by its two inspectors to the investigators, as well as the interviews given by enforcement personnel in District 3, are not in any way relevant to the allegations in this matter. It is Consolidation=s position that the eye witness observations, impressions and actions of the two inspectors are directly relevant to whether a reasonable mining person would have recognized the

> conditions which led to the Blacksville explosion. In addition, other interviews documented confusion among MSHA district enforcement personnel as to whether the ventilation plan and other applicable regulations were complied with both prior to and during the capping of the production shaft.
>
> The Secretary=s 104(d) citations and orders in this case allege either high negligence or reckless disregard of the law by Consolidation. These are very serious accusations, and it appears that the Secretary is trying to shield his own employees from post-accident scrutiny, while Consolidation=s agents are being subjected to the very worst sort of Monday morning quarterbacking. The requested information is relevant to the ability of Consolidation=s employees to recognize hazards at the production shaft and MSHA=s own ventilation plan enforcement practices that existed at the time of the explosion.@

As the Secretary noted, however, at the hearing on Consol=s first motion to compel discovery held February 23, 1996, the information providing the basis for Consol=s request herein was available to Consol when the MSHA internal review report was issued on August 17, 1993. The Secretary further noted at that hearing that Consol had accordingly waited over two years before requesting the information now sought. Because of the potential significance of the information, however, I agreed to further delay trial in these proceedings to resolve these limited pending discovery issues. Under the circumstances and to prevent further undue delay consistent with Commission Rule 56(c), I am strictly limiting the order of production herein to only materials relating to the interviews of MSHA enforcement personnel and specifically to questions regarding compliance with ventilation plan and other relevant regulations. Accordingly after examination of the files from his internal investigation submitted by the Secretary for in-camera review, I conclude that only those portions of the documents within the Secretary=s File 16(b) noted below will be included in the order for production.

Document 16(b) is described in the Vaughn index as AInterview questions and review team notes, including notes on interviewee answers and on interviewer=s impressions for 24 MSHA employees.@ It is noted that only the identifying information on page one of each form questionnaire (questions 1-6) and the following questions and answers are relevant to the issues herein: page 3 (questions 2-6), pages 4 and 5, page 11 (questions

6-8), page 12 (question 6), page 25 and page 26 (questions 1-6).

In the most recent filing on this issue, on March 29, 1996, the Secretary has taken the position that these documents are protected only by the deliberative process privilege and by Apersonal privacy@. The deliberative process privilege is a governmental privilege that has been recognized by the Commission. In Re: *Contents of Respirable Dust Sample Alteration Citations* 11 FMSHRC 987 (June 1992), and the Courts, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *E.P.A. v. Mink*, 410 U.S. 73 (1973). This privilege protects documents Areflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.@ In Re: *Contents of Respirable Dust Sample Alteration Citations*, 11 FMSHRC at 991, citing *N.L.R.B. v. Sears*, 421 U.S. at 150 (1975).

While the responses by secretarial personnel to the form questionnaire do appear to be Apre-decisional@, I do not find that the specific questions and answers at issue are Adeliberative@, i.e. they are not related to the process by which policies are formulated. In addition, the questions and answers deal primarily with factual information rather than advice, recommendations or opinions.

Moreover, to the extent that some of the answers may be deemed to be Aopinions@, I do not find any to be Adeliberative@ in the sense that they are related to the process by which a policy is formulated. Accordingly I do not find them subject to the deliberative process privilege. In any event, since the noted questions and answers directly relate to the issues at bar, including the Areasonably prudent person@ test, unwarrantable failure and negligence, I conclude that Consol has a substantial need for that information. I further find that Consol would be unable without undue hardship (and without further delay in these proceedings) to obtain the substantial equivalent of the material by other means.

The Secretary=s bald assertion of a Apersonal privacy@ privilege is unexplained and without reference to any legal authority. There is no record evidence moreover that any of the interviewees are claiming any such personal privilege. Accordingly no such claim of privilege can be appropriately evaluated and it is rejected.

ORDER

The Secretary is accordingly directed to produce for Consol within ten (10) days of the date of this Order (a) copies of the

five memoranda of interviews within Investigator Bowman=s file, and (b) the noted questions and answers from each of the identified form questionnaires associated with the name of each interviewee from File 16(b) of the Secretary=s internal

review files. The Secretary is further directed to resume immediate custody of all of the documents submitted for in-camera review and to segregate those documents for preservation in the event of Commission or court review. In light of this order the hearings on the motion to compel discovery previously scheduled to commence on June 18, 1996, are cancelled. Counsel for the Secretary is directed to initiate a teleconference with all parties and the undersigned at 10:00 a.m. on June 27, 1996, to establish a new trial date for these proceedings.

Gary Melick
Administrative Law Judge
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