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MSHA V. ASARCO, INC.
DDATE:
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TTEXT:
August 28, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. SE 88-82-RM
SE 88-83-RM
ASARCO, INC. SE 89-67-M

Before: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"), concerns a discovery dispute between the Secretary of Labor and Asarco, Inc. ("Asarco") and is before the Commission for a second time. Commission Administrative Law Judge Avram Weisberger issued an Order on Remand on May 20, 1991, in response to the Commission's prior decision in this proceeding. Asarco Inc., 13 FMSHRC 1199 (May 1991)(ALJ). The judge's order required the Secretary to produce a number of specific documents notwithstanding her claims of privilege as to those documents and upheld the Secretary's privilege claims as to other documents. The Secretary filed a Petition for Interlocutory Review of that part of the judge's order on remand requiring her to produce all or part of five documents that she asserts are protected by the informant's privilege. The Commission granted the Secretary's petition. For the reasons that follow, we reverse the judge's order in part and affirm it in part.

I.

Factual and Procedural Background

Asarco operates the Immel Mine, an underground zinc mine in Knox County, Tennessee. A fatal accident occurred at the mine on July 15, 1988, when an electrician contacted an energized 4,160-volt terminal located inside a transfer switch cabinet. An inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations charging violations of 30 C.F.R. • 57.12017 & 57.12019. The citations allege that the top terminals in the cabinet were not deenergized and that suitable clearance ~1324

was not provided while the electrician was cleaning the terminals and insulators.

The discovery dispute began when the Secretary refused to produce, on the basis of the informant's privilege, the attorney-client privilege and the

work product rule, all of the documents Asarco sought in its request for production of documents. After an in camera examination of the documents, Judge Weisberger held that certain of these documents were not subject to the privileges asserted by the Secretary and ordered the Secretary to produce them. Unpublished Order of September 22, 1989. When the Secretary refused to comply with his order compelling production, the judge dismissed the civil penalty proceeding against Asarco. 11 FMSHRC 2351 (November 1989)(ALJ). The

The Secretary filed a Petition for Discretionary Review, which the Commission granted. On review, the Commission vacated the judge's order dismissing the civil penalty proceeding, and also vacated that portion of his order of September 22, 1989, which had directed the Secretary to produce the disputed documents. Asarco, Inc. 12 FMSHRC 2548 (December 1990)("Asarco I"). The Commission remanded this matter to the judge for further proceedings consistent with its decision and its prior decision in Bright Coal Co., 6 FMSHRC 2520 (November 1984).

Both the Secretary and Asarco filed briefs before the judge on remand. In his Order on Remand, the judge held that some of the disputed documents were privileged and not subject to discovery. He also determined that some of the disputed documents were not protected by the informant's privilege and ordered the Secretary to produce them. The Secretary filed a Petition for Interlocutory Review of that portion of the judge's order requiring the Secretary to produce five documents that she maintains are protected by the informant's privilege. Asarco filed a statement in opposition to the Secretary's Petition and a Motion for Sanctions, including dismissal, against the Secretary for her continuing refusal to comply with the judge's discovery orders. The Commission granted the Secretary's Petition for Interlocutory Review.

In its brief on review, Asarco replied to the issues raised by the Secretary and, in Part II of its brief, further argued that the judge erred in upholding the Secretary's claim that portions of one document are protected from disclosure by the attorney-client privilege and the work product rule. Asarco Br. 12-15. In response, the Secretary filed a motion to strike the latter portion of Asarco's brief as being outside the proper scope of Commission review. Asarco responded in opposition to the Secretary's motion to strike.

The five documents that are the subject of the Secretary's present appeal and the judge's ruling with respect to each document are as follows:
A. Exhibit B, MSHA Form No. 4000-60 Special Assessment Review
This document is an internal MSHA special assessment form used when the Secretary proposes a civil penalty under 30 C.F.R. • 100.5. The Secretary seeks to withhold from Asarco, on the basis of the informant's privilege, only
~1325

numbered paragraph one on page two. The disputed paragraph summarizes the statement of an individual but does not identify the individual by name.

The judge held that the Secretary bears the burden of proving facts necessary to support the existence of the privilege. 13 FMSHRC at 1200. He determined that the Secretary did not offer any evidence to show that the identity of an informant would be revealed by the production of the document.

Id. The judge found as follows:

The statement does not indicate whether the person who made it is a present or former employee of Respondent, or whether the individual is an independent contractor. Petitioner has not alleged, nor does the record contain any indication of the number of persons in the job category of the person who made the statement at issue. Nor is there any indication of the number of persons who performed the same task. Hence, I conclude that it has not been established that the informer's identity would be revealed by allowing discovery of the statement at issue. Hence, the Secretary shall divulge paragraph 1 on page 2 of Exhibit B.

Id.

B. Exhibits E, F & G, Detailed Statements of Miners

These three documents are the transcribed notes, in question-and-answer format, of an MSHA Special Investigator's interviews of three individuals.

The Secretary seeks to withhold all of these documents.

The judge first held that the three statements are "subject to a qualified privilege." 13 FMSHRC at 1201-02. The judge then found that "the material consisting of a transcription of [the employees'] detailed extensive statements, is unique, closely related in time to the instance in issue, and within the sole control of the Secretary." 13 FMSHRC at 1202 (emphasis in original). He determined that Asarco "does not have another avenue available to obtain the transcriptions of the detailed statements" and that "these statements would enable Asarco to use the material to refresh the recollection of a witness or to attempt to impeach the credibility of a witness by way of prior inconsistent statement." Id.

The judge further held that the documents "are essential to a fair determination of the issues." Id. The judge found that the documents "contain statements that have a critical bearing on the issues raised by the citations at issue and possible defenses." 13 FMSHRC at 1203. On that basis, the judge concluded that "Asarco has a high degree of need to discover these exhibits" and that "Asarco's need ... outweighs the Secretary's need to maintain the informer's privilege." Id.

~1326

C. Exhibit K, Notes of MSHA's Special Investigator

This document consists of Special Investigator Everett's detailed notes of his investigation of this accident. A large part of this document was previously produced by the Secretary. Only two portions of this document are

in dispute in this appeal. First, the Secretary seeks to withhold the first six words of the seventh line of the paragraph on the middle of page 12 and the quoted phrase at the end of the paragraph.(Footnote 1) Second, the Secretary seeks to withhold the list of questions on page 23, and the responses on page 24 and the first two lines on page 25.

The judge held that the informant's privilege applied to most of the middle paragraph on page 12 of this document, but held that:

the first six words of the seventh line of that paragraph, as well as the quoted phrase at the end of this paragraph contain information that might lead to a possible defense, without identifying the source of the information. It is difficult to see how Asarco could obtain this information without discovery. Hence, applying the factors enunciated in Bright, discovery of this deleted material is to be allowed..."

13 FMSHRC at 1205.

With respect to the questions and answers on pages 23 through 25, the judge held that in order for Asarco to obtain the specific statements contained in this material "it would need not only the identity of the informer, but also the specific questions asked." Id. He concluded that because this material is relevant to this proceeding and is in the sole custody of the Secretary, it is subject to discovery under the Bright test.

II.

Disposition of Issues

A. Secretary's Motion to Strike Portion of Asarco's Brief

Section 113(d)(2)(A)(iii) of the Mine Act provides that Commission review is limited to the questions raised in the petition for discretionary review. This principle is also applicable to interlocutory review proceedings conducted pursuant to Commission Procedural Rule 74, 29 C.F.R. • 2700.74. Commission Procedural Rule 74(d) provides that, if a petition for interlocutory review is granted, "the scope of review shall be confined to review of the ruling or order of the judge on the issue stated in the Commission's order granting review, and shall not extend to other issues." The Secretary's

¹ Before the judge, the Secretary sought to withhold the entire paragraph. The judge held that Asarco was not entitled to discover the remainder of the paragraph.

~1327

petition for interlocutory review, which the Commission granted, did not seek review of the judge's attorney-client privilege or work product rulings. In the present case, the judge's discovery rulings are separate and distinct. Asarco could have filed a petition for interlocutory review of the judge's other rulings, in response to the Secretary's motion to strike, at any time. Since Asarco's brief raises issues concerning the judge's other rulings, which

are outside the scope of the present interlocutory review, the Secretary's motion to strike Part II of Asarco's brief is granted.

B. Informant's Privilege

The principal issue in this case is whether the judge's Order on Remand complies with the Commission's decision in Asarco I. The Commission must determine whether the judge abused his discretion in requiring the Secretary to disclose to Asarco all or specific parts of five documents because the informant's privilege does not apply or the privilege must yield since Asarco's need for the document is greater than the Secretary's need to maintain the privilege.

Discovery before the Commission is regulated by Commission Procedural Rule 55, 29 C.F.R. • 2700.55. The scope of discovery is specified in subsection (c):

Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

The Secretary alleges that each of the disputed passages is protected by the informant's privilege. Commission Procedural Rule 59, 29 C.F.R.

□ 2700.59, provides, in pertinent part

A judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

In Bright and Asarco I, we stressed the importance of the informant's privilege and set forth the specific procedures to be followed if the Secretary asserts that privilege. Bright, 6 FMSHRC at 2526; Asarco I, 12 FMSHRC at 2553-54. We also held that it is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of the informant. Asarco I, 12 FMSHRC at 2554, citing *Roviaro v. United States*, 353 U.S. 53, 60 (1957). In reviewing a judge's discovery rulings, the Commission "cannot merely substitute its judgment for that of the administrative law judge." Asarco I, 12 FMSHRC at 2555; Rather, the Commission is required "to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings." *Id.* The Commission recently reaffirmed that a judge is granted wide discretion in discovery matters and that his findings will not be disturbed "unless a clear abuse of
~1328

discretion is demonstrated." In Re: Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 1005 (June 1992) ("Dust Sample Case").

The Commission further emphasized:

[W]hen analyzing the manner, content, and effect of a judge's discovery rulings, the judge, by rule, is authorized to exercise wide discretion in discovery matters, and the

Commission by precedent is disinclined to substitute its judgment for that of the judge unless error or abuse of discretion has occurred.

Dust Sample Case, 14 FMSHRC at 1004. The Commission noted, with approval, that in Federal practice, unless there is a "manifest abuse of discretion" on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review, and that, if review is ordered, the judge's orders will not generally be overturned "unless, in the totality of the circumstances, [the] rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Id.*, quoting *Xerox Corp v. SCM Corp.*, 534 F.2d 1031, 1032 (2nd Cir. 1976) and *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1976).

With these guiding principles in mind, we now address the documents in dispute.

1. Exhibit B - Special Assessment Review

In *Asarco I*, the Commission held that an informant's statement is protected by the privilege if disclosure would tend to reveal his identity, and that whether the informant is identified by name cannot be the sole basis for making that determination. 12 FMSHRC at 2554. The Commission concluded that the judge erred in his previous order because he failed to determine whether release of the document, including the disputed paragraph, would tend to reveal the identity of an informant. *Id.* The Commission vacated the judge's order and remanded for further consideration. The Commission stated, in relevant part, that the "judge should determine whether release of the statement ... would tend to reveal the informant's identity taking into consideration the factual context of this case." *Id.*

On remand, the judge determined that the Secretary failed to establish that release of the document would tend to reveal the identity of an informant. 13 FMSHRC at 1200. The Secretary argues that the judge erred in his analysis because he failed to recognize that the "words in question describe the individual informer" and "the universe of persons fitting that description is relatively small." *Sec. Br. 10*. She bases her argument on the consideration that, in her opinion, "it is not seriously contested by *Asarco* that the universe of persons with potentially relevant information in this case is other than small in number and known to *Asarco*." *Sec. Br. 10 n. 5*. In the alternative, she asks the Commission to remand the case to the judge so that she can "establish with specific evidence the size of the universe of individuals with potential knowledge of facts in this case." *Id.*

~1329

The Secretary bears the burden of proving facts necessary to support the existence of the informant's privilege. *Bright*, 6 FMSHRC at 2523. In the present case the Secretary asserts in her brief that the "universe of persons with potentially relevant information about this case" is small in number and known to *Asarco*. *Sec. Br. 10 n. 5*. Before the judge on remand, she argued that it would be "impossible for the Secretary to argue the specific facts of

each of these statements to show in the factual context of this case their revelation would identify the speaker." Sec. Br. on Remand 6. The Secretary asked the judge to consider the statement contained in the exhibit "in light of the limited universe of employees who would necessarily possess the information which the statement reveals." Id. The Secretary did not seek to present any facts to the judge to establish her claim.

The judge reviewed the document in camera. Following the Commission's instructions in *Asarco I*, he determined that release of the statement attributed to an unidentified informant would not tend to reveal the informant's identity. He found that, in meeting her burden of proof, the Secretary did not "proffer any evidence" but "merely asserted" in her brief that the identity of the informant could be provided by the content and context of the statement because of the small universe of persons with knowledge about the relevant events. 13 FMSHRC at 1200. He found that the Secretary did not establish, and the record did not contain, any indication of the number of persons in the job category of the informant or the number of persons who performed the same task. Id. He determined that the Secretary failed to meet her evidentiary burden of establishing that the informant's identity would tend to be revealed by the disclosure of the statement. Id. Because the Secretary bears the burden of proving facts necessary to support the existence of the informant's privilege, it is not enough for the Secretary merely to argue that the case involves a small universe of persons with knowledge of the relevant events. It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination. In this case, the judge was required to determine whether the statement, which did not contain the name of an informant, would tend to reveal the identity of the informant. Such an analysis may not be possible unless the party invoking the privilege provides the judge with facts that explain how disclosure of the subject material would tend to reveal that informant's identity. In general, a "bald assertion of privilege is insufficient ... since a trial court must be provided with sufficient information so as to rule on the privilege claim." 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* • 26.60[1] (2d ed. 1991). Thus, the Secretary had the burden of showing how or why the disclosure of the disputed text would tend to reveal the identity of the informant.

The Secretary did not present to the judge, either in open court or in camera, any evidence to support the claimed privilege. Moreover, on remand to the judge, the Secretary again failed to support her argument with any evidence. From our examination of the record, it is not readily apparent that the person to whom the statement is attributed would tend to be revealed by the contents of the document or the context of the disputed text. Therefore, given the discretion granted to trial judges in discovery matters, we conclude
~1330

that the Secretary has not demonstrated that the judge committed "a clear

abuse of discretion" with respect to this exhibit. Dust Sample Case, 14 FMSHRC 1005. We therefore affirm his order requiring the Secretary to disclose the disputed language in Exhibit B.

We fully appreciate why the Secretary must exercise care not to identify an informant inadvertently in presenting facts to prove the applicability of the privilege in a small universe setting. The Secretary's burden of proving that a document would tend to reveal an informant's identity, however, is not necessarily high. For example, an affidavit from an MSHA investigator or anyone else with knowledge of the facts, setting forth how or why disclosure of statements of informants would tend to reveal the identity of an informant, may be sufficient. If the Secretary believes that she must disclose specific facts to meet her burden in a given case, and that such facts might tend to reveal an informant's identity, she can submit an affidavit for the judge's in camera review.

2. Exhibits E, F & G - Detailed Statements of Miners

In *Asarco I*, the Commission concluded that the judge failed to consider whether the information in these documents could be obtained by Asarco through depositions or by other means. 12 FMSHRC at 2556. The Commission also concluded that the judge failed to set forth the basis for his conclusion that Asarco's need for the information was essential to a fair determination of the issues and that its need outweighed the Secretary's need to maintain the privilege. *Id.* The Commission vacated the judge's order and remanded for further consideration. The Commission also stated that the judge should "weigh the factors set forth in *Bright* and clearly articulate the basis for his conclusion." 12 FMSHRC at 2557.

On remand, the judge reasoned that "[a]lthough the individuals whose statements are the subject of Exhibits E, F, and G, are employees of Asarco, and presumably under its control, ... the material consisting of a transcription of their detailed extensive statements, is unique, closely related in time to the instance at issue, and within the sole control of the Secretary." 13 FMSHRC at 1202 (emphasis in original). He held that because Asarco does not have any other means of obtaining "the transcripts of the detailed statements" at issue, the material would enable Asarco to more effectively examine witnesses at the hearing. *Id.* The judge concluded that Asarco's need for the documents outweighed the Secretary's need to maintain the informant's privilege. 13 FMSHRC at 1203.

The Secretary maintains that the judge's conclusion that Asarco is entitled to the documents because it would not be able to duplicate the precise contents of the documents on its own is "legally insupportable and would, if accepted, effectively eviscerate the informer's privilege." Sec. Br. 11-12. The Secretary emphasizes that the judge failed to comply with the Commission's instruction to consider whether Asarco could obtain "substantially similar information from other sources." Sec. Br. 12. The Secretary maintains that Asarco could get essentially the same information by depositing those miners who may have knowledge of the relevant events.

~1331

Sec. Br. 13. Finally, the Secretary argues that the judge failed to appreciate that, pursuant to Commission Procedural Rule 59, the judge may compel the Secretary to disclose, two days prior to hearing, the names of all persons the Secretary expects to call as witnesses and that he may also order the Secretary to produce the statement of any informant who is actually called as a witness. Sec. Br. 12.

We hold that the judge incorrectly interpreted the law and abused his discretion. First, the judge erred in basing his order on the fact that the Secretary was in sole control of the requested material -- the documents themselves -- rather than the information contained in the documents. In its remand, the Commission directed the judge to consider "whether Asarco could obtain substantially similar information from other sources" 12 FMSHRC at 2556. The judge based his decision on a finding that the documents themselves are unique and within the sole control of the Secretary. The issue, however, is whether Asarco can get substantially the same information by deposing those miners who have knowledge of the accident. See *Bright*, 6 FMSHRC at 2526. The judge did not enter any findings with respect to this issue except that Asarco "might, by way of deposition, have access to information within the knowledge of these persons." 13 FMSHRC at 1202. By focusing on the fact that the documents are "unique," the judge erred as a matter of law. While we agree with Asarco that the Commission cannot merely substitute its judgment for that of the judge, Asarco has access to the same individuals with knowledge of the accident as the Secretary's investigators and can question them in the same manner, under subpoena, if necessary.

Second, as the Secretary pointed out, the judge failed to recognize that Asarco will be able to obtain the names of the Secretary's witnesses two days before the trial and that any statement of a miner who is called as a witness may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial. In *Asarco I*, the Commission noted that "this case concerns Asarco's requests for documents during the discovery phase of this proceeding" rather than Asarco's right to documents, otherwise protected by the informant's privilege, relating to the testimony of a witness at the time of trial. 12 FMSHRC at 2561 n. 3 (emphasis in original). As set forth in *Asarco I*, however, Asarco's right to these documents at the time of trial is a separate and procedurally distinct issue from the discovery issue presented here. See, e.g., *Brennan v Engineered Products, Inc.*, 506 F. 2d 299, 302-03 (8th Cir. 1974). The judge erred in concluding that Asarco's need for the documents is greater than the Secretary's need to maintain the privilege, based on his conclusion that Asarco may need them in examining witnesses at the hearing. Asarco's need for the documents at the hearing should be resolved by the judge at that stage of these proceedings.

Third, in analyzing whether these documents are essential to a fair determination of the issues, the judge determined that the exhibits "contain statements that have a critical bearing on" the issues in the case. 13 FMSHRC

at 1203. Because substantially the same information is available to Asarco by other means, as discussed above, disclosure of these documents is not essential to a fair determination of the issues. In contrast, the operators in the Dust Sample Case demonstrated a compelling need for scientific studies ~1332

that were within the scope of the deliberative process privilege, because, in part, those studies may play a unique and significant role in that case. 14 FMSHRC at 994-95. The Secretary was in sole control of those studies, and the operators could not obtain substantially the same information by deposing the appropriate individuals.

The judge's failure to comply with the balancing test set forth in Bright and Asarco I constitutes a clear abuse of discretion in contravention of Commission Procedural Rule 59. For the foregoing reasons, the judge's order with respect to these exhibits is reversed.

3. Exhibit K - Special Investigator's Notes

Because the judge failed to rule on the informant's privilege issues in his prior order, the Commission remanded "this issue to the judge for his reconsideration in accordance with [Asarco I] and Bright." 12 FMSHRC at 2557.

a. Material on page 12

The disputed paragraph on page 12 is the special investigator's description of a conversation that he had with an individual during his investigation of the accident. On remand, the judge determined that much of the paragraph should be withheld from Asarco, but he held that two passages of this paragraph did not identify the source of the information and that Asarco could not otherwise obtain this information. 13 FMSHRC at 1205. Thus, the judge determined that the informant's privilege does not apply to the disputed passages within this paragraph because they do not identify the source of the statements. Although he did not state so expressly, the judge determined that the Secretary failed to meet her burden of showing that the release of the passages would tend to reveal the identity of a miner informant. The judge's analysis is somewhat confusing, however, because he also performed a Bright balancing test, which is applicable only when the judge has determined that the material is subject to a qualified privilege.

The Secretary contends that release of the phrases in question "would almost certainly" reveal an informant's identity, given "the small universe of those individuals who might have relevant information." Sec. Br. 14. In addition, she argues that the judge erred in concluding that the privilege should yield because Asarco would not be able to "obtain this information without discovery." *Id.*, quoting 13 FMSHRC at 1205. She contends that the judge's holding demonstrates that he failed to comply with Asarco I's direction to evaluate whether Asarco had "other avenues available from which to obtain the substantial equivalent of the requested material." *Id.*, quoting 12 FMSHRC at 2555. She also maintains that the judge's holding suggests he believed that, with appropriate discovery, Asarco could effectively obtain this material.

As with exhibit B, discussed above, the Secretary has asserted without any proof that release of the passages would reveal the informant's identity because of the small universe of individuals who might have relevant information. It is not readily apparent to us that the specific language of the disputed passages would tend to reveal the identity of an informant. It ~1333

is also not apparent that Asarco could determine the source of the statements by examining other parts of Exhibit K, previously supplied by the Secretary. As stated above, a bald assertion of privilege is inadequate because the trial court must be provided with sufficient facts to rule on the claim of privilege. For the same reasons set forth with respect to Exhibit B, we affirm the judge's holding.

The Secretary has failed to show that the judge's order is a clear abuse of discretion. The Secretary had two opportunities in this proceeding to provide evidence to the judge in support of her argument that, because the universe of persons with knowledge of the facts in this case is small, disclosure of the statement of an unnamed informant would tend to reveal the identity of an informant. As stated above, this evidentiary burden is not high. An affidavit from an MSHA investigator or anyone else with knowledge of the facts would generally be sufficient and the Secretary may request that the judge review such evidence in camera. A separate affidavit would generally not be required for each document, unless the facts giving rise to the assertion of the privilege differ significantly.

Finally, we note that the Secretary argued before the judge that the entire paragraph containing these passages should be protected by the privilege. The judge protected from disclosure those portions of the paragraph that contain the name of the informant and allowed discovery of two passages that do not contain the informant's name. Notwithstanding our affirmance, we underscore that better judicial practice dictates that a judge, before ruling against the Secretary's assertion of privilege, should generally consider providing the Secretary an opportunity to supplement the record with such evidence as she deems appropriate. This practice is particularly advisable before a judge orders discovery of disputed material after deleting information that identifies the informant. The judge's failure to provide the Secretary with an additional opportunity to present such evidence in this case is not a clear abuse of discretion because, as stated above, the Secretary had an additional opportunity after remand to provide evidence to support her claim of privilege on the basis of the small universe argument, and failed to do so.

b. Material on pages 23 - 25

This material consists of a list of questions asked of an informant, who is identified by name, and the answers. The judge determined that the specific questions asked, as well as the answers supplied, are in the sole custody of the Secretary. 13 FMSHRC at 1205. He held that "inasmuch as the information relates to the circumstances surrounding [one of the citations],

the information would be relevant in resolving the issues and might lead to a possible defense." 13 FMSHRC 1205-06. He concluded that under the Bright balancing test the material is subject to discovery. 13 FMSHRC at 1206.

The Secretary argues that the judge's analysis is legally insupportable because it is based on the premise that Asarco is entitled to know what questions to ask the informant in order to elicit the same responses. She maintains that an in camera examination of the disputed material by the Commission will reveal that the "information contained in it would be readily ~1334

reproducible by even the most pedestrian questioning of the individual by a competent legal representative..." Sec. Br. 16. The Secretary states that Asarco could obtain substantially similar information from other sources and that Asarco has not met its burden of proving facts necessary to show that release of the material is essential to a fair determination of the issues.

Id.

Because the material does reveal the identity of an informant, the judge was required to determine whether Asarco's need for the information was greater than the Secretary's need to maintain the privilege. Asarco had the burden of showing a critical need for this information. The judge's holding with respect to this material is similar to his holding for Exhibits E, F and G, described above, that, because the Secretary is in sole possession of the documents themselves, Asarco has no other way to obtain the information contained therein. For the reasons set forth above with respect to Exhibits E through G, we conclude that the judge erred and abused his discretion. The Secretary is not in sole control of this information. Because Asarco could obtain similar information from other sources, the disclosure of these passages are not essential to a fair determination of the issues.

The judge's failure to comply with the balancing test set forth in Bright and Asarco I constitutes a clear abuse of discretion in contravention of Commission Procedural Rule 59. For the foregoing reasons, the judge's order with respect to the questions and answers on pages 23 through 25 is reversed.

~1335

III.

Conclusion

For the reasons set forth above, we affirm that portion of the judge's Order on Remand that required the Secretary to disclose to Asarco numbered paragraph one on page two of Exhibit B and two phrases on page 12 of Exhibit K. We reverse that portion of the judge's Order on Remand that required the Secretary to disclose Exhibits E, F, and G and the questions and answers on pages 23 through 25 of Exhibit K.(Footnote 2) We hereby dissolve our order of July 24, 1991, staying this proceeding.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner
L. Clair Nelson, Commissioner

2 Asarco's motion for sanctions against the Secretary for filing the Petition for Interlocutory Review in the proceeding is hereby denied.