

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

September 22, 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	:	

SUPPLEMENTAL ORDER **DENYING RESPONDENT'S MOTION TO COMPEL**

By Order dated September 6, 2000, Respondent's motion to compel production of documents was denied, in part. The Secretary was ordered to produce, for *in camera* inspection, four witness statements and any similar portions of the special investigator's notes. Review of those materials *in camera* was determined to be the most efficient means of determining whether Respondent had a substantial need for the documents and would be unable to obtain the substantial equivalent of them without undue hardship.

The Secretary was directed to submit the documents by September 13, 2000. An extension of that deadline, to September 20, 2000, was requested, without opposition by Respondent. On that date, the Secretary advised that an "unforeseen staff shortage" would delay submission of the documents until the following day. The documents were hand delivered on September 21, 2000, along with a "Response" to the order consisting of further argument on the substantial need — undue hardship issues.¹ The Secretary did not request leave to submit further argument on these issues and further argument was not contemplated in the Order. I have not considered the Secretary's further argument.

¹ While the Secretary's response to the Order (without enclosures, of course) was hand delivered to the Commission, it was mailed to counsel for Respondent. On the morning of September 22, 2000, counsel for the Secretary was, by phone, directed to transmit a copy of the response to Respondent by facsimile.

The documents submitted consist of four witness statements, three of which were properly identified on the privilege log. The fourth statement, however, is a statement by Franklin Runyon, which is already in Respondent's possession and does not match any of the descriptions of the four witness statements on the log.² Also submitted is a document identified on the privilege log as a "memo to file", dated March 10, 1999. It reflects the substance of a conversation that the investigator had with a witness, wherein the witness described a phone conversation with an individual in mine management. No other materials were identified as responsive to the Order.³

None of the documents submitted match the description of the fourth witness statement identified on the privilege log as being dated March 5, 1999. Upon inquiry, Complainant's counsel advised that there is no such statement in the file and speculated that the statement of Franklin Runyon may have been erroneously described on the log. Counsel expressed an intent to submit a corrected privilege log and confirmed that no privilege is asserted with respect to the Runyon statement.

As noted in the Order, I determined to review the documents *in camera* because it was possible that they might "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." It was also observed that the facts of this case suggested that the presence of such information was unlikely.

A review of the documents has established that they do not contain information so contemporaneous with critical events that Respondent could have a substantial need for the documents in preparation of its case. None of the individuals witnessed the "search" incident or the discussion with the Complainant's that followed. There is also no reason to believe that Respondent could not obtain the equivalent of the information contained in the statements by other means. The individuals have been identified as persons with knowledge of relevant facts and are, presumably, available for interview or deposition. There is no reason to believe that they would not disclose all relevant information known to them. In any event, Respondent has not established that any person with knowledge of relevant facts is unavailable or has claimed such failed recollection that relevant information is effectively unavailable to it. *See, Varuzza by Zarrillo v. Bulk Materials, Inc.*, 169 F.R.D. 254 (N.D.N.Y. 1996); *Ehrlich v. Howe*, 848 F. Supp. 482, 492-94 (S.D.N.Y. 1994).

² Handwritten versions of the witness statements, as initially taken by the investigator, were also produced.

³ Copies of the materials with proposed redactions were also submitted. The disposition of the motion makes it unnecessary to review the propriety of the proposed redactions.

Conclusion and Order

Respondent's motion to compel is denied as to the witness statements and memorandum. The materials submitted by the Secretary will be filed under seal, and will be available in the event they are needed for further review.

Michael E. Zielinski
Administrative Law Judge

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