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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>DELEK REFINING, LTD.,<br><br>Respondent,<br><br>and<br><br>USW LOCAL 202, DISTRICT 13,<br><br>Authorized Employee Representative. | OSHRC Docket No. 09-0844 |

APPEARANCES:

Dolores G. Wolfe, Trial Attorney; Sheryl L. Vieyra, Senior Trial Attorney; U.S. Department of Labor, Dallas, TX; Madeleine T. Le, Counsel for Occupational Safety and Health; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For Complainant

Mark S. Dreux and Valerie N. Webb, Attorneys; Arent Fox L.L.P., Washington, DC
For Respondent

**ORDER**

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

In November 2008, the Occupational Safety and Health Administration ("OSHA") inspected the Tyler, Texas facility of Delek Refining, Ltd. ("Delek") following an explosion and fire. In May 2009, OSHA issued Delek two citations, one serious and one willful, alleging violations of the process safety management ("PSM") standard. During discovery, the Secretary issued Process Safety and Reliability Group, Inc. ("PSRG") a subpoena duces tecum requesting a

May 4, 2008 report ("Report") marked "draft," that Delek claims was prepared by PSRG to assist Delek's counsel in the "analysis of the technical issues associated with compliance with the [PSM] standard." Delek filed a motion to quash the subpoena on August 25, 2010, claiming that the Report was protected from disclosure under the attorney-client privilege. Administrative Law Judge Stephen J. Simko, Jr. denied Delek's motion to quash on September 28, 2010, and denied Delek's subsequent motion for reconsideration on December 10, 2010. Delek petitioned the Commission for interlocutory review of the judge's order on December 20, 2010, renewing its argument that the attorney-client privilege protects the Report from disclosure. *See* Commission Rule 73(a)(2), 29 C.F.R. § 2200.73(a)(2). The Commission granted Delek's petition on January 19, 2011, and stayed the judge's orders *sua sponte* during the pendency of the interlocutory review. Both parties have filed briefs with the Commission in support of their positions on this issue.

The application of the attorney-client privilege to a document prepared by a third party such as PSRG is a question of first impression for the Commission. In addition, under the particular circumstances of this case, it cannot be determined whether any part of the Report is privileged without viewing its contents. Accordingly, we direct the judge to review the Report *in camera* and reconsider, in accordance with the principles discussed below, the extent to which the attorney-client privilege may be applicable.[1] *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228 n. 15, 1991 CCH OSHD ¶ 29,442, p. 39,685 n.15 (No. 88–821, 1991) (holding that ordinarily, a Commission judge resolves factual issues first).

**Discussion**

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance."[2] *Fisher v. United States*, 435 U.S. 391, 403 (1976). The burden of proving that the privilege applies rests on the party claiming its protection. *See In*

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[1] In light of our determination that further findings on this issue are necessary, we deny Delek's motion for oral argument.

[2] We note that the work product doctrine, by contrast, protects documents that "are prepared in anticipation of litigation or for trial." A party may obtain a document protected by the doctrine upon demonstrating a "substantial need" for the document and that it "cannot, without undue hardship, obtain the[] substantial equivalent [of the document] by other means." Fed. R. Civ. P. 26(b)(3). Here, where Delek is claiming attorney-client privilege, not work product protection, we need not address whether the Report was prepared in anticipation of litigation.

*re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir. 1973). A number of courts have recognized that the attorney-client privilege can extend to communications between a client and a third party hired by the client's attorney in certain circumstances. *See, e.g., United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

Here, Delek seeks to apply the attorney-client privilege to PSRG's third party report. In his order denying Delek's motion to quash the Secretary's subpoena, the judge relied primarily on *FTC v. TRW, Inc.*, 628 F.2d 207 (D.C. Cir. 1980), and *Kovel*, the latter being the seminal case on whether the attorney-client privilege can apply to a document created by a third party. Specifically, the judge explained that the attorney-client privilege only extends to the report of a third party when the report collects and translates client information into usable form. *See TRW*, 628 F.2d at 212; *Kovel*, 296 F.2d at 922. He determined that the Report in this case was "far more complex than merely collecting and translating into a usable form information obtained from the client" and therefore, the privilege did not apply.

We note, however, that complexity is not a factor the *Kovel* court or other courts that have addressed the third party report issue have considered when determining whether the attorney-client privilege applies. Although the privilege can apply to simple, ministerial acts—such as an attorney's secretary relaying a message from a client to the attorney, or the translation of a client's statement from one language to another—it is not limited to those actions. Rather, the privilege applies to third party communications where the following three prerequisites are met.

The first prerequisite is that the client must have provided information to the third party, rather than the third party providing its own information. Thus, the privilege will not apply where the attorney consults the third party to obtain information the client did not have, s*ee United States v. Ackert*, 169 F.3d 136, 139-40 (2d Cir. 1999), or employs the third party to gather data through studies and observations of the physical conditions at a client's site, rather than through client confidences, *see Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997) (citing *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994)).

The second prerequisite is that the client must have sought legal advice as opposed to some other kind of advice or information. *See United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995) (holding that the privilege does not extend to a third party where the client was really

seeking accounting advice, not legal advice); *United States v. Bornstein*, 977 F.2d 112, 117 (4th Cir. 1992) (explaining that the key inquiry is whether the primary purpose of third party accounting services was to allow the attorney to give legal advice); *Kovel*, 296 F.2d at 922 ("What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").[3]

Finally, the third prerequisite is that in order to provide that legal advice, the attorney needed the services of the third party—often described in terms of a need for the third party to "translate" technical or complex information. *See Kovel*, 296 F.2d at 921-22 (privilege applies only if the third party's services were "necessary, or at least highly useful, for the effective consultation between the client and the lawyer"); *Cote*, 456 F.2d at 144 (describing test as "whether the [third party's] services are a necessary aid to the rendering of effective legal services to the client"); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (finding that third party assistance must be "necessary to effectuate the client's consultation"). Indeed, the Second Circuit has described the third party's role as that of a "translator or interpreter" who serves to "improve the comprehension of the communications between attorney and client." *Ackert*, 169 F.3d at 139-40.[4]

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[3] For example, in tax cases where the client's attorney has brought in an accountant, courts have distinguished between clients seeking accounting, as opposed to legal, advice in determining whether the privilege extends to the accountant's materials. *Compare Adlman*, 68 F.3d at 1500 (proponent of privilege failed to sustain its burden of proof where client sought advice on probable tax consequences of a proposed restructuring and attorney admitted that he lacked the necessary expertise to assess the tax implications), *and United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (privilege inapplicable to appraiser's materials where client needed to submit appraisal to Internal Revenue Service to document value of charitable gift—"any communication related to the preparation. . . of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value of the [gift]"), *with United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (privilege held applicable where attorney provided advice on whether to file an amended tax return, an issue which "undoubtedly involved legal considerations which mathematical calculations alone would not provide"), *and United States v. El Paso Co.*, 682 F.2d 530, 534 (5th Cir. 1982) (suggesting that predicting the outcome of tax litigation where different interpretations of tax regulations are possible would be considered legal advice).

[4] Cases involving tax issues also provide examples of where courts have found that the assistance of a third party was necessary in this sense. *See, e.g., El Paso Co.*, 682 F.2d at 534 (attorney could not determine the outcome of potential litigation without accountant's analysis of client's contingent tax liabilities); *Cote*, 456 F.2d at 144 (attorney could not advise clients on whether to file amended returns without accountant's audit of clients' books and records).

In sum, whether Delek has demonstrated that the privilege applies in the instant case depends on (1) whether PSRG obtained the information addressed in the Report from Delek or, instead, gathered it itself, (2) whether Delek sought legal advice (such as advice regarding an issue of regulatory interpretation) rather than technical advice, and (3) whether Delek's attorneys needed PSRG to "improve" their comprehension of information provided by Delek so they could effectively provide legal advice to their client. After reviewing the Report *in camera* and making these determinations, the judge must assess whether the record establishes that the attorney-client privilege protects the Report in its entirety, in part, or not at all.[5] If the judge finds that the record is insufficient to make the requisite determinations, the privilege cannot apply. *See TRW*, 628 F.2d at 213 (holding that where the proponent of the privilege has not provided the court "with sufficient facts to state with reasonable certainty that the privilege applies, the burden is not met"). Accordingly, we direct the judge to reconsider this issue in a manner consistent with this opinion.[6]

SO ORDERED.

__/s/_____
Thomasina V. Rogers
Chairman

__/s/_____
Cynthia L. Attwood
Commissioner

Dated: July 11, 2011

[5] In denying Delek's motions, the judge found that alternative arguments made by the Secretary regarding the inapplicability of the attorney-client privilege to the Report were meritorious. These arguments, which the Secretary has also raised in her brief to the Commission, are based on the Secretary's contention that the Report must be disclosed because it is the PSM audit that Delek was required to complete in 2008 pursuant to 29 C.F.R. § 1910.119(o)(1). Delek, on the other hand, has averred in sworn affidavits by Delek's counsel and PSRG's CEO that the Report was not, and was never intended to be, the audit required by the PSM standard. We find that the record provides no basis at this time to question Delek's assertion, and, therefore, we have no basis to reach the Secretary's other arguments.

[6] We note that the subpoena that was the subject of Delek's motion to quash requests other documents from PSRG. Because these documents are not before us, we make no determination on whether PSRG must disclose those documents to the Secretary.

United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
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Atlanta, Georgia 30303-3104

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**ORDER**

After further review of all cases cited by both parties and additional legal arguments, respondent's motion for reconsideration and its motion for stay are DENIED.

SO ORDERED:

__/s/_____
**Judge Stephen J. Simko, Jr.**
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**Date: December 10, 2010**

This order has been sent to:

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