FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 8, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-36
Petitioner	:	A.C. No. 46-08593-11714
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim's Branch No. 3a
Respondent	:	

ORDER DENYING MOTION FOR PARTIAL RECONSIDERATION

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 18, 2004, I granted, in part, and denied, in part, a motion of the Respondent to compel the Secretary to furnish certain documents. *Baylor Mining, Inc.*, 26 FMSHRC 739 (Aug. 2004). The Secretary has filed a motion for partial reconsideration of the order and the Respondent has filed a response in opposition. For the reasons set forth below, the Secretary's motion is denied.

The order contained a footnote which stated: "The Respondent will be receiving the names of the Secretary's miner witnesses two days before trial. At that time, counsel for the Respondent should also receive all statements made by those miners who will be witnesses." *Id.* at 744 n.5 (citation omitted). Contending that this "requires that miners who are named as witnesses will be simultaneously designated as informants," the Secretary requests that the footnote be retracted. (Sec. Mot. at 4, 10.) The Respondent states that the motion should be denied and that it should be furnished the miner witnesses' statements at the time such witnesses are identified.[1]

In making its argument, the Secretary relies on the Federal Register discussion of Commission Rules 61 and 62, 30 C.F.R. §§ 2700.61 and 2700.62, when they were adopted.

[1] Respondent also requests that I require the Secretary to furnish the witness statements forthwith because no finding was made in the order that the statements were subject to the "informant's privilege." No such finding was made because I determined that the "work product" privilege precluded discovery of the statements making it unnecessary to consider whether the "informant's privilege" also applied to the statements. 23 FMRHRC at 742-43. Therefore, to the extent Respondent requests reconsideration of the order, its request is denied.

There, in discussing the relationship between the two, it was stated that: "Consistent with § 2700.61, in disclosing the names of miner witnesses, a judge shall not disclose whether any were also informants." 58 FR 12158, 12163 (Mar. 3, 1992). This discussion to the contrary, however, the case law does not support the Secretary's contention that Rule 61 precludes release of miner witness statements because the statements might identify the witnesses as informants.

While the rule clearly forecloses the release of such statements during discovery, the Commission has recognized that a Respondent's right to witness statements "at the time of trial is a separate and procedurally distinct issue" from whether they can be discovered. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992). Furthermore, in the same case, the Commission stated that "any statement of a miner who is called as a witness may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial." *Id.* In a subsequent case, the Commission specifically stated that "the judge may at trial order disclosure of informants' statements" even if the statements had previously been determined not to be discoverable, *Sec'y of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237 (Nov. 1993). Consequently, I find that Baylor is entitled to the witness statements at the hearing.

As an alternative to her position that the witness statements should not have to be disclosed, the Secretary argues that if the witness statements must be disclosed, "the disclosure should take place only after conclusion of direct examination of the miner witness." (Sec'y Mot. at 9.) I decline to adopt such a procedure.

In *Brennan v. Engineered Products, Inc.*, 506 F.2d 299 (8th Cir. 1974), the court considered the same issue in a Fair Labor Standards Act case involving employee informants with the same interest against employer retaliation as miner witnesses. In discussing whether witness statements had to be provided to the employer defendant, the court stated:

> A resolution of this dilemma must be entrusted to the sensitive discretion of the trial court. One alternative is for the District Court to employ the Jencks Act approach urged by the government, allowing the defendant to examine the statements of witnesses only after completion of direct examination. It may be that, where the only possible use of the statement is for impeachment purposes, such an approach will be sufficient to protect the defendant. A second alternative would be for the District Court to order pretrial disclosure only of a summary of the evidence which will be presented by each witness it proposes to call, and not the statements themselves. A third alternative would be to order production of the statements themselves, either at the same time as the witness list is ordered, or at a shorter period of time before the witness' appearance.

Id. at 304-05 (citations omitted).

In *Asarco*, the Commission included the fact that witnesses would be named two days before the trial and that the witnesses' statements could be obtained in the same sentence. I infer from this that the Commission favored the third alternative, but did not specifically say so because it was not necessary to that decision. Even is this is reading too much into *Asarco*, I still find the third alternative preferable. Having to stop the hearing after each miner witness testifies so that the Respondent can read any statements and perhaps investigate other evidence brought to light by the statement will unnecessarily protract and delay the hearing. In addition, allowing the Respondent to have the statements two days prior to the hearing, permits Respondent's counsel to fully prepare their case prior to the hearing.

Finally, this determination in favor of judicial efficiency is not made at the expense of the witnesses' interest in being protected from retaliation. The Secretary's investigation should have long been completed two days before the trial so there is no incentive for the operator to harass the witnesses in the hope of precluding their giving information to the Secretary. Further, two days before the trial provides little opportunity for an operator to retaliate against a witness.[2]

Order

Footnote 5 in the original order was not intended to be an order but rather a statement of the way matters would proceed to hearing. However, inasmuch as the Secretary does not agree that that is how the witness statements should be handled, I will make it an order. Accordingly, the Secretary's motion is **DENIED** and it is **ORDERED** that the Secretary furnish the names of her miner witnesses to the Respondent two days before the hearing and that at the same time, the Secretary provide to the Respondent the statements, including memoranda of interview, of any miners who will be witnesses.[3]

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

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[2] Of course, if retaliation occurs at anytime against a miner witness, he has a remedy under section 105(c) of the Act, 30 U.S.C. § 815(c).

[3] If any statement contains information which may tend to identify an informant who will *not* be a witness at the trial, that information may be redacted to protect the informant's identity.

Distribution: (Certified Mail)

James F. Bowman, Conference & Litigation Representative
U.S. Department of Labor, MSHA, 100 Bluestone Road, Mt. Hope, WV 25880

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

David J. Hardy, Esq., Spillman, Thomas & Battle, PLLC
Spillman Center, 300 Kanawha Boulevard, East, P.O. Box 273, Charleston, WV 25321

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