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 DENYING RESPONDENT'S MOTION TO QUASH SECRETARY'S SUBPOENA *DUCES TECUM* TO SIERRA CLAIM SERVICES, LLC, TO THE EXTENT INDICATED HEREIN

I. FACTS

National Pipe & Plastics (NPP) provides PVC pipe for agricultural, commercial, municipal and export markets in North America. On March 22, 2013, Mr. Chris Rick was allegedly fatally injured by a Sellick powered industrial truck operated by a NPP employee, Isaac Ravenell, in a yard at NPP'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 began an investigation. Compliance Safety and Health Officers (CSHO) conducted an inspection at NPP's premises on March 22, 2013, April 4, 2013, and on April 8, 2013.

NPP is insured by Tokio Marine & Nichido Fire Insurance Co., Ltd. (TMNF). On about March 22, 2013, Tokio Marine Management, Inc. (TMM), TMNF's U.S. branch, was also notified of the fatality. On about March 27, 2013, Sierra Claims Services, LLC (Sierra), an independent claims adjuster, was retained by TMM to investigate the fatality. On March 28, 2013, Diane Site, a Senior Adjuster at Sierra, sent an email to NPP's Isabel Stewart, Subject:

Chris Rick, that listed 14 matters that she would be looking for during her upcoming visit to NPP on 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 report.

On September 16, 2013, OSHA issued two citations to NPP: one citation consisting of 16 serious items with a proposed total penalty of $67,000 (Dkt. No. 13-1770) and one citation consisting of one other-than-serious item with no proposed penalty (Dkt. No. 13-1771). 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 material 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 moved to quash the Secretary's subpoena to Sierra because: 1) it called for the disclosure of privileged matter of NPP; 2) Sierra's documents and records were prepared in anticipation that litigation would result from the fatality; and 3) the Secretary could not show the substantial need and undue hardship required to overcome the work product privilege.

On May 9, 2014, the Secretary filed his Memorandum of Law in opposition to

Respondent's Motion to Quash (Opposition). The Secretary asked that the Court deny the Motion to Quash because: 1) NPP had not met its burden of showing the subpoenaed documents are protected by the work product doctrine; 2) NPP lacked standing to quash a subpoena directed to a third party insurer, and 3) NPP's motion to quash was untimely.

On May 20, 2014, the Court issued an Order, providing that: 1) NPP would have the opportunity to provide the Secretary with a privilege log listing all of the documents contained within Sierra's file that NPP asserted were protected from disclosure by privilege; 2) if the Secretary wished to challenge any assertion of privilege, the parties should meet and confer by June 13, 2014; 3) the parties were to jointly advise the Court by June 16, 2014, if there was any dispute and each party would be able to supplements its filings on the Motion to Quash by June 20, 2014; 4) the Court would 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, originally scheduled for May 20, 2014, in order to address any limited issues arising from Sierra's compliance with the subpoena. The Court also established April 1, 2013 – the day Sierra's claims adjuster first visited NPP's worksite – as a benchmark for when Sierra's attention shifted from claims investigation towards potential litigation.

The Court, at the Secretary's request, extended the parties' deadline to submit further briefing to June 27, 2014. The parties conferred by phone and e-mail, but were not able to reach a solution with respect to two materials: 1) the transcript of Sierra's April 1, 2013 interview of Isaac Ravenell and 2) the return of fifteen photographs of the accident scene that had been disclosed by NPP to the Secretary.

NPP withheld eight transcripts from recorded interviews Sierra conducted with NPP's management and non-management personnel on April 1, April 2, and April 5, 2013. The

Secretary contends that while Mr. Ravenell's April 1, 2013 interview transcript and the fifteen photographs may be work product, the Secretary has a substantial need for these materials that overrides any NPP's work product qualified privilege.

NPP contends that the Secretary cannot demonstrate a substantial need for the Ravenell interview transcript or that it will suffer undue hardship without the transcript because the Secretary: 1) can depose Mr. Ravenell, 2) can obtain equivalent information from other sources, and 3) must offer more than conclusory assertions of its need for the Ravenell interview transcript.

The case is set for a hearing on September 9, 2014.

II. DISCUSSION

The ordinary work product privilege is not absolute and must be balanced with the generally liberal rules of discovery.[1] The work product privilege may be overcome: 1) upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and 2) 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)(A)(ii). The work product privilege affords qualified protections to material prepared in anticipation of litigation. *See U S. v. Adlman*, 134 F.3d 1194, 1194-95, n. 1 (2d Cir. 1998). It allows a party to protect prepared legal theories and strategies "with an eye toward litigation," free from intrusion by the adverse party. *Id.* at 1196 (*quoting Hickman v. Taylor*, 329 U.S. at 510-11; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (work product privilege applies to documents prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the

[1] *Hickman v. Taylor*, 329 U.S. 495, 506 (1947) (". . .[S]ince the discovery provisions are to be applied as broadly and liberally as possible, the privilege limitation must be restricted to its narrowest bounds."); *See also* 29 C.F.R. § 2200.52(b). (The scope of discovery in Commission matters "may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case.")

case and his litigation strategy). The Commission has adopted a three-prong test to determine whether an item in question is considered work product under the privilege. This privilege applies when the material in question is shown to be: 1) documents or other tangible things; 2) prepared in anticipation of litigation or trial; and 3) gathered by or for a party or that party's representative. *Cont'l Oil*, 9 BNA OSHC 1737, 1741 (No. 79-570, 1981).

A secondary consideration is the difference between two types of work product: ordinary and opinion. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). Ordinary work product includes factual information. *See In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (finding that tape recordings can be discoverable fact work product after the government showed that the grand jury had a substantial need for the recordings and could not obtain the information through other means); *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982) (finding that notes of interviewing attorney discoverable where the notes recited "in paraphrased, abbreviated form, statements" by an employee). Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 399 (1981); *Adlman,* 134 F.3d at 1197. Opinion work product enjoys either absolute or near-absolute immunity and is only discoverable in rare circumstances, such as where the work contains evidence of fraud or illegal activities. *See In Re Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981) (opinion work product is not absolutely immune, but nearly so); *St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1471 (consolidated) (No. 14-1734, 2006) (same). There is no evidence that the Ravenell interview transcript includes any notes or counsel opinion.

A. Isaac Ravenell's April 1, 2013 Interview Transcript

The Secretary does not dispute that the transcript of the Mr. Ravenell's interview is work product. The Court's May 20, 2013 Order stated "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." Order, at 10. Sierra's interview of Mr. Ravenell took place on April 1, 2013, the benchmark date in the May 20, 2013 Order. NPP states on its privilege log that the interview transcripts are material "prepared in anticipation of litigation" and that "Sierra conducted the interview[s] and created the transcript as part of its investigation to assess the scope of National Pipe's potential liability to the decedent."[2] NPP has a basis to assert that the Ravenell interview transcript is protected from disclosure under the work product doctrine. The Secretary does not dispute this and concedes that "because the Ravenell transcript is dated April 1, consistent with Your Honor's Order, the transcript was created by Sierra in anticipation of litigation and is, therefore, work product." Secretary's Supplemental Memorandum of Law in Opposition to Respondent's Motion to Quash the Secretary's Subpoena[*sic*] *Duces Tecum* to Sierra Claims Services, LLC dated June 27, 2014, at p. 3 (Opposition Supplement). The Secretary asserts that the Ravenell Interview Transcript is ordinary work product that is entitled only to qualified protection under the work product doctrine. *Id.*

The Commission has found that "[fact] work product… is discoverable, but only if the party seeking the material 'shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means' " *Cranesville Aggregate Cos.* 23 BNA OSHC 1570, 1572 (No. 09-0211, 2011) (consolidated) (quoting Fed. R.Civ.P. 26 (b)(3)(A)(ii)).

The Secretary has demonstrated multiple attempts to contact, interview or depose Mr. Ravenell before requesting the transcript from NPP. To date, OSHA and the Secretary have been unable to contact Mr. Ravenell. OSHA's CSHO Scott Schrilla arrived at NPP's worksite in

[2] NPP Privilege Log, filed May 30, 2014, at 2.

Vestal, NY at about 8:45 p.m., March 22, 2013.[3] When CSHO Schrilla arrived he was unable to speak to Mr. Ravenell, who had been sent home.[4] Mr. Ravenell was also unavailable on April 4, 2013 and April 8, 2013 when CSHO Duane Gary conducted his inspections of NPP's worksite.[5] Mr. Ravenell's last day of work at NPP appears to have been on April 1, 2013. Mr. Ravenell was apparently fired from NPP sometime after the March 22, 2013 accident.[6] CSHO Gary obtained Mr. Ravenell's phone number from NPP's president and attempted to contact him.[7] CSHO Gary attempted to call the phone number, but it was the wrong number.[8]

The Secretary has also made several attempts to locate Mr. Ravenell. The Secretary propounded interrogatories seeking the addresses and phone numbers for Mr. Ravenell and other NPP employees. The telephone number provided to the Secretary by Respondent, different than the one provided to CSHO Gary in July 2013, contained only nine digits, and was incomplete. On June 12, 2014, NPP's counsel stated that the company did not have current contact information for Mr. Ravenell. However, the Respondent's Supplemental Briefing to Respondent's Motion to Quash Secretary's Subpoena *Duces Tecum* to Sierra Claim Services, LLC (Motion to Quash Supplement) stated that "upon information and belief, [Mr.] Ravenell still resides in the Binghamton area."[9] It is unclear what information NPP based this belief upon, particularly if it told the Secretary that it did not have current contact information for Mr. Ravenell. Finally, the Secretary has made several additional attempts to contact Mr. Ravenell through multiple phone numbers, physical addresses, and e-mail addresses that have been

[3] CSHO Schrilla's June 18, 2014 deposition states that he left his home in the Syracuse area within approximately 10 minutes of receiving the call informing him about the accident. He arrived in the Binghamton area at approximately 8:45 p.m. Opposition Supplement at 6, n. 2.
[4] Declaration of Scott Schrilla, dated June 25, 2014, at ¶ 9.
[5] Declaration of Duane Gary, dated June 25, 2014, at ¶ 9.
[6] *Id*. at ¶ 10.
[7] *Id*.
[8] *Id.* at ¶¶ 11-12.
[9] Motion to Quash Supplement, dated June 27, 2014, at 4.

associated with him or his mother.

The Ravenell interview transcript is apparently 30-40 pages long and is a verbatim transcript. The Respondent has presented no evidence to the contrary. Because the transcript is verbatim and contains no opinion or counsel thought processes, it may be characterized as ordinary work product. *See, e.g., U.S. v. Clemens*, 793 F. Supp. 2d 236, 255-256 (D.D.C. 2011) (finding that "silence" as to whether a transcript is verbatim or attorney notes fails to meet the burden of work product privilege); *S.E.C. v. Treadway*, 229 F.R.D. 454, 455 (S.D.N.Y. 2005) (distinguishing between interview notes and "verbatim transcripts that would be subject to discovery as witness statements"). As such, the transcript is discoverable upon a showing that the Secretary: 1) has a substantial need for the materials and 2) cannot, without undue hardship, obtain a substantial equivalent by other means. Fed. R. Civ. P. 26(b)(3)(A)(ii).

There is no bright-line test for what constitutes a showing of substantial need and undue burden. *Cont'l Oil*, 9 BNA OSHC at 1742 ("What constitutes a sufficient showing under Rule 26 is difficult to pinpoint and depends on the facts of a given case"). The Commission "generally consider[s]: 1) the importance of the material; 2) the difficulty of obtaining the material from different sources; and 3) whether those different sources would supply the substantial equivalent of the material sought. *Id*.

(1) Importance of the material

Mr. Ravenell was the NPP employee who was operating the fork truck on March 22, 2013, when Christopher Rick was struck and killed at NPP's worksite. The Secretary claims that Ravenell interview transcript is important to his case because two of the OSHA citation items concern Mr. Ravenell's specific conduct.[10] Specifically, Citation 1, Item 7 alleges that Mr.

[10] Citation 1, Item 7 – 29 C.F.R. § 1910.178(n)(6) requires that a [power industrial truck] driver shall be required to

Ravenell failed to keep a clear view of the direction of travel as he operated the truck on March 22, 2013; and Citation 1, Item 8 alleges that Mr. Ravenell was operating the fork truck without an operational back-up alarm on March 22, 2013.[11] These two citation items arise directly from Mr. Ravenell's operation of the fork truck, and it is clear that the Ravenell interview transcript may play an important role in the litigation and be "central to the substantive claims in litigation." *See Cont'l Oil*, 9 BNA OSHC at 1742; *Madanes v. Madanes*, 199 F.R.D. 135, 150 (S.D.N.Y. 2001) (finding substantial need shown where the information sought was "central to the substantive claims in litigation."); *Nat'l Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) ("Because the information is directly probative on many of the issues in the case, plaintiffs have shown substantial need."). Mr. Ravenell's conduct on March 22, 2013 is central to Citation 1, Items 7 and 8. His recollection of the events would be directly probative on issues regarding these citation items. The information is clearly of importance to the Secretary and at least two of the citation items at issue.

(2) Difficulty of obtaining the material through other means

The Secretary must also prove undue hardship in obtaining the substantial equivalent of the transcript.

> [Undue hardship] does not mean that the movants must prove that obtaining the information elsewhere is absolutely impossible or that they must prove the required element beyond a reasonable doubt. All that is needed is a showing that it is likely to be significantly more difficult, time-consuming or expensive to obtain the information from another source than from the factual work product of the objecting party.

Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 67 (E.D.N.Y. 2007) (*citing S.E.C. v. Thrasher*, No. 92 CIV. 6987, 1995 WL 46681, *9 (S.D.N.Y. Feb. 7, 1995) (Magistrate decision),

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look in the direction of, and keep a clear view of the path of travel.

[11] Citation 1, Item 8 – 29 C.F.R. § 1910.178(p)(1) if at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

aff'd, No. 92 CIV. 6987, 1995 WL 456402 (S.D.N.Y. Aug. 2, 1995).

The easiest method for the Secretary to obtain the information that he desires would be to subpoena Mr. Ravenell for deposition. However, the Secretary is still not able to locate Mr. Ravenell and is unable to serve a subpoena upon him. The Secretary believes that the only other means is impractical: "having OSHA inspectors stake-out the half-dozen or so addresses associated with Mr. Ravenell over the last few years."[12] This method still does not guarantee that the Secretary will be able to locate Mr. Ravenell. Requiring OSHA to stake-out Mr. Ravenell's many reported addresses would be time-consuming, difficult, expensive and speculative. OSHA's area office is over an hour's drive[13] from the Binghamton area and there are approximately a half-dozen addresses associated with Mr. Ravenell. This distance and number of potential addresses would likely require multiple trips or several employees to spend hours waiting around to see if Mr. Ravenell is associated with any of the addresses. This burden is unreasonable for the Secretary to undertake.

The Secretary has made several attempts to get into contact with Mr. Ravenell and is still unable to locate him. To require OSHA to send out employees to stake-out potential addresses in the hopes of locating Mr. Ravenell is an undue burden. Under these circumstances, production of the Ravenell interview transcript has now been shown to be justified. *See Hickman v. Taylor*, 329 U.S. at 511-12 ("production may be justified where witnesses are no longer available or can be reached only with difficulty.").

(3) Whether the different means would supply the substantial equivalent of the material sought

The Secretary does not believe that there is another source of information that would constitute the substantial equivalent of Mr. Ravenell's interview transcript. *See, e.g. Wheeling-*

[12] Opposition Supplement at 7.
[13] Opposition Supplement at 8.

Pittsburg Steel Corp., 4 BNA OSHC 1578, 1579 (No. 10833, 1976) (finding that photographs that depict the scene and that cannot be retaken due to a probability that scene had changed do not have a substantial equivalent). Several cases have held that the unavailability of a witness satisfies the element that a party is unable to obtain the substantially equivalent information. *See, e.g., Scurto v. Commonwealth Edison Co.*, No. 97 C 7508, 1999 WL 35311, at *2 (Jan. 11, 1999 N.D. Ill.) (holding that parties may obtain fact work product "only in 'rare situations' such as those involving witness unavailability"); *U.S. v. Davis*, 131 F.R.D. 391, 395-96 (S.D.N.Y. 1990) (finding statement discoverable where witness was "effectively unavailable" because in Greece); *McNulty v. Bally's Park Place, Inc.*, 120 F.R.D. 27, 30 (E.D. Pa. 1988) (finding statement from defendant's employee discoverable where plaintiff's efforts to reach witness were "unavailing"). The only other available statement from Mr. Ravenell is his statement to the police department on March 22, 2013. It is not substantially equivalent to the interview transcript. First, the statement is approximately 10 lines long,[14] far less than the 30-40 page interview transcript that the Secretary seeks. Second, the response contains handwritten answers to only two questions, one of which is "describe the incident."[15] Third, the statement does not address the functionality of the back-up alarm on the fork truck. Fourth, the statement was taken pursuant to a police investigation for criminal liability, which may emphasize matters that are different than the issues addressed by OSHA. Sierra's interview of Mr. Ravenell was likely conducted with a focus on wrongful death or other civil litigation.[16] Finally, the Sierra interview was conducted on April 1, 2013, after OSHA's first visit on March 22, 2013, and prior to OSHA's April 4, 2013 scheduled visit.

[14] Opposition Supplement, Exhibit A.
[15] *Id.*
[16] Work product doctrine only applies to documents created with "an eye towards litigation." *See Adlman*, 134 F.3d at 1196 (*quoting Hickman v. Taylor*, 329 U.S. at 510-11); *St. Lawrence Food Corp.*, 21 BNA OSHC at 1470. (holding the same). If the April 1, 2013 interview of Mr. Ravenell was not conducted for this purpose, then the transcript would not be protected from disclosure by the work product privilege.

Neither the Secretary nor NPP has identified any eyewitness to the accident who can provide the substantial equivalent of the information that is expected to be in Mr. Ravenell's lengthy interview transcript that was created within ten days of the accident when facts relevant to the accident were much more contemporaneous to Mr. Ravenell than today.[17] The Secretary has deposed six witnesses and none have been able to confirm or deny whether Mr. Ravenell was looking in the direction of travel prior to hitting Mr. Rick. Mr. Ravenell's supervisor, who was working in close proximity, was unable to confirm or deny this as well. Additionally, none of the witnesses have been able to confirm or deny whether the backup alarm was functioning at the time of the accident, or whether Mr. Ravenell performed a pre-shift inspection of the alarm. The Secretary has demonstrated that there are no substantially equivalent means for the material sought because, most likely, Mr. Ravenell was best situated to provide the answers to the Secretary's questions regarding Citation 1, Items 7 and 8.

The Secretary has presented facts that the Court finds weigh in favor of the aforementioned factors and are sufficient to justify the discoverability of the Ravenell interview transcript. The Secretary has demonstrated a substantial need for Mr. Ravenell's interview transcript.[18] The verbatim transcript likely contains facts that are necessary to the Secretary's

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[17] *See Savoy v. Richard A. Carrier Trucking, Inc.,* 176 F.R.D. 10, 14 (D. Mass. 1997) (defendant's offer to produce witness for deposition did not constitute substantial equivalent of information that might be contained in statement taken at time of accident).

[18] The Secretary need not at this time prove the admissibility of the transcript into evidence at any upcoming trial. *See Hickman v. Taylor*, 329 U.S. at 511:

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And *production might be justified where the witnesses are no longer available or can be reached only with difficulty*. (emphasis added)

See also 29 C.F.R. §2200.52(b) ("It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.").

substantive claims, particularly Item 1, Citations 7 and 8. Repeated attempts to locate and contact Mr. Ravenell have been unsuccessful and no other witnesses have been able to provide the information sought by the Secretary. The Secretary has also demonstrated an undue burden for obtaining the information as well. The Court finds that the Secretary has been unable to interview or depose Mr. Ravenell or obtain information that is equivalent to the Ravenell interview transcript from other sources.

B. Fifteen Photographs of the Accident Scene

NPP produced fifteen black and white photographs of the accident scene that were taken by Sierra's representative on April 1, 2013 to the Secretary on June 6, 2014.[19] NPP claims that these photographs were inadvertently disclosed to the Secretary on June 6, 2014 and has sought the return of these fifteen photographs from the Secretary under the work product doctrine.[20] NPP produced the 15 photographs as part of a 363-page production of "the portion of Sierra Claim Services, LLC's investigation file of which no claim to privilege has been made." Opposition Supplement at 10, n. 5. NPP originally identified the fifteen photographs as photographs NPP took. NPP informed the Secretary that the fifteen photographs were "duplicates" of photographs NPP had previously produced to the Secretary. NPP later told the Secretary that Sierra had taken the fifteen photographs after the Secretary sought color copies of the photographs from NPP. *Id.* NPP did not include the photographs in the original Privilege & Redaction Log on May 30, 2014. NPP identified the fifteen photographs as "photographs of the forklift accident scene" and asserted that they were protected from disclosure by the work product privilege in its Addition to Privilege and Redaction Log, dated June 5, 2014. First, the

[19] *See* Opposition Supplement, at 2.
[20] *See* The Addition to Privilege & Redaction Log, dated June 5, 2014, that asserts work product privilege as "Material Prepared in Anticipation of Litigation" with regard to the fifteen photographs. *See also* email from NPP's counsel to the Secretary's counsel, dated June 13, 2014, requesting the Secretary return or destroy the photographs. Opposition Supplement, at Exhibit B. NPP did not address its position on the fifteen photographs in its Motion to Quash Supplement. *See* discussion on waiver, *infra,* at 16.

Court must decide whether the fifteen photographs qualify for protection from disclosure under the work product privilege.

Photographs of an accident scene are typically not protected from production under the work product doctrine because they "fail to come within the categories of 'mental impressions, conclusions, opinions, or legal theories of an attorney.'" *Wheeling-Pittsburgh Steel Corp.*, 4 BNA OSHC at 1579; *Hamilton v. Great Lakes Dredge & Dock Co.*, No. 05 CIV. 3862, 2006 WL 2086026, at *1 (E.D.N.Y. July 25, 2006) (photographs of an accident scene, taken immediately after an accident has occurred are not protected by work product); *Hughes v. Groves*, 47 F.R.D. 52, 56 (W.D. Mo. 1969) ("[t]he weight of modern authority is that photographs are discoverable). Photographs that depict an accident scene and cannot be retaken are generally discoverable. *See Hickman v. Taylor*, 329 U.S. at 511; *Wheeling-Pittsburgh Steel Corp.,* 4 BNA OSHC at 1579 (finding that photographs depicting the scene at issue that cannot be retaken due to a probability that the scene has changed are typically discoverable.). Accident *Situs* photographs "are not properly part of the 'work product' of the lawyer." *Hughes v. Groves*, 47 F.R.D. at 56.

CSHO Schrilla arrived to Binghamton area at approximately 8:45 p.m. on the night of March 22, 2013. Opposition Supplement at 6, n. 2. CSHO Schrilla took photographs of the accident scene, however these were taken sometime after 8:45 p.m. Declaration of Duane Gary, at ¶ 8. The fifteen photographs at issue are apparently of the work area and equipment as it existed at NPP at about the time of the accident.[21] From March 22 until April 1, 2013, the accident scene was generally undisturbed other than the relocation of the industrial truck. Opposition Supplement at 11. On April 1, 2013, Sierra took photographs of the mostly

[21] No set of photographs are exactly as the work area existed at the time of the accident because Emergency Medical Services personnel requested that the industrial truck be moved when they arrived on the scene. Opposition Supplement at 11, n. 6.

undisturbed accident site. Opposition Supplement at 11; Addition to Privilege & Redaction Log, dated June 5, 2014. The photographs taken by CSHO Schrilla during the evening of March 22, 2013 are likely different than those taken by Sierra on April 1, 2013, presumably during daylight. CSHO Gary arrived at NPP thereafter on April 4, 2013. Opposition Supplement at 6, 9. The fifteen photographs contain no captions or any other information that reflect the mental impressions of NPP or their counsel. The Court finds that the fifteen photographs do not qualify as work product.[22]

NPP has claimed to the Secretary that the photographs were inadvertently disclosed to the Secretary and requested that they be returned or destroyed. If a party inadvertently discloses work product it is not considered a waiver of work product protection until any claim of privilege is resolved. *See* Fed. R. Civ. P. Rule 26(b)(5)(B); *Scanlon v. Bricklayers & Allied Craftworkers, Local No. 3*, 242 F.R.D. 238, 237 (W.D.N.Y. 2007) (finding that inadvertent disclosure of work product is not considered a waiver of work product privilege); *U.S. v. Rigas*, 281 F.Supp.2d 733, 738 (S.D.N.Y. 2003) (holding the same). Inadvertent disclosure of work product does not apply here because the fifteen photographs are not protected from disclosure based upon the work product privilege.

On June 5, 2014, NPP submitted its updated privilege log to the Secretary where it claimed a privilege and asserted that the fifteen photographs were "Material Prepared in Anticipation of Litigation."[23] Addition to Privilege & Redaction Log, dated June 5, 2014. Respondent did not address the issue of the return or destruction of the photographs in its Motion to Quash Supplement filed with the Court on June 27, 2014. It has not articulated in its Motion

[22] Even if the photographs were work product the Secretary has demonstrated a substantial need for them because the accident scene was different from how it existed on the evening of March 22 and April 1, and April 4, 2013 when CSHO Gary returned to NPP. *See Zoller v. Conoco, Inc.,* 137 F.R.D. 9, 10 (W.D. La. 1991) (photographs were discoverable because accident scene had changed dramatically since accident).

[23] A copy of the updated privilege log was also served upon the Court at that time by NPP.

to Quash Supplement why a material prepared in anticipation of litigation privilege applies here, and the Court is aware only that NPP asserted in its updated privilege log that "Sierra created the photographs as part of its investigation to assess the scope of National Pipe's potential liability for the forklift accident." *Id.*

A showing that a privilege applies to each communication for which it is asserted is required. *U.S. v. Legal Servs. for N.Y.C.*, 249 F.3d 1077, 1082 (D.C. Cir. 2001). Further, the proponent of the privilege must establish the claimed privilege with "reasonable certainty." *In Re Subpoena Duces Tecum Issued to Commodity Futures Comm'n*, 439 F.3d 740, 750-51 (D.C. Cir. 2006). Here, Respondent failed to carry its burden and did not address any privilege relating to the fifteen photographs in its Motion to Quash Supplement. The Court finds that NPP has waived and abandoned any claim of privilege relating to the fifteen photographs. *See Georgia–Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991) (Issues not briefed are treated as waived or abandoned); *Marmon Group, Inc.*, 11 BNA OSHC 2090, 2090, n. 1 (No. 79-5363, 1984) (Commission declines to reach issues on which the aggrieved party indicates no interest.); *Thomas Industrial Coatings, Inc.*, No. 06-1542, 2009 WL 8581817, at * 16 (August 18, 2009) (O.S.H.R.C.A.L.J.) ("Issues not briefed are deemed waived.").

III. CONCLUSION

For the aforementioned reasons, the Court concludes that Respondent's Motion to Quash the Secretary's Subpoena *Duces Tecum* to Sierra Claim Services, LLC, with regard to Mr. Ravenell's April 1, 2013 interview transcript and the fifteen photographs is without merit to the extent indicated herein.

IV. ORDER

WHEREFORE IT IS ORDERED THAT Respondent's Motion to Quash the Secretary's

Subpoena *Duces Tecum* to Sierra Claim Services, LLC, is DENIED to the extent indicated herein;

IT IS FURTHER ORDERED THAT Mr. Ravenell's April 1, 2013 interview transcript shall be produced to the Secretary by July 23, 2014;

IT IS FURTHER ORDERED THAT the fifteen photographs are not protected from disclosure by the work product privilege, Respondent shall produce color copies of these photographs by July 23, 2014 to the Secretary, and the fifteen photographs (either black and white or in color, or both) may be used by the Secretary during the course of this proceeding subject to the rules of evidence; and

IT IS FURTHER ORDERED THAT the Secretary is not required to return to NPP or Sierra, sequester, or destroy any of these fifteen photographs that are in his possession.

SO ORDERED.

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

Dated: July 16, 2014
Washington, D.C.