

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2002

CDK CONTRACTING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-420-RM
	:	Order No. 7919016; 4/23/2001
	:	
	:	Docket No. WEST 2001-421-RM
	:	Order No. 7919017; 4/23/2001
v.	:	
	:	Docket No. WEST 2001-422-RM
	:	Order No. 7919018; 4/23/01
	:	
	:	Docket No. WEST 2001-423-RM
	:	Order No. 7919019; 4/23/2001
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-424-RM
ADMINISTRATION (MSHA),	:	Order No. 7919021; 4/23/2001
Respondent	:	
	:	Docket No. WEST 2001-425-RM
	:	Order No. 7919022; 4/23/2001
	:	
	:	Docket No. WEST 2001-426-RM
	:	Citation No. 7919023; 4/23/2001
	:	
	:	Docket No. WEST 2001-427-RM
	:	Citation No. 7919024; 4/23/2001
	:	
	:	Docket No. WEST 2001-428-RM
	:	Citation No. 7942519; 4/23/2001
	:	
	:	Mine ID 05-00037 L35
	:	Portland Plant/Quarry

**ORDER GRANTING, IN PART, CONTESTANT'S
MOTION TO COMPEL PRODUCTION**

CDK Contracting Company (“CDK”) filed a motion to compel the Secretary to produce a document entitled “Draft Fatal Accident at Holnam Cement Plant, Summary of Physical Factors” in response to its discovery requests (“Physical Factors Summary”). The Secretary withheld the Physical Factors Summary pursuant to the deliberative process privilege.

CDK asserts that the Physical Factors Summary contains relevant information that is essential to the preparation of its defense in these cases. One of its employees fell to his death while working at the Holnam Cement Plant, in Florence, Colorado. Employees of the Mine Safety and Health Administration's ("MSHA") Technical Support branch provided assistance to the supervisory MSHA inspector who investigated the accident. In his deposition, this inspector testified that he relied on information contained in the Physical Factors Summary when he issued the citations and orders at issue. CDK contends that the Physical Factors Summary contains information that directly relates to the issues in these cases. It argues that the deliberative process privilege does not apply to factual information contained in the Physical Factors Summary and that it is therefore entitled to this information. In addition, CDK argues that the reasoning behind MSHA's decision to issue citations in these cases is not protected by the privilege. It maintains that the privilege protects personal opinions by agency employees not policies adopted by the agency. CDK argues that, in any event, a document loses its protected status once MSHA relies on the document when taking enforcement actions. In the alternative, it asks for an *in camera* review of the Physical Factors Summary.

The Secretary opposes an *in camera* review and asks that I deny CDK's motion. The Secretary provided CDK with a privilege log which states that the Physical Factors Summary is "privileged pursuant to the deliberative process privilege." She contends that the privilege protects communications between subordinates and supervisors that are antecedent to adoption of agency policy. She states that the Physical Factors Summary is a four-page document prepared by Michael Shaughnessy, an MSHA Mechanical Engineer, for review by Ronald Pennington, an MSHA supervisory mine inspector. Mr. Shaughnessy was assigned to evaluate the physical factors involved in the fatal accident. The Secretary further states that Shaughnessy's Physical Factors Summary includes a "section describing the purpose of the evaluation, an analysis and conclusion about the physical factors that contributed to the fatality, and a section summarizing Mr. Shaughnessy's findings." (S. Response at 6). The Physical Factors Summary was sent to Inspector Pennington before any citations or orders were written and before MSHA issued its written report on the accident, which the Secretary asserts "contains MSHA's final opinion about the contributing factors and causes of the fatal accident investigated by Inspector Pennington's team." *Id.* She states that the contested document was written in order to provide "Inspector Pennington with the perspective of a mechanical engineer on the facts of the case prior to any decisions on citations and orders and the Report of Investigation." *Id.* at 7.

Based on the above, the Secretary contends that the Physical Factors Summary is pre-decisional because it was submitted to the supervisory inspector before any enforcement action was taken and before the final accident report was written. She states that it is deliberative because it is the work product of a "subordinate team member" prepared for use by the lead accident investigator "who is charged with making final agency decisions." *Id.* The Secretary argues that the Physical Factors Summary is "a pre-decisional recommendation by a subordinate team member to an agency decision-maker who was free to accept or reject

the factual conclusions contained within it.” *Id.* at 8. The Secretary contends that CDK is free to discover the reasons for any decision made by MSHA in these cases; it just cannot “pry into the agency’s internal deliberations.” *Id.* at 9.

The Secretary also maintains that any facts contained in the Physical Factors Summary are Shaughnessy’s “interpretation of the facts, not the agency’s.” *Id.* As a consequence, the Secretary contends that the any “facts” contained in the document are also deliberative. She argues that the deliberative process privilege protects the ability of subordinates with technical expertise to present to the agency’s enforcement personnel their perspective on the facts of a case without the fear that their view of the facts will be released in future litigation. The Secretary also contends that an *in camera* review is unnecessary because the court can determine that the privilege has been properly invoked without such an inspection.

ANALYSIS

The deliberative process privilege protects the “‘consultative functions’ of government by maintaining the confidentiality of ‘advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (DC Cir. 1978) (citations omitted). To be covered by the privilege, the material must be both pre-decisional and deliberative. Purely factual material that does not expose an agency’s decision-making process is not covered by the privilege unless it is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary’s burden to establish that the privilege applies to material it seeks to protect from disclosure.

During his deposition, Inspector Pennington stated that he relied upon information provided to him by Mr. Shaughnessy in the Physical Factors Summary when he issued the citations and orders to CDK. (Pennington Dep. at 174). CDK contends that it is entitled to review this factual information because it was part of the basis for the Secretary’s enforcement action. The Secretary maintains that even the factual portions of the Physical Factors Summary represent “Shaughnessy’s opinion on what the facts in this case were.” (S. Response at 9). The contested document merely contains Shaughnessy’s “interpretation of the facts” with the result that the document is protected by the privilege. *Id.*

The Secretary states that Inspector Pennington made the final decision to issue the citations and orders in these cases. CDK is entitled to know what facts Inspector Pennington relied on when he issued citations and orders, no matter what the source of these facts were. I agree with the Secretary that Shaughnessy’s “interpretation of the facts” is protected by the privilege. If, however, Inspector Pennington relied on any of “Mr. Shaughnessy’s facts” when taking enforcement actions against CDK, then these facts are no longer protected because the agency adopted these facts as its own findings when it took these enforcement actions. *See Newmont Gold Co.*, 18 FMSHRC 1532, 1535-37 (Aug. 1996) (ALJ).

Relying on *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1998), the Secretary contends that the entire Physical Factors Summary is protected because disclosing the document would expose MSHA’s deliberative process to public scrutiny. In that case, the court held that the issue was whether the contested documents were part of the deliberative process of the agency not whether they were essentially deliberative or factual. *Id.* at 1118. The court held, “even if the content of a document is factual, if disclosure of the document would expose ‘the decision-making process itself’ to public scrutiny by revealing the agency’s ‘evaluation and analysis of the multitudinous facts,’ the document would nevertheless be exempt from disclosure.” *Id.* (citation omitted). Under this process-oriented analysis, “documents containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure.” In addition,

[f]actual materials . . . would likewise be exempt from disclosure to the extent that they reveal the mental processes of decision-makers. In other words, whenever the unveiling of factual materials would be tantamount to the “publication of the evaluation and analysis of the multitudinous facts” conducted by the agency, the deliberative process applies.

Id. at 1119 (citation omitted). The Commission adopted this analysis, *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992-93 (June 1992).

The dispute over the deliberative process privilege arose under significantly different circumstances in *National Wildlife Federation* (“*NWF*”) than in the present cases. *NWF* involved draft forest plans and draft environmental impact statements that were considered by the agency when it developed a plan for the Wallowa-Whitman National Forest. Many documents and parties were involved in the adoption of the forest plan. The present case involves civil litigation that was initiated after the Secretary issued the citations and orders against CDK. In issuing the citations and orders that engendered these cases, the Secretary relied upon certain facts developed by Mr. Shaughnessy during his investigation. Disclosing to CDK the facts that Inspector Pennington relied upon when issuing the citations will not “reveal the mental processes of decision-makers.” The Secretary does not dispute that CDK is entitled to discover the reasons why she issued the citations and orders. Thus, the Secretary will inevitably be revealing the mental processes that MSHA’s decision-makers went through when they concluded that CDK violated the agency’s safety standards. Disclosing the facts that Inspector Pennington relied upon will, at most, only reveal these same mental processes. The document in question is a four-page summary prepared by Mr. Shaughnessy. Release of the facts in the document that were relied upon by the agency in issuing the citations and orders is not “tantamount to the publication of the evaluation and analysis of the multitudinous facts conducted by the agency.” In *NWF*, the agency voluntarily released portions of the disputed documents and the District Court, after an *in camera* inspection, ordered that additional portions be released. *Id.* at 1115-16. On review, the 9th Circuit held that the remaining portions were protected by the privilege because release of the remaining portions would reveal the agency’s deliberative process. *Id.* at 1123. The Secretary has not

released any portion of the Physical Factors Summary nor has she shown how the release of facts in the document will reveal MSHA's deliberative processes. She opposes an *in camera* review.

I hold that CDK is entitled to those portions of the Physical Factors Summary that set forth facts relied upon by MSHA when it issued the citations and orders at issue in these cases. Although the Physical Factors Summary is pre-decisional, the facts relied upon by MSHA to justify the issuance of the citations are not deliberative and the privilege does not apply. In her response to the motion to compel, the Secretary stated that she will be calling Mr. Shaughnessy as an expert witness at the evidentiary hearing and that she will produce an expert witness report pursuant to Fed. R. Civ. P. 26(a)(2) when required by the administrative law judge. Thus, as a practical matter, the Secretary will be disclosing prior to trial all of the facts she is seeking to protect here. I find that CDK's need for the information far outweighs the Secretary's interest in keeping it confidential.

ORDER

CDK's motion to compel the production of documents is **GRANTED**, but only to the extent described in this order. It is **ORDERED** that counsel for the Secretary shall direct Inspector Pennington to review the Physical Factors Summary and specify those portions of the document that he relied upon when he determined that the subject citations and orders should be issued to CDK. The Secretary may redact those portions of the Physical Factors Summary that Inspector Pennington did not rely upon in issuing the citations and orders. The opinions and nonbinding recommendations of Mr. Shaughnessy that were not factual in nature need not be released. All information that is purely factual in nature must be released, even if Inspector Pennington did not rely upon such facts. Counsel for the Secretary **SHALL PROVIDE** to counsel for CDK, on or before **May 15, 2002**, those portions of the Physical Factors Summary that I have held are not protected by the deliberative process privilege, as described above. Except as set forth above, CDK's motion to compel the production of documents is **DENIED**.

Richard W. Manning
Administrative Law Judge

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