

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 10, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-242-DM
on behalf of CURTIS STAHL,	:	MSHA Case No. WE MD 98-18
Complainant	:	
v.	:	
	:	
A & K EARTH MOVERS, INC.,	:	Belle Vista Pit
Respondent	:	Mine ID 26-02046

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 and interrogatories with the Secretary. In responding to those requests, the Secretary redacted certain language from statements and otherwise refused to provide information based on the “informant’s privilege.” The respondent has filed a motion to compel the information that the Secretary claims is covered by the privilege. The Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

Commission Rule 61, 29 C.F.R. § 2700.61, provides that: “A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.” This rule codifies the long established right of the government to withhold from disclosure the identity of any person who provides information about violations of the law to government officials. *Roviario v. U.S.*, 353 U.S. 53 (1957); *Bright Coal Co.*, 6 FMSHRC 2520, 2524 (November 1984). It is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of the informant. *Asarco, Inc.*, 12 FMSHRC 2548, 2554 (December 1990) (*Asarco I*) (citing *Roviario* at 60).

It is apparent from the motion and response, as well as telephone conference calls with the both counsel and the judge, that the controversy, in this case, concerns two statements given to the Mine Safety and Health Administration (MSHA) investigator investigating Mr. Stahl’s complaint. The first is the statement of Eleuterio Jacinto made on August 18, 1998. It consists of five pages. Words have been redacted from two sentences on page three of the statement. The second statement is a Memorandum of Interview dated January 14, 1999. It contains three pages.

The identity of the interviewee, his address and telephone number have been redacted on the first page. About half of the questions and answers on the second page of the statement have been redacted.

In its response to the motion, the Secretary has provided unredacted copies of the statements for *in camera* review. Based on a review of the Jacinto statement, I conclude that both of the redactions would disclose the identity of an informant and, therefore, are covered by the informant's privilege. Turning to the January 14 memorandum, I conclude that most of the redacted language either identifies the informant or would tend to reveal his identity. However, I conclude that the question and answer in lines nine and ten, the first four redacted words in line 25, and the questions and answers in lines 27 through 30 neither identify the informant nor tend to reveal his identity.¹ This conclusion is based both on the words themselves and the fact that counsel for the Secretary was unable to articulate how they came within the privilege when asked about the language during a conference call. Accordingly, I will order that the indicated words and lines be revealed to counsel for the Respondent.

Finding that the informant's privilege is applicable does not end the matter. As the Commission has said, "if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest." *Bright*, 6 FMSHRC at 2526. The burden is on the Respondent to show that disclosure of the statements is necessary to a fair determination of the case. *Id.* Factors to be considered in conducting the balancing test include: (1) whether the Secretary is in sole control of the requested material, (2) whether the material is already within the Respondent's control, and (3) whether the Respondent has other avenues available from which to obtain the "substantial equivalent of the requested material." *Id.*

In connection with these criteria, the Commission has held that having access to the same individuals with knowledge of the facts as the Secretary's investigators and being able to question them in the same manner, under *subpoena*, if necessary, means that the Respondent does have other avenues available from which to obtain the information. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (August 1992) (*Asarco II*). Consequently, I conclude that A & K can get substantially the same information contained in these statements by interviewing, or deposing, miners who worked at the Bella Vista Pit during the period of June and July 1998.

Based on the above, I conclude that the Respondent has not shown that disclosure of the statements is necessary to a fair determination in this case. In addition, I note that on August 11, 2000, counsel for the Secretary must furnish to the Respondent the names of the miner witnesses he intends to call at the hearing. If either of these informants is to be a witness, the Secretary must also provide the complete statement of the witness to counsel for the Respondent, for the purpose of refreshing the witness' recollection or impeaching his credibility at the trial. *Id.* Thus,

¹ Lines are counted from the top of the page. Only lines containing words are counted.

if the Respondent has not already undertaken to interview, or depose, the miners at the Bella Vista Pit, it will have the statements it desires.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent the questions and answers found on lines 9, 10, 27-30 and the four words beginning on line 25 of the January 14, 1999, statement. In all other respects, the Motion to Compel is **DENIED**.

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

Distribution: (by facsimile)

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Richard L. Elmore, Esq., Hale Lane Peek Dennison Howard and Anderson, 100 West Liberty Street, Tenth Floor, Reno, NV 89501

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