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SOL & RODNEY MCCOY V. ORA MAE COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 31, 1979

RAY MARSHALL, SECRETARY OF LABOR,
ex rel. RODNEY D. McCOY

v. Docket No. KENT 79-263-D

ORA MAE COAL COMPANY

ORDER

The Secretary of Labor has filed a petition for interlocutory review of a judge's ruling that he must produce documents that allegedly contain statements by miners to Mine Safety and Health Administration (MSHA) personnel concerning a discrimination complaint. The documents include the report of an MSHA investigator. The Secretary moved before the judge to strike those portions of Ora Mae Coal Company's motion for production that requested those documents. The motion to strike claimed that production would violate 29 CFR §2700.59, which bars a judge from disclosing the names of miner-informants except in extraordinary circumstances. The judge ordered deletion of the names of miner-informants before production of the documents containing their statements. The Secretary claims in his petition for interlocutory review that the judge erred in not reviewing all the documents in camera to determine whether the statements, even with the names deleted, might reveal to the operator the identity of the miner-informants. As to the MSHA investigator's report, the Secretary claims executive privilege as well.

Inasmuch as the Secretary in his motion to strike did not invoke the claim of executive privilege, did not argue to the judge that the statements themselves might reveal the identity of informants, and did not request an in camera inspection by the judge, we consider interlocutory review to be inappropriate at this time. These matters should have been presented to the judge first. The petition for

interlocutory review is accordingly denied without prejudice.

Marian Pearlman Nease, Commissioner

Frank F. Jestrab, Commissioner