

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 11, 2003

AGGREGATE INDUSTRIES, WEST	:	CONTEST PROCEEDINGS
CENTRAL REGION, INC.,	:	
Contestant	:	Docket No. WEST 2002-317-RM
	:	Citation No. 7914271; 01/22/2002
v.	:	
	:	Docket No. WEST 2002-318-RM
	:	Citation No. 7914268; 01/24/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2002-319-RM
ADMINISTRATION (MSHA),	:	Citation No. 7914269; 01/24/2002
Respondent	:	
	:	Docket No. WEST 2002-320-RM
	:	Citation No. 7943951; 01/31/2002
	:	
	:	Fort Collins Plant
	:	Id. No. 05-04733
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-32-M
Petitioner	:	A.C. No. 05-04733-05501
	:	
v.	:	Docket No. WEST 2003-33-M
	:	A.C. No. 05-04733-05502
AGGREGATE INDUSTRIES, WEST	:	
CENTRAL REGION, INC.,	:	Fort Collins Plant
Respondent	:	

**DISCOVERY ORDER**  
**ORDER TO INITIATE CONFERENCE CALL**

Aggregate Industries, West Central Region, Inc., (“Aggregate Industries”) filed two motions seeking information concerning the Secretary’s special assessment process. In its motion to compel, Aggregate Industries seeks an order compelling the Secretary to produce all documents that it requested “concerning the special assessment related to the alleged unwarrantable failure violation . . . including, but not limited to the MSHA form 7000-32, Special Assessment Review Form, prepared by MSHA to support and obtain a special assessment of \$30,000.” In its motion to take depositions, Aggregate Industries asks that the Secretary be ordered to “designate one or more managing agents or other persons to testify . . . concerning the special penalty assessments, and factors, information and documents related to such penalty assessments, including the Special Assessment Review Form, concerning those

citations contested in these proceedings.” The Secretary opposes both motions.

### **I. Special Assessment Review Form**

With respect to the Special Assessment Review Form, the Secretary maintains that the document is irrelevant and subject to the deliberative process privilege. She contends that it is irrelevant because the Commission assesses penalties *de novo*. She maintains that it is subject to the deliberative process privilege because it contains predecisional, deliberative recommendations made by the MSHA inspector to his supervisors about whether a special assessment should be initiated. The Secretary knows of no other documents concerning the special assessment that have not already been provided to Aggregate Industries.

As discussed in more detail below, I agree with the Secretary that her special assessment process in 30 C.F.R. § 100.5 is totally irrelevant in these proceedings. Commission administrative law judges assess penalties taking into consideration the six penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), without regard to the Secretary’s special assessment provisions. If I find that the Secretary has established violations in these cases, I will assess each penalty based only on the penalty criteria without taking into consideration how the Secretary assessed the violation.

The Special Assessment Review Form contains facts that the MSHA inspector presents to his supervisor to support a special assessment. Thus, this form may contain factual information that relates to the penalty criteria. The deliberative process privilege protects communications between subordinates and supervisors within the government that are “antecedent to the adoption of an agency policy.” *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents that are protected by the privilege “are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Id.* Nevertheless, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.”<sup>1</sup> *Id.*

The Secretary provided a copy of the Special Assessment Review Form for my *in camera* review. After reviewing the document, I find that it is not protected by the deliberative process privilege. First, the only substantive writing on the form is in section 10, which contains the facts the inspector used to support his recommendation. He describes, in one short sentence, why he believed that the operator was especially negligent with respect to Citation No. 7914271.

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<sup>1</sup> A more detailed discussion of the deliberative process privilege is contained in my order in *Newmont Gold Co.*, 18 FMSHRC 1532 (August 1996).

The citation was issued under section 104(d)(1) of the Mine Act. The body of the citation itself contains the same information. The inspector's determination with respect to negligence was adopted by the Secretary as the agency's position. Thus, even if the review form had once been protected by the privilege, its protected status was lost when MSHA adopted his recommendation.

In addition, the Secretary's position with respect to the Special Assessment Review Form is inconsistent at best. I take official notice of the fact that I have been assigned several cases in the past few years in which this form was attached to the Secretary's petition for assessment of penalty as a part of Exhibit A. In addition, the Secretary has introduced this form into evidence at hearings to support her case. *See, e.g., Basin Resources, Inc.*, 19 FMSHRC 1565, 1570-71 (Sept. 1997) (ALJ); *S & M Construction, Inc.*, 18 FMSHRC 1018, 1051-52 (June 1996) (ALJ). The Secretary cannot make her Special Assessment Review Form public in some cases and claim that it is privileged in others.

I find that the Special Assessment Review Form has some marginal relevance to the Secretary's high negligence and unwarrantable failure determinations. For the reasons set forth above, the Secretary is hereby **ORDERED** to provide counsel for Aggregate Industries a copy of the Special Assessment Review Form for Citation No. 7914271 within ten days of this order.

## **II. Depositions of MSHA Assessment Office Officials**

Aggregate Industries seeks to depose the "MSHA employee best suited to testify concerning penalty assessments in this matter." The Secretary contends that such depositions would neither produce relevant evidence nor would they appear likely to lead to the discovery of admissible evidence. Aggregate Industries contends that it is "entitled under Fed. R. Civ. P. 30(b)(6) to discover any evidence concerning or supporting the petition for assessment of penalty. . . ." It bases its argument on its belief that "the Secretary of Labor intends to offer evidence to support the petition for assessment of penalty."

I find that the information that Aggregate Industries seeks to obtain is totally irrelevant to these cases. First, I will not admit any evidence from the Secretary concerning her proposed assessments except as it relates to the six criteria under section 110(i) of the Mine Act. Evidence concerning her special assessment procedures will not be admitted. More importantly, Commission judges assess penalties *de novo* by examining the penalty criteria of section 110(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd* 736 F. 2d 1147 (7<sup>th</sup> Cir. 1984). Commission administrative law judges must enter findings of fact on each of the six penalty criteria. *Cantera Green*, 22 FMSHRC 616, 621-22 (May 2000). A judge must explain how his findings with respect to the penalty criteria contributed to his penalty assessment. A judge does not consider the Secretary's regulations at 30 C.F.R. Part 100 when assessing penalties. Consequently, the information that Aggregate Industries seeks is irrelevant to the issues raised in these cases.

The Secretary will have the burden of proof with respect to the six penalty criteria.<sup>2</sup> Aggregate Industries will have the opportunity to cross-examine the Secretary's witnesses on the criteria and to introduce evidence of its own. For the reasons set forth above, Aggregate Industries' motion to take depositions is **DENIED**.

### **III. Conference Call Concerning Hearing Date.**

Counsel for the Secretary shall initiate a conference call on or before February 21, 2003, to establish a hearing date for these cases. If I do not hear from the parties by that date, the hearing will commence on April 22, 2003.

Richard W. Manning  
Administrative Law Judge

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<sup>2</sup> Aggregate Industries will have the burden of establishing that the proposed penalties will adversely affect its ability to continue in business.