

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 19, 1999

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of LEWIS FRANK BATES,	:	
Complainant	:	Docket No. WEVA 99-121-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723
	:	
SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of EARL CHARLES ALBU,	:	
Complainant	:	Docket No. WEVA 99-122-D
v.	:	HOPE CD 99-12
	:	
CHICOPEE COAL COMPANY, INC.,	:	Lilly Branch Surface Mine
Respondent	:	Mine ID 46-08723

ORDER DENYING THE SECRETARY'S MOTION FOR RECONSIDERATION
ORDER DENYING THE SECRETARY'S MOTION FOR CERTIFICATION
FOR INTERLOCUTORY REVIEW
AND
ORDER GRANTING IN PART THE SECRETARY'S MOTION FOR STAY

These discrimination proceedings are scheduled for hearing on November 2, 1999, in Charleston, West Virginia. On October 15, 1999, I issued an Order granting the respondent's motion to compel the disclosure of all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters. The October 15, 1999, Order required the Secretary to disclose such signed statements, by facsimile and regular mail, on or before the close of business on Wednesday, October 20, 1999.

In a motion filed on October 19, 1999, the Secretary seeks reconsideration of the October 15, 1999, Order, and, alternatively, requests certification to the Commission of whether signed statements provided to MSHA by parties in discrimination matters are protected from discovery by the work-product privilege. If the Secretary's request for certification is denied, the Secretary seeks to stay the October 15, 1999, Order so that she may seek certification directly from the Commission.

In seeking reconsideration, the Secretary once again asserts the signed statements are protected work products because they were prepared by an agent of the Secretary in contemplation of litigation. As noted in the October 15, 1999, Order, a document purporting to be a party's signed statement is not entitled to the work-product privilege simply because an MSHA inspector, rather than the party, transcribed what the party said. Put another way, the work-product privilege applies to the thought processes and opinions of the Secretary's personnel and counsel, neither of which apply to statements by parties.

Moreover, as noted in the October 15, 1999, Order, even if such signed statements by discrimination complainants were protected under the work product privilege, a respondent in a discrimination proceeding has a compelling need to examine such statements because they are unique in that they provide the basis for the Secretary's initiation of a 105(c)(2) discrimination proceeding. In seeking reconsideration, the Secretary's relies on established case law holdings that general assertions of the impeachment value of documents protected by the work-product privilege are inadequate to overcome the privilege. The Secretary's reliance on such cases is misplaced. Here, the respondent's request is specific - - it seeks to examine the statements by the parties that motivated the Secretary's enforcement action.¹

Finally, in her reconsideration request, the Secretary does not properly distinguish statements provided to MSHA by *parties* to a discrimination proceeding from statements obtained from individuals in general during the course of a section 105(c) or section 110(c) investigation. Non-party statements may be protected by the informant's privilege and/or the miner's privilege pursuant to Commission Rules 61 and 62, 30 C.F.R. 29 §§ 2700.61 and 2700.62. However, even non-party signed statements are not protected by the work-product privilege just because they were obtained by MSHA personnel. Accordingly, the Secretary's request for reconsideration of the October 15, 1999, Order compelling disclosure shall be denied.

Turning to the Secretary's alternative requests, an interlocutory discovery ruling is certifiable for Commission review under Rule 76 if it involves a controlling question of law that will materially advance the final disposition of this matter. 29 C.F.R. § 2700.76. I am not persuaded that compelling disclosure of the complainants' allegations, absent any claim that any portion of those allegations would violate another privilege, such as identifying a confidential informant, involves a controlling question of law. Moreover, it is a central goal of the Mine Act to expeditiously resolve discrimination matters. *See* Commission Order in *Sec. o/b/o Lonnie Bowling et al v. Mountain Top Trucking, et al*, 21 FMSHRC ___, slip op. at p.2 (September 24, 1999). Accordingly, I am not inclined to delay these proceedings.

¹ As discussed in the October 15, 1999, Order, if there is any material in the parties' signed statements that should be redacted on the basis of another privilege, the Secretary should seek to protect such material from disclosure.

Although, I have denied the Secretary's request for certification of the October 15, 1999, ruling on discovery, I will grant the Secretary's request for a delay of the October 20, 1999, deadline for providing the complainants' signed statements to enable the Secretary to seek certification directly from the Commission. Consequently, the date for providing the respondent with the complainant's signed statements is extended until the close of business on Monday, October 25, 1999.

ORDER

In view of the above, the Secretary's requests for reconsideration, and, alternatively, for certification for review, of the October 15, 1999, Order compelling disclosure, **ARE DENIED**. Consistent with the above, **IT IS ORDERED** that the Secretary provide the respondent, **on or before the close of business on Monday, October 25, 1999**, by facsimile and regular mail, all signed statements secured from Lewis Frank Bates and Earl Charles Albu during the course of MSHA's investigation in these discrimination matters. **IT IS FURTHER ORDERED THAT** the scheduled hearing of these matters on November 2, 1999, shall proceed.

Jerold Feldman
Administrative Law Judge

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