United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ST. LAWRENCE FOOD CORP., d/b/a PRIMO FOODS, Respondent.	OSHRC Docket Nos. 04-1734 and 04-1735

APPEARANCES:

Michael P. Doyle, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; Department of Labor, Washington, DC
For the Complainant

David P. Antonucci, Esq.; Antonucci Law Office, Watertown, NY
For the Respondent

DECISION

Before: RAILTON, Chairman, and ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission is an order of Administrative Law Judge G. Marvin Bober dismissing citations issued to the St. Lawrence Food Corporation (St. Lawrence) for the Secretary of Labor's (Secretary) failure to comply with the judge's discovery orders. The orders in question directed the Secretary to provide St. Lawrence with written documents that the Secretary claimed were protected from disclosure by either the attorney-client privilege or the work product doctrine. The judge concluded that the Secretary had not shown that the documents were protected by either of these exceptions to disclosure and that her continued refusal to provide St. Lawrence with discoverable materials warranted

dismissal. We reverse. We find that the judge erred in rejecting the Secretary's claims that the documents were protected, and he erred by dismissing the citations. We set aside the sanction imposed by the judge and remand for further proceedings.

Facts

The facts giving rise to this opinion stem from a discovery dispute that began during a pretrial deposition by St. Lawrence's attorney on August 23, 2005. The Secretary's attorney objected to certain questions asked of two Occupational Safety and Health Administration (OSHA) compliance officers regarding communications with their supervisors. She asserted the deliberative process privilege and instructed the deponents not to answer the questions. On August 29, 2005, St. Lawrence filed a motion with the judge requesting that he compel the deponents "to appear again for further depositions and . . . answer questions regarding their opinions and the internal actions of OSHA." The Secretary opposed St. Lawrence's motion, again raising the deliberative process privilege.

On September 29, 2005, the judge issued an order mischaracterizing St. Lawrence's motion and granting alternative relief.[1] Instead of ordering the compliance officers to appear again for depositions and answer St. Lawrence's questions, the judge granted St. Lawrence's motion as follows:

> [T]he Respondent's request for the government employee witnesses' *written* advisory opinions, recommendations and deliberations, fact materials, factual findings and recommendations, materials related to the explanation, interpretation or application of an existing policy or materials *written* after the Citations and Notification of Penalties that were issued on September 10, 2004 . . . is granted.

(Emphasis added.) The judge ordered the Secretary to provide the written documents to St. Lawrence within ten working days.

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[1] St. Lawrence did not move for reconsideration of the September 29, 2005 order based on the judge's failure to grant the relief it sought, nor did it seek clarification of that order.

The Secretary submitted a Motion for Reconsideration on October 6, 2005. She pointed out that St. Lawrence had not requested written materials and argued that, to the extent the judge was *sua sponte* directing the Secretary to produce written documents, the documents were protected from disclosure by the work product and attorney-client privileges.

The judge issued an initial Order on Motion for Reconsideration on October 11, 2005, and a Corrected Order on Motion for Reconsideration on October 20, 2005, in which he rejected the Secretary's privilege claims. The judge found that "labeling" the documents privileged on the basis of the attorney-client and work product claims made for them was "simply self-serving" and did not prove the materials were prepared in anticipation of litigation or for trial.

The next day, October 21, 2005, the Secretary submitted a Second Motion for Reconsideration and Motion for a Protective Order, which included an affidavit signed by the Solicitor's attorney. The Secretary identified the following eight documents as covered by the judge's order:

1. a three-page memorandum prepared by the staff attorney asking questions of the compliance officer to assist her in analyzing the citation items and understanding the case file;
2. a one-page e-mail from the compliance officer to the staff attorney explaining aspects of the lockout/tagout standard;
3. a single page of e-mail correspondence between the staff attorney and the compliance officer discussing alternative theories of citation;
4. a one-page memorandum prepared by the compliance officer to assist the attorney in the preparation of answers to interrogatories;
5. a one-page e-mail from the compliance officer to the staff attorney suggesting questions to be asked of respondent's officials at their depositions;
6. an eleven-page trial plan prepared by counsel for all health citation items setting forth the proof for each item and strategic considerations identifying strengths and weaknesses, which was shared with the compliance officer for discussion and comment;
7. a twenty-four page trial plan prepared by counsel for all safety citation items setting forth the proof for each item and strategic considerations identifying

strengths and weaknesses, which was shared with the compliance officer for discussion and comment;

8. a four-page memo prepared by the compliance officer at the request of counsel to assist her in trial preparation by summarizing proof of certain elements of the case and referring, *inter alia*, to confidential informants.

The Secretary argued that all eight documents are protected from discovery by either the work product doctrine or the attorney-client privilege, and she requested that the judge issue a protective order precluding discovery of those documents. The Secretary dropped her deliberative process claim, which she had raised with respect to a ninth document.

On October 25, 2005, the judge issued an order denying the Secretary's motion. The judge concluded that the Secretary had not established the confidentiality of the documents in question because she failed to state "that the documents were not provided to a third party or parties[,] or a third party or parties have not had access to the documents." That same day the Secretary filed a motion asking the judge to stay his order pending interlocutory review by the Commission. The following day, October 26, 2005, the judge issued two orders: (1) an order denying the Motion for Stay, and (2) an Order to Show Cause why "the Secretary should not be declared to be in default and the Citations . . . dismissed." In denying the Motion for Stay, the judge found that the Secretary's motion lacked substantive support because it failed to explain why she had not provided him with copies of the documents or with a "Vaughn Index."[2]

On October 31, 2005, the Secretary filed a petition for interlocutory review with the Commission. She also responded to the judge's Order to Show Cause by arguing that dismissal would be an improper sanction where she was following the proper procedures in asserting that the work product and attorney-client privileges exempted the documents from disclosure.

On November 14, 2005, the judge issued a Decision and Order dismissing the citations and thus rendered moot the Petition for Interlocutory Review that was pending

[2] A Vaughn Index is a privilege log tailored to the specific requirements of the Freedom of Information Act (FOIA) and the exemptions from disclosure stated in the FOIA. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); 5 U.S.C. § 532.

before the Commission. The Secretary filed her Petition for Discretionary Review on December 5, 2005.

Discussion

A party raising a claim of privilege in Commission proceedings must initially "specify the privilege claimed and the general nature of the material for which the privilege is claimed."[3] Commission Rule 52(d), 29 C.F.R. § 2200.52(d).[4] In response to a judge's order, or if the opposing party has filed a motion to compel, the privilege-seeking party must provide greater detail: "Identify the information that would be

[3] The Commission revised its Rules of Procedure, including Rule 52, effective August 1, 2005. In his November 14, 2005 Order dismissing the citations, the judge analyzed the Secretary's privilege claims under both the Commission's old and new Rule 52. We note, however, that the Secretary initially made her work product and attorney-client privilege claims on October 6, 2005, in her Motion for Reconsideration, after the revised Rule 52 went into effect. Accordingly, we will analyze the Secretary's claims only under the revised rule. However, application of the old rules would yield no different result.

[4] Rule 52(d) provides:
(d) Privilege.
(1) *Claims of privilege*. The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from Judge or the Commission, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon *in camera*, that is, with the record and hearing room closed to the public, or *ex parte*, that is, without the participation of parties and their representatives. The judge may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed.
(2) *Upholding or rejecting claims of privilege*. If the Judge upholds the claim of privilege, the Judge may order and impose terms and conditions as justice may require, including a protective order. If the Judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged." *Id.* This claim must be supported by affidavits, depositions, or testimony and shall specify the relief sought. *Id.* We first consider the Secretary's claim that the documents were covered by the attorney-client privilege.

I. Attorney-Client Privilege

"The attorney-client privilege is one of the oldest recognized privileges for confidential communication. The privilege is intended to encourage 'full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (citations omitted). The privilege protects from disclosure confidential communications from a client to an attorney made in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The attorney-client privilege also protects communications *from* the attorney *to* the client when the attorney's communication discloses confidential information received from the client. *Schefler v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983). The privilege applies regardless of whether the client is a business, individual or government agency. *See United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 534 (2d Cir. 2005).

In this case, the judge unquestionably erred in finding that the Secretary failed to properly establish the attorney-client privilege. The Secretary's affidavit makes abundantly clear that all of the documents for which she is claiming the privilege contain communications between the Solicitor's attorney and the compliance officers. Five of the documents—numbers (1), (2), (4), (5) and (8)—are e-mails or memoranda prepared by the compliance officers to help the Solicitor's attorney prepare for this case. The sixth document, number (3), contains e-mails between a compliance officer and the attorney in which they discuss alternative theories of citation. As OSHA employees, the compliance officers are "clients" for purposes of determining whether their communications with the Solicitor's attorney are protected by the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 391-92 (1981). Because those communications were intended to

secure the Solicitor's assistance for OSHA in the pending proceeding, they come within the scope of the attorney-client privilege.

The judge also erred in finding that the Secretary did not establish the confidentiality of the documents in question because she failed to assert that third parties had not been given access to the documents. The Secretary plainly states in her affidavit that "the materials described were intended to be and *were kept confidential*. . . ." (Emphasis added). This averment, in the absence of any evidence to the contrary, establishes that the documents have not been disclosed to third parties. Indeed, the summary of documents indicates that all of the documents are communications *within* the Department of Labor.[5]

We therefore conclude that the documents for which the Secretary invoked the attorney-client privilege under Commission Rule 52(d)(1) were protected by the attorney-client privilege and thus exempt from discovery.

II. Work Product Doctrine

The record also shows that all eight documents were protected by the attorney work product doctrine. This doctrine, which is codified in Federal Rule 26(b)(3), protects from disclosure certain materials prepared by attorneys or their agents acting for clients in anticipation of litigation.[6] *Hickman v. Taylor*, 329 U.S. 495, 508 n.11 (1947). It applies when the materials in question are shown to be (1) documents or other tangible things, including an attorney's "mental impressions, conclusions, opinions or legal

[5] The judge also found that the Secretary's privilege claims lacked substantive support because the Secretary failed to explain why she had not provided him with a Vaughn Index. *Vaughn*, 484 F.2d 820. Commission Rule 52 does not require a party to submit a Vaughn Index in support of its privilege claim. We therefore find that it was improper for the judge to rely on that factor in denying the Secretary's claim.

[6] Federal Rule 26(b)(3) applies in Commission proceedings because the Commission has not issued its own rule addressing the scope of the work product doctrine. *See* Commission Rule 2(b), 29 C.F.R. § 2200.2(b) ("In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure."); 29 U.S.C. § 661(g).

theories," (2) prepared in anticipation of litigation or trial,[7] and (3) gathered by or for a party or by or for that party's representative. 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2024 (2d ed. 1987). *See also Continental Oil Co.*, 9 BNA OSHC 1737, 1741, 1981 CCH OSHD ¶ 25,371, p. 31,580 (No. 79-570, 1981) (applying three-part test to work product claim). Opinion work product enjoys either absolute or near-absolute immunity and is only discoverable in very rare and extraordinary circumstances, such as where the work product contains evidence of fraud or illegal activities. *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). *See also In re Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981) ("It is clear that opinion work product is entitled to substantially greater protection than ordinary work product.")

Here again, the judge clearly erred in concluding that the Secretary had not properly claimed the relevant privilege and in finding that the documents were not privileged. The Secretary's affidavit supports a finding that all eight documents are attorney work product because they are (1) documents or tangible things, (2) prepared in anticipation of litigation or trial, and (3) gathered by or for another party or by or for that other party's representative. *Continental Oil*, 9 BNA OSHC at 1741, 1981 CCH OSHD at p. 31,580. In her affidavit, the Secretary summarizes the contents of each of the eight documents covered by the judge's discovery orders. For most of the documents, the descriptions alone make clear that they were prepared in anticipation of litigation in the present case: document (1) was prepared to help the Solicitor's attorney "understand[] the case file"; document (2) "explain[s] aspects of the lockout/tagout standard" at issue in this case; document (3) discusses alternative theories of citation; documents (4) and (5) were prepared to assist the attorney with interrogatories and depositions; documents (6) and (7) are the attorney's trial plans; and document (8) summarizes proof of certain

[7] The Second Circuit, where this case arose, has interpreted the phrase "in anticipation of litigation" broadly in the context of work-product claims, holding that documents are within the scope of the rule if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1994) (emphasis added).

elements of the Secretary's case and refers to confidential informants. The Secretary also expressly states in her affidavit; "These materials are contained in the attorney's litigation file and were developed in ongoing consultation with OSHA after the issuance of the citations *for the sole purpose of preparing these matters for litigation*." (Emphasis added.) This language removes any doubt that the Secretary has complied with Commission Rule 52(d)(1) by identifying the relevant information and privilege, and providing a factual basis for her claim of privilege.

Because the eight documents are covered by the work-product doctrine, St. Lawrence has the burden of proving it is entitled to discovery of the Secretary's work product. *See Castle v. Sangamo Weston, Inc.*, 744 F.2d 1463, 1467 (11th Cir. 1984). St. Lawrence has not carried its burden here. As we have found, six of the eight documents withheld by the Secretary are covered by the attorney-client privilege and exempt from disclosure for that reason. The remaining two documents, numbers (6) and (7), are the Solicitor's trial plans. Most courts hold that this "opinion work product" is either immune from discovery, *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), or can be discovered only in cases of "extraordinary justification," such as where the attorney's actions are themselves an issue in the underlying proceeding. *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982). St. Lawrence argues that it needs discovery of the Solicitor's trial plans, along with the six other contested documents, to prepare for the hearing, understand the actions of various OSHA personnel, and prepare for cross-examination of witnesses. However, these factors could be cited in almost any OSHA case. St. Lawrence cites no authority which would support finding that these factors present extraordinary circumstances justifying the disclosure of opinion work product.

III. Dismissal of the Citations

Commission Rule 52(f), 29 C.F.R. § 2200.52(f) provides that a Commission judge may impose any sanction stated in Federal Rule 37, including dismissal, for failing to comply with a discovery order. However, the judge cannot impose a sanction that is too

harsh under the circumstances of the case. *Noranda Aluminum, Inc.*, 9 BNA OSHC 1187, 1189, 1981 CCH OSHD ¶ 25,086, p. 30,988 (No. 79-1059, 1980). The Commission has held that dismissal of a citation is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, pp. 49,975-76 (No. 00-0389, 2001). Failure to comply with a judge's order is not, by itself, an indication of 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." *Donald Braasch Constr., Inc.*, 17 BNA OSHC 2082, 2086, 1995-97 CCH OSHD ¶ 31,259, p. 43,868 (No. 94-1355, 1997).

We find no basis for the judge's dismissal sanction here. As we have found, the Secretary's position has a substantial legal basis. Apart from the Secretary's noncompliance with the judge's orders, we see nothing in this record that could be considered contumacious. *Donald Braasch*, 17 BNA OSHC at 2086, 1995-97 CCH OSHD at p. 43,868 (dismissal not warranted where Secretary had a substantial legal basis for failing to disclose and no evidence of contumacy). The judge described as contumacious the Secretary's noncompliance with his orders and her "refus[al] . . . to allow the [judge] *in camera* inspection." However, the judge never ordered an *in camera* inspection of any document and St. Lawrence did not request one. The cases St. Lawrence cites in support of its claim that dismissal was appropriate are inapposite at best. While the cases suggest that a party's intentional failure to follow discovery orders can be considered bad faith, they neither hold that such a failure is *necessarily* evidence of bad faith nor do they address the extent to which courts may consider whether the party's conduct has a substantial legal basis, a factor the Commission has considered in its decisions. These cases also fail to address circumstances in which a court rule provides a specific procedure for resolving a discovery dispute and the non-complying

party invokes that rule, as the Secretary did here when she filed her Petition for Interlocutory Review pursuant to Commission Rule 52(d)(2), 29 C.F.R. § 2200.52(d).[8]

Because the Secretary's conduct was not contumacious, and because St. Lawrence was not prejudiced by the Secretary's failure to comply with the judge's orders, the judge erred when he dismissed the citations.[9]

ORDER

We set aside the judge's order dismissing the citations and remand this case for further proceedings consistent with the Commission's rules and in accordance with this opinion.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: March 20, 2006

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[8] St. Lawrence claims that it was prejudiced in its ability to prepare for trial because "no meaningful examination of the [compliance] inspectors ever occurred." It also claims prejudice resulting from the Secretary's failure to provide discovery. These contentions are at best premature as this matter never got to trial before the judge.

[9] On remand, we expect the judge to follow applicable court and Commission precedent, particularly with regard to discovery. *See Lewis County Dairy Corp*., 21 BNA OSHC 1070, 1071 (No. 03-1533, 2005). We also find it necessary to criticize two other aspects of the judge's handling of this matter. First, the judge largely created the discovery problems before us in this case. He ordered the documents in question produced *sua sponte*. St. Lawrence did not initially request them. Second, the judge decided not to give the Commission adequate time to consider the Secretary's petition for interlocutory review of his order overruling the Secretary's claim of privilege. Such a petition "is denied unless granted within 30 days of the date of receipt by the Commission's Executive Secretary." Commission Rule 73(b), 29 C.F.R. § 2200.73(b). Yet the judge dismissed the citations fourteen days after the petition for interlocutory review was filed with the Commission.

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SECRETARY OF LABOR, Complainant, v. ST. LAWRENCE FOOD CORP., d/b/a/ PRIMO FOODS Respondent.	OSHRC Docket Nos. 04-1734 and 04-1735

DECISION AND ORDER ON ORDER TO SHOW CAUSE

The undersigned in his order dated September 29, 2005 granted the Secretary's request for privilege protection under the informer's privilege, denied the Secretary's request for privilege protection under the deliberative process privilege and granted the Respondent's request for certain documentary materials. ("Discovery Order 1"). On October 21, 2005, the undersigned denied the Secretary's request for privilege protection under the deliberative process privilege, the attorney-client privilege, and the work product privilege. ("Discovery Order 2"). On October 25, 2005, the undersigned denied the Secretary's Second Motion For Reconsideration seeking privilege protections. ("Discovery Order 3")[1].

On October 25, 2005, the Respondent filed its motion seeking dismissal of these cases for the Secretary's failure to comply with the undersigned's orders. Respondent alleged that it was prejudiced

[1] The Secretary has never forwarded the documents to the Respondent. Moreover, the Secretary has not, in any of its motions, submitted to the undersigned the disputed materials for *in camera* inspection.

in its preparation for trail scheduled to commence on November 8, 2005, as the Secretary has failed to comply with any of the Court's privilege protection orders and "STILL has not produced the inspectors and other previously deposed parties for continued depositions in light of these order [sic]; as a result the Respondent (a) "cannot fully prepare or prepare pretrial submissions without discovery," (b) cannot complete discovery without the "demanded documents" which have "willfully been withheld," (c) cannot "[w]ithout the discovery and continued depositions * * * understand the actions of OSHA or its employees," (d) cannot without the opinions of the inspections [sic] and area director * * * understand the basis or scope of either the citations or penalties," and (e) cannot "prepare cross- examination of these [OSHA] witnesses." "The acts of the Complainant have reached the level of a fundamental denial of substantive due process" due in part to the "magnitude and complexity" of these proceedings. In its supplemental submission dated October 31, 2005, the Respondent argues that it has been prejudiced since "[w]ithout the information [it] cannot prepare for trial," and "[d]ismissal is clearly warranted * * * ."

In a further supplement dated November 1, 2005, the Respondent stated that the "bad faith and contumacious conduct of the Secretary is [sic] manifest" as the Secretary has (a) not completed discovery, (b) asserted "self-serving" claims of privilege, (c) "produced privileged documents; indicating the complainant does not find merit in its own arguments,' (d) "filed redundant motions to delay disclosure until the eve of * * * trial, and therefore, these cases should be dismissed.

On October 26, 2005, the undersigned issued his Order To Show Cause. The Order required the Secretary to show cause why these cases should not be dismissed for failure to provide the Respondent's counsel with the ordered discovery materials. As the trial is scheduled to commence on November 8, 2005 time is of the essence in deciding this matter.

On October 31, 2005, the Secretary filed her response to the Court's Order To Show Cause. This Decision and Order is being issued as a result of the Court's Order To Show Cause.

DISCUSSION AND CONCLUSION

The purpose of discovery is to narrow the issues, to obtain evidence for use at a trial, and to secure information concerning the existence of evidence. Wright, Miller & Marcus, *Federal Practice and Procedure*: *Civil 2d* 2001. In the opinion of the undersigned, discovery also encourages settlement. The basic philosophy of federal discovery process is that prior to trial, every party to a civil action is entitled to disclosure of all relevant information in the possession of any person unless the information is privileged. 6 *Moore's Federal Practice* 26.02 (Matthew Bender 3d ed.).

Failure to comply with a court order is a basis for dismissal. Dismissal is appropriate where there has been a willful failure to prosecute on the part of a party, complete intransigence despite a clear order from the court, *Chira v. Lockheed,* 634 F.2d 664, 665-666 (2d Cir. 1980) or a complete failure to complete discovery as directed. *Ali v. A & G Company*, 542 F.2d 595 (2d Cir. 1976).

The sanction of dismissal is available to the court to ensure the smooth and fair operation of discovery. Wright, Miller & Marcus, *Federal Practice and Procedure*: *Civil 2d* 2281. If the conduct of a party reflects willfulness, bad faith gross negligence, or any other fault of the party rather than an inability to comply, then the sanction of dismissal is warranted. Wright, Miller & Marcus, *Federal Practice and Procedure*: *Civil 2d* 2284 and 2289.

Effective on August 1, 2005, the Commission revised Rule 52, *General provisions governing discovery.* Rule 52 of the Commission's Rules of Procedure, 29 C.F.R. 52. Specifically Rule 52(d), *Privilege.* (1) *Claims of Privilege* and (2) *Upholding or rejecting claims of* privilege. The undersigned is of the opinion that the Secretary would suffer no injustice if either the Old Rule or the Revised Rule is applied to the facts of theses cases; however, out of an abundance of caution, I am considering the Secretary's actions under both the Old Rule and the Revised Rule.

Old Rule

Discovery sanctions may be imposed pursuant to Rule 52, *General provisions governing discovery.*

Rule 52 of the Commission's Rules of Procedure, 29 C.F.R. 52. Specifically Rule 52(e) of the Commission's Rules of Procedure, 29 C.F.R. 52(e) is applicable. The Show Cause Order issued on October 26, 2005 inaccurately referenced Rule 41(a) of the Commission's Rules of Procedure. However, both Rules require the disobedient party to explain his/her actions after being given an opportunity to show cause.

Rule 52(e) *Failure to cooperate: Sanctions* provides, as pertinent, "[i]f a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. The orders may issue upon the initiative of a Judge after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party. The orders may include any sanction stated in Fed.R.Civ.P. 37, including the following: * * * (4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." (Hereinafter referred to as "Old Rule").

On August 29, 2005, the Respondent filed its motion to compel, and the Secretary filed its response. In Discovery Orders 1 and 2, the issues before this Court were the informer's privilege, deliberative process privilege, the attorney-client privilege, and the work product privilege The Court in its Discovery Orders referenced Supreme Court and federal case law setting forth the factors a court considers in ruling on privilege requests as well as the burden of proof placed upon the party seeking each privilege.

The Secretary in its multiple motions for reconsideration did not meld the factors and its parallel burden of proof to the facts of these cases. Despite the Court's discourse on privilege protections, the Secretary ignored the requirements of Discovery Orders1,2 and 3, and refused to provide the Respondent with the materials as directed or to allow the undersigned *in camera* inspection. As a result the Respondent has been prejudiced in its trial preparations. *Supra.* This pattern of failures to cooperate on the part of the Secretary's counsel was not due to competing legal theories or conflicts in Federal

circuit case law, but to intransigence. Thus, this pattern of failures to comply with the Commission Rules and the undersigned's orders constitutes wilful behavior, contumacious conduct, and bad faith. *Pittsburgh Forgings Company*, 10 BNA OSHC 1512, 1514 (No. 78-1361, 1982). (The Commission has an interest in preserving the integrity of its orders as well as to deter future misconduct. Citing *National Hockey League v. Metropolitan Hockey League,* 98 S.Ct. 2778 (1976). *In accord, Trinity Industries Inc.*, 15 BNA OSHC 1579, 1583, n. 6. The Citations and Notification of Penalties will be dismissed.

Revised Rule

Commission Rule 52(d), *Privilege* (1) *Claims of Privilege* , 29 C.F.R. 52(d)(1), as revised on August 1. 2005, provides, as pertinent, "The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from Judge * * *, or in response to a motion to compel the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the alleged privileged information be received and the claim ruled upon an in camera. * * *

(2) *Upholding or rejecting claims of* privilege. * * * If the Judge overrules the claim of privilege, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission." (Hereinafter referred "Revised Rule").

The Revised Rule is a beacon of light in the safe harbor of privilege(s) protection. It set outs in an orderly manner the procedures a party must adhere to when a party claims privilege. Applying the facts of these cases to the Revised Rule, the result is identical to the one reached under the Old Rule.

Federal Rule of Civil Procedure 37(b)

Rule 37(b)(2)(C) provides, as pertinent, If a party* * * fails to obey an order to provide or permit discovery, * * * the court may make such orders in regard to the failure as are just and among others the following: * * * (C) An order striking out the pleadings or parts thereof * * * or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

In *Societe Internationale Pour Participations Industrie*lles et Commericales, *S.A.* v. *Rogers*, 78 S.Ct. 1087, 1093 (1958), the Court noted: "For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation."

In theses cases, the undersigned explained in great detail several times the requirements that a party must follow in seeking privilege protection, and allowed the Secretary ample time to provide the discovery request. The record is clear that the Secretary failed to comply with discovery Orders 1 and 2, and the discoverable materials. The materials that the Secretary failed to provide the Respondent were both appropriate and necessary to its defense, *supra. Tokyo Electron Arizona v. Discreet Industries*, 215 F.R.D. 60,63 (E.D.N.Y., 2003)("The Second Circuit has warned litigants that 'a party who flaunts [discovery] orders does so at his own peril.'") The Citations and Notification of Penalties will be dismissed.

IT IS ORDERED that Citations and Notification of Penalties that were issued on September 10, 2004 (Inspection Numbers 306315771, corresponding to OSHRC Docket No. 04-1735 and 306315680, corresponding to OSHRC Docket No. 04-1734) are dismissed..

IT IS FURTHER ORDERED THAT the administrative trial scheduled to commence on November 8, 2005 is cancelled.

/s/
G. Marvin Bober
Administrative Law Judge

Dated: November 2, 2005
Washington, D.C.