

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 27, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 2001-58
Petitioner : A.C. No. 46-08476-03513
v. :
:
C C COAL COMPANY, :
Respondent : Skitter Creek Mine #1

ORDER DENYING IN PART A MOTION TO
COMPEL DISCOVERY
AND GRANTING IN PART A MOTION TO
COMPEL DISCOVERY

This case is before me on a Petition by the Secretary to assess a Civil Penalty for the
alleged violation of mine safety regulations. The parties have filed prehearing summary
statements pursuant to my prehearing order and are engaged in discovery in preparation for a
hearing now scheduled for January 23, 2002, in Charleston, West Virginia.1

On December 11, 2001, the respondent filed a motion to compel discovery, seeking two
classes of information; (1) records of the process of calculating the Civil Penalty proposed by the
Secretary, and (2) documents obtained in the course of an investigation, including witness
statements. On December 19, 2001, the Secretary filed a response to the motion, including copies
of the requested investigative documents for my in camera inspection. For the reasons given
below, I deny the motion with a few exceptions listed..

Method of Assessment

Respondent asserts a need to know the method used by the Secretary in calculating the
proposed Civil Penalty in this case. The Secretary responds by invoking the "deliberative
process" privilege and contending that Respondent has not shown a compelling need for
information on the process to justify overriding the privilege. It is my understanding Respondent
has been provided the penalty assessment sheet.

1 The timeliness of the Motion to Compel was never seriously in doubt. See, letter of
December 26, 2001, from Respondent's Counsel to the Administrative Law Judge.

The motion does not raise legal issues as to the existence and scope of the “deliberative process” privilege. There is no question about the privilege extending to the consultations, oral or written, between government officials leading up to a determination of the amount of a Civil Penalty to assert in a case such as this. Respondent is entitled to know the factual information used by these officials and the criteria which they employed in evaluating the factual information. Respondent is not seeking either the factual information or the criteria. Respondent is seeking to know the significance the officials placed on particular bits of information. This is precisely what is protected by the privilege.

Further, Respondent has not made a compelling showing of need for this privileged information. At the hearing, the way MSHA officials evaluated information in reaching their conclusion as to an appropriate Civil Penalty would not be relevant. The issue at a hearing will be how I evaluate the information presented as it relates to an appropriate Civil Penalty amount.

Investigative Records

The investigative records sought in this case fall into three basic categories; (1) records of interviews with management, (2) records of interviews with miners, and (3) records of conversations with Respondent’s attorney. All of these records were created or obtained subsequent to the issuance of a citation by a mine inspector. I find the timing alone qualifies these records under the Work Product privilege; all of them were created or obtained when the probability of litigation was sufficiently great to consider them “in contemplation” of litigation. On the other hand, I find Respondent has shown a sufficient need for the information to overcome this relatively weak privilege. Unless the documents are otherwise privileged, Respondent is entitled to them. The parties appear to agree that the applicable law is well articulated in the decision by Judge Feldman in *Secretary of Labor v. Root Neal & Company*, 21 FMSHRC 835 (July 1999).

The other privilege asserted for these documents is the “informant” privilege. I note initially that this privilege protects only the identity of the informant. It does not protect the information which the informant has provided unless the information is such as to precisely identify the informant. I note also that the privilege extends only to informants who are “miners.” I find the privilege does not extend to mine management staff, members of the general public, or to government employees.

Applying these principles to the documents provided to me *in camera* I conclude the Secretary is obligated to produce all the documents other than the Memoranda to File by Linda Roberts dated January 23 and February 12, 2001.

ORDERED as follows:

1. Secretary will provide to the Respondent all the documents which accompanied the Secretary’s December 20, 2001, letter to me except for the Memoranda to File by Linda Roberts

dated January 23 and February 12, 2001.

2. Except for the documents to be produced under paragraph 1, above, the motion to compel discovery is denied.

Irwin Schroeder
Administrative Law Judge
703-756-5232

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