FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

April 2, 2025

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2024-0231
Petitioner,	:	A.C. No. 46-09569-594789
	:	
v.	:	
	:	
CONSOL MINING COMPANY, LLC	:	Mine: Itmann No. 5
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL UNREDACTED SPECIAL ASSESSMENT REVIEW FORMS

This case is before me upon the filing of the Petition of the Secretary of Labor for Assessment of Civil Penalty against CONSOL Mining Company, LLC ("CONSOL") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. On July 17, 2024, Chief Administrative Law Judge Glynn F. Voisin assigned me this docket and attached a copy of my Prehearing Order. Counsel for the parties have complied with my Prehearing Order and filed their initial prehearing reports. By order dated November 20, 2024, I set this matter for a hearing to be held on May 28–30, 2025, in Beckley, West Virginia.

Since complying with my Prehearing Order, CONSOL has filed a series of motions related to the Secretary's proposed special assessments. This order focuses on CONSOL's Motion to Compel Unredacted Special Assessment Review Forms for the two proposed penalties in this case which, the Secretary claims, contain privileged communications.

I. BACKGROUND

The Special Assessment Review ("SAR") Form (MSHA Form 7000-32, Revised August 2006) consists of an initial penalty recommendation by the issuing MSHA inspector, with a narrative in support, and concurrences or oppositions of supervisors indicated by a check in a box, which may be accompanied by comments. (*See* Resp't Mot., Ex. 1.) SAR Forms typically repeat facts written elsewhere that the inspector would like MSHA to consider when reviewing the recommendation that the penalty be specially assessed. Language on the SAR Form states the form contains information that is privileged. Here, the Secretary issued special assessments for both the section 104(d)(1) citation and order issued to CONSOL. (Sec'y Pet., Ex. A.)

During discovery, CONSOL requested that the Secretary share her SAR Forms for the citation and order both issued to CONSOL under section 104(d)(1) of the Mine Act. (Resp't

Mot. at 1.) In response, the Secretary asserted that some of the information in the SAR Forms is protected from discovery under the deliberative process privilege. (Resp't Mot. at 1.) Thus, on October 8, 2024, the Secretary provided CONSOL with redacted copies of the SAR Forms for the citation and order in this case. (Sec'y Opp'n at 1.) Specifically, the Secretary shared for both violations the information on the SAR Forms in Items 1 through 9 related to the relevant MSHA district and field offices, the mine's identification number and name, the operator's name, the citation/order number and issue date, as well as checked boxes marked as to whether this was an accident-related violation and whether the operator was notified of the special assessment. (Resp't Mot., Ex. 1.) However, MSHA redacted its staff's deliberative analysis for the remainder of Items 10 through 13 for Citation No. 9595886—as well as Items 10 and 11 for Order No. 9595887 (Items 12 and 13 were not filled out and left blank)—as to why the violations warrant special assessment penalties. (*See* Resp't Mot., Ex. 1.)

On November 15, 2024, CONSOL filed a pre-trial Motion to Compel Unredacted Special Assessment Review Forms for the citation and order in this case. On November 20, 2024, the Secretary filed an unopposed Motion for Extension of Time to respond to CONSOL's Motion to Compel, which I granted on November 22, 2024. On December 6, 2024, the Secretary filed her Opposition to CONSOL Mining Company, LLC's Motion to Compel Production of "Special Assessment Review Form."

CONSOL asks me to require the Secretary to turn over the unredacted SAR Forms, because CONSOL believes the information in the documents is needed to challenge the Secretary's proposed special assessment penalties at the hearing. (Resp't Mot. at 1.) CONSOL also asks that I conduct an *in camera* review to determine whether the documents are protected by the government's deliberative process privilege. (Resp't Mot. at 3.) Because CONSOL's motion involves the Secretary's proposed civil penalties, I now discuss the legal framework of the Mine Act's penalty procedures, as well as the government's deliberative process privilege as it applies to the Secretary's SAR Forms.

II. PRINCIPLES OF LAW

A. The Mine Act's Penalty Scheme

1. The Secretary Proposes Civil Penalties

When an "authorized representative" of the Secretary finds a violation of the Mine Act or of "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Mine Act]," 30 U.S.C. § 814(a), the Secretary may propose a civil penalty. 30 U.S.C. § 815(a). Six statutory factors guide the Secretary's enforcement discretion in deciding whether to assess a penalty and, if so, in what amount. Those factors are: (1) "the operator's history of previous violations"; (2) "the appropriateness of such penalty to the size of the business of the operator charged"; (3) "whether the operator was negligent"; (4) "the effect on the operator's ability to continue in business"; (5) "the gravity of the violation"; and (6) "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 815(b)(1)(B). The statute is explicit that, in proposing penalties, "the

Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors." 30 U.S.C. § 820(i).

The Secretary has promulgated regulations that guide her exercise of discretion in proposing penalties. Normally, MSHA applies the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3 to calculate the amount of a proposed penalty. However, the Secretary permits MSHA to waive the regular assessment process if MSHA "determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). The "special assessment" approach provides "the Secretary greater latitude in deciding what penalty to propose, requiring only that the Secretary base the proposed penalty on her own weighing of the six statutory criteria" set forth in 30 U.S.C. § 815(b)(1)(B). *Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 725 (D.C. Cir. 2019). This approach comports with the Mine Act's scheme of higher penalties for violations issued along the "d-chain." *See Lodestar Energy, Inc.*, 25 FMSHRC 343, 344 (July 2003) (holding that "[s]ection 104(d) of the Mine Act creates a 'chain' of increasingly severe sanctions that serve as an incentive for operator compliance").

2. The Commission Assesses Penalties *De Novo*

Under section 105(d) of the Mine Act, if an operator contests an order, citation, or proposed penalty assessment, the Commission must provide an opportunity for a hearing, and thereafter a Commission Administrative Law Judge ("ALJ") must "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." 30 U.S.C. § 815(d). Section 110(i) of the Mine Act delegates to the Commission the authority to assess all civil penalties based on the same six statutory factors that informed the Secretary's penalty proposal and the information relevant thereto developed in the course of the adjudicative proceeding. 30 U.S.C. § 820(i).

Commission ALJs possess independent authority to assess all contested civil money penalties *de novo* pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i); 29 C.F.R. § 2700.30(b) ("[i]n determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary"); *Am. Coal Co.*, 933 F.3d at 727 (holding that "once violations are found, the determination of the appropriate remedy is left to the Commission's independent, *de novo* judgement"); *Solar Sources Mining, LLC*, 42 FMSHRC 181, 183 (Mar. 2020) (holding that "the Commission *independently assesses* a civil penalty *de novo* based on findings of fact and consideration of [the] six penalty factors"); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (holding that "in a contested case the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary[, r]ather . . . the amount of the penalty to be assessed is a *de novo* determination"); *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014) (holding that "Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act"); *Cantera Green*, 22 FMSHRC 616, 622 (May 2000) (holding that "the Commission and its judges are required to assess penalties de novo"); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000) (holding that "[t]he principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established"); *Shamrock Coal Co.*, 1 FMSHRC 469 (June 1979), *aff'd* 652 F.2d 59 (6th Cir.

1981) ("holding that de novo assessment of penalties is within the authority of the Commission and its judges").

Furthermore, Commission ALJs are not bound by the Secretary's regulations in 30 C.F.R. Part 100. *Am. Coal Co.*, 933 F.3d at 727; *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (holding that the Part 100 regulations "are not binding in any way in Commission proceedings"). Additionally, Commission "Judges *are not required* to explain their divergence from a special assessment" because explaining a divergence from an "opaque" MSHA penalty assessment—

> serves neither the goal of transparency and public trust nor the principles of fair and objective assessments. On the contrary, such a requirement would interject a foundational bias toward the enhanced penalty into the consciousness of the trier of fact, whether or not the reason for the enhancement has been validated by the trial process.

Solar Sources Mining, LLC, 42 FMSHRC at 200.

B. <u>Scope of Discovery</u>

Per Commission Procedural Rule 56(b), "[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). Under Federal Rule 26(b)(1), a party may discover "any *nonprivileged* matter that is *relevant* to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1) (emphasis added). 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, parties withholding otherwise discoverable information or documents on the basis of privilege must expressly make such a claim and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A).

C. <u>Deliberative Process Privilege</u>

1. The General Rule

The statutory basis of the deliberative process privilege is an exception to the disclosure requirements of the Freedom of Information Act, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). *See In re: Contests of Respirable Dust Sample*

Alteration Citations (*Dust Cases*), 14 FMSHRC 987, 990-92 (June 1992) (discussing the historical origins of the deliberative process privilege). In interpreting the exception, the Supreme Court explained that the privilege protects the "'decision[-]making process of government agencies,' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted); *see also United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980) (holding the privilege protects the "thoughts, ideas, and analyses that encompass the process by which an agency reaches a decision"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that the deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"). The purpose of the privilege is to ensure that "frank discussion of legal or policy matters" is not inhibited by making those discussions public. *Sears, Roebuck & Co.*, 421 U.S. at 150.

In order for a document to be protected under the deliberative process privilege, it must: (a) be "pre-decision;" (b) pertain to communications between subordinates and supervisors; and (c) relate to "deliberative" communication—i.e., the process by which policies are formulated. *Dust Cases*, 14 FMSHRC at 992 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). Thus, "[a] document is 'pre[-]decisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Senate of P.R. ex rel. Judiciary Comm. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987).

2. Applicability of the Deliberative Process Privilege to Factual Information

The Commission has held that "purely factual information that does not expose an agency's decision[-]making process does not come within the ambit of the privilege." *Dust Cases*, 14 FMSHRC at 993 (citing *Exxon v. Doe*, 585 F. Supp. 690, 698 (D.D.C. 1983)). The Commission has explained that if the factual information can be segregated from the otherwise protected deliberative material, then it must be disclosed. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1246 (July 1997). However, even if the information can be segregated, the party opposing disclosure can prevent disclosure by showing "that the material is 'so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of deliberative information that is entitled to protection.'" *Id.* at 1246–47 (quoting *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992)).

Courts have applied the privilege to disclosures of factual information when such disclosure "'would expose an agency's decisionmaking [*sic*] process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Consolidation Coal*, 19 FMSHRC at 1247 (quoting *Quarles v. U.S. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990)). Specifically, "courts only protect from disclosure . . . factual material in underlying documents when it is clear that there was an evaluation made by an agency regarding which facts it would rely upon and those which it would disregard." *Consolidation Coal*, 19 FMSHRC at 1249 (citing *Playboy Enterprises, Inc. v. United States Dep't of Justice*, 677 F.2d 931, 935-36 (D.C. Cir. 1982); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974)).

3. Overcoming the Deliberative Process Privilege

Finally, even if the deliberative process privilege applies, the Commission has noted that it is qualified and subject to the balancing test set forth in *Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. Under this test, if "disclosure is essential to the fair determination of a case, the privilege must yield." *Bright Coal Co.*, 6 FMSHRC at 2523 (citing *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)). Application of this test requires analysis of the case's particular circumstances, including whether the Secretary is in sole control of the information, the nature of the violation, possible defenses, and the impact of the information. *Dust Cases*, 14 FMSHRC at 988; *Bright Coal Co.*, 6 FMSHRC at 2526. The party seeking disclosure has the burden of proving the facts necessary to establish that the information sought is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526.

III. PARTIES' ARGUMENTS

In its Motion to Compel Unredacted Special Assessment Review Forms, CONSOL argues that it needs the redacted information in the SAR Forms to learn the basis of the Secretary's proposed special assessment penalties so that it can challenge the proposed penalties at the hearing and otherwise adequately prepare a defense. (Resp't Mot. at 1.) While CONSOL acknowledges that Commission Judges decide penalties *de novo*, it disputes any assertion that the SAR Forms are irrelevant. (Resp't Mot. at 3.) Instead, CONSOL argues that the SAR Forms are relevant because Commission Judges must explain their reasoning for deviating from the Secretary's proposed penalty. (Resp't Mot. at 3.) CONSOL adds that I will not be able to fully explain my penalty assessment in this case without the information in the unredacted SAR Forms. (Resp't Mot. at 4.)

CONSOL also argues that it is entitled to MSHA Inspector Andrew Mullins's and MSHA Supervisor Nicholas Christian's written statements in the SAR Forms related to the violations because the Secretary listed them as potential witnesses. (Resp't Mot. at 1–2.) CONSOL disputes that questioning MSHA Inspector Mullins about the basis of his written statement in the SAR Forms during a deposition is an acceptable alternative to the unredacted SAR Forms. (Resp't Mot. at 3.) Lastly, CONSOL argues that because these SAR Forms are no more deliberative than the citation and order, they are not protected by the deliberative process privilege. (Resp't Mot. at 2.)

The Secretary in her opposition to CONSOL's motion argues that the SAR Forms are not discoverable because they are not relevant or reasonably calculated to lead to the discovery of admissible evidence. (Sec'y Opp'n at 2.) In support, the Secretary asserts that under the Mine Act, she is delegated only the duty of proposing penalties, and the Commission has the authority to assess all civil penalties *de novo*. (Sec'y Opp'n at 2.) Because the Commission has *de novo* authority to assess civil penalties, the Secretary argues that the SAR Forms do not have the tendency to make a fact more or less probable than it would be without the evidence, and they are therefore not discoverable. (Sec'y Opp'n at 3.)

In the alternative, the Secretary contends that the SAR Forms are not discoverable because they are protected by deliberative process privilege. (Sec'y Opp'n at 3.) The Secretary argues that the information contained in the SAR Forms consists of pre-decisional communications, as they were exchanged prior to the formulation of MSHA's decision to specially assess the violations. (Sec'y Opp'n at 6.) The Secretary also contends that the information in the SAR Forms is deliberative in nature, as it constitutes the thoughts, ideas, reasoning, and analyses of the inspectors and their supervisors in reaching the decision to specially assess the proposed penalties for the violations. (Sec'y Opp'n at 6.) The Secretary adds that the factual information contained in the SAR Forms is inextricably intertwined with the inspectors' decision-making process of whether the violations warrant special assessment. (Sec'y Opp'n at 6.)

The Secretary further argues that if I order the Secretary to provide the unredacted SAR Forms, MSHA Inspectors and Supervisors would be discouraged from providing their candid analysis in the future for fear of disclosure. (Sec'y Opp'n at 7.) The Secretary also contends that the factual information sought by CONSOL is reasonably accessible to it and therefore the information contained in the SAR Forms is not essential to a fair determination of this case. (Sec'y Opp'n at 7.)

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. <u>Whether the SAR Forms are Relevant</u>

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. Some of my colleagues have held that the SAR Forms are irrelevant and accordingly denied other operators' motions to compel their production. *See Pocahontas Coal Co.*, 34 FMSHRC 903, 905 (April 2012) (ALJ Feldman) (holding that "the Secretary's special assessment criteria, as vague as it may be, is not relevant given the *de novo* authority of the Commission to assess civil penalties, [and therefore,] the special assessment review forms . . . are not discoverable"); *Hidden Splendor Res., Inc.*, 33 FMSHRC 2345, 2347 (Sept. 2011) (ALJ Rae) (holding that "the conclusions and contemporaneous recommendations" in the SAR form are "irrelevant in the *de novo* determination by the Administrative Law Judge at hearing"); *Consolidation Coal Co.*, 35 FMSHRC 3236, 3236–37 (Sept. 2013) (ALJ Moran) (denying motion to compel production of SAR Form on the grounds that "once a matter is before the Commission, no part of Part 100 or that subset within it, [including] special assessments under section 100.5, remains material").

My colleagues denied other operators' motions to compel SAR Forms largely on the grounds that the Secretary's penalty assessment process is irrelevant. I agree with this conclusion. As I previously stated, *see* discussion *supra* Part II.A.2, the Commission assesses penalties *de novo* and is not bound by the Secretary's proposed penalties or by the regulations in 30 C.F.R. part 100. *Am. Coal Co.*, 933 F.3d at 727; *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (holding that the Part 100 regulations "are not binding in any way in Commission proceedings"). Furthermore, in *Solar Sources Mining, LLC*, 42 FMSHRC 181, 200 (Mar. 2020), the Commission held that ALJs "are not required to explain their divergence from a

special assessment." Thus, whatever "remedial enforcement judgments the Secretary might or might not have made in suggesting a penalty amount are beside the point," because the ALJ will independently determine the penalty by applying the statutory factors in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Am. Coal Co.*, 933 F.3d at 727.

However, the aggressive nature of CONSOL's motions in this case dictates careful analysis of whether the SAR Forms are relevant. For me to consider the Secretary's proposed special assessment penalties, she must prove facts justifying those penalties at the hearing. *See Solar Sources Mining, LLC*, 42 FMSHRC at 197 (holding that "favorable consideration of the agency's proposal for a high penalty is subject to the Secretary's presentation of proof of facts warranting a high penalty"). Hence, the Secretary must present evidence addressing the six statutory criteria set forth in 30 U.S.C. § 815(b)(1)(B), the same statutory criteria I must consider in determining an appropriate penalty. *See* 30 U.S.C. § 820(i). As the SAR Forms "describe the facts and circumstances justifying the recommendation for special assessment," they may provide insight into what evidence the Secretary will present at the hearing for me to consider. *Volume III – 30 CFR Parts 40 through 50 and Parts 62 and 100*, MSHA (May 16, 1996), https://www.msha.gov/volume-iii-30-cfr-parts-40-through-50-and-parts-62-and-100; *see also Aggregate Indus., W. Cent. Region, Inc.*, 25 FMSHRC 88, 89, 90 (Feb. 2003) (ALJ Manning) (holding that "the Special Assessment Review Form has some marginal relevance to the Secretary's high negligence and unwarrantable failure determinations"); *CDK Contracting Co.*, 25 FMSHRC 289, 291 (May 2003) (ALJ Manning) (same); *Coeur Alaska, Inc.*, 37 FMSHRC 2499, 2500 (Oct. 2015) (ALJ Simonton) (holding that the operator "is entitled to the full factual basis upon which the special assessment was issued so that it may mount a complete defense to both the fact of violation and the assessed penalty"). I therefore determine that the SAR Forms are only irrelevant to *my* ultimate determination of an appropriate penalty after the hearing. However, the SAR Forms could have a "tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining" this action. Fed. R. Evid. 401. Accordingly, I conclude that the SAR Forms are marginally relevant to the Secretary's high negligence and unwarrantable failure determinations in this case and therefore discoverable subject to the Secretary's claim of deliberative process privilege.

B. Whether the SAR Forms are Protected by the Deliberative Process Privilege

1. Applying the Test for the Deliberative Process Privilege

As previously discussed, *see* discussion *supra* Part II.C.1, in order for a document to be protected under the deliberative process privilege, it must: (a) be "pre-decision;" (b) pertain to communications between subordinates and supervisors; and (c) relate to "deliberative" communication—i.e., the process by which policies are formulated. *Dust Cases*, 14 FMSHRC at 992 (quoting *Jordan*, 591 F.2d at 774). The information contained in the SAR Forms was exchanged prior to the formulation of MSHA's decision to propose special assessment penalties for the violations. *See Volume III – 30 CFR Parts 40 through 50 and Parts 62 and 100*, MSHA (May 16, 1996), https://www.msha.gov/volume-iii-30-cfr-parts-40-through-50-and-parts-62-and-100. Therefore, I determine that the information in the SAR Forms consists of pre-decisional communications.

The SAR Forms pass from the issuing MSHA inspector, who makes a factual or strategic advice-giving recommendation, to superior officials who engage in the deliberative process and either agree or disagree with the recommendation for the same or independent reasons. *See Volume III – 30 CFR Parts 40 through 50 and Parts 62 and 100*, MSHA (May 16, 1996), https://www.msha.gov/volume-iii-30-cfr-parts-40-through-50-and-parts-62-and-100. Thus, I determine that the information contained in the SAR Forms pertains to communications between subordinates and supervisors.

The SAR Forms record the thoughts, ideas, reasoning, and analyses used by the MSHA inspectors and their supervisors in reaching the decision to propose a special assessment penalty for a violation. Indeed, as the D.C. Circuit noted, the Secretary's special assessment penalty proposal "is nothing more than h[er] own chosen litigating position. It is a party's argument; it is not a fact to be proven by evidence." *Am. Coal Co.*, 933 F.3d at 727. Thus, the SAR Forms consist of the "Secretary's internal deliberations about what penalty to *recommend*." *Id.* Accordingly, I determine that the SAR Forms contain deliberative communications.

The Secretary's SAR Forms can contain a significant amount of factual information about the violations. This factual information, however, directly relates to MSHA's task of determining whether a special assessment penalty, in the Secretary's view, is warranted for a violation. Because that information guides the Secretary's decision-making process, it must be privileged as well. In other words, the factual information contained in the SAR Forms is "inextricably intertwined" with the MSHA inspectors' analysis of whether the violations warrant special assessment penalties. *Consolidation Coal Co.*, 19 FMSHRC at 1246–47 (citation omitted). As a result, I determine that the entire portion of the SAR Forms related to the proposed special assessment is privileged. An *in camera* review of the SAR Forms would be superfluous. The presence of facts in the SAR Forms does not vitiate the privilege protecting the documents. The very nature of a SAR Form is to ensure that the issuing inspector and MSHA superiors provide their personal opinions, evaluations, and recommendations regarding the proposed special assessment; indeed, the form itself contains printed language that the information provided is privileged. I agree that those communications are privileged.

2. Whether CONSOL Can Overcome the Privilege

Although I find that whole portions of the SAR Form are entitled to the deliberative process privilege, I must determine whether the privilege passes the balancing test set forth in *Bright Coal Co.*, 6 FMSHRC 2520 (Nov. 1984). As previously discussed, *see* discussion *supra* Part II.C.3, this balancing test involves consideration of whether the Secretary is in sole control of the information. *Dust Cases*, 14 FMSHRC at 988; *Bright Coal Co.*, 6 FMSHRC at 2526. The Secretary notes in her opposition that she has already produced or identified the factual bases she considered in proposing special assessment penalties for the violations in this case. (Sec'y Opp'n at 7.)

Moreover, as previously discussed, *see* discussion *supra* Part II.A.1, six statutory factors guide the Secretary's enforcement discretion in deciding whether to propose a special assessment penalty for a violation. 30 U.S.C. § 815(b)(1)(B); 30 C.F.R. § 100.5(b). Four of the six statutory factors include: "the operator's history of previous violations," "the appropriateness of such

penalty to the size of the business of the operator charged," "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation," and "the effect on the operator's ability to continue in business." 30 U.S.C. § 815(b)(1)(B). CONSOL's history of previous violations, the amount of coal it produces, and when the citation and order at issue in this case were terminated, are publicly disclosed and can all be found on the Mine Data Retrieval System website. *See Mine Data Retrieval System*, U.S. DEP'T OF LABOR, https://www.msha.gov/data-and-reports/mine-data-retrieval-system. CONSOL is also in the best position to consider the effect of the proposed penalties on its ability to continue in business, based on its knowledge of its own business. *Sec'y of Labor v. Davis Coal Company*, 2 FMSHRC 619, 624 (Mar. 1980) (holding that "[t]he burden of proving that the penalties proposed will have an adverse effect on an operator's ability to continue in business is obviously that of the operator").

The other two statutory factors the Secretary must consider are "whether the operator was negligent," and "the gravity of the violation." 30 U.S.C. § 815(b)(1)(B). The Secretary has shared copies of the citation and order and the MSHA inspector's notes, which set forth in detail the justifications underlying the issuance of the citation and order, as well as relevant photographs. (Sec'y Opp'n. at 7; Sec'y Pre-Hr'g Report at 4.) The Secretary also provided the "Narrative Findings for a Special Assessment" document for this case which contains the underlying facts of the violations, including facts regarding the gravity of the violations and CONSOL's negligence. (Sec'y Opp'n. at 9.) After summarizing the facts of the violations in this case, MSHA explains in the Narrative Findings document that it is proposing "a special assessment under § 100.5 because the violations exhibited a high degree of negligence and contributed to a serious accident."[1] Moreover, the Secretary highlights that CONSOL has had the opportunity to explore the factual bases underlying the issuances of these proposed special assessment penalties through depositions. (Sec'y Opp'n at 7.)

I therefore determine that the Secretary is not in sole control of the information that CONSOL seeks, as the information is reasonably accessible to CONSOL. Thus, in accordance with *Bright Coal Company*, I conclude that, because disclosure of the SAR Forms is not essential to the fair determination of this case, CONSOL has not overcome the Secretary's assertion of the deliberative process privilege, and the unredacted SAR Forms should not be produced.

I conclude that CONSOL has failed to establish a need for the portions of the SAR Forms that contain communications protected by the deliberative process privilege invoked by the Secretary. The factual information in the SAR Forms that underpins the Secretary's proposed special assessment penalty, and sought by CONSOL, is reasonably accessible to CONSOL for it to challenge the proposed penalties at hearing and otherwise adequately prepare a defense. Additionally, CONSOL's other arguments fail because the Commission held in *Solar Sources Mining* that Commission Judges need not explain any deviation from the Secretary's proposed special assessment penalties. *Solar Sources Mining, LLC*, 42 FMSHRC at 200. Moreover,

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[1] In her petition, the Secretary references "the Narrative Findings for a Special Assessment in Exhibit A," but neglected to attach the narrative. (Sec'y Pet. at 3.) However, the Secretary has submitted the narrative to CONSOL and the Court as an exhibit in her Motion for Protective Order Regarding Rule 30(b)(6) Deposition. (Sec'y Mot. for Protective Order, Ex. D.)

Commission Judges do not rely on the Secretary's proposed special assessments to explain their own penalty assessments; rather, Judges assess penalties *de novo* based on a determination of the facts educed at hearing. *See* discussion *supra* Part II.A.2. Lastly, the status of MSHA Inspector Mullins and MSHA Supervisor Nicholas Christian as named witnesses does not change the nature of the SAR Forms or their status as privileged communications.

V. ORDER

Based on the foregoing reasoning, CONSOL's Motion to Compel Unredacted Special Assessment Review Forms is hereby **DENIED**.

Alan G. Paez
Administrative Law Judge

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