

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,)	
)	
Complainant,)	CONSOLIDATED
)	
v.)	OSHRC Docket Nos. 13-1770
)	and 13-1771
National Pipe and Plastics, Inc.,)	
)	
Respondent.)	
)	
)	

**ORDER RE: RESPONDENT’S MOTION TO QUASH SECRETARY’S
SUBPOENA DUCES TECUM TO SIERRA CLAIM SERVICES, LLC**

I. FACTS

On March 22, 2013, Mr. Chris Rick was allegedly fatally injured by a Sellick powered industrial truck operated by a National Pipe and Plastics, Inc. (NPP) employee in a yard at Respondent’s facility at 3421 Old Vestal Road, Vestal, New York 13850. NPP promptly reported the fatality to the Occupational Safety and Health Administration (OSHA) and OSHA promptly commenced an investigation. NPP is insured by Tokio Marine & Nichido Fire Insurance Co., Ltd. (U.S. Branch) (TMNF) for matters relating to the fatality. On about March 22, 2013, Tokio Marine Management, Inc. (TMM), on behalf of TMNF, was also notified of the fatality.

In an affidavit dated April 21, 2014, Mr. Mark J. Fitzgerald , Supervising Senior Litigation Specialist, Special Liability Unit (Fitzgerald Affidavit), at TMM, stated that:

since the claim involved a death, TMM formed a reasonable belief upon first notice of this loss [March 22, 2013] that litigation would be commenced against TMNF’s insured NPP. Accordingly, a decision was made to immediately investigate the facts and circumstances surrounding the death of Christopher Rick so that the interests of NPP would be protected in the inevitable event of a lawsuit against it. ...

Its [Sierra's] investigation was limited to issues relating to the forklift fatality and undertaken in anticipation of litigation.

On about March 27, 2013, Sierra Claims Services, LLC (Sierra), an independent claims adjuster, was retained to investigate the fatality by TMM. On March 28, 2013, Diane Site, a Senior Adjuster at Sierra, sent an email message to NPP's Isabel Stewart, Subject: Chris Rick, that included a basic list of 14 matters she was looking for during her upcoming visit to NPP scheduled for Monday, April 1, 2013. The list included a request that NPP obtain (among other things): 1) photographs of the forklift and warning signs, 2) maintenance records of the forklift, 3) statements from the forklift driver and other witnesses to the accident or its aftermath, and 4) copies of the OSHA, police, and coroner reports.

On September 16, 2013, OSHA issued several citations to NPP, at least two of which related to the fatality. On September 27, 2013, NPP contested the citations. On about November 4, 2013, the matters were docketed at the Commission. On January 6, 2014, the Secretary filed his Complaints and NPP filed its answers thereafter.

On April 7, 2014, the Secretary applied to the Court for a subpoena *duces tecum* for documents and records in the possession of Sierra, including all materials associated with the fatality and any investigation conducted by Sierra. The Court issued the requested subpoena *duces tecum* on April 8, 2014 to the Secretary. On April 15, 2014, the Secretary served the subpoena *duces tecum* upon Sierra seeking the production of responsive materials by May 1, 2014.

On April 25, 2014, NPP filed its Motion to Quash Secretary's Subpoena *Duces Tecum* to Sierra Claim Services, LLC (Motion to Quash). NPP's Motion to Quash included a Memorandum of Law and affidavits by: 1) David Culbertson, NPP's President, 2) Robert Manganelli, Principal Partner and Member of Sierra, 3) Mark J. Fitzgerald, and 4) Leslie P. Guy,

Esq., NPP's counsel. NPP moves to quash the Secretary's subpoena to Sierra because: 1) NPP has standing to do so based on privilege, 2) Sierra's documents and records were prepared in anticipation that litigation would result from the fatality, and 3) the Secretary cannot show the substantial need and undue hardship required to overcome the work product privilege.¹

On May 9, 2014, the Secretary filed his Memorandum of Law in Opposition to Respondent's Motion to Quash (Opposition). The Secretary asks the Court to deny the Motion to Quash because: 1) NPP has not met its burden of showing the subpoenaed documents are protected by the work product doctrine, 2) NPP lacks standing to quash a subpoena directed to a third party insurer, and 3) NPP's motion to quash is untimely; *i.e.* it was filed a day late with the Court through a personal delivery that occurred on or after April 25, 2014 by a federal express mailing sent on April 24, 2014, instead of by a United States mailing sent on April 24, 2014.²

Discovery is ongoing and closes on August 15, 2014. A trial in these matters is scheduled to commence on September 9, 2014.

II. DISCUSSION

The Court will address the standing and timeliness issues first.

A party generally lacks standing to challenge a subpoena served on a third party.³ A party may challenge a subpoena served on a third party if the challenge is based on privilege. *See W. Coast Prods. Inc. v. Doe*, 275 F.R.D. 9, 16 (D.C. Cir. 2011); *Lee Way Motor Freight, Inc.*, 3 BNA OSHC 1843, 1846 (No. 7674, 1975) (parties lack standing to attack subpoena directed to third party, "except when privileged matter of the movant would be disclosed.").

¹ NPP included in its Motion to Quash an email between NPP and Sierra that NPP says "prompted Sierra's investigation" for *in camera* review by the Court. It asserts that the email "tells NPP that Sierra is performing its investigation to protect NPP's interest," includes an analysis by Sierra of "NPP's potential liability for the forklift fatality" and "provides direction to NPP if a claim or lawsuit is commenced."

² The Secretary also seeks Court permission to leave open his Fed. R. Civ. P. 30(b)(6) deposition of NPP, scheduled for May 20, 2014, in order to address any limited issues arising from Sierra's compliance with the subpoena.

³ *See Vogue Instruments Corp. v. Lem Instruments Corp.*, 41 F.R.D. 346 (S.D.N.Y. 1967).

Here, NPP alleges that the subpoena to Sierra calls for the disclosure of NPP's privileged-protected material. The Court finds that NPP has standing to move to quash the subpoena to Sierra.

The Secretary's timeliness objection is also rejected. The Secretary served the subpoena upon Sierra on April 15, 2014 by certified mail. The Secretary's letter dated April 15, 2014 accompanying the subpoena also shows that a copy of the subpoena was sent to NPP's counsel by U.S. Mail. Sierra received the subpoena on April 17, 2014. Commission rules require any person served with a subpoena to move to revoke or modify the subpoena within 5 days after service if the person does not intend to comply. *See* 29 C.F.R. § 2200.57(c). Where a response is required in less than 11 days, weekends and holidays are excluded per 29 C.F.R. § 2200.4(a). Accordingly, Sierra was required to file its motion to quash by April 24, 2014.

The record does not show precisely when NPP received its copy of Sierra's subpoena. When service is made by mail a separate period of 3 days is allowed, in addition to the prescribed period of 5 days per 29 C.F.R. § 2200.4(b). Since service upon NPP was made by U.S. mail on April 15, 2014, NPP's motion to quash was due to be filed with the Court by April 25, 2014.

NPP sent out its Motion to Quash by federal express on April 24, 2014.⁴ The Court received the Motion to Quash on April 25, 2014. Pursuant to Commission rules, service by an overnight delivery service is deemed effected at the time of personal delivery. Additionally, the Court finds there has been no prejudice shown to the Secretary by virtue of NPP sending out its Motion to Quash by federal express on April 24, 2014, or the Court receiving it on April 25, 2014. The Court finds that there has not been any "undue delay" in NPP filing its Motion to

⁴ *See* Certificate of Service by NPP's counsel certifying that a copy of the Motion to Quash was served upon the Secretary on April 24, 2014 via federal express.

Quash as alleged by the Secretary and the Court is unwilling to deny NPP's Motion to Quash for lack of timeliness as requested by the Secretary.

The Secretary also argues that NPP has not met its burden of showing the subpoenaed documents are protected by the work product doctrine. Specifically, the Secretary asserts that NPP has not identified the documents over which it asserts work-product protection and is unable to protect Sierra's entire claims file. The Secretary asserts that NPP has failed to catalog the documents for which it seeks work-product protection by either submitting all of them to the Court for *in camera* review and/or by identifying all of them on a privilege log served upon the Secretary and filed with the Court. The Secretary also asserts that NPP has not shown that all responsive documents allegedly protected by privilege were created because of the prospect of litigation. He argues that NPP's affidavits accompanying its Motion to Quash are not specific and competent proof that the entirety of Sierra's claim file was prepared because of the prospect of litigation. The Secretary asserts that NPP's affidavits do not adequately "identify the point which their work crossed the line between ordinary claim investigation and anticipation of litigation." He further asserts that at least some of the documents in Sierra's claim file were prepared in the ordinary course of business, include public documents such as police and autopsy reports, and include documents that NPP provided to Sierra, such as forklift maintenance records. Lastly, the Secretary asserts that NPP has waived any claim of work-product protection with respect to any documents NPP provided to Sierra since NPP failed to submit a privilege log to the Secretary.

The Federal Rules of Civil Procedure provide for broad discovery. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim, or defense – including the existence, description, nature, custody, condition, and location of any documents or

other tangible things and the identity and location of persons who know of any discoverable matter.”⁵ Fed. R. Civ. P. 26(b)(1). The rules, however, endeavor to also “preserve a zone of privacy in which lawyers, insurers, and other representations of litigants may develop legal theories and strategies uninhibited by the possibility that an adversary may become privy to the resulting documents, by protecting certain work product prepared for the litigation.” *U. S. v. Adlman*, 134 F.3d 1194, 1196 (2nd Cir. 1998). Fed. R. Civ. P. 26(b)(3) provides that “Ordinary, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”

In order to be protected as work product, NPP must show that the materials: 1) must be documents or tangible things, including an attorney’s mental impressions, conclusions, opinions or legal theories, 2) were prepared in anticipation of litigation or trial, and 3) were prepared or gathered by or for a party, or by or for its representative. *United Coal Companies v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1998), *Cranesville Aggregate Cos.*, 21 BNA OSHC 1570 (No. 09-2011, 2011). Documents prepared in anticipation of litigation are those that “can fairly be said to have been prepared or obtained because of the prospect of litigation.”⁶ *Adlman*, 134 F.3d at 1202 (emphasis in original). Such a determination is necessarily fact-specific. Courts are cautioned not to hold that all documents in an insurer’s file are protected by work product privilege because of a party’s “ritualistic incantation” that all documents created by insurers are made in preparation for litigation. *American Ins. Co. v. Elgot Sales Corp.*, 97 Civ. 1327(RLC) 1998 WL 647206, at * 1 (S.D.N.Y. Sept. 21, 1998) (discussing need for limiting

⁵ A nonparty too may be compelled to produce documents and tangible things. See Fed. R. Civ. P. 34(c).

⁶ “Prospect of Litigation” means that the lawyer or party’s representative must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable. *EEOC v. Lutheran Social Serv.*, 186 F.3d 959, 968 (D.C. Cir. 1999).

principle to avoid allowing an insurer's entire file to be exempt from discovery.) A party withholding insurance documents must establish that the author of the document anticipated litigation at the time that the document was created, and would not have created the document in essentially the same way had the prospect of litigation not existed. *See Weber v. Paduano*, No. 02 Civ. 3392(GEL), 2003 WL 161340, at **4, 6 (S.D.N.Y. Jan. 22, 2003) (party asserting the work product privilege has the "burden of demonstrating, by specific evidence, that each document [contained in an insurer's file] was prepared in anticipation of litigation."). The party seeking to withhold insurance documents may not simply rest on conclusory assertions that the work product privilege protects all of the documents in an insurer's file from disclosure. *See Id., Condon v. Stephan Machinery Corp.*, No. 90 Civ. 0283 (PKL), 1990 WL 311599, at *2 (S.D.N.Y. June 18, 1990) (Blanket assertions of work product protection as to entire files, rather than specific documents, are never sufficient to prevent discovery, since the party opposing discovery must establish that each document is work product.). Documents consisting of factual materials and analyses of facts may not be protected by the work product privilege. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 398-401 (1981), *Weber*, 2003 WL 161340, at * 5.⁷ Conversely, documents containing mental impressions of a party's or insurer's attorneys, or an insurer's internal strategy as to how to handle any potential litigation arising from the underlying incident constitute a "core" of materials that are most likely protected by the work product doctrine.⁸

The Court agrees with the Secretary that NPP has not sufficiently identified the documents over which it asserts work-protection protection. NPP has failed to catalog the documents for which it seeks work-product protection by either submitting all of them to the

⁷ *See e.g. Wheeling-Pittsburgh Steel Corp.*, 4 BNA OSHC 1578, 1579 (No. 10833, 1976) (Photographs depicting the scene at issue that cannot be retaken due to a probability that the scene has changed are typically discoverable.).

⁸ Attorney opinion work product, including recommendations, is virtually undiscoverable. *See U.S. v. Deloitte, LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010).

Court for *in camera* review and/or by identifying all of them on a privilege log served upon the Secretary and filed with the Court. NPP has not shown that all responsive documents that are included within Sierra's file, allegedly protected by the work product privilege, were created because of the prospect of litigation. The Court is unwilling to find Sierra's entire file exempt from discovery.

Generally, a party is obligated to provide a privilege log for documents withheld based upon privilege that are within its possession, custody and/or control. A party generally does not have to log those documents that it does not possess, have in its custody, or exercise any power of control. *Arkwright Mutual Ins. Co. v. National Union Fire Ins.*, No. 90 Civ. 7811(AGS), 1994 WL 510043, at * 15 (S.D.N.Y. Sept. 16, 1994). Both parties and nonparties withholding subpoenaed information under a claim that it is privileged must expressly make the claim of privilege and describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected will enable the parties to assess the claim. *See* Fed. R. Civ. P. 26(b)(5), 45(e)(2). Here, neither NPP or Sierra has produced any privilege log listing documents in Sierra's file withheld due to privilege.

Based upon the information before it, the Court is unable to make a determination with regard to any document that may be contained within Sierra's file where the author of the document anticipated litigation at the time that the document was created, and would not have created the document in essentially the same way had the prospect of litigation not existed. The Court will, however, provide NPP with the opportunity by May 30, 2014 to provide the Secretary with a privilege log listing all of the documents contained with Sierra's file that NPP asserts are protected from disclosure by privilege.⁹ *See Weber*, 2003 WL 161340, at * 5 (Defendants

⁹ NPP shall also file a copy of its privilege log with the Court by May 30, 2014 and insure that it is received by the Court by that date.

provided plaintiff with privilege logs identifying the different documents maintained in a defendant's insurer's liability file.).

In the event NPP is unable to provide the Secretary and the Court with such a privilege log by May 30, 2014, then the Court will find that NPP and/or Sierra have not proffered sufficient evidence to demonstrate that the documents in Sierra's file(s) are protected from disclosure by work product privilege and the Court will deny NPP's Motion to Quash. In the event a privilege log is produced and the Secretary wishes to challenge the assertion of any privilege, the parties shall meet and confer by June 13, 2014 in order to attempt to resolve any dispute as to privilege. The parties shall jointly advise the Court by June 16, 2014, should any dispute remain and each party may supplement its filings, with regard to the Motion to Quash by June 20, 2014. The supplements may include the submission of affidavits by authors of privileged documents addressing whether or not: a) they anticipated litigation at the time that the documents were created, and b) the documents would have been created in essentially the same way had the prospect of litigation not existed.

The Secretary asserts that NPP's affidavits do not adequately identify the point which Sierra's work crossed the line between ordinary claim investigation and anticipation of litigation. The Court does not agree. This case involves a forklift fatality where OSHA launched its investigation on March 22, 2013, the day the incident occurred. NPP was ultimately charged with violating the standards at 29 C.F.R. § 1910.178(p)(1), operating an industrial truck without a functional backup alarm, and 29 C.F.R. 1910.178(n)(6), employee operating a powered industrial truck did not look in the direction of travel. TMM's Fitzgerald's affidavit states that "[o]n or about March 27, 2013 Sierra was retained to investigate this matter in anticipation of and in contemplation of litigation against NPP." Similarly, Sierra's Mr. Manganelli states in his

affidavit that Sierra was retained on behalf of TMM on about March 28, 2013 to investigate the fatality “in anticipation of and in contemplation of litigation against NPP.” On April 1, 2013, Ms. Siti, Sierra’s claims adjuster, visited the incident site to obtain material related to the incident and commence her investigation. The Court finds that there is sufficient evidence to identify April 1, 2013 as an objective benchmark in the investigative process that indicates the point at which Sierra ascertained sufficient information regarding the incident in order to turn its attention to potential litigation. By that date, there should have been enough evidence before Sierra for, at least, some of its employees to reasonably conclude that NPP was likely exposed to some liability and litigation could reasonably be anticipated and contemplated.

The Court agrees with the Secretary that NPP has waived any claim of work-product protection with respect to any documents that are in or under NPP’s possession, custody, or control that were provided by NPP to Sierra since NPP has failed to submit a privilege log to the Secretary showing these, and apparently any other withheld privilege protected documents. *See Honda Lease Trust v. Middlesex Mut. Assur. Co.*, No. 3:05 CV1426 (RNC), 2008 WL 349239, at *3 (D. Conn. Feb 6, 2008) (“[f]ailure to produce a privilege log is sufficient grounds to deem the [work product privilege] waived.”). NPP has not waived the work product privilege by failing to provide a privilege log identifying any documents that are contained within Sierra’s file(s). *See Arkwright*, 1994 WL 510043, at * 15 (A party does not have to log those documents that it does not have the power to produce itself, since it may not be compelled to produce them.).

III. CONCLUSION

The Court is unable to make a determination with regard to any document that may be contained within Sierra’s file where the author of the document anticipated litigation at the time that the document was created, and would not have created the document in essentially the same

way had the prospect of litigation not existed.

IV. ORDER

Having considered NPP's Motion to Quash and the Secretary's Opposition thereto, the Court ORDERS THE FOLLOWING:

- 1) NPP shall have the opportunity by May 30, 2014 to provide the Secretary with a privilege log listing all of the documents contained with Sierra's file that NPP asserts are protected from disclosure by privilege;¹⁰
- 2) In the event a privilege log is produced and the Secretary wishes to challenge the assertion of any privilege, the parties shall meet and confer by June 13, 2014 in order to attempt to resolve any dispute as to privilege;
- 3) The parties shall jointly advise the Court by June 16, 2014, should any dispute remain and each party may supplement its filings, with regard to the Motion to Quash by June 20, 2014;
- 4) Consistent with the above, the Court will withhold making its final ruling on NPP's Motion to Quash for the time being; and
- 5) The Secretary may leave open his Fed. R. Civ. P. 30(b)(6) deposition of NPP, scheduled for May 20, 2014, in order to address any limited issues arising from Sierra's compliance with the subpoena.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

¹⁰ NPP shall also file a copy of its privilege log with the Court by May 30, 2014 and insure that it is received by the Court by that date; or advise the Court and the Secretary that it is not submitting and filing a privilege log for documents in Sierra's file(s).

Date: May 20, 2014
Washington, D.C.