DJW/mat

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

DUANE EARL HEAVIN,

Plaintiff,

v. No. 02-2572-KHV-DJW

OWENS-CORNING FIBERGLASS,

Defendant.

## MEMORANDUM AND ORDER

Pending before the Court is Plaintiff's renewed Motion to Compel Production of Documents (doc. 83). For the reasons stated below, Plaintiff's Motion will be denied.

### Relevant Procedural Background

On October 15, 2003, Defendant submitted a privilege log to Plaintiff claiming 68 documents were protected from disclosure. On October 20, 2003, Plaintiff requested a more detailed privilege log and approximately eleven days later, Defendant served an amended privilege log and explanatory letter asserting various grounds for refusing to produce documents listed within the log. Plaintiff subsequently filed a Motion to Compel the documents at issue.

On February 3, 2004, this Court issued a Memorandum and Order requiring Defendant to prepare and submit to Plaintiff a Second Amended Privilege Log, and requiring Defendant to include (1) a description of the document; (2) date prepared; (3) date of document; (4) identity of the persons who prepared the document; (5) identity of the persons for whom the document was prepared and to whom the document and copies were directed; (6) purpose of preparing the document; (7) number of pages; (8) basis for withholding discovery of the document; and (9) any other pertinent information, including information regarding Crawford & Company.

In light of the Court's directive, Defendant reviewed those documents contained in its original privilege log and determined that 21 of the original 68 documents it previously claimed were privileged should be produced to Plaintiff. Defendant ultimately served a Second Amended Privilege Log and copies of the 21 non-privileged documents upon Plaintiff. As directed, Defendant also submitted to the Court for *in camera* review the 47 documents it maintains are protected.

Upon review of the Second Amended Privilege Log, *in camera* review of the documents referenced in such privilege log, and consideration of the arguments presented by counsel with regard to the Motion to Compel, the Court is now ready to rule.

## Discussion

### A. Work Product Protection

The Second Amended Privilege Log submitted by Defendant identifies each of the 47 documents as protected work product. As set forth in the Court's previous Memorandum and Order, to establish work product protection, a party must show that "(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party."[1]

Defendant claims each of the referenced documents were prepared in the course of adversarial litigation or in anticipation of a threat of adversarial litigation that was "real and imminent" (as opposed to materials that were prepared in an earlier and nonadversarial stage of the claims process for the purpose of determining whether there is coverage and whether the claim should be paid). Defendant further claims each of the 47 documents were prepared by or for Defendant or a representative of Defendant.

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[1] *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D. Kan. 2000) (citations omitted).

In support of these claims, Defendant submits the written contract between Defendant and Crawford & Company, which sets forth the terms and conditions of the agreement between Defendant and Crawford & Company with regard to handling Defendant's worker's compensation claims. Defendant also submits an affidavit prepared by Doug Healy ("Healy"), the Human Resources Leader within Defendant's Kansas City, Kansas plant. This evidence establishes that, for routine worker's compensation claims, where the occurrence of the injury and compensability were not in question, Crawford & Company had full authority to handle claims up to $15,000. In the event the claim was over $15,000, however, Crawford & Company would need to seek authority from the respective Owens Corning plant.

Healy's affidavit further establishes, for purposes of the pending Motion, that Crawford & Company would do an initial analysis on claims, and if it was determined that it was a routine claim, where the occurrence of the injury and compensability were not at issue, Crawford & Company had authority to handle those matters on its own. However, if initial review of the claim indicated that occurrence or extent of the injury were in question, such that litigation of the claim was likely, Crawford would refer such claims to outside counsel. Healy avers that this was routinely done in cases involving claims of respiratory injuries, where the occurrence, timing, extent, and compensability of any alleged injuries was always in question.

Healy further declares that, given the claim made by Mr. Heavin alleging hypersensitivity, general weakness and fatigue, with no known accident or injury and no indication that any accident occurred on Owens Corning's premises, it was readily apparent to Defendant and Crawford & Company that the claim would result in litigation. Accordingly, Healy states Miles Mustain of the law firm Mustain, Higgins, Kolich, Lysaught & Tomasic "was immediately retained" to serve as

counsel in the anticipated litigation. Although Healy does not identify the precise date of retention, documentation submitted to the Court indicates that on August 7, 1990, Mr. Mustain was directed by Defendant to undertake an investigation into Heavin's activities and former employment. The evidence further establishes that Mr. Mustain contemplated a discovery deposition of Mr. Heavin sooner rather than later.

Based on the arguments and evidence submitted, the Court is persuaded that the 47 documents identified in the Second Amended Privilege Log as protected by work product were prepared by or for Defendant or a representative of Defendant in anticipation of litigation. As a preliminary matter, the evidence establishes that Defendant contracted with Crawford & Company to handle its worker's compensation claims, and that the specific responsibilities and duties assigned to Crawford & Company in that role included assisting Defendant's counsel in the course of adversarial litigation and assisting Defendant's counsel when the threat of adversarial litigation was "real and imminent."

The evidence further establishes that due to the type of injury alleged by Plaintiff and the lack of information submitted in the Accident Report to support a causal connection between the injury and Defendant's workplace, Defendant hired an attorney to represent its interests in anticipation of a threat of adversarial litigation. The Court finds that, under the specific circumstances presented, the threat of litigation was "real and imminent."

B. Attorney-Client Privilege

Because the Court find all of the documents set forth in Defendant's Second Amended Privilege Log are protected from disclosure by the work product doctrine, the Court finds it unnecessary to address whether the attorney-client privilege attaches to those same documents.

C. Conclusion

In light of the above, it is hereby ordered that Plaintiff's renewed Motion to Compel Production of Documents (doc. 83) is denied.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this _____ day of October, 2004.

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties