FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 12, 1999

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 98-45-R
	:	Order No. 7171660; 1/22/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 1
ADMINISTRATION (MSHA),	:	Mine ID 46-07711
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-39
Petitioner	:	A.C. No. 46-07711-036660
v.	:	
	:	Docket No. WEVA 98-69
EAGLE ENERGY INCORPORATED,	:	A.C. No. 46-07711-03666
Respondent	:	
	:	Mine No. 1
	:	
	:	Docket No. WEVA 98-81
	:	A.C. No. 46-07711-03670
	:	
	:	Mine No. 2

ORDER DENYING EAGLE ENERGY INCORPORATED=S MOTION TO COMPEL DISCOVERY

Before me for consideration is Eagle Energy Incorporated=s (Eagle Energy=s) December 15, 1998, Motion to Compel the Secretary to produce the following:

1. Copies of the reports of the health and safety conferences conducted by representatives of the Mine Safety and Health Administration (MSHA) with Eagle Energy company officials on October 7, 1997 (2 pages), December 4 and 10, 1997 (5 pages), and February 26, 1998 (2 pages);

2. A copy of hand written notes by MSHA Supervisor Terry Price regarding his November 5, 1997, meeting with Eagle Energy company officials (1 page); and

3. A copy of a memorandum dated April 14, 1998, from MSHA Conference and Litigation Representative Ira Lee to the Secretary=s counsel, Yoora Kim.

The Secretary filed an Opposition to Eagle Energy=s motion to compel on December 17,

1998, asserting the health and safety conference reports as well as Price=s notes of his November 5, 1997, meeting are protected by the work product and deliberative process privileges. The Secretary=s opposition also asserted the April 14, 1998, memorandum from Lee to counsel was protected by the attorney-client privilege. Eagle Energy replied to the Secretary=s opposition on December 31, 1998. In its reply, Eagle Energy conceded the Lee memorandum was protected by the attorney-client privilege. However, Eagle Energy asserts the health and safety conference reports and Price=s notes are not protected because they were prepared during the normal course of business.

The Work Product Privilege

Commission Procedural Rule 56(b), 29 C.F. R. ' 2700.56(b), provides that parties may obtain discovery of any relevant matter that is not privileged. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[1] In *ASARCO, Inc.,*

[1]Commission Procedural Rule 1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission=s Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A]party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party=s representative (including the other party=s attorney, consultant, surety, indemnitor, insurer, or agent) 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other

12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
>
> 1. Adocuments and tangible things;@
>
> 2. APrepared in anticipation of litigation or for trial;@ and
>
> 3. Aby 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 Aonly 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.@ If the court orders that the materials be produced because the required showing has been made, the court is then required to Aprotect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.@

Id. at 2558 (citations omitted). The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the privilege. P. & B Marina, Ltd. Partnership v. Logrande, 136. F.R.D. 50, 57 (E.D.N.Y. 1991), aff=d, 983 F.2d 1047 (2d Cir. 1992).

It is clear that the conference notes and the notes prepared by MSHA Supervisor Price are Atangible documents@ prepared Aby or for the Secretary.@ The dispositive question concerning the applicability of the work product privilege is whether these documents were Aprepared in anticipation of litigation or for trial.@ Whether these documents are privileged because they were prepared with litigation in mind must be based on the nature of the documents and the factual situation in each particular case. *ASARCO*, 12 FMSHRC at 2558. If the documents can fairly be said to have been prepared **because of the prospect of litigation**, then the documents are covered by the privilege. *Id. [citing* Wright & Miller, *Federal Practice and Procedure* ' 2024 p.198-99 (1970)] 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. *Id.* In addition, particular litigation must be contemplated at the time the document is prepared in

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representative of a party concerning the litigation.

order for the document to be protected. *Id.*

Eagle Energy argues the subject notes are not protected because they were made in the ordinary course of business regardless of whether litigation was contemplated. As asserted by Eagle Energy, the question is whether MSHA reports of a safety and health conference are routinely prepared in the ordinary course of business without regard to whether litigation is contemplated. In addressing this question, it is necessary to analyze MSHA=s procedures for health and safety conferences contained in 30 C.F.R. ' 100.6. Operators that elect not to contest citations may decide not to request a safety and health conference. Safety and health conferences are only conducted, subject to MSHA=s approval, upon an operator=s request.

30 C.F.R. '' 100.6(b) and (c). Such conferences are the means by which operators may submit mitigating information including facts that operators believe warrant a finding that no violation occurred. 30 C.F.R. ' 100.6(e). Citations that are not vacated are referred by the safety and health conference official to the Office of Assessments with the inspector=s evaluation as a basis for determining the appropriate amount of civil penalty to be assessed. 30 C.F.R. '' 100.6(f) and (g).

Thus, generally, only contested citations are the subjects of safety and health conferences. Moreover, the MSHA official conducting the conference uses the information submitted by the operator as a basis for the referral to the Office of Assessments. Upon receipt of a notice of proposed penalty issued by the Office of Assessments, the operator has 30 days to pay or contest the proposed penalty. 30 C.F.R. ' 100.7(b). In essence, the safety and health conference is the initial step in the litigation process if the operator contests the proposed civil penalty. Consequently, such conferences are not routinely conducted, but rather, they are conducted when an operator challenges the initial citation. Accordingly, the notes of such conferences, including the notes of Supervisor Price, were prepared in contemplation of litigation and, as such, are protected by the work product privilege. Likewise, any notes prepared by an operator=s representatives during such conferences are also protected.

Having concluded that the conference reports and notes are protected, the analysis shifts to whether Eagle Energy can overcome the privilege by demonstrating a substantial need for the information, and establishing that it will suffer an undue hardship if it must attempt to obtain the information by other means. It is difficult for Eagle Energy to make such a showing for summaries of meetings with MSHA conference officials and Price that were attended by it own company representatives. General assertions, as advanced by Eagle Energy, that the protected material is needed to compare present recollections against prior statements, or for general purposes of impeachment, are not sufficient to overcome the work product privilege. *Consolidation Coal Company*, 19 FMSHRC 1239, 1243-44 (July 1997). Consequently, Eagle Energy has failed to overcome the privilege, and its motion to compel the safety and health

conference reports and Supervisor Price=s notes shall be denied.[2]

In the alternative, if Eagle Energy does not prevail in its motion to compel, it requests *in camera* review of the subject conference reports and Price=s notes to determine if they contain Apurely factual materials@ which are not protected. It is inappropriate to request the trier of fact to review, *in camera*, protected work product documents containing trial strategy, opinions or other confidential information solely on the basis of mere speculation that some severable, purely factual material may exist. Rather, the proponent of the *in camera* review must provide sufficient detail identifying the nature and substance of the factual material sought to be discovered.

Commission Rule 56(c) permits the Judge, upon his own motion to limit discovery to prevent undue burden or delay. 29 C.F.R. ' 2700.56(c). The discretion to order *in camera* review should be used judiciously. The *in camera* review process must not be used like a fishing expedition. Accordingly, absent a threshold showing identifying the nature of the information sought to be discovered, Eagle Energy=s request for *in camera* review is denied.

Attorney-Client Privilege

[2] Having determined the conference reports and Price=s notes are protected by the work product privilege, I need not address the Secretary=s assertion that they are also protected by the deliberative process privilege. However, I note that deliberative process in contemplation of hearing is protected under the work product doctrine. *See fn. 1 infra*. The distinction between these two privileges would be blurred if all deliberations in anticipation of hearing were also covered by the deliberative process privilege. Rather, the Commission has defined the deliberative process privilege as one which Aattaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.@ *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) [*quoting Jordan v. United States Dep=t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)]. It has neither been alleged nor shown that the conference or Price meeting concerned the formulation of agency policy.

Eagle Energy, in its reply to the Secretary=s opposition to its motion to compel, concedes the April 14, 1998, memorandum from MSHA Conference and Litigation Representative Ira Lee to the Secretary=s counsel, Yoora Kim, is protected by the attorney-client privilege. (*Reply*, pp. 16-17). Therefore, I construe Eagle Energy to have withdrawn its motion to compel the Lee memorandum.

In view of the above Eagle Energy=s Motion to Compel **IS DENIED**.

Jerold Feldman
Administrative Law Judge

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