

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

August 3, 2004

BECON CONSTRUCTION, INC., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEST 2001-204-RM Citation No. 7994802; 01/02/2001
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Respondent	:	Lebec Cement Plant Mine ID 04-00213 AF6
	:	
MORTON ENGINEERING AND CONTRACTING, INC., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEST 2001-226-RM Citation No. 7994802; 01/02/2001
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Respondent	:	Lebec Cement Plant Mine ID 04-00213 8FQ
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEST 2002-147-M A.C. No. 04-00213-05502 AF6
	:	
BECON CONSTRUCTION COMPANY, Respondent	:	Lebec Cement Plant
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEST 2002-164-M A.C. No. 04-00213-05504 8FQ
	:	
MORTON ENGINEERING & CONSTRUCTION, INC., Respondent	:	Lebec Cement Plant
	:	

ORDER DENYING SUPPLEMENTAL MOTION TO COMPEL

Before me is a Supplemental Motion to Compel filed on July 12, 2004, by Becon Construction Company, Inc. ("BECON") and the Secretary's July 29, 2004, Opposition. Becon's Supplemental Motion follows a May 18, 2004, Order denying Becon's Motion to Compel the Secretary's further responses to Becon's interrogatories. 26 FMSHRC 499.

With respect to written statements, the May 18, 2004, initial Order denied Becon's motion to compel miner witness statements that are entitled to the miner informant and miner witness privileges in Commission Rules 61 and 62, respectively. 29 C.F.R. 2700.61 and 2700.62. *Id.* at 450-51. However, leave was granted for Becon to request the Secretary to provide non-miner witness statements, which, if necessary would have been viewed *in camera*. *Id.* at 452. Despite the Order denying access to miner witness statements, in its Supplemental Motion, Becon once again seeks the disclosure of all statements obtained during the course of the Secretary's accident investigation. In view of Becon's failure to limit its request to non-miner statements, I conclude there are no non-miner witness statements that Becon seeks to compel. Accordingly, Becon's supplemental motion to compel witness statements identified in the Secretary's Second Amended Privilege Log as Exs. A, E, FF, L, M, N, O, P, Q, R, S, T, U, V and Y **IS DENIED**.

With respect to the remaining documents that Becon seeks disclosure of, the initial Order noted that investigative field notes, case analysis, memorandum or summary of interviews prepared by or for a party in anticipation of litigation are protected by the work product privilege. *Id.* at 451 *citing Consolidation Coal Company*, 19 FMSHRC 1239 (July 1997). The Order also noted that intra-agency memorandum or e-mail communications that are "consultative" in nature, in that they contain advisory opinions, recommendations and deliberations, are protected by the deliberative process privilege. *Id.*

Finally, the initial Order emphasized that BECON had not articulated why it objected to the Secretary's assertion of privilege with respect to each document. Nor had Becon shown an overriding need for any document. However, Becon was granted leave to supplement its Motion to Compel if it provided specific assertions why a privilege should not apply to each document. Alternatively, Becon was invited to overcome the Secretary's privilege claims by a showing of substantial need and undue hardship with respect to each individual document.

Once again Becon failed to comply with the initial Order by generally denying the Secretary's privilege claims. Becon's request for the disclosure of the Case Closure Memorandum of District Manager Lee D. Ratcliff, identified as Ex. F in the Secretary's Privilege Log, is clearly entitled to the work product and/or deliberative process privileges. Similarly, the Special Investigation Report, identified as Ex. H, is protected by the work product privilege. *Asarco, Inc.*, 12 FMSHRC 2548, 2559 (Dec. 1990). Finally, Health and Safety Conference Notes prepared by Mine Safety and Health Administration personnel during a meeting attended by the respondents, identified as Ex. J, are protected by the work product privilege.

In each of these instances Becon has failed to demonstrate a compelling need for these documents. The facts surrounding the subject fatal trolley accident have been the focus of extensive civil litigation during which time witnesses have been deposed and discovery has been completed. Consequently, Becon has failed to demonstrate that it does not already possess the information it seeks, or that the information is not available from other sources. Thus, Becon has failed to demonstrate the requisite showing to warrant an *in camera* review. Consequently, Becon's supplemental motion to compel Exs. F, H and J **IS DENIED**. Accordingly, Becon's Supplemental Motion to Compel **IS DENIED**.

Jerold Feldman
Administrative Law Judge

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