FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-24-M
Petitioner	:	A. C. No. 30-02863-05501 8UQ
v.	:	
	:	West Bloomfield Mine
ROOT NEAL & COMPANY,	:	
Respondent	:	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO COMPEL

I. Background

This civil penalty proceeding is being brought by the Secretary against Root Neal & Company (Root Neal), a contractor of Elam Sand & Gravel Corporation (Elam). This matter is scheduled for hearing on August 3, 1999, in Rochester, New York.

The case concerns an accident that occurred on May 9, 1998, wherein Michael Corbin, an Elam employee, sustained serious injuries to his arms and back. The accident occurred when Corbin was struck by a descending loader bucket of a Caterpillar 966F. At the time of the accident, Corbin was engaged in mounting a bucket scale on the Caterpillar loader with Root Neal employees Frank Pluta and John Wall. The May 26, 1998, accident report prepared by Mine Safety and Health (MSHA) Inspector William L. Korben, Jr., reflects that Elam's superintendent Alan "Jody" Randolph assigned Corbin to assist Pluta and Wall because of Corbin's welding experience. A copy of the May 26, 1998, accident report was provided to the respondent by the Secretary on July 23, 1999.

On July 26, 1999, the Secretary filed her Response and Objections to Interrogatories posed by the respondent. In response to Interrogatory No. 4 requesting the identity of all persons who had personal knowledge of the circumstances surrounding the accident, the Secretary identified David Spallina, Elam's President, Corbin, Randolph, Wall and Pluta as individuals having first hand knowledge. On July 26, 1999, the Secretary also filed her witness exchange list reflecting that she had advised the respondent that her intended witnesses included Spallina, Randolph, and Corbin.

Under Rule 56(b), 29 C.F.R. § 2700.56(b), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule with respect to what is relevant material, and have, conversely, narrowly construed the claim of privilege. *Hickman v. Taylor,* 329 U.S. 495 (1947); *Secretary/Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (1984). The burden of persuasion rests with the party asserting the privilege. Even if a privilege is properly asserted, it remains qualified. Thus, the material may be subject to discovery upon a showing by the party seeking disclosure that there is a "substantial need" for the material and that a failure to disclose would impose an "undue hardship." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *Consolidation Coal Company*, 19 FMSHRC 1239, 1243 (July 1997) (Citations omitted); Fed R. Civ. P. 26(b)(3)..

II. The Asserted Privileges

The Secretary seeks to protect from disclosure fourteen documents based on assertions that these documents are protected by the informant's privilege, the work product privilege and the deliberative process privilege.

A. The Informant's Privilege

The Commission discussed the history and substance of the informant's privilege in *Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company,* 15 FMSHRC 2228, 2234 (November 1993). The Commission stated:

> Commission Procedural Rule 61, . . . 29 C.F.R. § 2700.61, provides that, "except in extraordinary circumstances," a judge "shall not . . . disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." The informant's privilege is based on the Supreme Court's discussion in *Roviaro v. United States*, 353 U.S. 53 (1957). The informant's privilege is the right of the government to withdraw from disclosure the identity of persons furnishing information on violations of the law to law enforcement officials. *Bright*, 6 FMSHRC at 2522-23. In general, the privilege protects against the disclosure of an informant's identity and against the release of those portions of written statements that could reveal an informant's identity. The Commission has emphasized ― and all parties to the present proceeding agree ― that the privilege is qualified. Where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. *Bright,* 6 FMSHRC at 2523. (Emphasis added).

Thus, the informant's privilege protects the identity of an anonymous informant. Although the Secretary is not seeking to protect information provided to MSHA by Root Neal employees Wall and Pluta, the Secretary seeks to protect, based on the informant's privilege, any statements that may have been provided to MSHA by Corbin, the victim of the accident, as well

as any statement by Randolph and Spallina. Thus, in essence, the Secretary argues she may invoke the informant's privilege to protect from disclosure any written statement provided to MSHA investigators even if the operator knows an individual has provided information to MSHA and the individual has no expectation of anonymity.

However, the informant's privilege is not intended to protect the content of statements given to government officials unless that content discloses a confidential informant's identity. Here, the respondent knows that Corbin, Randolph and Spallina have first hand knowledge of the facts surrounding the accident. Surely the Secretary does not claim that the respondent is unaware that the accident victim has been a source of MSHA's information. Rather, Corbin, Randolph and Spallina are well known to the respondent as individuals that have provided MSHA with important information. In fact, they have been identified by the Secretary in her answers to interrogatories and in her list of intended witnesses. In this regard, the Commission has concluded a claim of informant's privilege does not lie where there is an express identification of the individual alleged to be an informant. *Thunder Basin*, 15 FMSHRC at 2236. Accordingly, as noted below, statements by Corbin, Randolph and Spallina, or, summaries of information provided by Corbin, Randolph and Spallina in MSHA investigative reports, are not protected by the informant's privilege.

B. 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, 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 investigative report and other documents sought to be protected under the work product privilege are "tangible documents" prepared "by or for the Secretary." The dispositive 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, <u>particular litigation must be contemplated at the time the document is prepared in order for the document to be protected</u>. *Id. (*Emphasis added*).*

The Secretary seeks to protect substantial portions of MSHA November 17, 1998, 110(c) investigative report prepared by Special Investigator John S. Patterson. Although the 110(c) investigation did not result in any 110(c) charges being brought by the Secretary, the 110(c) investigation was conducted after the citations in issue had been issued in May 1998.

In *ASARCO* the Commission concluded that a portion of a 110(c) investigation was entitled to work product protection. However, the portion of the investigative report protected in *ASARCO* concerned notes made by an MSHA Special Investigator while interviewing an MSHA supervisory inspector in the presence of an attorney assigned to the Secretary's Solicitor's office. 12 FMSHRC at 2257. In contrast, here, the Secretary seeks to protect from disclosure investigative report summaries of information provided by individuals, who have now been identified by the Secretary as individuals with first hand knowledge, and who the Secretary intends to call as witnesses. The facts in this case are therefore distinguishable from *ASARCO*.

Moreover, even if the report was protected by the work product privilege, the respondent has a substantial need for statements made to investigators shortly after the subject accident occurred by individuals with first hand knowledge. *See Consolidation Coal*, 19 FMSHRC at 1244, n.4. To deprive the respondent of such statements made following the accident by victim Corbin and his supervisor Randolph creates an undue hardship in the preparation of the respondent's case. Consequently, as noted below, with the exception of the MSHA investigator's conclusions that are entitled to protection under the deliberative process privilege, the portions of the 110(c) investigative report that have been redacted must be provided to the respondent in discovery.

C. 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)]. "Protected by the privilege are 'pre-decisional' communications that are 'deliberative,' meaning that the communication 'must actually be related to the process by which policies are formulated.'" *Id*. (quoting 591 F.2d at 774) (emphasis omitted). Thus, the conclusions of the investigator in the 110(c) investigation report are "pre-decisional" in nature and protected by the deliberative process privilege.

D. The Miner Witness Privilege

Commission Rule 62, 29 C.F.R. § 2700.62, provides:

> A judge shall not, until two days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the judge to testify or whom a party expects to summon or call as a witness.

Application of this privilege is consistent with Congressional concern regarding the possibility of retaliation against miners who participate in enforcement proceedings brought by the Secretary pursuant to the Mine Act. *Bright*, 6 FMSHRC at 2524. However, the Secretary has waived this privilege with respect to Corbin and Randolph since they have been identified as intended witnesses. The miner witness privilege does not apply to David Spallina who is Elam's President.

III. Disposition of the Secretary's Privilege Claims

Document 1: Health and Safety Conference worksheet prepared by MSHA personnel. This document was prepared after the respondent notified MSHA that it was contesting the citations. Consequently, it is protected by the work product privilege.

Document 2: MSHA Special Assessment Recommendation Form. This document provides the basis, or lack thereof, for a special assessment. A respondent is then notified whether a special assessment is assessed. The document is prepared in the normal course of business whether or not a citation is contested. Moreover, this form provides for notification of the operator that a special assessment has been made. This form has previously not been accorded work product or deliberative process protection. *See ASARCO, Inc.*, 14 FMSHRC 1323, 1328-30 (August 1992). Accordingly, it is not privileged and must be disclosed.

Documents 3 through 8: These documents are redacted portions of the 110(c) investigation prepared by MSHA Special Investigator John S. Patterson on November 17. 1998, that contain factual material including information provided by Corbin and Randolph. These individuals have been identified by the Secretary as intended witnesses who have first hand knowledge of the accident. Thus, these witnesses lack the anonymous informant status that is a condition precedent to the informant's privilege. The nature of the investigative report is not entitled to work product protection as there is no evidence that it had been prepared after consultation with the Solicitor's office in contemplation of litigation. Even if these redacted portions were protected under the work product privilege, the need for the victim's statements and his supervisor's statements provided shortly after the accident outweighs the privileged nature of the investigator's summary of the information provide to him by these individuals. Depriving the respondent of the victim's recollection of the accident as reported to MSHA places an undue hardship with regard to the respondent's ability to prepare its case.

Document 9: This document is a redacted portion of MSHA's 110(c) investigation. The second paragraph which had been redacted concerns factual information and must be disclosed. The remaining portion of Document 9 deals with the conclusion and recommendation of the investigative inspector. Conclusions and recommendations are protected by the deliberative process privilege. Thus, the Secretary's privilege claim in Document 9 is granted in part and denied in part.

Document 10: This document is a redacted portion of the 110(c) investigation that identifies the individuals interviewed by the 110(c) investigator. The identity of all of these individuals has been provided by the Secretary in her witness exchange list and answers to interrogatories. Consequently, there is no informant's privilege. Thus, Document 10 must be disclosed.

Document 11: Document 11 contains portions of notes of the 110(c) investigator. They are deliberative in nature as they served as the basis for the 110(c) investigative report and conclusions. As such, they are entitled to deliberative process privilege protection.

Document 12: This document is an MSHA form entitled Possible Knowing/Willful Violation Review Form. It contains the opinions, conclusions and recommendations regarding whether 110(c) charges should be brought. It is deliberative in nature and entitled to deliberative process privilege protection.

Document 13 and 14: These documents are statements provided to MSHA by individuals who have been named as intended witnesses. Their identity has been provided to the respondent by the Secretary. Therefore, these statements are not entitled to protection under the informant's or miner witness privileges. Accordingly, copies of these statements must be provided to the respondent.

ORDER

Consistent with the above discussion, **IT IS ORDERED** that the respondent's motion to compel with respect to Document Nos. 2 through Document 8, Document No. 10, Document No. 13 and Document No. 14 **IS GRANTED**. The respondent's motion to compel with respect to Document No. 9 **IS GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED, having provided the parties with a facsimile of this Order, and having advised the parties of the substance of this Order partially compelling disclosure during a conference call on the morning of July 27, 1999, that the Secretary provide copies of the above documents to the respondent no later than the close of business (5:00 p.m.) on July 28, 1999.

IT IS FURTHER ORDERED That the Secretary's request for a protective order with respect to Document No. 1, the conclusion and recommendation portion of Document No. 9, Document 11 and Document 12 **IS GRANTED**.

Jerold Feldman
Administrative Law Judge

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