FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
August 18, 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 GRANTING, IN PART,
AND
DENYING, IN PART, MOTION TO COMPEL

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). The Respondent filed a request for production of documents with the Secretary. Citing the "work product" privilege, the "informant's" privilege and the "deliberative process" privilege, the Secretary declined to furnish 12 documents in response to the Respondent's request.[1] Consequently, the Respondent has filed a Motion to Compel disclosure of the documents. Relying on the privileges previously asserted, the Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

The documents at issue are: (1) The inspector's September 10, 2003, notes; (2) An August 6, 2003, Special Investigation Report; (3) A September 19, 2003 Memo from the special investigator to the Acting Director of the Office of Assessments; (4) An April 14, 2003, signed miner witness statement; (5) An April 10, 2003, unsigned miner witness statement; (6) A May 30, 2003, Memorandum of Interview of a miner witness; (7) and (8) Two June 9, 2003, Memoranda of Interview of members of management; (9) A June 6, 2003, Memorandum of Interview of a member of management; (10) A June 13, 2003, signed miner witness statement; (11) A May 30, 2003 Memorandum of Interview of a "private" individual; and (11) A June 19, 2003, Memorandum of Interview of a miner witness.

With the exception of the inspector's notes, the Secretary's Conference and Litigation Representative argues that the remaining 11 documents are covered by the "work product"

[1] It is not clear whether the Secretary withheld 11 or 12 documents since, as will be seen *infra*, the Secretary has already furnished the inspector's notes.

privilege. The work product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[2] The Commission has held that:

> In order to be protected . . . under Fed. R. Civ. P. 26(b)(3), the material sought in discovery must be:
>
> 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."

Asarco, Inc., 12 FMSHRC 2548, 2558 (Dec. 1990) (*Asarco I*). The documents clearly meet (1) and (3), so the question is whether they were prepared "in anticipation of litigation or for trial."

The investigation in this case was carried out in response to a section 103(g) complaint, 30 U.S.C. § 813(g).[3] As evidence that the investigation was in anticipation of litigation, the Secretary has submitted the affidavits of the Supervisory Special Investigator and the investigator. The supervisor's affidavit states:

> I assigned Robert W. Simmons, Special Investigator, to conduct an investigation of this complaint. Because of the allegation of possible falsification of records, one of the purposes of Mr. Simmons' investigation was to recommend whether civil penalty assessments should be proposed and whether the matter

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[2] Commission Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Act, the Commission's procedural rules, or the Administrative Procedure Act.

[3] Section 103(g)(1) provides, in pertinent part, that:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representation has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . . Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists. . . .

> should be referred to the United States Attorney form [*sic*] possible criminal action. In addition, it was known that Mr. Lucas had been killed in a subsequent accident at the Jim's Branch No. 3a Mine and that there was ongoing litigation concerning his death. As such, the work performed by Investigator Simmons as part of this investigation was performed in anticipation of possible litigation.
>
> Special Investigations conducted pursuant to Section 103(g) of the Act are not conducted in the ordinary and routine course of MSHA's business. Normally, a 103(g) complaint is assigned to a regular inspector to investigate. However, because this case involved an allegation of falsification of records, it was assigned to a Special Investigator and a special investigation was conducted. This investigation was conducted with the understanding that litigation was a possibility.

(Sec'y. Resp., Attach. B., Aff. of James G. Jones, Paras. 4 & 5.) The affidavit of Simmons contains essentially identical language. (Sec'y. Resp., Attach. C., Aff. of Robert W. Simmons, Paras. 4 & 8.)

The affidavits are relevant because the belief of the party preparing the document, that litigation will result, if objectively reasonable, is the initial focus of whether a document was prepared in anticipation of litigation. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3rd Cir. 1993). Consequently, finding the affiants' beliefs to be objectively reasonable, I find that the Secretary has met the first step in sustaining her claim of the privilege.

Next, the Secretary correctly argues that "it is well recognized that such special investigations are conducted by MSHA in anticipation of litigation." (Sec'y. Resp. at 5.) Indeed, in *Asarco I*, the Commission held that MSHA special investigations under sections 110(c) and (d), 30 U.S.C. § 820(c) and (d), are undertaken in anticipation of litigation. *Id.* at 2559. Section 110(d) deals with criminal penalties for operators who "willfully violate[] a mandatory health or safety standard." Thus, it appears that the investigation, although initially triggered by a 103(g) complaint, falls within the protection of the privilege by the possibility of criminal charges.

Further, it does not appear that MSHA arrived at this rationale in response to the instant motion. The August 6 memorandum, written well before the citation was issued, states as its subject: "Special Investigation Report Under Section 110 . . . ." This also supports the claims in the affidavits that the investigation was undertaken with litigation a possibility.

Finally, even though there is no evidence that criminal charges resulted from the investigation, the privilege would still apply in this case. As the Commission said in *Asarco I*, "documents prepared for one case have the same protection in a second case, if the two cases are closely related." *Id.* at 2558. The Commission went on to say:

> It is our understanding that no charges have been brought as a result of Everett's special investigation. Nevertheless, this civil penalty case, brought under section 110(a), 30 U.S.C. § 820(a), is closely related litigation and it further appears that it could fairly be said that the document was prepared in anticipation of that litigation.

Id. at 2559 (citations omitted). In this case, the civil penalty case for inadequate task training is more than just closely related to the investigation; lack of task training was one of the allegations in the 103(g) complaint. (Sec'y. Resp. Attach. A.)

In conclusion, I find that the Secretary has met her burden of establishing that the documents in question were prepared in anticipation of litigation. Documents 2 and 3 are clearly covered by the privilege as they are documents prepared in anticipation of litigation by the Secretary's investigator. Documents 4, 5 and 10, the signed and unsigned miner witness statements, taken by the investigator during the investigation also fall within the privilege. *See Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986). Finally, Documents 6, 7, 8, 9, 11 and 12, the memoranda of interviews, are also covered by the privilege. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997). Accordingly, I hold that the work product privilege applies to all 11 documents.

Having found that all 11 of the documents are entitled to work product immunity, "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.' Fed. R. Civ. P. 26(b)(3)." *Asarco I*, 12 FMSHRC at 2558. In this case, the Respondent argues that the documents "presumably motivated the Secretary's enforcement action and contain information needed by Baylor to prepare its defense over two and one-half years after the event." (Mot. at 9.)

This assertion may meet the substantial need part of the test, but it does not demonstrate that Baylor is unable without undue hardship to obtain the substantial equivalent of the materials by other means. This is not a case where the Secretary obtained the information back in 2001 when memories were fresh. The Secretary got the information a year ago. That is about the same length of time that proceeds most cases before the Commission.

Baylor has access to the same individuals with knowledge of the alleged inadequate task training as did the investigator and can question them in the same manner, under *subpoena*, if necessary. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992) (*Asarco II*). Other than a lapse in time, which is essentially the same for both parties, the Respondent has made no showing that it attempted to question witnesses and they could not remember what happened, that some witnesses are no longer available, that it would have to go to unusual expense to obtain the information contained in the documents or that some other *actual* reason prevents the operator

from obtaining this information. Accordingly, I conclude that the Respondent has not met the undue hardship test and that documents 2-12, with the exception of documents 7, 8 and 9 need not be disclosed.[4]

With respect to documents 7-9, which are memoranda of interviews of Baylor managerial employees, Fed. R. Civ. P. 26(b)(3) provides that: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Since Baylor, the party, is a corporation, it follows that it may obtain the statements of its agents without the required showing of substantial need and undue hardship. Inasmuch as the Secretary has not asserted any other privilege with regard to these documents, they must be furnished to the Respondent.

This disposes of all of the documents except the inspector's notes dated September 10, 2003. The Respondent requests "the inspector's notes redacted only, if applicable, of identifying information regarding informant witnesses and the mental impressions, conclusions, opinions or legal theories of any attorney or other representative party concerning the case." (Mot. at 14.) In response, the Secretary's representative states:

> With respect to the inspector's notes that the respondent [*sic*] seeks produced, those notes were taken after the issuance of the citation at issue and relate to a follow-up inspection to determine whether the violation had been abated. The only material that was redacted from those notes was the social security and phone numbers of persons who were interviewed.

(Sec'y. Resp. at 8.) Thus, it appears that the Secretary has already produced the inspector's notes.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent Documents 7, 8 and 9, the memoranda of interview

[4] Having found that the work product privilege applies to these 11 documents, I do not reach the Secretaries assertion of the "informant's" and "deliberative process" privileges.

of management. In all other respects, the Motion to Compel is **DENIED** and the Secretary need not disclose the two memoranda from the investigator or the witness statements or other memoranda of interviews.[5]

T. Todd Hodgdon
Administrative Law Judge
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/hs

[5] 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. *Asarco II*, 14 FMSHRC at 1331.