

Mine Accident Investigation Facts Not Subject to Attorney Privileges, ALJ Rules

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Practices

Workplace Safety and Health

According to at least one administrative law judge, neither the work product privilege nor the attorney-client privilege allows an Arizona metal producer and its contractor to withhold factual information gathered during the companies' investigation of a fatal mine accident from their regulatory authority.

The April 25 ruling in *BHP Copper, Inc. v. Secretary of Labor* by Administrative Law Judge Margaret Miller gives an Arizona mine operator and its contractor 10 days to turn over to the Mine Safety and Health Administration a copy of the accident investigation report, along with any emails, photographs, witness statements, or other documents related to that report that contain any factual information. However, Miller allowed the companies to redact from their submission any deliberation, opinion, comment, legal strategy, or mental impression of any attorney or attorney's representative.

The "work product privilege" protects materials prepared by an attorney in anticipation of litigation from discovery by the adverse party. The mine operator in this case argued that the accident report and accompanying materials were prepared at the direction of an attorney in anticipation of defending against both a wrongful death claim and punitive regulatory action from MSHA. The agency countered that the report does not qualify as work product because the companies are required under Section 50.11(b) of the Mine Act to conduct accident investigations. In addition, MSHA pointed to internal procedures, in place since at least 2008, under which the mine operator and the contractor routinely conduct accident investigations to gain insight into how to prevent future accidents.

ALJ Miller rejected the operator's work product defense. She pointed to a 1992 decision from the U.S. Court of Appeals for the Fourth Circuit that relied on the Federal Rules of Civil Procedure in ruling that reports prepared in the normal course of business or to meet regulatory requirements are not considered documents prepared in anticipation of litigation. She also referenced a 1990 case in which the Federal Mine Safety and Health Review Commission stated that if "litigation is contemplated but the document is prepared in the normal course of business rather than for purposes of litigation, it is not protected."

Turning to consideration of the companies' assertion of attorney-client privilege, the judge said a 1981 U.S. Supreme Court decision explained that this "privilege applies to communications between company employees and counsel for the company acting in a legal capacity, in order to secure legal advice, and only if employees are aware of that purpose." However, citing that same decision, she stated that neither the attorney-client nor the work product privilege protects underlying facts. "[A] party cannot conceal a fact merely by revealing it to his attorney," she said, quoting the Supreme Court.

There are benefits and risks associated with creating a report after an accident. Those risks may change depending on how the company conducts its investigations and involves counsel. Contact a member of the Workplace Safety and Health practice to discuss accident investigation protocol and its implications.

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