# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 9, 2000

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| PERFORMANCE COAL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. WEVA 99-40-R |
| | : | Citation No. 4204336; 12/17/98 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Upper Big Branch Mine - South |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 99-93 |
| Petitioner | : | A.C. No. 46-08436-03564 |
| v. | : | |
| | : | Upper Big Branch Mine-South |
| PERFORMANCE COAL COMPANY, | : | |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2000-28 |
| Petitioner | : | A.C. No. 46-08436-0350 A |
| v. | : | |
| | : | Upper Big Branch Mine-South |
| MARK ALLAMAN, Employed by, | : | |
| PERFORMANCE COAL COMPANY, | : | |
| Respondent | : | |

## ORDER GRANTING IN PART MOTION TO COMPEL

These consolidated contest and civil penalty proceedings are scheduled for hearing on December 19, 2000, in Charleston, West Virginia. Before me for consideration are the respondents' motion to compel the disclosure of documents and the Secretary's opposition to the respondents' motion. Specifically, the respondents seek any statements provided to the Mine Safety and Health Administration (MSHA) by Johnny Williams and Rick Lilly; all documents concerning how and why the subject citation was specially assessed and the calculations related thereto; and all documents in MSHA's investigative file, with the exception of MSHA's investigative recommendations and any information directly covered by the informant or miner witness privilege.

Consistent with my request during the course of an October 18, 2000, telephone conference with the parties, on November 7, 2000, the Secretary furnished the following documents for *in camera* review:

> (1) A signed statement of Johnny R. Williams obtained by MSHA on March 30, 1999.
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> (2) A March 31, 1999, memorandum of interview with Randell L. Lilly prepared by MSHA Special Investigator James G. Jones.
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> (3) A report of an MSHA Health and Safety Conference attended by Performance Coal Company representatives on January 20, 1999.
>
> (4) An MSHA Proposed Assessment Worksheet.
>
> (5) A Base Penalty Calculation for Special Assessment dated February 2, 1999.

A. The signed statement of Johnny R. Williams

The Secretary argues that the Williams statement is protected by the work product privilege. The respondents asserts the work product privilege is inapplicable because, despite the fact that the statement was obtained after the January 19, 1999, filing of Performance Coal Company's contest in Docket No. WEVA 99-40-R, it was obtained prior to the initiation of the captioned 110(c) proceeding in Docket No. WEVA 2000-28.

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. Here, the Williams statement is a tangible document obtained by the Secretary in anticipation of litigation because it was obtained after the contest filed by Performance Coal Company. However, the signed statement was not "prepared" by the Secretary. The signed statement is entitled to the same protection from disclosure that a treatise obtained from the library by Secretary's counsel would be entitled to - - none. The Secretary cannot prevent disclosure of Williams' signed statement by asserting it is really the investigator's work product because it is only Williams' acknowledgment of the accuracy of what the MSHA investigator heard the Williams say. Since the signed statement constitutes a document "prepared" by Williams rather than the Secretary, the work product privilege does not apply. Consequently, the respondents' motion to compel the signed Williams' statement shall be granted.

I note parenthetically, even if Williams' signed statement was protected under the work product privilege, the analysis would shift to whether the respondents have a substantial need for the statement, and whether depriving the respondent of these documents would constitute an 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). While assertions that protected material is needed for general purposes of impeachment may not be sufficient to overcome the work product privilege, here the statement provided by Williams, the victim of a November 24, 1998, roof fall accident, is unique in that the statement evidences Williams' recollections less than six months after the accident. *Consolidation Coal Company*, 19 FMSHRC 1239, 1243-44 (July 1997). Depriving the respondents' counsel of access to recollections recorded relatively soon after the accident would result in a significant hardship. Thus, even if the Williams statement was protected, the respondents have a compelling need to examine the contents of Williams' statement in preparation for trial.

Finally, Williams will be called by the Secretary as a witness in these proceedings. Even if a witness's signed statement is protected by privilege, such statements are routinely disclosed at trial in a criminal proceeding. *See Jencks v. United States*, 353 U.S. 657. 667-69 (1957); 18 U.S.C. § 3500 (Jencks Act). In this regard, the Commission has noted, in National Labor Relations Board (NLRB) administrative proceedings, the NLRB itself provides at trial, for cross examination purposes, a witness's prior statements relative to the subject matter of his testimony. See *Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company,*

15 FMSHRC 2228, 2237 (November 1993), referring to 29 C.F.R. § 102.118(b)-(d) (NLRB "Jencks" procedure). Thus, the privilege issue notwithstanding, the Secretary would be compelled to produce Williams' statement at trial.

B. MSHA investigator Jones' March 31, 1999, memorandum of Lilly interview

With respect to the work product question, the Secretary's memorandum containing Jones' recollections of his March 31, 1999, interview with Randell L. Lilly is in stark contrast to the Williams statement. Unlike the Williams statement, the Jones memorandum was indeed prepared on behalf of the Secretary in contemplation of litigation. It contains the recollections of Jones concerning what Jones was told by Lilly. Accordingly, the Jones memorandum is protected by the work product privilege.

C. The January 20, 1999, MSHA Health and Safety Conference Report

The Secretary seeks protection of the January 20, 1999, MSHA Health and Safety Conference Report on the basis of the work product and deliberative process privileges. The conference was attended by officials of Performance Coal Company. The dispositive question concerning the applicability of the work product privilege is whether the document was "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.*

The question is whether MSHA reports of a safety and health conferences 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 reports of such conferences are protected by the work product privilege.

Having concluded that health and safety conference reports are protected, the analysis shifts to whether the respondents 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 the respondents to make such a showing since officials of Performance Coal Company attended the safety conference. Consequently, the respondents have failed to overcome the work product privilege. Thus, the motion to compel the safety and health conference report shall be denied. Having determined the health and safety conference report is protected by the work product privilege, I need not address the Secretary's assertion that it is also protected by the deliberative process privilege.

D. The MSHA Proposed Assessment Worksheet

The Secretary contends the Proposed Assessment Worksheet is protected by the deliberative process privilege. The Commission has defined the deliberative process privilege as one which "attaches 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)]. The Proposed Assessment Worksheet contains mental impressions and opinions concerning the degree of gravity associated with the subject violation as well as the degree of culpability attributable to the respondents. It contains recommendations concerning the appropriate civil penalties that should be proposed. Consequently, the Proposed Assessment Worksheet is protected by the deliberative process privilege.

E. Base Penalty Calculation for Special Assessment

The Base Penalty Calculation for Special Assessment is a computer generated form that contains the special assessment penalty criteria relied upon by the Secretary as well as a history of previous similar violations. This form contains data without any opinion or impressions of MSHA personnel. It is apparently generated in the normal course of business to determine the appropriate penalty to be assessed regardless of whether the citation is contested. As such, this form is not protected by the deliberative process or work product privileges. Consequently, the respondents' motion to compel the Base Penalty Calculation for Special Assessment form shall be granted.

Finally, the respondents' motion to compel all documents in MSHA's investigative file not otherwise protected by privilege shall be denied because it is overly broad.

## ORDER

Consistent with the above discussion, **IT IS ORDERED** that the respondents' motion to compel with respect to the March 30, 1999, statement of Johnny R. Williams and the Base Penalty Calculation for Special Assessment dated February 2, 1999, **IS GRANTED**.

**IT IS FURTHER ORDERED** that the Secretary provide the respondents with copies of the Williams statement and the Base Penalty Calculation for Special Assessment within ten days of the date of this Order.

**IT IS FURTHER ORDERED** that the respondents' motion to compel the March 31, 1999, Jones memorandum of Lilly interview, the January 20, 1999, Health and Safety Conference Report, the MSHA Proposed Assessment Worksheet, and all MSHA investigative documents not otherwise protected by privilege **IS DENIED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Mark Heath, Esq., Heenan, Althen & Roles, One Valley Square, Suite 1380, P.O. Box 2549, Charleston, WV 25329 (Certified Mail)

Emily Goldberg-Kraft, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 516, Ballston Towers #3, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

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