FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 6, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF MICHAEL JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

ORDER DENYING, IN PART, RESPONDENT'S MOTION TO COMPEL

This case is before me on a complaint by the Secretary of Labor on behalf of two miners, Michael Jenkins and Michael Mahon, alleging that they had been discriminated against in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, ("the Act"), 30 U.S.C. § 815(c)(1). Respondent, Durbin Coal, Inc., has moved to compel production of documents requested in discovery that the Secretary contends are protected from disclosure on grounds of privilege.

The thirteen documents at issue are described in a "privilege log", an amended version of which was appended to the Secretary's opposition to the motion to compel. They consist of the notes of the investigator, four witness statements and various internal Department of Labor (DOL) memoranda, including the report of the investigation. The Secretary has claimed the work product privilege as to all of the documents and also asserted, variously, the informant's, deliberative process and law enforcement privileges. Statements obtained from Jenkins and Mahon have been produced to Respondent. The Secretary has also produced several statements obtained from management representatives and individuals associated with management's position in the litigation.[1]

[1] Respondent asserts that all such statements must be produced upon request by its counsel, who also represents the individuals. Counsel for the Secretary has confirmed that none of the witness statements at issue were made by individuals represented by Respondent's counsel.

I find that the documents at issue are materials prepared in anticipation of litigation and fall within the work product privilege. I also find that Respondent has not, at this time, met its burden of showing substantial need for the materials and undue hardship. However, further information is needed before a final decision can be made on those issues as to some of the documents, portions of which would also be protected by the informant's privilege. Respondent's motion to compel is, therefore, denied, in part, at this time. The witness statements and, possibly, portions of the investigator's notes will be reviewed *in camera* and a further order will issue with respect to those documents.

The Work Product Privilege

The most instructive discussion by the Commission of the work product privilege, as applied to materials similar to those sought here, is found in *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990).[2] The following portion of the *ASARCO* decision, at pp. 2557-59, addresses the controlling legal principles in a similar factual context.

> The work product rule has its modern origins in the case of *Hickman v. Taylor*, 329 U.S. 495 (1947), and in Rule 26(b)(3) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P"). Unlike the attorney-client privilege * * * the work product rule does not solely protect confidential communications between attorney and client and is best described as a qualified immunity against discovery. In order to be protected by this immunity under Fed. R. Civ. P. 26(b)(3) the material sought in discovery must be:
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> 1. "documents and tangible things;"
>
> 2. "prepared in anticipation of litigation or for trial;" and
>
> 3. "by or for another party or by or for that party's representative."
>
> It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

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[2] The work-product privilege applies in this context only to documents or tangible things, not to factual information contained therein. The identities of persons with knowledge of relevant facts and other factual information obtained in the course of MSHA's investigation are available to Respondent through properly framed interrogatories and depositions. *See, gen,* 6 Moore's Federal Practice, § 26.70[2][a] (Matthew Bender 3d ed.). The Secretary has indicated that the identities of witnesses have been disclosed in response to an interrogatory requesting the identities of persons with knowledge of relevant facts.

> Fed. R. Civ. P. 26(b)(3). If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id*.
>
> Commission Procedural Rule [56(b)], 29 C.F.R. § 2700.[56(b)], provides, as pertinent here, that parties may obtain discovery of any relevant matter that is not privileged. The Commission is guided, "so far as practicable" and as is "appropriate," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its rules. 29 C.F.R. § 2700.1(b). In applying Fed. R. Civ. P. 26(b)(3) to the contested passage of Exhibit K, the material in dispute is clearly a document. In addition it was prepared by a party to this litigation or by its representative, MSHA Special Investigator R.L. Everett. As stated above, it is not necessary that the document be prepared by or for an attorney.
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> The key issue is whether Exhibit K was prepared in anticipation of litigation. If, in light of the nature of a document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation, then the document is covered by the privilege. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. Finally, documents prepared for one case have the same protection in a second case, if the two cases are closely related.
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> The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation. A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. § 820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed. (footnote omitted) (citations omitted)

See, also, Consolidation Coal Co., 19 FMSHRC 1239, 1242-44 (July 1997).

As in *ASARCO*, the key question here is whether the materials sought were prepared in anticipation of litigation. The materials in dispute were prepared by the Secretary's Mine Safety and Health Administration (MSHA) in the course of investigating a complaint filed by Jenkins and Mahon pursuant to § 105(c)(2) of the Act. The complaint, a copy of which was appended to the complaint filed with the Commission, was filed on March 3, 1999, and alleged that Jenkins

and Mahon had been unlawfully discharged on March 2, 1999. It identified the responsible person as Forrest Newsome, Superintendent of the mine, and described the unlawful action and relief requested as follows:

> We feel that we have been discriminated against in that we were falsely accused of reporting safety violations to inspectors and for stealing. These charges have resulted in our being discharged.
>
> We request as our relief to have our records cleared, our jobs restored and back pay for all lost pay, wages, etc.

MSHA promptly initiated an investigation, in the course of which it interviewed numerous miners and management personnel, reducing many of those conversations to writing, including formal signed witness statements. A report of the investigation was ultimately prepared and typically would consist of a compilation of the factual information gathered in the investigation and a recommendation on whether or not to initiate litigation on behalf of the complaining miners.

The facts of this particular case present a more compelling justification than those in *ASARCO* for concluding that the documents generated in the course of the investigation were prepared "in anticipation of litigation." The determination of whether litigation should be commenced is virtually the sole purpose of an investigation of discrimination complaints pursuant to § 105(c) of the Act. Moreover, the complaint filed by Jenkins and Mahon stated the essence of a claim actionable under § 105(c) of the Act, including a specific claim for relief. Consequently, the prospect of litigation here was more concrete than presented in *ASARCO*, especially considering that Jenkins and Mahon could initiate litigation even if the Secretary ultimately determined not to proceed.

Durbin attempts to distinguish *ASARCO* by arguing that the disputed materials there involved an inspector's notes "*concerning the inspector's conversation with an attorney from the Secretary's Solicitor's Office regarding the case.*"[3] Durbin's argument reflects the erroneous focus of the parties in *ASARCO*. While the underlying purpose of the work product privilege was protection of the mental impressions of an attorney, under the federal rules the privilege is considerably broader and does not depend upon involvement by an attorney. The factual distinction noted by Respondent was not pertinent to, or mentioned in, the Commission's rational for determining that the materials were prepared in anticipation of litigation. Respondent also argues that in the absence of at least a preliminary determination that the complaint had merit, the prospect of litigation was far from certain and the documents should be viewed as having been generated in the mandatory regular course of business of MSHA. However, the "regular course of business" concept can be misleading when applied to a government investigation. As

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[3] Durbin Coal, Inc.'s Reply to the Secretary's Response to Durbin's Expedited Motion to Compel Production of Documents, at p. 5. (emphasis in original).

observed in *ASARCO*, "a major function" of the special investigation there was to determine whether litigation should be brought. Here, neither party has identified any other potential purpose of the investigation initiated in response to the discrimination complaint. The materials at issue here can be said to have been generated in "the ordinary course of business" only because the anticipation of litigation was MSHA's "business" in investigating the complaint filed by Jenkins and Mahon.[4]

On the facts of this case, the documents sought by Respondent here were generated in anticipation of litigation and are protected by the work product privilege.

This conclusion is reinforced by the fairly well-settled proposition, that the initiation of an investigation by a government agency is sufficient to satisfy the "anticipation of litigation" requirement. *Maertin v. Armstrong World Industries, Inc.*, 172 F.R.D. 143 (D.N.J. 1997); *Vermont Gas Systems, Inc. v. United States Fidelity & Guaranty Co.,* 151 F.R.D. 268, 275-76 (D.Vt. 1993); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 513 (D.N.H. 1996); *and, see gen.*, 6 Moore's Federal Practice § 26.70[3][d] (Matthew Bender 3d ed.) . If Durbin had conducted it's own investigation upon being notified by MSHA of Jenkins' and Mahon's complaint, and it may well have done so, materials generated in the course of that investigation would likely fall within the work product privilege and Durbin could assert that privilege in response to any discovery requests by the Secretary.

Substantial Need - Undue Hardship

As noted above, Respondent can overcome the privilege by establishing that it has a substantial need for the materials and is unable to obtain the substantial equivalent of the materials without undue hardship. Respondent asserts two arguments in an attempt to overcome the privilege. It posits that the witness statements and similar materials are unique in that they were prepared within days or weeks of the alleged act of discrimination and, consequently, are likely to more accurately reflect the witness' observations of events and cannot be duplicated through a deposition. Respondent also argues that the materials would be useful for impeachment, although it offers no evidence that there are likely to be discrepancies between the statements and any other similar materials, e.g. a deposition of the witness, or anticipated testimony.

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[4] *See, Kent Corp. v. NLRB*, 530 F.2d 612, 623 (5th Cir.), *cert. denied.* 429 U.S. 920 (1976); *People by Vacco v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143, 150-51 (S.D.N.Y. 1995).

The Commission observed in *Consolidation Coal Co., supra.* 19 FMSHRC 1243-44, that "[a] number of courts * * * have concluded that, by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a "substantial need" for purposes of the work-product privilege." (Footnote omitted) Respondent's "more contemporaneous" argument has more substance. The witness statements were taken on March 5, 11, 15, 1999 and April 12, 1999, relatively close to the March 2, 1999, termination of the Complainants. The other materials were generated from March 3 through April 29, 1999. Respondent relies on *Smith v. Black Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 584-85 (S.D.Tex. 1996) in which production of witness statements taken immediately following an accident was ordered.

Facts relevant to allegations of unlawful discrimination under § 105(c) of the Act, typically occur over a considerably longer time span than those pertinent to an accident.[5] In this particular case, however, the pertinent time frame may be relatively short. Discovery responses submitted in conjunction with another pending motion to compel indicate that the disputed "stealing" incident likely occurred on March 2, 1999, the date of the alleged terminations. Complainants here do not allege engagement in protected activity over a lengthy period. Rather they argue that Respondent suspected that they had engaged in protected activity and terminated them for that reason. The factual predicate for this allegation is presently unknown to the undersigned. It is possible that the four witness statements contain information so contemporaneous with occurrences critical to the issues in this case, that Respondent would have substantial need of it to prepare its defense and could not duplicate it through other means, e.g. interviews or depositions of persons identified as having relevant knowledge or information. Similar considerations apply to portions of the special investigator's notes, if any, that reflect communications from other witnesses whose statements have not already been provided to Respondent. Other factors suggest that those materials are unlikely to contain contemporaneous information satisfying the substantial need - undue hardship tests. Respondent's discovery responses indicate that there were five witnesses to the "stealing" incident and subsequent alleged terminations and it has been provided statements from all of them. The other portions of the notes and the internal memoranda are not likely to contain such information.

Without knowing the identities of the four witnesses who provided statements, or the content of the statements, Respondent claims that there is little more that it can advance in support of its argument. In the absence of more information about the four witness statements and any similar portions of the investigator's notes, an informed decision on Respondent's need and hardship arguments cannot be made. While it is Respondent's burden to establish need and hardship, it is the Administrative Law Judge's responsibility to make informed decisions on

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[5] An operator's knowledge or suspicion of protected activity and its attitude toward such activity may be established by facts that occurred days, weeks or even months before the alleged adverse action.

discovery issues.[6] Rather than direct the Secretary to provide detailed descriptions of the materials, it would be much more efficient to review them *in camera*. Accordingly, the Secretary will be directed to submit for *in camera* review copies of the four witness statements, and portions of the investigator's notes, if any, reflecting communications by any other persons whose statements have not been provided to Respondent. The statements and excerpts from the notes should be marked so as to indicate proposed redactions to protect the identities of informant's and any deliberative process material.[7]

The Informant's Privilege

The Secretary claimed the informant's privilege as to the four witness statements, the investigator's notes and some of the internal memoranda. The Commission has recognized the importance of the informant's privilege in effectuating the purposes of the Act. *Secretary obo Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (Nov. 1984). It is the identity of the informant that is protected by the privilege, not the contents of a statement, except for those portions of the content that would tend to identify an informant. *ASARCO, supra.*, 12 FMSHRC at 2553-54. It is the Secretary's burden to establish that the privilege applies. *Id.* Because the privilege is qualified, a party may seek to overcome it by demonstrating that the information is necessary for a fair determination of the case and that its need for the information outweighs the Secretary's need to maintain the privilege.

The Secretary has not presented factual evidence from which application of the privilege can be determined, aside from information directly identifying an informant, e.g. name, address, etc. Information, such as, job title and duties and responsibilities may be privileged if unique to the informant, or to such a small group of persons that the informant would tend to be identified. Without competent evidence establishing that the entire statement consists of such information and that it would disclose an informant's identity, however, the Secretary clearly has not satisfied her burden as to the entirety of the witness statements, or to those portions of the investigator's notes, if any, described above.

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[6] As the Commission observed in *ASARCO, Inc.*, 14 FMSHRC 1323, 1329 (August 1992) (*ASARCO II*):

> It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination.

[7] Noted on the Secretary's privilege log is an assertion of the law enforcement privilege with respect to the investigator's notes. In opposition to the motion, however, the applicability of that privilege is not explained and the Secretary has clearly failed to sustain her burden on that issue.

As noted above, a final determination on whether Respondent has met its burden of establishing substantial need and undue hardship as to the witness statements and portions of the investigator's notes will be made after a review of those materials. If the redactions proposed by the Secretary go beyond a straightforward application of the legal principles and privileges discussed herein, the Secretary may also provide evidence that such portions of the witness statements and portions of the investigator's notes are covered by the privilege by submitting for *in camera* review an affidavit by a person with knowledge of the facts relied upon. *See, ASARCO II*, 14 FMSHRC at 1330, 1333.

The Deliberative Process Privilege

The deliberative process privilege was first discussed by the Commission in *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992). Following a brief review of the origin of the privilege the Commission observed:

> The breadth of the privilege is described by the court in *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753 [772] (D.C. Cir. 1978):
>
> > This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

To be covered by the privilege, the material must be both "pre-decisional" and "deliberative." *Id.* 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 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 prove that the privilege applies to material it seeks to protect from disclosure. *Id.* 14 FMSHRC at p. 993. *Consolidation Coal Co.*, *supra*, 19 FMSHRC at 1246-47. A party seeking to overcome the privilege has the burden of demonstrating that its need for the information outweighs the governmental interest in protecting it from disclosure.

The deliberative process privilege it not truly at issue here. While Respondent argues that the privilege has not been properly invoked, it also has made clear that it does not seek portions of the documents that would be protected by the privilege. In its reply to the Secretary's opposition to the motion, at p. 9, Respondent made clear that "the deliberative process privilege does *not* apply to the *factual* portions of these documents, which are all that Durbin seeks." (emphasis in original) Factual information, with limited exception, is not protected by either the informant's or deliberative process privilege. If, on review of the documents described above, it is determined that they should be produced under the work-product analysis, only those portions

of the documents that contain information that does not identify an informant or reflect the pre-decisional, deliberative processes of the Secretary will be ordered produced.

Conclusion and Order

Respondent is generally entitled to relevant factual information in possession of the Secretary that has properly been requested through discovery. The work-product privilege applies to the materials generated in the course of MSHA's investigation. However, Respondent may have a substantial need for, and be unable to obtain by other means without undue hardship, the four witness statements and any similar portions of the investigator's notes. Even if not protected from disclosure by the work-product privilege, information that identifies or tends to identify a person who has provided information to the Secretary would be protected by the informant's privilege. The Secretary's pre-decisional deliberations, information that is of marginal, if any, relevance and unlikely to be factual in nature, has not been requested and is unlikely to be contained in the materials that have been ordered produced for *in camera* inspection.

The motion to compel is denied, except as to the four witness statements and portions of the special investigator's notes reflecting communications by other individuals whose statements have not already been provided to Respondent. On or before Wednesday, September 13, 2000, the Secretary is directed to provide for *in camera* review, copies of those materials with proposed redactions to protect the identity of informants and the Secretary's pre-decisional deliberations. The Secretary may also submit evidence establishing the applicability of the informant's privilege to those portions of the documents to which its application may not be obvious. Upon review of the documents and consideration of any such evidence, a further order will be issued.

Michael E. Zielinski
Administrative Law Judge

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