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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

David Jewell,
Plaintiff,
v.

No. C 09-1669 JL

**ORDER DENYING MOTION FOR
PROTECTIVE ORDER (Docket # 19)**

Polar Tankers Inc, et al.
Defendants.

I. Introduction

This Court has original jurisdiction over this maritime personal injury case under the Jones Act, 46 U.S.C. §30104. All parties consented to this Court’s jurisdiction under 28 U.S.C. §636(c).

Defendants’ motion for protective order was initially submitted in a five-page joint statement by the parties but the Court ordered the parties to brief the matter fully, in light of the complexity and novelty of the legal issues. The parties submitted supplemental briefs and responses in response to the Court’s order and the matter came on for hearing. Lyle C. Cavin, Jr. appeared for Plaintiff and Max Kelley, appeared for Defendants. After the hearing, Defendant filed under seal a copy of the IIR and a Supplemental Declaration by Defendants’ in-house counsel, Katharine F. Newman. The Court carefully considered the briefing and arguments by counsel and the post-hearing submissions and hereby denies

1 the motion. Defendants shall produce to Plaintiffs the person most knowledgeable (“PMK”)
2 with regard to post accident root cause analysis and any documentation of corrective action
3 prior to and after Plaintiff’s injury. In connection with the deposition, Defendants shall also
4 produce any and all documents drafted by the PMK or others relating to post accident root
5 cause analysis. Compliance shall be due within ten days of issuance of this order.

6 **II. Analysis**

7 **A. Neither the U.S. Supreme Court nor the U.S. Court of Appeals for the**
8 **Ninth Circuit recognize the self critical analysis privilege**

9 Defendant claims that the Incident Investigation Report, (“IIR”) prepared after
10 the accident is protected by the “self-critical analysis” privilege (“SCA”), Defendant
11 relies on *Dowling v American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992) as the
12 basis for the existence of the privilege in the 9th Circuit, as well as for their position that the
13 privilege applies to their IIR.

14 However, *Dowling* does not stand for the creation of such a privilege in the Ninth
15 Circuit, but acknowledges that presently there is no such privilege. The court in *Dowling*
16 held that “*Even if such a privilege exists, the justifications for it do not support its application*
17 *to voluntary routine safety reviews.” Id.* (Emphasis added.) A more recent Ninth Circuit
18 case holds that the privilege has never been recognized by that court or any other court in
19 Oregon or California. *Union Pacific Railroad Company v Brent Mower*, 219 F.3d 1069 (9th
20 Cir. 2000).

21 Furthermore, when faced with a claim of the privilege, the court in *Dowling* refused
22 to apply it, citing the US Supreme Court’s longstanding view that the policy favoring open
23 discovery requires privileges must be “strictly construed.” The US Supreme Court
24 further held that the privilege is not authorized by Congress and not “sufficiently
25 important to outweigh the need for probative evidence.” *University of PA v EEOC*, 493
26 U.S. 182, 189 (1990).

27 There is no basis for applying the privilege in this jurisdiction. There is a “well
28 recognized federal policy of promoting broad pre-trial discovery...” *Boyd v City of New*

1 York, 1987 WL 6915 at 1 (S.D.N.Y Feb.11, 1987). Further, privileges are “not lightly
2 created, nor expansively construed, for they are in derogation of the search for truth.” *U.S.*
3 *v Nixon*, 418 U.S. 683, 710 (1974). While some Circuits have recognized the existence of a
4 self critical analysis privilege, the majority have declined to do so. The Ninth Circuit has
5 never recognized it and the US Supreme Court has disavowed it. The state courts in
6 California have similarly rejected its existence. There is no reason for this court to grant
7 such extraordinary relief to Defendants and create the privilege in the Ninth Circuit.

8 **B. The IIR is not subject to the attorney-client privilege.**

9 Typically, an eight-part test determines whether information is covered by the
10 attorney-client privilege: (1) Where legal advice of any kind is sought (2) from a
11 professional legal adviser in his capacity as such, (3) the communications relating to that
12 purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently
13 protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be
14 waived. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n. 2 (9th Cir.1992) The party
15 asserting the privilege bears the burden of proving each essential element. *United States v.*
16 *Munoz*, 233 F.3d 1117, 1128 (9th Cir.2000).

17 In a case concerning a claim of attorney-client privilege for an internal corporate
18 investigation, the court of appeals very recently reaffirmed the burden on the party
19 asserting attorney-client privilege and the strict limits on its scope and application. The
20 court in *U.S. v. Ruehle* held that the privilege should be strictly construed and limited in
21 scope. In particular, the mere submission of a report to an attorney for review does not
22 render the communication privileged. *U.S. v. Ruehle*, 583 F.3d 600, 607 -608 (9th Cir.
23 2009).

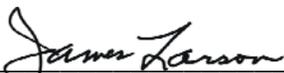
24 This Court, with these principles in mind, carefully considered the parties’ briefing
25 and arguments on this issue and reviewed the IIR, and Supplemental Declaration of
26 Defendant’s in-house counsel, Katharine F. Newman, both submitted under seal. The Court
27 concludes after its review that the attorney-client privilege does not apply to the IIR in
28 question.

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III. Conclusion and Order

For the reasons stated above, the court hereby denies Defendants' Motion for a Protective Order. Defendants shall produce to Plaintiff the person most knowledgeable ("PMK") with regard to post accident root cause analysis and any documentation of corrective action prior to and after Plaintiff's injury. In connection with the deposition, Defendants shall also produce any and all documents drafted by the PMK or others relating to post accident root cause analysis. Compliance shall be due within ten days of issuance of this order.

DATED: April 8, 2010



James Larson
United States Magistrate Judge

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