

CCASE:
CONTESTS OF RESPIRABLE DUST
SAMPLE ALTERATION
CITATIONS
DDATE:
19910927
TTEXT:

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING MOTION FOR RECONSIDERATION
ORDER UPHOLDING CLAIM OF PRIVILEGE ASSERTED FOR
CERTAIN DOCUMENTS
ORDER TO PRODUCE NON-PRIVILEGED DOCUMENTS
ORDER TO PRODUCE CERTAIN PRIVILEGED DOCUMENTS

In accordance with my order of September 13, 1991, the Secretary submitted on September 20, 1991, certain documents for in camera inspection. She also filed a motion for reconsideration of that part of my order directing production of documents 161 and 176, and submitted these two documents for in camera inspection in the event the motion for reconsideration is granted.

I

MOTION FOR RECONSIDERATION

The Secretary argues that document 163 is protected by the work product privilege and the deliberative process privilege. She asserts that document 176 is protected by the investigative privilege. I have examined both documents, and grant the Secretary's motion for reconsideration.

Document 163 consists of 36 typewritten pages, some with handwritten changes. The title page is dated April 11, 1991, and is headed "Briefing Materials" with eleven subtitles. Pages 9248 through 9262 constitute a draft of a statement for Secretary of Labor Lynn Martinto be given before a House Subcommittee on April 15, 1991. There are handwritten changes on pages 9255, 9256, 9257, and 9259 of the draft. Pages 9262 through 9265 consist of a general description of the Department's dust sampling program and a "chronology of events" outlining the history of "tampered samples" from February 1989 through March 1991. Pages 9266 through 9270 contain proposals from persons outside the Department for changes in the dust sampling program and the Department's position on those proposals. Pages 9271 through 9275 contain proposals for enforcing "AWC violations" by penalty assessment, decertification, changes in the sampling program and criminal investigations. Pages 9276 through 9280 have to do with Department proposals for future action on matters unrelated to the dust tampering changes. These pages are not relevant to this

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proceeding. Pages 9281 and 9282 are a copy of a letter from Assistant Secretary Tattersall to the Safety Director of Energy West Mining Company, December 24, 1990, concerning the latter's proposal for the use of a helmet to control a miner's dust exposure.

The Secretary argues that the work product privilege is applicable because the document was prepared after the dust sampling citations were issued. But it is clear that it was not prepared in contemplation of litigation but to brief the Secretary who was going to testify before Congress. The work product privilege is inapplicable. With the exception of pages 9266 through 9275, the document is not covered by the deliberative process privilege. Only those pages comprise predecisional recommendations or opinions concerning policies under consideration. I uphold the Secretary's claim of privilege with respect to pages 9266 through 9275. Pages 9276 through 9280 are irrelevant and therefore not discoverable. The Secretary will be ordered to produce the rest of the document.

Document 176 is a single page memorandum from the FBI to MSHA Pittsburgh Technical Support Center dated April 11, 1989, accompanying 19 respirable dust sample cassettes. The Secretary asserts that a reference in the upper right hand portion of the document reveals an investigative technique. As such it is privileged. The remainder of the document is not privileged. The Secretary will be ordered to produce the document after excising the description in the upper right hand corner.

II

OTHER DOCUMENTS INSPECTED IN CAMERA

Document 55 is a copy of a letter from the Criminal Division of the United States Justice Department to the U.S. Attorney for the Eastern District of Kentucky dated November 1, 1989, concerning an MSHA investigation of tampered respirable dust samples. The letter notes that identical letters were sent to 15 other U.S. Attorneys. The Secretary's claim of privilege is upheld. The document is protected by the work product privilege.

Document 112 is a file concerning an investigation of possible altered dust samples by a coal mine operator showing referral to the U.S. Attorney and "progress updates" from March 1989 to May 1991. The document is privileged as part of the investigative file.

Document 116 is a letter dated January 18, 1991, from J. Davitt McAteer, Executive Director, Occupational Safety and Health Law Center to Assistant Secretary Tattersal, enclosing a copy of a letter from McAteer to Senator Edward Kennedy and a "Report on the All White Center Problem" prepared by the

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Occupational Safety and Health Law Center. There are underlinings and marginal notes in the letters and report, apparently made by MSHA officials. The letter and accompanying documents are not privileged. Neither the underlining nor the marginal notes could be taken as predecisional deliberations by MSHA personnel. Therefore, the claim of privilege is denied and the Secretary will be ordered to produce the entire document.

Document 120 is an unsigned, undated draft "Briefing Paper" describing the respirable dust standards for coal mines, the purposes and results of the standards, and "recent enforcement activity" concerning the alleged tampered samples. The description of the recent enforcement activity is factual and does not include proposals for future action. For this reason it does not fit the deliberative process privilege. The Secretary will be ordered to product the document.

Document 139 is a memorandum dated March 16, 1989, concerning the direct referral of a case to the U.S. Attorney, Charleston, West Virginia. This document is privileged as part of the U.S. Attorney work product, and the investigative file.

Document 143 consists of notes of a meeting on August 8, 1989, between MSHA representatives and the Solicitor of Labor's office concerning evidence of alleged respirable dust sample tampering and "a strategy for dealing with the growing scope of this evidence." The document appears to be incomplete, but as presented is privileged as part of the attorney work product.

Document 144 is a sample citation and a one page list of "issues to be discussed during 10/24 meeting." The latter page lists a number of options for dealing with alleged violations of 70.209(b). It includes a discussion of possible crimina proceedings. The document is privileged as part of the deliberative process.

Document 154 is a two page, undated, unsigned memorandum with two headings: "The Peabody Case" and "Current MSHA Activity." The latter discusses proposed enforcement action against mine operators after the completion of the criminal investigation. The document is privileged as part of the investigative file.

Document 161 consists of two pages of unsigned handwritten notes headed by "5/13 Dust Meeting:" the notes refer to the Peabody plea agreement, Congressional oversight hearings and future enforcement activity, including criminal proceedings. The document is privileged as part of the investigative file.

Document 169 consists of a single page of handwritten notes entitled "Meeting with MSA 4/18/91." It does not appear to refer to the present proceedings or future proceedings, but to a

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proposal for new dust capsules. It is privileged as part of the deliberative process.

Document 350 is a computer printout showing the number and percentage of tampered samples from approximately 630 mines. It does not show any dates. It is privileged as part of the investigative file.

Document 353 is a computer printout of altered dust samples with handwritten notations. The handwritten notations indicate that the count is "as of 10/13/89". Although the Secretary states that it concerns a criminal investigation, there is nothing in the document to indicate that. However, it is privileged as part of the investigative file.

Document 375 is a copy of a memorandum dated March 15, 1989, from an MSHA investigator and an MSHA industrial hygienist to the Chief of the MSHA Office of Technical Compliance and Investigations recommending that a case of alleged dust sample tampering be referred to the U.S. Attorney. This document is privileged as part of the investigative file and as part of the attorney work product.

Document 425 consists of copies of 2 pages of partially illegible notes with dates from 10/30/89 to 12/8/89, apparently referring to testing of dust filters. The document is privileged as part of the investigative file.

III

DISCOVERY OF PRIVILEGED DOCUMENTS

Documents for which claims of "executive privilege" or attorney work product privilege are upheld may nevertheless be ordered produced if necessary to the opposite party's case. In such a case, I must consider whether "need for access to the documents, or any part of the documents, for purposes of this litigation must be overridden by some higher requirement of confidentiality." *Committee For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 794 (D.C. Cir. 1971), cert. denied, 404 U.S. 917 (1971). In the case of *Secretary/Logan v. Bright Coal Company, Inc.*, 6 FMSHRC 2520 (1984), the Commission considered whether disclosure of documents protected by the "informer's privilege" should be compelled. It ruled that the burden is on the party seeking disclosure to show that the information is essential to a fair determination of the case. Factors to be considered in deciding whether to compel disclosure include whether the Secretary is in sole control of the material, and whether the other party has other avenues available to it to obtain the substantial equivalent of the requested material. In the cases before me, the material sought is, for the most part, in the sole possession of the Secretary, and the operators do not

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have other means of obtaining it or its equivalent. In addition to those factors, I will use the following guidelines in deciding whether to order disclosure of privileged documents:

1. Confidential communications between attorney and client will not be ordered disclosed.

2. Documents related to continuing criminal investigations or criminal proceedings will not be ordered disclosed.

3. Other documents for which the claim of executive privilege was upheld will be ordered disclosed to the extent that they are factual and deal with matters which are completed rather than those still pending.

4. Documents for which the claim of work product privilege was upheld will be ordered disclosed to the extent they are factual and do not include mental impressions, conclusions, opinions or legal theories.

Following these guidelines, I will order the Secretary to disclose the following documents by placing them in the Document Depository:

Documents 3, 4 and 5. These documents were held privileged as part of the deliberative process. However, they appear to be factual in nature although in draft form. They are exclusively in the Secretary's control, and are clearly relevant and important, indeed are close to the core issue of this case. Since the final report has been prepared, these documents relate to a completed matter. I hold that their disclosure is essential to a fair determination of this case, and this overrides the Secretary's interest in confidentiality.

Documents 350 and 353. These are computer printouts concerning the alleged tampered samples. They are wholly factual and do not include mental impressions, conclusions or proposals for future action.

Documents 365, 366 and 367. These documents do contain deliberations and opinions, but they precede the Report on sample filter abnormalities (Document No. 2), and therefore are related to a completed rather than a pending matter.

Document 401. This is a draft of a study PHTC prepared prior to the report identified as Document No. 1. For the reasons given in my discussion of Documents 365, 366 and 367, this document will be ordered disclosed.

Document 424. This is a draft showing the results of Agency testing of dust filters preliminarily to the preparation of Document No. 1. For the same reasons as given for the four prior

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documents, this will be ordered disclosed.

Documents 425. This document apparently relates to testing of dust filters. There is no indication that it involves pending or continuing matters.

ORDER

For the above reasons, IT IS ORDERED:

1. The Secretary shall produce the following documents by placing them in the Document Depository available to all other parties: Documents 3, 4, 5, 116, 120, 163 (except for pages 9266 through 9275 and 9276 through 9280), 176 (with the description in the upper right hand corner of the one page document excised), 201, 203, 329, 350, 353, 365, 366, 367, 401, 424 and 425.

2. The Secretary need not produce the following documents: 17, 55, 56, 111, 112, 113, 119, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 154, 155, 156, 157, 160, 161, 169, 200, 326, 327, 328, 339, 340, 375, 384, 394, 402, 403, 406, 407, 426, 441.

James A. Broderick
Administrative Law Judge