SECRETARY OF LABOR, Complainant, v. DONALD BRAASCH CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 94-2615

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Barbara L. Hassenfeld-Rutberg erred in concluding that the informer's privilege, as applied to Robert Puckett, had been waived, and that, in any event, Respondent, Donald Braasch Construction, Inc. ("Braasch"), had demonstrated a need for the alleged privileged information that outweighed the privilege. We find that the judge erred. We set aside the sanctions imposed by the judge for the Secretary of Labor's refusal to disclose any statements Puckett may have given to the Secretary, and remand for further proceedings as to Willful Citation 2.

Introduction

The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information on violations of the law to law-enforcement officers. *See Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1980 CCH

OSHD ¶ 24,436 (No. 76-1484, 1980) ("*Massman-Johnson*"). The privilege also protects the contents of such a communication to the extent that it would reveal the informant's identity. *Id.* at 1373, 1980 CCH OSHD at p. 29,805. The privilege applies to proceedings before the Commission. *Stephenson Enterprises, Inc.*, 2 BNA OSHC 1080, 1973-1974 CCH OSHD ¶18,277 (No. 5873, 1974), *aff'd*, 578 F.2d 1021 (5th Cir. 1978). One purpose of the privilege as applied to Commission proceedings is to protect employees from retribution by their employers. *Quality Stamping Products, Co.*, 7 BNA OSHC 1285, 1288, 1979 CCH OSHD ¶ 23,520, p. 28,504 (No. 78-235, 1979) ("*Quality Stamping*"). There is also a strong public interest in protecting the flow of information regarding violations of the law by preserving the anonymity of those individuals who furnish information to the government. *Massman-Johnson*, 8 BNA OSHC at 1371, 1980 CCH OSHD at p. 29,804. The informer's privilege is a qualified privilege and must give way when disclosure is essential to the fair determination of a case. *See Roviaro v. United States,* 353 U.S. 53, 60 (1957); *Dole v. Local 1942, IBEW,* 870 F.2d 368, 372 (7th Cir. 1989). The privilege must yield upon pain of dismissal if on balance an employer's need for the information to prepare its defense outweighs the government's interest in withholding the identity of the informer. *Quality Stamping*, 7 BNA OSHC at 1288, 1979 CCH OSHD at p. 28,505.

Facts

The issue before us arises out of an inspection of Respondent Braasch conducted by the Occupational Safety and Health Administration ("OSHA") after an accident in which a crane operator, Robert Puckett, was seriously injured. There were several witnesses to the accident, including Puckett, an oilman, and the crane rigger. In addition, there were several other people on site, including Donald Braasch, Respondent's owner. As a result of the inspection, OSHA issued three citations, all of which Braasch contested.

During prehearing discovery, Braasch moved for permission to depose certain individuals and to obtain any statements OSHA had received from its employees, witnesses to the accident, and any others who may have made statements. The motion was granted and

on May 25, 1995, Braasch deposed various persons, including Puckett and Michael Scime, the OSHA Compliance Officer who had inspected the work site after the accident. Upon the advice of the Secretary's counsel, Scime asserted the informer's privilege when questioned about any statements Puckett may have made to OSHA. Specifically, Scime refused to disclose (1) whether Puckett had made any statements to him or another OSHA representative, and (2) if he had, the content of those statements. As a result, the deposition of Scime was continued until a later date.

Braasch's counsel asked the judge to review, *in camera*, several documents, including Puckett's statement, which the Secretary had claimed were privileged.[1] Braasch argued in its memorandum supporting this request that Puckett had waived the informer's privilege by previously testifying about the incident.[2] The judge subsequently ordered the Secretary to send her the alleged privileged documents for *in camera* inspection, but she did not request Puckett's statement to the Secretary, and in fact, held in that same order that the privilege had been waived as to Puckett, and even if had not been waived, Braasch had established a need for the information that outweighed the privilege. The judge did not indicate the grounds on which the privilege was deemed waived or the basis for finding sufficient need. She ordered the Secretary to disclose any statement made by Puckett to OSHA. The Secretary's counsel refused to comply with this order on the grounds that such information was privileged.

On June 15 and 19, 1995, the judge reiterated her earlier ruling and ordered the Secretary to turn over to Braasch any statements given by Puckett to OSHA. The Secretary's

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[1]The Secretary claimed the informer's privilege in response to Braasch's initial request for all statements taken from witnesses to the accident. The Secretary never admitted, and does not now admit, that it took a statement from Puckett. In its request for *in camera* inspection, Braasch specifically mentioned a statement from Puckett, which it assumed existed.

[2]Puckett testified about the events surrounding the accident at a New York State Department of Labor Crane Examining Board hearing and at his deposition by Respondent's counsel. The parties' joint motion to take judicial notice of Exhibits A and B of the Secretary's opening brief, the transcript of the Crane Examining Board hearing and the deposition of Robert Puckett, is hereby granted.

counsel continued to adhere to her position and refused to disclose whether a statement was given by Puckett, and if so, the statement itself. In response to the judge's questioning, the Secretary's counsel stated that she had not petitioned for interlocutory review of the disclosure order and that she would continue to assert the informer's privilege on the information at issue. On June 21, 1995, after further refusal by the Secretary to comply with the disclosure order, the judge issued an order prohibiting the Secretary from calling Puckett as a witness in the upcoming hearing, and warning that "any further disobedience of the June 9 and 19, 1995 Orders may also result in dismissal of Willful Citation 2, Item 1 with its proposed penalty of $49,000 or other sanction as deemed appropriate." Braasch's counsel filed a motion for sanctions on June 23, 1995, which the judge granted on June 26, 1995, by dismissing the willful citation. On June 28, 1995, the judge denied the Secretary's motion for a stay pending an interlocutory appeal and on July 3, 1995, the Secretary filed with the Commission a petition for interlocutory review and stay of proceedings. On August 7, 1995, the Commission denied the petition.

On November 30, 1995, following a hearing, the judge issued a decision addressing the remaining citations, in which she reaffirmed her earlier finding that the Secretary's refusal to obey her orders was contumacious and upheld the sanctions she had imposed. In that decision, the judge also stated that in addition to contumacy, the Secretary's failure to timely appeal her disclosure order was one of the grounds for her dismissal of the willful citation.[3]

I. Informer's Privilege

A. Waiver of Privilege

It is well settled that the informer's privilege is waived once the identity of the informer is disclosed. *Roviaro*, 353 U.S. at 60. However, the waiver must be a voluntary

[3]The Secretary's petition for interlocutory review of the judge's June 28, 1995 order was timely under Commission Rule 73, 29 C.F.R. § 2200.73. The judge apparently considered the Secretary dilatory because she did not petition for interlocutory review of her earlier orders, the first of which was issued on June 9, 1995.

disclosure of the identity of the informer. It is not enough, as Braasch claims, that the identity of the informant or informants appears obvious. In *Dole v. Local 1942*, the Seventh Circuit rejected the union's claim that the inclusion of six union members on a list of persons who had possible knowledge of the facts of that case constituted a waiver of the privilege by the Secretary. The court held that the fact these individuals were knowledgeable does not mean that they actually gave information to the Department of Labor. 870 F.2d at 375. *Dole* followed the reasoning of *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972), which held that the Secretary did not waive the informer's privilege even though she had identified the twelve employees who had given statements to the Department of Labor. The Fifth Circuit distinguished persons who had given statements from persons who were informers within the context of the privilege, concluding that if the employee is merely known to the employer as "a statement giver, then disclosure of the statement might reveal him as an informer." *Id.* at *306.* Similarly, in *Massman-Johnson*, the Commission held that the submission of a witness list or summary of prospective witnesses' testimony is not a waiver of the informer's privilege. 8 BNA OSHC at 1373, 1980 CCH OSHD at p. 29,806.

We find no basis for concluding that either the Secretary or Puckett waived the informer's privilege in this case. Our review of the record, including the transcripts of Puckett's testimony at the state hearing and his deposition in this case, shows that he was never asked, nor did he testify, about any contact with OSHA.[4] Although the circumstances in this case may suggest that Puckett is an informer, that cannot be considered a voluntary waiver of the identity of an informer. The interest of the Secretary is in protecting the

[4]Braasch also argued in its motion to the judge that since Puckett was no longer its employee at the time of the hearing, there was no threat of retaliation, and therefore no need for the privilege to extend to Puckett. However, the informer's privilege is applicable to any person furnishing information to the government regarding violations of Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, regardless of the informer's employment relationship to the cited employer. *Quality Stamping*, 7 BNA OSHC 1285, 1979 CCH OSHD ¶ 23,520 (No. 78-235, 1979).

identity of informers, and the privilege extends to the content of any statement that may identify an individual as an informant. To hold that the informer's privilege is waived each time an employer believes it knows which of its employees cooperated with OSHA would defeat the purpose of the privilege.

B. Substantial Need

As we have noted earlier, the informer's privilege may be overcome by a showing that the opposing party's need for the privileged information outweighs the government's entitlement to the privilege. The need must be substantial; a mere assertion that the information may be helpful to prepare a defense is not enough. *See United States v. Prueitt,* 540 F.2d 995, 1003 (9th Cir. 1976), *cert. denied sub nom.*, 429 U.S. 1063 (1977); *United States v. Alvarez*, 472 F.2d 111 (9th Cir. 1973). The Commission has held that a respondent must show that the information is essential to its preparation for the hearing and that it is unable to obtain the information by other means. *Massman-Johnson,* 8 BNA OSHC at 1378, 1980 CCH OSHD at p. 29,810.

We conclude that Braasch has not established a sufficient need to overcome the privilege. The judge found that substantial need was shown because Braasch claimed the statement was necessary to defend against the willful citation, but this bare claim of need is not enough to overcome the privilege, particularly when Braasch has access to a wealth of information regarding the accident. *See Culinary Foods, Inc. v. Raychem Corp.*, 150 F.R.D. 122 (N.D.Ill. 1993) (need for OSHA's informers' statements not established where party could obtain information from other sources). In this case, Braasch has Puckett's versions of the events in question through his deposition taken by its own counsel and his testimony at the state hearing. It also has the testimony of Albert Lytle, the state inspector assigned to investigate the accident, and James Bodensteiner, the safety consultant for the prime contractor on the project, concerning the statements Puckett made to them. Braasch also has access to others who witnessed the accident. Furthermore, had the Secretary called Puckett as a witness at the hearing, Braasch would have been afforded an opportunity to review any

statement he may have made and to use it during cross-examination. *See Massman-Johnson*, 8 BNA OSHC at 1376, 1980 CCH OSHD at p. 29,809.

In summary, we hold that because there has been no voluntary disclosure from any source that Puckett gave a statement to OSHA, the privilege has not been waived. We also hold that Braasch did not otherwise establish a substantial need for the disclosure of Puckett's statement. Accordingly, the judge erred by ordering disclosure of Puckett's statement over the Secretary's claim of privilege.

II. Dismissal of the Willful Citation

The judge dismissed the willful citation in this case as a sanction for the Secretary's refusal to comply with the discovery order. We note that the Commission has a strong interest in preserving the integrity of its orders, and that any party who fails to comply with a judge's order does so at its own peril and must be prepared to accept the consequences of noncompliance if its argument does not ultimately prevail. *Trinity Industries Inc.*, 15 BNA OSHC 1579, 1583 n.6, 1991-93 CCH OSHD ¶ 29,662, p.40,184 n.6 (No. 88-1545, 1992) (consolidated). Under Commission precedent, failure to comply with a judge's order, irrespective of its correctness, may result in dismissal if the party's conduct is contumacious in character. *Id*. at 1582, 1991-93 CCH OSHD at p. 40,184; *Sealtite Corp.*, 15 BNA OSHC 1130, 1133, 1991-1993 CCH OSHD ¶ 29, 398, p. 39,581 (No. 88-1431); *Noranda Aluminum, Inc.*, 9 BNA OSHC 1187, 1189, 1981 CCH OSHD ¶ 25,086, p. 30,988 (No. 79-1059, 1980). In this case, the judge based her order dismissing the willful citation on the grounds that the Secretary's failure to comply with her order was contumacious. However, the Commission has held the failure to comply with an order is not, by itself, an indication of bad faith or contumacious conduct where the party's reason for refusing to comply has a substantial legal basis and its conduct did not indicate disrespect towards the Commission or the issuing judge. *Trinity Industries,* 15 BNA OSHC at 1583, 1991-1993 CCH OSHD at p. 40,185. In this case, as our analysis of the Secretary's claim of privilege demonstrates, the Secretary's reason for not disclosing the statement had a substantial legal basis. Moreover,

the judge does not set forth, nor does the record indicate, any conduct other than noncompliance by the Secretary that may be considered contumacious.

Further, we do not believe, as our dissenting colleague does, that the Secretary's failure to more promptly seek interlocutory review in this situation constitutes contumacious conduct.[5] Commission Rule 73,[6] which governs interlocutory review, does not require the Secretary to file a petition for interlocutory review before refusing to comply with a judge's order. While the better practice may have been for the Secretary to petition the Commission for interlocutory review of the judge's order upon the initial refusal to comply, we do not hold that it was contumacious not to do so.[7]

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[5]Indeed the Secretary filed a petition for interlocutory review within days of the judge's dismissal of the willful citation carrying a proposed penalty of $49,000. This petition was filed two weeks before the hearing and thus could have been acted upon by the Commission prior to the hearing.

[6]Rule 73, governing interlocutory review, states in pertinent part:

> (a) *General*. Interlocutory review of a Judge's ruling is discretionary with the Commission. A petition for interlocutory review may be granted only where the petition asserts and the Commission finds: (1) That the review involves an important question of law or policy about which there is substantial ground for difference of opinion and that immediate review of the ruling may materially expedite the final disposition of the proceedings; or (2) That the ruling will result in a disclosure, before the Commission may review the Judge's report, of information that is alleged to be privileged.
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> (b) *Petition for interlocutory review.* Within five days following the receipt of a Judge's ruling from which review is sought, a party may file a petition for interlocutory review with the Commission. . . .

[7]We share our colleague's concern that Commission administrative law judges be treated with deference and respect. However, the Commission's support for judges and their orders must be balanced with the Commission's obligation to review these orders. Here we are reviewing both the judge's underlying decision and the subsequent order sanctioning the Secretary for noncompliance. In this regard, we find our colleague's view of what the Secretary's counsel should have done to afford the judge appropriate deference to be overly

(continued...)

Our dissenting colleague states that behavior of the sort here "might well have resulted in a contempt citation from a court of general jurisdiction," yet she cites no precedent in support of this proposition. Moreover, she 1) agrees that the Secretary's obligation to protect Mr. Puckett from employer reprisals "may have been paramount;"
2) evidently agrees that the Secretary was correct, and the judge wrong, on the merits of the issue of waiver here; and 3) agrees that our provision for interlocutory appeal is permissive rather than mandatory. In such circumstances --- where the basis for sanction is found to be legal error -- reviewing courts have found, as we do here, that the sanction must be lifted. *See Hodgson v. Charles Martin Inspectors of Petroleum,* 459 F.2d 303 (5th Cir. 1972); *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282 (5th Cir. 1987).

The Commission cases cited by our dissenting colleague bear little resemblance to this case. In those cases, the party who failed to comply with the judge's order did so without explanation and with disregard for Commission proceedings. Furthermore, the correctness of the underlying judge's order was not at issue and therefore was not addressed. In *Sealtite Corp.*, we found that a preponderance of the evidence did support the judge's decision to dismiss an employer's contest for failure to respond to his orders. Similarly, in *Philadelphia Const. Equip., Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶ 30,051 (No. 92-899, 1993),

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[7](...continued)
limited and without foundation. Our colleague would require the Secretary to either comply with the judge's order, an action that would have resulted in a waiver of privilege with irrevocable consequences, or file a petition for interlocutory review that Commission rules fail to require.

In her order dismissing the willful citation the judge failed to articulate what legal grounds she relied on to find the privilege waived or the factual basis for her finding that the respondent had established sufficient need. Moreover, we have found above that the judge's underlying decision, regarding the asserted privilege, was issued in error. While the Commission should not protect a party from the reasonable consequences of refusing without legal justification to comply with a judge's order, by the same token the Commission cannot decline to reverse a judge's order issued in error and, in the absence of contumacious conduct, must protect parties from the consequences of failing to comply with such an order. In our view, the Commission's obligation as an appellate body requires no less.

we found that the judge did not err in finding that the respondent failed to prove good cause for excusing its failure to appear at the scheduled hearing. Finally, *Chartwell Corp.*, 15 BNA OSHC 1881, 1991-93 CCH OSHD ¶ 29,817 (No. 91-2097, 1992), involved the Secretary's failure to make a mandatory filing absent adequate explanation.[8]

It is not difficult to imagine circumstances in which a party, in the process of seeking to vindicate its rights, uses words or gestures, or otherwise behaves in a manner that is abusive or contumacious. Such behavior may merit sanction, even where the party is ultimately vindicated on the merits. Here, however, we find evidence only of a party's assertion of its rights within the rules, and the dissent does not identify evidence of conduct to the contrary.

Since the only basis for the dismissal was the refusal to comply with an order that should not have been issued, we reverse the dismissal. *See Massman-Johnson*, 8 BNA OSHC at 1378, 1980 CCH OSHD at p. 29,810.

Order

We set aside the judge's orders prohibiting the Secretary from calling Puckett as a witness and dismissing the willful citation and accompanying penalty and we remand this case for further proceedings in accordance with this opinion.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

[8]Here, in contrast, the Secretary's counsel stated her position, along with accompanying law and argument, to the judge in both the transcribed conversation with the judge and her motion for reconsideration of the disclosure order.

Dated: _____

MONTOYA, Commissioner, dissenting:

I disagree with the majority's conclusion that Judge Barbara L. Hassenfeld-Rutberg abused her discretion in dismissing Citation 2, Item 1. No matter what the Assistant Solicitor's reasons might have been, by repeatedly flouting the judge's orders without seeking interlocutory review, she engaged in the sort of conduct that should properly be sanctioned as contumacious.

During discovery, Respondent Braasch demanded the production of all statements given to OSHA during Compliance Officer Scime's investigation. At Mr. Scime's May 25, 1995 deposition, Assistant Solicitor Curtwright directed him not to answer questions as to whether or not the injured crane operator, Robert Puckett, had given any such statements. On June 9, 1995 the judge ordered that any such statements be produced. In this order, the judge addressed the merits of the informant's privilege relied on by Ms. Curtwright. She concluded that the privilege had been waived because Mr. Puckett had already testified as to the facts of this accident, not only at his deposition but also at a State of New York license revocation hearing conducted in October 1994. She also concluded that Respondent Braasch had demonstrated a need for any such statements that outweighed the protections afforded by the privilege.

Ms. Curtwright did not react to this adverse ruling by filing a petition for interlocutory review with the Commission. She simply refused to comply. On June 15, 1995, the judge issued a second order stating that Mr. Puckett had waived the privilege. Ms. Curtwright's continued refusals, based on her continued assertion of the same privilege, brought a third such order dated June 19, 1995. On June 21, 1995, the parties contacted the judge by telephone from Mr. Scime's continued deposition. Because Ms. Curtwright again claimed the privilege and refused to comply, the judge issued a fourth order in which Mr. Puckett was now to be precluded from testifying on the Secretary's behalf at the hearing. In this order, the judge also warned that further refusal to comply would result in dismissal of Citation 2, Item 1. This order was faxed to the parties the same day. Ms. Curtwright continued to refuse compliance.

On June 23, 1995, Braasch finally moved for sanctions, and on June 26, 1995 the judge issued a final order dismissing Citation 2, Item 1. Only after this citation item was

dismissed did the Secretary file a petition for interlocutory review. By this time, it was too late for Ms. Curtwright to rehabilitate her treatment of the judge, and I find it telling that her petition to the Commission included no form of apology.[9] This petition was filed on July 3, 1995 and denied by the Commission on August 7, 1995, two weeks after the hearing. At the July 19, 1995 hearing, as in her decision of November 30, 1995 disposing of the remaining citation items, the judge repeated that Citation 2, Item 1 had been dismissed by her prehearing order.

It is this Commissioner's view that these repeated refusals to comply with the judge's orders, without seeking prompt interlocutory review, constitute the sort of "contumacious conduct" that the Commission has sanctioned with dismissal. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1991-93 CCH OSHD ¶ 29,398 (No. 88-1431, 1991) (affirming judge's decision to dismiss an employer's contest and assessing $47,500 in proposed penalties due to employer's contumacious failure to respond to orders and insistence on addressing matters not before the Commission); *Chartwell Corp.*, 15 BNA OSHC 1881, 1991-93 CCH OSHD ¶ 29,817 (No. 91-2097, 1992) (Secretary's failure to explain why complaint was not timely filed sufficiently contumacious to support judge's decision to dismiss citations). *Cf. Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128,1993 CCH OSHD ¶ 30,051 (No. 92-899, 1993) (very broad discretion of judge to impose sanctions not abused where judge found that employer's failure to timely appear at hearing was part of a consistent pattern of disregard for Commission proceedings, and dismissed employer's contest). By repeatedly refusing to comply with the judge's orders to produce Mr. Puckett's statements on grounds explicitly rejected by the judge in her first order, Ms. Curtwright demonstrated complete disrespect for the Commission and its process. As the Commission's judges do not possess contempt powers, the judge first sanctioned the Secretary by ordering Mr. Puckett precluded from testifying on the Secretary's behalf. The strongest sanction available, dismissal of the

[9]Given that Ms. Curtwright only filed a petition for interlocutory review after the citation item was dismissed, it can easily be inferred that her concern was for the loss of the citation item, and not with demonstrating to the Commission that she was practicing in good faith.

citation to which statements given to OSHA by Mr. Puckett would have related, was only levied after clear warnings and as a last resort.

Though I consider Ms. Curtwright's behavior in this case to have been contumacious, I am fully aware of the dilemma that a claim of privilege can present when the party claiming the privilege or, as here, his attorney, is faced with an adverse judge's order. While we are not told on this record whether Mr. Puckett himself ever invoked the informant's privilege, I understand that the Secretary's obligation to protect Mr. Puckett from employer reprisals may have been paramount. Nonetheless, though the judge's ruling that Mr. Puckett had waived the informant's privilege may have been wrong, Ms. Curtwright could only have shown the Commission that she was acting in good faith, and not in contempt of the judge's orders, by promptly seeking interlocutory review of the June 9, 1995 order. Instead, she chose to simply flout all orders directing disclosure of this information.

While the majority has correctly stated that Rule 73(a)(2) of the Commission's rules, 29 C.F.R. § 2200.73(a)(2), is permissive rather than mandatory, it also provided the Secretary with the *only* means to properly exhaust this privilege claim before the Commission, and thereby establish that Ms. Curtwright's refusals to obey the judge's lawful orders were in good faith. Behavior of this sort might well have resulted in a contempt citation from a court of general jurisdiction, and I think Ms. Curtwright's decision to flout the Commission's orders without first seeking interlocutory review should be sanctioned as contumacious conduct in this case. Certainly it was within the judge's discretion to do so, and I am deeply concerned for the effect that the majority decision will have on the morale of our administrative law judges.

/s/
Velma Montoya
Commissioner

Dated: March 3, 1997