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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 26, 1990
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: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. •801. et seq. (1988) ("Mine Act"), and concerns a discovery dispute between the Secretary of Labor and ASARCO, Inc. ("Asarco"). On November 21, 1989, Commission Administrative Law Judge Avram Weisberger granted Asarco's motion to dismiss these proceedings because the Secretary refused to comply with his order requiring her to produce certain documents for inspection by Asarco. ASARCO, Inc., 11 FMSHRC 2351 (November 1989)(ALJ) For the reasons that follow, we vacate the judge's order and remand this matter for further consideration consistent with this decision.
I.
Factual and Procedural Background
Asarco operates the Immel Mine, an underground zinc mine located in Knox County, Tennessee. A fatal accident occurred at the Immel Mine on July 15, 1988, when an electrician contacted an energized 4.160-volt terminal located inside a transfer switch cabinet. An electrical apprentice assisting him escaped serious injury. Following an investigation, Don B. Craig, a supervisory inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Asarco two citations alleging violations of 30 C.F R. •57.12017 & .12019 because the top terminals in the cabinet were not de-energized and because suitable clearance was not provided when the electrician was cleaning the terminals and insulators Asarco contested the citations.
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On March 9, 1989, during the course of pretrial discovery, Asarco served the Secretary with a request for production of documents in accordance with Commission Procedural Rules 55 and 57, 29 C.F.R. •2700.55 and 2700.57. The request for production contained nine requests for

documents related to MSHA's investigation of the accident, including its "special investigation," documents related to MSHA's special assessment procedures, and other documents. In accordance with Commission Procedural Rule 57, Asarco asked that MSHA's answer be provided within 15 days. MSHA did not respond to the request.

On April 21, 1989, Asarco filed a motion for an order to compel production of the documents sought in its March 9 request. Asarco asserted that the Secretary had failed to respond to the request for production except to notify Asarco orally that it would not comply with some of the requests on the basis of an "investigatory privilege." In order to facilitate production, Asarco agreed to limit its request for production to documents prepared during the past two years and, with respect to one request, to documents exchanged between specifically listed MSHA officials. Asarco also agreed to enter into a "protective order" to protect the identities of confidential informants.

On May 12, 1989, the Secretary filed responses and objections to Asarco's request for production. The Secretary objected to the requests for a number of reasons. As pertinent to this review proceeding, she asserted that answering certain requests would (1) reveal the identity of miners or violate Commission Procedural Rule 59, 29 C.F.R. •2700.59 1/ and (2) disclose protected work product of the Secretary's employees.

On June 6, 1989, Asarco filed another motion to compel production of documents. As relevant here, it asserted that the government cannot proceed affirmatively against Asarco and, under the guise of privilege, suppress evidence useful to its defense. It asserted that it was entitled to exculpatory information in the Secretary's possession. Second, Asarco maintained that the Secretary misunderstood the privileges that she asserted. It maintained that the Secretary could not simply state that documents contained privileged matters but must submit the documents in question to the administrative law judge for in camera inspection. Asarco argued that the Secretary's claim of confidentiality was too generalized to meet her burden of showing that the documents were protected from discovery.

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1/ 29 C.F.R. •2700.59 provides:

Name of miner witnesses and informants

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. 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.

On July 12, 1989, Judge Weisberger issued an order responding to Asarco's motions to compel. The judge concluded that the information sought in the requests for production was relevant to the proceeding. The judge ordered the Secretary to respond to each of the requests for production within 10 days of the order. The judge held that the Secretary was not to disclose, until two days before the hearing, the name of any miner who was expected to be a witness or the name of any informant who was a miner.

On July 31, 1989, the Secretary filed responses to the request for production. In her responses, the Secretary stated that the documents were being produced under protest and that she preserved for appeal all previously made objections.

On August 11, 1989, Asarco filed another motion to compel production of documents, alleging that the Secretary's response to the judge's order compelling production was incomplete. As relevant here, Asarco alleged that the Secretary improperly excised voluminous amounts of material from the documents produced. Asarco maintained that the Secretary improperly asserted "work product," "attorney/client privilege" or "miner/informant privilege" throughout the documents produced. In response to Asarco's motion to compel, the Secretary argued that she had properly excised privileged material from the documents produced, in part, to protect the identity of miner-informants. The Secretary requested the judge to view the documents in camera, if necessary, to resolve the matter.

By order dated September 1, 1989, the judge directed the Secretary to file with him the disputed documents for in camera examination with respect to the claimed privileges. In reviewing these documents, the judge did not consult with the attorneys for the parties and did not request additional information.

In an order dated September 22, 1989, the judge issued his rulings with respect to the excised portions of the documents. The judge discussed each document that contained excised material and set forth his determination as to what portion of each was protected by a privilege. The documents provided by the Secretary are contained in two files: File A (Civil Penalty Investigation File) and File B (Special Investigation File). The judge assigned exhibit letters to each contested document. In a number of instances, the judge held that portions of the documents that the Secretary wished to withhold from Asarco should be produced.

The judge's rulings with respect to the six documents that are the subject of this review proceeding are as follows:

I - FILE A

2. Exhibit B (Special Assessment Review, August 10 1988). An informer is not identified, and the entire statement is thus not to be excised.

9. Exhibit I (Continuation Sheet) taking into account the significance of the excised statement, and the circumstances of this case, the excised portion is subject to discovery.

II - FILE B

3. Exhibit E-The statements by a miner (employed by Respondent) in response to detailed questioning by an MSHA Special Investigator are detailed, extensive, and hence significant and relevant to the issues of the instant proceedings. There is no evidence that there exists herein any possibility of harassment or retaliation against the informer. I find accordingly that Respondent's need for the information in this exhibit outweighs the Petitioner's need to maintain this privilege (see, Bright Coal Co., Inc. 6 FMSHRC 2520 at 2526 (1984)). Accordingly. this exhibit is subject to discovery.

4. Exhibit F-The disposition of Exhibit F is the same as Exhibit E, based on the same rationale.

5. Exhibit G-The disposition of Exhibit G is the same as Exhibit E, based on the same rationale.

...

7. Exhibit K-The excised statements on pages 3 and 4 are contained in statements Dan Craig made in an interview with Robert Everett. Neither of these persons ha[s] been identified as attorneys. Accordingly, the statement of Craig are not within the scope of the attorney work product, or attorney/client privilege, and are discoverable. However, the last line of page 3 and the first 3 lines of page 4 are to be deleted, as they contain references to the work processes of a solicitor, and they are not relevant to the case at bar. Accordingly they are privileged.

Order of September 22, 1989

The judge ordered the Secretary to serve Asarco with copies of these documents within three days. For reasons that are not clear, the judge attached to his order copies of some of the disputed documents that are not before the Commission on review. Thus, Asarco was provided with unexcised copies of some of the contested documents before the Secretary was given the opportunity to determine how she wished to respond to the judge's order.

In response to the judge's order of September 22, the Secretary stated that she would "respectfully decline" to produce unexcised copies of six of the documents that the judge ordered her to produce and moved to seal the documents that she had provided to the judge. She also protested the judge's action in unilaterally providing certain other documents without the

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Secretary's knowledge or consent. Asarco subsequently filed motions to cancel the trial, impose sanctions, dismiss the penalty proceedings and vacate the citations. Asarco argued that the judge was correct in ordering the Secretary to provide the contested documents, and that its

case has been prejudiced by the Secretary's continued failure to comply with its discovery requests.

On October 16, 1989, the judge denied the Secretary's motion to seal the documents. He stated that he was "most concerned" about the Secretary's failure to comply with his order of September 22. He denied Asarco's motions to dismiss the cases and again ordered the Secretary to produce the disputed documents.

On October 23, 1989, the Secretary stated that because she believed that the judge's order was issued in error, she had no choice but to decline to produce the "identifying documents" in order to obtain review by the Commission. On November 21, 1989, the judge dismissed the proceeding against Asarco based on the Secretary's continued refusal to comply with his discovery order of September 22. 11 FMSHRC 2351 (November 1989)(ALJ).

The Commission granted the Secretary's subsequent petition for discretionary review. The Secretary asserts that the informant's privilege applies to all or part of each of the six documents on review. She asserts that the attorney-client privilege and the work product privilege apply to part of Exhibit K.

II.

Disposition of Issues

A. Informant's Privilege

The Secretary argues that each of the passages withheld from Asarco in the six documents are protected by the informant's privilege and are not subject to discovery. She relies on Commission Procedural Rule 59, and Bright Coal Co., 6 FMSHRC 2520 (November 1984), to support her position. She maintains that although the Secretary has the burden of proving facts necessary to support the existence of the informant's privilege, she satisfied this burden. She argues that once the privilege is established, the burden of proving facts necessary to show that the information sought is essential to a fair determination of the case rests with the party seeking disclosure. She alleges that Asarco has failed to meet this burden with respect to each document.

Asarco argues that the judge's determinations, set forth above, involved a balancing of interests and careful consideration of the relevant facts. It maintains that his findings in this regard should be affirmed because they are supported by substantial evidence. It argues that the Commission should not reweigh the factors the judge considered in reaching his decision. According to Asarco, the judge determined that the materials sought were relevant and discoverable after he carefully balanced the needs of each party. Asarco contends that because a judge is provided with considerable discretion when determining what is privileged, Judge Weisberger's orders compelling production should not be disturbed because he did not abuse this discretion.

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In Bright, the Commission set forth in considerable detail the

procedures to be followed if the Secretary asserts the informant's privilege. In that case, the Commission recognized the well established, but qualified, right of the government to withhold from disclosure information concerning possible violations of the law reported to government enforcement officials. Bright, 6 FMSHRC at 2522; see also, e.g., Roviaro v. United States, 353 U.S. 53, 59 (1957). The Commission held that this general privilege is applicable to the furnishing of information to government officials concerning possible violations of the Mine Act. 6 FMSHRC at 2524. The Commission concluded that an informant is "a person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." 6 FMSHRC at 2525. In Bright, the Commission set forth the procedural framework that Commission administrative law judges should use in analyzing whether an informant's identity should be withheld. If the judge concludes that the information sought is relevant and, therefore, discoverable, he must determine whether the information is privileged. The Commission stated that the burden of proving facts necessary to support the existence of the privilege rests with the government. 6 FMSHRC at 2523. The Commission stated:

> Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of this case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.
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> The burden of proving facts necessary to show that the information is essential to a fair determination rests with the party seeking disclosure. Hodgson v. Charles Martin Inspectors of Petroleum. Inc., 459 F.2d [303] at 307 [(5th Cir. 1972)]. In this regard a demonstrated, specific need for material may prevail over a generalized assertion of privilege. Black v. Sheraton Corn. of America, 564 F.2d [531] at 545 [(D.C. Cir. 1977)]. Some of the factors bearing upon the issue of need include whether the Secretary is in

sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested
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material. Where the disclosure of the identity an informer is essential to a fair determination of the case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 59.
6 FMSHRC at 2526.

On review the Secretary does not contend that the information contained in the contested portions of the six documents is not relevant, but argues that such information is protected by the informant's privilege. Each of the six documents is discussed below.

1. Exhibit B

With respect to Exhibit B, the judge ruled that "[a]n informer is not identified, and the entire statement is thus not excised." Order of September 22, 1989, p.1. It appears that the judge held that the privilege is not applicable to the relevant passage in Exhibit B because it does not contain the name of the informant.

It is well established that "where the disclosure of the contents of a communication will tend not to reveal the identity of an informer, the contents are not privileged." Roviaro. 353 U.S. at 60. If, on the other hand, the content of a communication would tend to reveal the identity of the informant, the contents are privileged. Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762, 768 (D.C. Cir. 1965); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972). See also Annotation, Application, in Federal Civil Action of Governmental Privilege of Nondisclosure of Identity of Informer, 8 A.L.R. Fed. 6, 27.28 (1971). The Secretary argues that because the universe of persons in this case with knowledge of the facts is small, release of the statement would reveal the identity of the informant notwithstanding the fact that the informant's name is not actually contained in the document. Asarco maintains that the judge's finding of fact that release of the statement would not reveal the identity of the informant must be upheld unless it is not supported by substantial evidence.

As stated above, there can be no dispute that an informant's statement is protected by the privilege if it would tend to reveal his identity. As the above authorities make clear, whether an informant is identified by name is not the sole basis for making that determination. The judge was required to determine whether release of the entire document, including the disputed passage, would tend to reveal the identity of the informant. We believe that he failed to do so and, accordingly, committed

error.

Accordingly, we vacate the judge's order of September 22, 1989, with respect to Exhibit B of File A and remand the issue for further consideration by the judge. The judge should determine whether release of the statement attributed to an unidentified informant would tend to reveal the informant's identity, taking into consideration the factual context of this case. If the judge determines that release of the statement would tend to reveal the identity of the informant, the judge must then determine whether Asarco's need

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for the information outweighs the Secretary's need to maintain the privilege, taking into account the factors set forth in Bright, quoted above, and as discussed further below.

2. Exhibit I

With respect to Exhibit I, the judge ruled that "[t]aking into account the significance of the excised statement, and the circumstances of this case, the excised portion is subject to discovery." Order dated September 22, 1989, p. 2. It appears that the judge may have used the Bright balancing test and concluded that Asarco's need for the information outweighed the Secretary's need to maintain the privilege. It is difficult to determine, however, what specific factors the judge balanced in reaching his conclusion.

The Secretary argues that she was not in sole control of the information sought by Asarco in this exhibit because the same information would be available to Asarco by taking the depositions of the small number of persons with knowledge of the facts of this case. She maintains that, as a result, Asarco failed to meet its burden of demonstrating a specific need for the document. Asarco maintains that the judge properly balanced the competing interests of the parties and that the Secretary is asking the Commission to examine the document de novo to determine whether the contested passage in the document should have been provided to Asarco. It maintains that the Commission should not reweigh the judge's determinations but should determine whether the judge abused his discretion.

We generally agree with Asarco that the Commission cannot merely substitute its judgment for that of the administrative law judge in this context. The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings. Cf. Knox County Stone Co., 3 FMSHRC 2478, 2480 (November 1981) (articulating similar standard of review of a judge's disposition of a settlement).

In Bright, the Commission held that the burden of proving that the information in the documents sought is essential to a fair determination of the issues rests with the party seeking disclosure. 6 FMSHRC at 2526; see also Hodgson, 459 F.2d at 307. The Commission stated that important

factors to be considered when evaluating whether the documents sought are essential include "whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested material. " 6 FMSHRC at 2526 (emphasis added). We cannot determine from review of the text of the judge's September 22, 1989, order if he considered whether the information contained in the disputed document could also be obtained from another source. The order also does not explain how the judge determined that Asarco's need for the information was greater than the Secretary's need to maintain the privilege to protect the public interest. Specifically, the order does not set forth the basis for the judge's conclusion that Asarco's need for the document was essential to a fair determination of the issues in the case. The judge simply stated that the excised statement in the document was

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"significant."

Given the strong policy embodied in the Mine Act to protect the identity of informants, as explained in Bright, the fact that the judge did not set forth the basis for his conclusion that Asarco demonstrated that the document was essential to a fair determination of the issues, and the fact that the judge apparently did not consider whether Asarco could have obtained substantially similar information by other means, we vacate the judge's order of September 22, 1989, with respect to Exhibit I of File A. We remand this issue to the judge for further consideration. One of the factors that the judge should consider in balancing the interests of the parties should be whether Asarco could obtain substantially similar information from other sources. The judge should determine whether the information excised by the Secretary is essential to a fair determination of the issues and he should clearly articulate the basis for his conclusion.

3. Exhibits E F & G

The judge held that Exhibits E, F & G of File B, which are detailed statements of miners, are "significant and relevant to the issues." Order of September 22, 1990, p.2. He further stated that the record contains no evidence of "any possibility of harassment or retaliation against the informer[s]." Id. He concluded that Asarco's need for the information in these exhibits outweighed the Secretary's need to maintain the privilege. As with Exhibit I, discussed above, the judge apparently did not consider whether the information in these statements could be obtained through depositions or by other means. The order does not set forth the basis for the judge's conclusion that Asarco's need for the information was essential to a fair determination of the issues. We also do not find a full articulation of the basis for his conclusion that Asarco's need for the information outweighed the Secretary's need to maintain the privilege.

Although under a Bright analysis the judge may consider the "possibility for retaliation or harassment," the Secretary is not required to present evidence that harassment or retaliation is likely or possible in the case being considered. The informant's privilege protects generally and broadly against possible retaliation and applies regardless of whether a particular operator would actually retaliate against an informant. "The purpose for allowing the informer's privilege ... is to make retaliation impossible, thus obviating the deterrent force of sanctions for retaliation." Wirtz v. Continental Finance & Loan Co.. 326 F.2d 561, 564 (5th Cir. 1964). It appears that the judge put great weight on the lack of "evidence" that retaliation or harassment was possible. The judge did not take any evidence on this issue and it is doubtful whether the Secretary could produce such evidence in any particular case, even if she were given the opportunity.

Based on the foregoing, we vacate the judge's order compelling the Secretary to produce Exhibits E, F and G of File B and remand the issue for further consideration by the judge. On remand the judge should consider whether Asarco could obtain substantially similar information from other sources and whether these documents are essential to a fair determination of

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the issues. Finally, the judge should weigh the factors set forth in Bright and clearly articulate the basis for his conclusion.

4. Exhibit K

The judge did not decide whether the relevant material in Exhibit K is, as the Secretary contends, protected by the informant's privilege. His ruling with respect to this exhibit relates exclusively to consideration of other privileges, as discussed below. The Secretary maintains that the judge's failure to rule indicates that he determined that the subject statements should not be provided. We cannot make that assumption on the existing record, and remand this issue to the judge for his reconsideration in accordance with this decision and Bright.

B. Work Product Rule

The passages of Exhibit K that the Secretary contends are protected by the work product rule are notes that MSHA Special Investigator Robert Everett made while interviewing MSHA Supervisory Inspector Craig concerning Craig's conversation about this case with an attorney of the Secretary's Solicitor's office. The Secretary argues that since the writing discloses the thoughts of an attorney, the contested passages are protected by the work product rule, notwithstanding the fact that the writing was by the hand of the "client." Asarco maintains that since the document was not prepared by an attorney, it falls outside of the scope of the work product rule. Asarco also asserts that this rule does not apply because the Secretary does not allege that the contested passages contain the impressions or personal recollections prepared or formed by an attorney

for his own use in prosecuting his client's case.
The work product rule has its modern origins in the case of Hickman v. Taylor, 329 U.S. 495 (1947), and in Rule 26(b)(3) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P"). 2/ Unlike the attorney-client privilege, discussed below, the work product rule does not solely protect confidential communications between attorney and client and is best described

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2/ Fed. R. Civ. P. 26(b)(3) provides in pertinent part:
... [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions. conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

as a qualified immunity against discovery. In order to be protected by this immunity under Fed. R. Civ. P. 26(b)(3). the material sought in discovery must be:
1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that party's representative."
See generally 8 C. Wright & A. Miller, Federal Practice and Procedure □2024, pp. 196-97 (1970); 6 J. Moore, J. Lucas & G. Grotheer, Moore' Federal Practice %26.64 (2d ed. 1989).
It is not required that the document be prepared by or for an attorney. Wright & Miller, supra, •2024. pp. 207.09; Moore, supra, %26.64[2]; U.S. v. Chatham City Corp., 72 F.R.D. 640, 642-43 (S.D. Ga. 1976). If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the

substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

Commission Procedural Rule 55(c), 29 C.F.R. •2700.55(c), provides, as pertinent here, that parties may obtain discovery of any relevant matter that is not privileged. The Commission is guided, "so far as practicable" and as is "appropriate," by the Federal Rules of Civil Procedure on procedural questions not regulated by the Mine Act or its rules. 29 C.F.R. □2700.1(b). In applying Fed. R. Civ. P. 26(b)(3) to the contested passage of Exhibit K, the material in dispute is clearly a document. In addition it was prepared by a party to this litigation or by its representative, MSHA Special Investigator R.L. Everett. As stated above, it is not necessary that the document be prepared by or for an attorney.

The key issue is whether Exhibit K was prepared in anticipation of litigation. If, in light of the nature of a document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation, then the document is covered by the privilege. Wright & Miller, supra, •2024. p. 198.99. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. Id. In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. Finally, documents prepared for one case have the same protection in a second case, if the two cases are closely related. Wright & Miller,

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supra, •2024, p. 201.

The record appears to us to reveal that the disputed portions of the special investigator's notes were prepared in anticipation of litigation. A major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act. 30 U.S.C. •820(c) & (d). A special investigator does not know at the outset of his investigation whether charges will be filed in that particular case. Nevertheless, the purpose of his investigation is to allow the Secretary to determine whether a case should be filed.

It is our understanding that no charges have been brought as a result of Everett's special investigation. Nevertheless, this civil penalty case, brought under section 110(a), 30 U S.C. •820(a), is closely related litigation and it further appears that it could fairly be said that the document was prepared in anticipation of that litigation. See Kent Corp. v. NLRB, 530 F.2d 612, 623-24 (5th Cir. 1976), cert denied, 429 U.S. 920 (1976) (investigative reports of NLRB regional office are prepared in

anticipation of litigation even though at time reports were prepared there had been no determination that charges had substance); Chatham, 72 F.R.D. at 642-43 (notes of interviews conducted by FBI agents constitute materials prepared in anticipation of civil rights litigation).

Thus, it would appear that the excised portions of Craig's statements contained in Exhibit K meet the relevant immunity tests described above. We, therefore, vacate that part of the judge's order of September 22, 1989, that held that the excised portions of the statements of Craig in Exhibit K are not within the scope of the work product rule. However, the judge may have considered relevant factors or nuances not fully reflected in his prior order. Accordingly, we remand this issue to the judge for further consideration consistent with this decision. In accordance with Commission Procedural Rule 1(b), 29 C.F.R. •2700.1(b). the judge should use Fed. R. Civ. P. 26(b)(3) as a guide in analyzing this issue.

C. Attorney Client Privilege

In his consideration of Exhibit K, the judge summarily concluded that the statements of Craig were not within the protection of the work product rule or the attorney-client privilege. Inasmuch as we are remanding the work product rule issue, we also remand the attorney-client privilege issue. We note in passing that the attorney-client privilege generally protects communications made by the client in confidence to his attorney and does not protect an attorney's mental impressions, conclusions, opinions or legal theories. Wright & Miller, •2017, pp 132.33; Hickman v. Taylor, 329 U.S. at 508.

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III.

Conclusion

The procedure to be followed by a judge, as set forth in Bright bears, repeating:

> If, on the one hand, the judge concludes that the Secretary's need to preserve the identity of his informers should prevail, he should deny the amended motion to compel production of documents, seal the material previously withheld as part of the record for use on any appeal, and proceed to decide the case on the merits without resort to the sanctions previously imposed due to the Secretary's nondisclosure of the statements. If, on the other hand, the judge concludes that the respondents' need for this information is essential for a fair determination of the case, and that the privilege must yield, he should order the Secretary to disclose the information. The judge may, at his discretion, conduct a limited hearing to afford the parties an opportunity to develop additional

evidence based upon the disclosure. He should then proceed to decide the case solely on the basis of the supplemented record. Should the Secretary resist the judge's order to disclose, dismissal of the proceeding is the appropriate sanction with further review available in accordance with section 113(d)(2) of the Mine Act. 30 U.S.C. •823(d)(2). In any event, the judge's decision must be supported by findings of fact and conclusions of law, and be grounded in the body of case law developed by the Commission in the areas of work refusal and discriminatory discharge.

6 FMSHRC at 2526. Under no circumstances should the judge transmit the disputed documents to the party requesting them if he determines that a privilege should yield. Instead, he should order the party asserting the privilege to produce the material. If that party refuses to do so, dismissal or other sanctions may be appropriate.

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For the reasons set forth above, we vacate the judge's order of November 21, 1989, dismissing these proceedings. We vacate that portion of the judge's order of September 22, 1989, directing the Secretary to produce the excised portions of the six disputed documents and we remand this matter to the judge for further proceedings consistent with this decision. 3

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3/ We note that this case concerns Asarco's requests for documents during the discover phase of this proceeding. We need not, and do not, decide in this case whether Asarco would be entitled, at the time of trial, to a document that is otherwise protected by the informant's privilege, if the Secretary calls that informant as a witness in the proceeding.

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