FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 28, 1999

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 98-72-R
	:	Citation No. 7166391; 3/11/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 98-73-R
ADMINISTRATION (MSHA),	:	Citation No. 7166392; 3/11/98
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-123
Petitioner	:	A.C. No. 46-07711-03674
v.	:	
	:	Mine No. 1
EAGLE ENERGY INCORPORATED,	:	
Respondent	:	

ORDER DENYING THE RESPONDENT'S MOTION TO COMPEL DISCOVERY AND ORDER DENYING THE SECRETARY'S REQUEST FOR SUBPOENA

The initial phase of the hearing in these matters was conducted from September 14 through September 17, 1999. The hearing is scheduled to reconvene on December 7, 1999. Before me for consideration is the respondent's motion to compel discovery of the Mine Safety and Health Administration Health (MSHA) and Safety Report concerning an April 21, 1998, meeting. The attendees on behalf of MSHA were James Bowman, Conference and Litigation Specialist, MSHA Inspector Thurman Workman and MSHA Supervisory Inspector Terry Price. The respondent was represented by then-counsel Donna Kelly. Also in attendance was Jeff Bennett, the respondent's Safety Director, Glen Conner, the respondent's President and Larry Ward, the respondent's General Manager. The respondent also seeks to discover any statements taken from individuals that will not be called by the Secretary in these proceedings.

Pursuant to my request, the Secretary has provided the relevant documents for my *in camera* review. The subject documents consist of an April 21, 1998, conference report and memoranda of MSHA interviews conducted between August and November 1998 with individuals who are employees of the respondent.

A conference call concerning the respondent's motion to compel and the Secretary's opposition was conducted on October 27, 1999. The Secretary asserts the respondent's motion should be denied because it is untimely. In the alternative, the Secretary contends the documents sought by the respondent are protected by the work-product privilege and the informant's privilege. If it is determined that the subject documents are protected, the respondent seeks disclosure of portions of these protected documents that contain factual material.

The Motion to Compel

As a threshold matter, Commission Rules 56 (d) and (e) provide that discovery shall be initiated within 20 days after an answer to a petition for assessment of civil penalty, and that discovery shall be completed within 40 days of its initiation. 29 C.F.R. § 2700.56(d) and (e). These rules authorize a judge to permit discovery after this date for good cause shown.

The respondent previously has sought to discover the April 21, 1998, conference report during the discovery period prior to the start of the September 14, 1999, hearing. The Secretary declined to provide the report at that time claiming it was protected by the deliberative process and work-product privileges. The respondent declined to file a motion to compel discovery of the conference report at that time. The respondent has failed to show the requisite good cause to support its untimely motion. Accordingly, the respondent's motion to compel the April 21, 1998, conference report shall be denied as untimely.

Similarly, the respondent has failed to show good cause for its untimely request for disclosure of statements the Secretary may have obtained from individuals who will not be called by the Secretary as witnesses. The respondent previously requested the Secretary to disclose all relevant statements obtained by MSHA in these matters during the discovery period prior to the beginning of the trial. The Secretary declined to provide such statements citing the informant's privilege. The respondent failed to seek disclosure by filing a motion to compel. The respondent now predicates its motion on the theory that statements taken by the Secretary by individuals not called as the Secretary's witnesses must contain information harmful to the Secretary's case. Such an assertion does not provide good cause for extending the discovery period. Accordingly, the respondent's motion to compel such statements shall also be denied as untimely.

Assuming the respondent's motion to compel was not untimely, the respondent's motion will be addressed on the merits because arguments advanced by the respondent in support of its motion during the October 27, 1999, conference call raise important issues.

The Secretary claims the subject documents are protected by the work-product privilege. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.*,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. 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.
>
> 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 '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.' If the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect 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. It is clear that the conference report and memoranda of interviews conducted by MSHA between August and November 1998 sought to be protected under the work product privilege are "tangible documents" prepared "by or for the Secretary."

The determinative question concerning the applicability of the work-product privilege is whether these documents were "prepared 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 order for the document to be protected. *Id.*

In addressing whether MSHA reports of a safety and health conference are prepared in contemplation of litigation, 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. Such conferences are not routinely conducted, but rather, they are conducted when an operator challenges the initial citation. Accordingly, MSHA's internal reports of such conferences are prepared in contemplation of litigation and, as such, are protected by the work-product privilege.

Turning to the memoranda of interviews, these interviews were conducted between August and November 1998, after the respondent had contested the citations in issue. They contain MSHA's recollections and analysis of information provided by the interviewees, and, such memoranda were clearly prepared in contemplation of litigation. As such, these memoranda are protected by the work-product privilege. Having concluded they are protected by the work-product privilege, I note parenthetically, that the content of such interviews are also protected by the informant's privilege as asserted by the Secretary.

I am concerned by the respondent's argument that, assuming that documents are protected by privilege, factual material within protected documents are not covered by the privilege and must be disclosed. The respondent misses the point. Once the Secretary has satisfied her burden that the subject documents are protected by privilege, the burden shifts to the respondent to overcome the privilege by demonstrating a substantial need for the documents, and that failing to obtain the documents will result in undue hardship. 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). Thus, it is <u>only after</u> making such a showing to defeat the privilege that a party is entitled to see portions of protected documents with redactions to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *ASARCO,* 12 FMSHRC at 2558 (citations omitted).

The respondent has failed to make any showing of need or hardship. Significantly, the respondent's counsel, as well as other company officials, attended the April 21, 1998, MSHA conference meeting. The notion that hardship will ensue unless the respondent obtains MSHA's notes of a meeting that the respondent's counsel and company officials attended is difficult to understand and must be rejected.

Similarly, the subject memoranda of interviews concern information provided to MSHA by the respondent's employees. The respondent could have informally interviewed its employees, or it could have deposed them under subpoena during discovery. Thus, the respondent has failed to demonstrate the substantial need required to overcome the privilege.

Having failed to satisfy its burden of overcoming the Secretary's privilege, the respondent is not entitled to see redacted portions of privileged documents. Accordingly, notwithstanding the untimeliness of the respondent's motion, the respondent's motion to compel discovery is also denied on the merits.

Collateral Issues

Finally, during the October 27, 1999, conference call, the Secretary requested that I issue a subpoena so that the Secretary could obtain the military discharge papers of an individual who the respondent intends to call as an expert witness. The Secretary seeks the subpoena to determine whether the deposition testimony of this individual, with respect to his military discharge in the 1970's, impacts on his credibility as an expert witness in these proceedings.

Assuming for the sake of argument that this individual's deposition testimony under oath was not candid, with rare exceptions not applicable here, untruthful acts that have not resulted in a conviction are deemed to be collateral in nature. Extrinsic evidence of such acts are not admissible. *See* John W. Strong *et al.*, *McCormick On Evidence*, § 49, at 202 (5th ed. 1999); *see also Fed R. Evid*. 608(b). Consequently, the Secretary's subpoena request will be denied.

ORDER

In view of the above, the respondent's motion to compel discovery **IS DENIED**. The Secretary's request for subpoena **IS ALSO DENIED**.

Jerold Feldman
Administrative Law Judge

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