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December 17, 2025

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2024-0092 A.C. No. 23-00079-590989 Docket No. CENT 2024-0175 A.C. No. 23-00079-595627 Docket No. CENT 2024-0255 A.C. No. 23-00079-601408 Docket No. CENT 2024-0309 A.C. No. 23-00079-602966
v.	
CENTRAL STONE COMPANY, Respondent.	Mine: Huntington Plant CS01 Mine ID: 23-00079

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL DEPOSITIONS AND ORDER DENYING SECRETARY'S MOTION TO STRIKE OR SEAL EXHIBITS

Before: Judge Simonton

These cases are before me each upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). Central Stone Company ("Respondent" or "Central Stone") filed a Motion to Compel Depositions on September 10, 2025. In its motion, Central Stone moves to compel the depositions of MSHA Staff Assistant Curtis Hardison, MSHA Supervisory Inspector Lawrence Sherrill, and MSHA Chief of Accident Investigations Marcus Smith. Resp't Mot. at 1. Central Stone argues that Hardison, Sherrill, and Smith each have relevant knowledge that is admissible evidence or likely to lead to admissible evidence, are not "high government officials" protected from being deposed, and that the Secretary's asserted objection as to privilege is premature and insufficient to refuse to produce the deponents altogether. Resp't Mot. at 5–11.

On September 22, 2025, the Secretary filed a response opposing Central Stone's Motion to Compel Depositions and also moved to strike or seal privileged exhibits. In its opposition, the Secretary argues: (1) Central Stone deposing Hardison, Sherrill, and Smith will result in

testimony that is irrelevant and duplicative because they each have no first-hand knowledge of the material facts and because Central Stone has not shown these officials possess unique, non-cumulative information unavailable from MSHA Inspectors Dunne and Hill which will be available for Central Stone to depose; (2) the depositions of Hardison, Sherrill, and Smith sought by Central Stone focuses on discussions had between other supervisors, MSHA personnel, and attorneys and therefore would inevitably wander into testimony protected by the deliberative process, work product, and attorney-client privileges; (3) Hardison, Sherrill, and Smith should be considered high-ranking government officials and therefore, because the information Central Stone seeks is already available from the inspectors that the Secretary has made available for testimony, no extraordinary circumstances exist to warrant deposing Hardison, Sherrill, and Smith; and (4) Central Stone's delay in requesting the deposition of Hardison, Sherrill, and Smith was unwarranted and will cause undue delay or impose an undue burden and therefore its motion should be denied. Sec'y Opp'n at 1, 5–15.

Additionally, the Secretary argues that Central Stone obtained privileged documents inadvertently through FOIA that were subsequently submitted in support of its Motion to Compel Depositions. Sec'y Opp'n at 15–17. Therefore, the Secretary argues that leaving these exhibits in the record would reward Central Stone's use of privileged materials, risk tainting these proceedings, and that the Court should remedy this by striking or sealing the exhibits in their entirety and order Central Stone to sequester or destroy all copies of the exhibits. Sec'y Opp'n ay 15–17.

On October 2, 2025, Central Stone filed its reply to the Secretary's opposition and motion to strike or seal privileged exhibits. Specifically, in response to the Secretary' opposition, Central Stone argued: (1) Hardison, Sherrill, and Smith need not "have firsthand knowledge of the cited conditions" to have discoverable information and may have unique discoverable facts; (2) potential application of a privilege does not bar a deposition; (3) Hardison, Sherrill, and Smith are not high government officials; and (4) the delay in deposing Hardison, Sherrill, and Smith was in part due to the Secretary and their deposition would not cause undue delay or impose an undue burden on the Secretary. Resp't Reply at 2–10.

Additionally, Central Stone argues that the Secretary's motion to strike or seal privileged exhibits should be denied because: (1) there is no lawful basis for striking the alleged privileged exhibits because they were released in response to a FOIA request which waives privilege; (2) there is no authority for a Commission ALJ to strike documents inadvertently released via FOIA as it does not contain any clawback provision; and (3) there is no basis for striking the alleged privileged exhibits because the Secretary has not proven that they are privileged, that she took reasonable steps to justify their return, or that she did not waive privilege under Fed. R. Evid. 502(b). Resp't Reply at 11–23.

I. CENTRAL STONE COMPANY'S MOTION TO COMPEL DEPOSITIONS

A. Relevance and Privilege

Commission Procedural Rule 56(b) states "[p]arties may obtain discovery of any *relevant*, non-privileged matter that is admissible evidence *or appears likely to lead* to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b) (emphasis added). Commission Judges may also look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). The scope of discovery under the Federal Rules is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Additionally, under the Federal Rules of Evidence, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401.

After reviewing the parties' submissions, I find that the depositions of Hardison, Sherrill, and Smith may reasonably lead to unique and relevant information. Although the Secretary argues that Hardison, Sherrill, and Smith may not be deposed because they do not have firsthand knowledge of the facts, such a distinction is unpersuasive. *See Jim Walter Res.*, *Inc.*, 26 FMSHRC 317, 319, 321–322 (Mar. 2004) (ALJ) (rejecting the Secretary's argument that MSHA employees could not be deposed because they lacked "firsthand, direct knowledge of the facts related to the issuance of the citation and order"). As Hardison, Sherrill, and Smith each actively participated throughout the investigation to varying degrees, they therefore may have relevant information pertaining to the citations and orders. Resp't Mot. at 5–8; Sec'y Opp'n at 6–8; *See Pocahontas Coal Co., Inc.*, 36 FMSHRC 2326, 2332 (Aug. 2014) (ALJ) (ordering the deposition of an MSHA Supervisor because he "supervise[d] the inspectors that wrote the citations that remain for adjudication [and therefore] . . . may have relevant information pertaining to the citations and orders"); *Buck Creek Coal*, 17 FMSHRC 845,849–50 (May 1995) (ALJ) (allowing the depositions of 19 people, including managers from district offices, because the "fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence").

Even in the event that each deponent does not have information that ultimately leads to relevant information, Central Stone should still have the opportunity to find out whether they do. *See Rail Link*, Inc., 20 FMSHRC 181, 182 (Jan. 1998) (ALJ) (finding that "[t]he fact that [the deponents] may not actually have knowledge of facts that will shed light on the issues raised in this case is not sufficient justification to issue a protective order," because "[t]hey may have such knowledge"). In addition, the Secretary did not provide any persuasive arguments that the proposed depositions would be oppressive or subject Hardison, Sherrill, Smith or MSHA to undue burden or expense.

The Secretary also attempts to bar the depositions of Hardison, Sherrill, and Smith because they may stray into information that will be subject to the deliberative process, work product, and attorney-client privileges. Sec'y Opp'n at 8–10. However, this is an insufficient

basis to bar the depositions altogether as it is not clear at this juncture to what extent the asserted privileges will apply. *See Newmont Gold Co.*, 18 FMSHRC 1304, 1307 (July 1996) (ALJ) (finding that "the fact that [the deliberative process privilege] may be raised during a deposition does not provide a sufficient basis to bar the deposition altogether [as] . . . it is not clear at this juncture that the . . . privilege will apply"). Indeed, the Secretary does not dispute that it objected to the depositions of Hardison, Sherrill, and Smith in part because "certain questions *may* implicate the deliberative process privilege." Resp't Mot. at 3–4, Ex. P (emphasis added). Therefore, barring the depositions entirely simply because privilege may be implicated is premature and unwarranted as the Secretary may still object to the privilege provoking questions at the deposition.

B. High-Ranking Officials

The Secretary argues that even if Hardison, Sherrill, and Smith may produce relevant and unprivileged information, they are exempt from deposition by virtue of the official positions they hold. Sec'y Opp'n at 11–13. However, Commission ALJs have routinely held that positions that are equivalent in rank or greater than those of Hardison, Sherrill, and Smith are not the type of "top government officials" to whom the protection usually is extended. *See Jim Walter Res., Inc.*, 26 FMSHRC 317, 323 (Mar. 2004) (ALJ) (denying the Secretary's motion for a protective order for the depositions of the Assistant Administrator of Coal Mine Safety and Health and the MSHA District . . . Manager because "they are not the type of 'top government officials' to whom the protection is usually extended"); *Pocahontas Coal Co., Inc.*, 36 FMSHRC 2326, 2332 (Aug. 2014) (ALJ) (finding a MSHA District Manager "is not in a position to be considered a high-ranking official privileged to protection from a deposition"); *Rail Link, Inc.*, 20 FMSHRC 181, 182 (denying the Secretary's motion for a protective order for depositions of an MSHA District Manager and an Assistant District Manager because "they are not the type of high level officials that require such protection"); *Newmont Gold Co.*, 18 FMSHRC at 1306–08 (finding that a MSHA District Manager and a MSHA District Assistant Manager "are not the type of high level government officials that require . . . protection [from depositions]"). Therefore, I find that Hardison, Sherrill, and Smith are not the type of "top government officials" to whom the protection from depositions is extended, and thus preventing their depositions is unwarranted.

C. Central Stone's Alleged Delay

Lastly, the Secretary argues that I should deny Central Stone's Motion to Compel Depositions because it "had ample opportunity to obtain the discovery it now claims to urgently need" and that "[c]ourts routinely deny discovery under these circumstances." Sec'y Opp'n at 14–15. Specifically, the Secretary characterizes Central Stone's approach as a "strategic decision to bypass the primary fact witnesses while seeking to compel testimony from supervisory personnel," noting that Central Stone "has not even noticed or taken the depositions" of other MSHA Inspectors identified in discovery. Sec'y Opp'n at 15. Central Stone responds that its delay in conducting depositions resulted from the Secretary's initial cancellation of scheduled depositions, the Secretary's reluctance to commit to deposition dates due to a potential government shutdown, and the difficulties it encountered in obtaining the Secretary's compliance with her discovery obligations. Resp't Reply at 10.

After reviewing the parties' submissions, I find no unexplained or inordinate delay in requesting the depositions of Hardison, Sherrill, and Smith, particularly in light of the complications Central Stone identified in its reply. Resp't Reply at 10. Nor has the Secretary shown that producing these witnesses for deposition would impose an undue burden. In the interest of allowing full and complete discovery, Central Stone will be permitted to depose these witnesses.

Accordingly, Respondent's Motion to Compel Depositions is **GRANTED** and the Secretary is **ORDERED** to produce Curtis Hardison, Lawrence Sherrill, and Marcus Smith for deposition.

II. SECRETARY'S MOTION TO STRIKE OR SEAL PRIVILEGED EXHIBITS

The Secretary asserts that Central Stone utilized privileged materials that were inadvertently released to Central Stone via a Freedom of Information Act ("FOIA") request, to support its Motion to Compel. Sec'y Opp'n at 15–16. Specifically, the Secretary argues: (1) these documents contain deliberative-process, attorney-client, and work-product material; (2) courts have held that inadvertent FOIA disclosure does not strip privileged status from protected material;(3) Federal Rules of Evidence and Procedure dictate that inadvertent disclosure does not waive privilege where the producing party took reasonable steps to prevent disclosure and the Secretary promptly took steps to rectify the error; and (4) to protect the integrity of proceedings, the Commission has authority to regulate discovery and issue orders to prevent undue prejudice or delay. Sec'y Opp'n at 15–17. Therefore, the Secretary requests that I strike or seal Exhibits B, C, D, E, F, H, I, J, K, L, M, N, and O from Central Stone's Motion to Compel Depositions and order Central Stone to sequester or destroy all copies of the privileged documents consistent with Fed. R. Civ. P. 26(b)(5)(B). Sec'y Opp'n at 16–17.

In response, Central Stone argues: (1) there is no lawful basis for striking Exhibits B, C, D, E, F, H, I, M, N, and O because they were released in response to a FOIA request which waives privilege as the documents are now public; (2) there is no authority for a Commission ALJ to strike documents inadvertently released via FOIA as it does not contain any clawback provision; and (3) there is no basis for striking Exhibits J, K, and L because the Secretary has not proven that they are privileged, that she took reasonable steps to justify their return, or that she did not waive privilege under Fed. R. Evid. 502(b). Resp't Reply at 11–22.

As a preliminary issue, Central Stone distinguishes Exhibits J, K, L from the remainder of the exhibits at issue. Resp't Reply at 12. Specifically, Central Stone asserts that while Exhibits B, C, D, E, F, H, I, M, N, and O were disclosed via a FOIA request, Exhibits J, K, and L were produced by "the Secretary . . . in response to its requests for production of documents." Resp't Reply at 11–12. Therefore, Central Stone admits that Exhibits J, K, and L were disclosed "in a federal proceeding" and thus are guided by Fed. R. Evid. 502(b). Resp't Reply at 13 n.2.

In contrast, the Secretary makes no distinction between the exhibits and simply asserts that "Respondent obtained privileged documents inadvertently through FOIA . . . [and] knowing that the documents contain privileged, non-public information, submitted some of the information in support of its Motion, specifically Exhibits B, C, D, E, F, H, I, J, K, L, M, N, and

O." Sec'y Opp'n at 16. However, the Secretary admits that its initial letter to Central Stone asserting its non-waiver of privilege, only specified Exhibits B, C, D, E, F, H, I, M, N, and O as being disclosed via a FOIA request. Sec'y Opp'n at 16 n.2. It is only until her Opposition to Respondent's Motion to Compel Depositions that the Secretary asserts that the addition of Exhibit J, K, and L demonstrates a "more complete" reflection of "the documents addressed in [its] motion." Sec'y Opp'n at 16 n.2. However, nowhere in the Secretary's motion does she explicitly state if the additional Exhibits of J, K, and L were also inadvertently disclosed via a FOIA request. Additionally, as Central Stone notes, Exhibits J, K, and L bear distinctive blue "DOL" stamps and numbering, which Central Stone argues indicate that the Secretary produced these documents in discovery. Resp't Reply at 12; Resp't Mot. at Exs. J, K, L. Despite this apparent conflict in how Exhibits J, K, and L were disclosed, the Secretary elected to not file a reply. Therefore, based on the parties' representations, I find that Exhibits J, K, and L were produced by the Secretary in response to Central Stone's discovery requests, not through a FOIA request. For that reason, I will address Exhibits J, K, and L separately from Exhibits B, C, D, E, F, H, I, M, N, and O.

A. Exhibits B, C, D, E, F, H, I, M, N, and O

The Secretary argues that courts and agencies routinely strike or seal privileged materials to protect the integrity of proceedings, and that Commission judges likewise have authority to regulate discovery and issue orders to prevent undue prejudice or delay. Sec'y Opp'n at 15–17. Therefore, because leaving these exhibits in the record would reward Central Stone's use of privileged materials and risk tainting these proceedings, the Secretary argues that I strike or seal them and order Central Stone to destroy or sequester the materials. Sec'y Opp'n at 15–17.

Preliminarily, any discussion regarding whether inadvertent disclosures under FOIA waives privilege, and the applicability of these disclosures under Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B), is moot if the Commission does not have the inherent authority to grant the Secretary's request to strike, seal, sequester, or destroy Exhibits B, C, D, E, F, H, I, M, N, and O. Therefore, I will first address whether Commission judges have the authority to issue such orders for materials that are inadvertently released via a FOIA request.

The Court's review of Commission case law provided little guidance in addressing whether Commission judges have the inherent authority to strike, seal, sequester, or destroy privileged materials that were inadvertently disclosed via FOIA and thus this issue is one of first impression for the Commission. 30 U.S.C. § 816 (a)(1), provides that Commission decisions are reviewable in the circuit in which the violation allegedly occurred, or, in the D.C. Circuit. Therefore, as the dispute before me arises out of Hannibal, Missouri which falls within the Eighth Circuit, I canvassed the decisions of both the Eighth and D.C. Circuit Court of Appeals for guidance.

Although the Eighth Circuit has not addressed the issue before me, the D.C. Circuit recently did in *Human Rights Def. Ctr. v. U.S. Park Police*, 126 F.4th 708 (D.C. Cir. 2025). There the D.C. Circuit Court reviewed a district court's issuance of a clawback order for FOIA documents which similarly failed to fully redact privileged information and thus were erroneously produced. *Human Rights Def. Ctr*, 126 F.4th at 712. The district court's order

acknowledged that "FOIA does not provide for the return or destruction of inadvertently produced documents but held that it could draw on inherent judicial authority to bar [Plaintiff] from disclosing, disseminating, or making use of the accidentally produced names." *Id.* at 715. However, the D.C. Circuit Court reversed the judge's order because the assertion that the

> court could use its inherent authority to redress the agency's mistaken disclosures . . . cannot be squared with the terms of FOIA and the structure of its disclosure process [as] Congress designed FOIA to function largely without court compulsion. . . . And if the agency during that administrative stage fails to make intended redactions, neither FOIA nor any inherent judicial authority enables it to seek a court order to limit the effects of its error. Nothing suggests the agency acquires an otherwise absent clawback remedy just because a FOIA requester resorts to litigation to enforce an unfulfilled FOIA entitlement.

Id. at 719.

As a result, the D.C. Circuit Court viewed "[t]he primary function of the [judge's] order . . . [as] not to support a core judicial authority, but to fill a perceived hole in the FOIA statute by enabling the government to put the proverbial cat back in the bag." *Id.* at 718. Notably, the D.C. Circuit Court also rejected an analogy to Fed. R. Civ. P. 26(b)(5)(B), in which the Respondent argued that as Fed. R. Civ. P. 26(b)(5)(B) "explicitly address[es] the risk that, in reviewing and disclosing large volumes of information, mistakes may be made" the court may use its inherent authority to "'address the same problems inherent in responding to FOIA requests' through a clawback order." *Id.* at 719. However, the D.C. Circuit Court responded that "the comparison hurts more than it helps. A provision akin to Rule 26(b)(5)(B) could have been but was not included in FOIA. That alone defeats any persuasive effect of the [Respondent's] analogy. Congress presumably acted deliberately in omitting general clawback authority from FOIA." *Id.*

In light of the discussion above, I find the reasoning of the D.C. Circuit Court in *Human Rights Def. Ctr*, highly persuasive. Therefore, I find that that I do not have the inherent authority to issue an order to strike, seal, sequester, or destroy Exhibits B, C, D, E, F, H, I, M, N, and O that were inadvertently disclosed via FOIA. As a result, I need not address whether Exhibits B, C, D, E, F, H, I, M, N, and O are privileged, the applicability of Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B), or whether the Secretary has waived privilege.

B. Exhibits J, K, and L

The Secretary argues that "Exhibits . . . J, K, [and] L. . . contain deliberative-process, attorney-client, and work-product material." Sec'y Opp'n at 16. The Secretary, as the party asserting privilege over Exhibits J, K, and L, has the burden of proving that they apply. *United States v. Ivers,* 967 F.3d 709, 715 (8th Cir. 2020) (holding "the party seeking to assert the [attorney -client] privilege . . . has the burden of showing that the privilege applies"); *Citizens for Resp. & Ethics in Washington v. United States Dep't of Just.*, 45 F.4th 963, 972 (D.C. Cir. 2022) (affirming that "[a]n agency invoking the deliberative-process privilege thus must 'establish what deliberative process is involved, and the role played by the documents in issue in the course of that process'"); *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997) (holding that

"[t]he burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege"). As Central Stone correctly points out, the Secretary "has offered only conclusory assertions with no evidence. She has not identified which pages, or specific text, of Exhibits J, K, and L she asserts are privileged, or which privileges she asserts apply to which pages." Resp't Reply at 13.

However, despite the Secretary's lack of guidance, I nevertheless reviewed Exhibits J, K, and L and found no indication of privileged material under the deliberative-process, attorney-client, or work-product material privileges. Accordingly, because I find that Exhibits J, K, and L contain no privileged material, I need not address the applicability of Fed. R. Evid. 502(b) or Fed. R. Civ. P. 26(b)(5)(B), nor whether the Secretary has waived privilege. *See Sec'y of Labor v. Aggregate Industries Wrc, Inc.,* 39 FMSHRC 1997, 1999 (Oct. 2017) (ALJ) (reviewing the alleged privileged document and finding that "[b]ecause . . . the email in question is not protected by the attorney-client privilege, I need not reach the issue whether the email should be destroyed or returned under Fed. R. Evid. 502(b) and Fed. R. Civ. P. 26(b)(5)(B)").

Accordingly, the Secretary's Motion to Strike or Seal Privileged Exhibits is **DENIED**.

III. ORDER

In light of the foregoing, it is hereby **ORDERED** that Central Stone Company's Motion to Compel Depositions is **GRANTED**. Additionally, the Secretary's Motion to Strike or Seal Privileged Exhibits is **DENIED**.

David P. Simonton
Administrative Law Judge

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