

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2004

BECON CONSTRUCTION, INC., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEST 2001-204-RM Citation No. 7994802; 01/02/2001
	:	
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 MOTION TO COMPEL**

The stay in these consolidated contest and civil penalty proceedings was continued on February 26, 2004, pending the disposition of the civil litigation associated with the subject October 26, 2000, overhead trolley accident. During the course of a February 25, 2004, telephone conference, the parties advised that the wrongful death case was resolved. However, personal injury cases have not been completed. Since testimony in these administrative proceedings can have an impact on the civil litigation, the stay in these matters has remained in effect until all relevant civil litigation is complete.

Written discovery has proceeded during the stay. On April 9, 2004, Becon Construction Company, Inc. ("BECON"), filed a Motion To Compel Further Responses to Interrogatories.<sup>1</sup> On April 19, 2004, the Secretary, citing the departure of the formerly assigned counsel, filed a Motion for Extension of Time until April 29, 2004, to file an opposition to BECON's Motion to Compel. The Secretary's request was granted as BECON did not interpose an objection. The Secretary's Opposition to BECON's Motion to Compel was filed by facsimile on April 29, 2004.

As a threshold matter, citing the *Federal Rules Of Civil Procedure* Rule 33(b)(4), BECON asserts the Secretary waived all responsive objections and privileges to interrogatories because she did not serve her answers until July 5, 2002, although she was only granted an extension to respond until June 28, 2002. In response, the Secretary contends, on or about June 27, 2002, former Secretary's counsel Jason Vorderstrasse contacted the office of Kevin McNaughton, BECON's counsel, to request a brief extension of time. Vorderstrasse reportedly was advised by McNaughton's secretary that McNaughton was on vacation until July 8, 2002. Vorderstrasse mailed the Secretary's interrogatory response on July 5, 2002. In support of her opposition to BECON's waiver of privilege assertion, the Secretary has submitted an affidavit of Vorderstrasse .

BECON responded to the Secretary's Opposition on May 12, 2004. BECON asserts that Vorderstrasse's initial request for an extension of time was untimely because it occurred via a voice message left at McNaughton's office on July 1, 2002. BECON provided an affidavit of Jackie Betts, McNaughton's secretary, indicating that although she recalled speaking to Vorderstrasse on July 1, 2002, during which time Mcnaughton was on vacation, she did not grant Vorderstrasse an extension of time to respond to BECON's interrogatories.

Vorderstrasse's account of his inability to contact McNaughton during the July 4 holiday season is not contested. Moreover, I have consistently liberally granted extensions of time that were mutually agreeable to all parties. Surely, BECON was not prejudiced by the brief delay of Secretary's interrogatory response, particularly during a period when McNaughton was

---

<sup>1</sup> It is not clear why BECON's waited until April 9, 2004, to file its Motion To Compel further responses to the Secretary's responses to interrogatories that were mailed on July 5, 2002.

vacationing. Moreover, BECON has waited approximately 1½ years to move for further responses from the Secretary. Civil Procedure Rule 33(b)(4) provides the Judge with the discretion to excuse untimely objections to interrogatories for good cause shown. Even if I were to conclude that the Secretary's objections to interrogatories were untimely, the brief delay does not warrant the extraordinary relief sought by BECON. Accordingly, BECON's request that I rule that the Secretary has waived objections to interrogatories based on privilege **IS DENIED**.

With respect to the Secretary's assertions of privileges, BECON poses a series of broad interrogatories that requests the Secretary to identify and/or provide each fact, witness or document that supports, in whole or in part, the statements in Citation No. 7994801 "that the trolley was not tracking properly on the rail system prior to the accident" and that it was known to BECON's site manager that the trolley was not tracking properly.

In response to BECON's interrogatories, the Secretary identifies Federal and State officials who are potential witnesses. With respect to other witnesses the Secretary asserts the miner witness privilege and the informant's privilege. BECON contends that the Secretary has waived these privileges because the Secretary has published the names of non-government employees, including miners, who have provided information during the course of her accident investigation.

#### The Miner Informant and Witness Privileges

\_\_\_\_\_ Protecting miners who participate in enforcement proceedings brought by the Secretary from retaliation is indispensable to the effective administration of the Mine Act as a safety statute. *Sec'y o/b/o Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520, 2524, 2526. In this regard, Commission Rule 61 provides that, absent extraordinary circumstances, a Judge shall not order the disclosure of the name of a miner who is an informant. 29 C.F.R. § 2700.61. Commission Rule 62 prohibits the disclosure of the identity of a miner witness until two days before a scheduled hearing. 29 C.F.R. § 2700.62.

BECON argues the Secretary has waived these privileges by publishing the names of miners who she has interviewed. This type of assertion was rejected in *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5<sup>th</sup> Cir. 1972), wherein the Court stated:

Knowing the identity of persons who have given statements to the Secretary is not equivalent to knowledge of which of those persons were informants within the context of the privilege. Only when the content of the statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorable. In short, if the employee is not known to the defendant as an informer but merely a statement giver, then disclosure of the statement might reveal him as an informer.

459 F.2d at 306.

To provide statements of miners simply because a mine operator is aware that a miner is a statement giver would eviscerate the miner protections provided in Commission Rules 61 and 62. The miner witness privilege is an unqualified privilege. However, the miner informant's privilege is a qualified privilege that can be overcome by a showing of substantial need. A desire to use informant statements for impeachment purposes is not an adequate basis for defeating the privilege. Significantly, BECON can depose any individual identified by the Secretary. BECON has failed to demonstrate the extraordinary circumstances that are necessary to defeat the privilege. Accordingly, BECON's Motion to Compel the disclosure of miners' statements **IS DENIED**.

#### The Informant's Privilege With Respect to Non-Miners

BECON has not specifically articulated the identity of non-miner statements, if any, that it seeks from the Secretary. Accordingly, leave is granted for BECON to request the production of statements obtained by the Secretary from non-miners. BECON should specifically state the basis for its knowledge that statements were taken, the basis for its interest in such statements, and, its understanding, if any, of the nature of the subject matter of such statements. If the Secretary asserts the informant's privilege, I may review the statements *in camera*.

#### The Work Product and Deliberative Process Privileges

In her Opposition to BECON's Motion to Compel, the Secretary identified a variety of special investigator field notes, a special investigation report, notes from a health and safety conference and memoranda of interviews that she claims are protected, in whole or in part, by the work product and deliberative process privileges. As a general proposition, 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. *See, e.g., Consolidation Coal Company*, 19 FMSHRC 1239 (July 1997). 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.*

BECON has not articulated why it objects to the Secretary's assertion of privilege with respect to each specific document. Nor has it shown an overriding need for any document. Accordingly, leave is granted for BECON to supplement its Motion to Compel by specifically identifying each document it seeks to compel the Secretary to provide, providing specific assertions why the claimed privilege should not apply to each document. If necessary, I will review documents *in camera* to resolve any privileges asserted by the Secretary. If BECON seeks to overcome privilege by a showing of substantial need and undue hardship, it should provide an individual showing for each document. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2<sup>nd</sup> Cir. 1992).

## **ORDER**

As discussed above, BECON's Motion to Compel the statements of miners **IS DENIED**. With respect to the production of specific non-miner witness statements, leave is granted for BECON to serve upon the Secretary such request within 21 days of this Order. The Secretary shall have 14 days to reply to BECON's request.

With respect to all other documents, leave is granted for BECON to file, within 21 days of this Order, a supplemental motion to compel that challenges the specific privileges asserted by the Secretary and/or demonstrates a compelling need that overcomes the asserted privilege.

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

Kevin J. McNaughton, Esq., Schaffer & Lax McNaughton & Chen, 515 South Figueroa Street, Suite 1400, Los Angeles, CA 90071 (Counsel for Becon)

John S. Lowenthal, Esq., Lewis, Brisbois, Bisgaard & Smith LLP, 650 East Hospitality Lane, Suite 600, San Bernardino, CA 92408 (Counsel for Morton)

Pamela W. McKee, Esq., Associate Regional Solicitor, U.S. Department of Labor, World Trade Center, 350 South Figueroa Street, Suite 370, Los Angeles, CA 90071-1202

/hs