

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RONALD E. MELHORN,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 98-CV-6687
NEW JERSEY TRANSIT RAIL	:	
OPERATIONS, INC.,	:	
Defendant.	:	

**MEMORANDUM**

**GREEN, S.J.**

**May , 2001**

Presently before the court are Plaintiff's Motion to Compel Production of an Unredacted Copy of Defendant's Supervisor's Investigation Report of Personal Injury, and Defendant's Motion to Resettle this court's Order dated April 5, 2001. For the reasons stated below, both motions will be granted.

**I. FACTUAL HISTORY**

On or about August 28, 1998, Plaintiff Ronald E. Melhorn allegedly suffered injuries during the course and scope of his employment as a locomotive engineer with Defendant New Jersey Transit Rail Operations, Inc. (See Compl. ¶ 5.) Plaintiff avers that he sustained a cervical herniated disc and impingement syndrome of the right shoulder and developed a depressive disorder after a train on which he was working derailed during shoving operations. (See Pl.'s Mot. to Compel Unredacted Copy of Def.'s Supervisor's Investigation Report of Personal Injury, ¶ 2.) As a result of his injuries, Plaintiff allegedly remains permanently disabled from resuming any form of employment. (See id. ¶ 4.) On December 24, 1998, Plaintiff instituted this action against Defendant under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. (FELA); Federal Safety Appliance Act, 45 U.S.C.A. §§ 1, et seq., recodified in 49 U.S.C.A. § 20301, et al.

## II. DISCUSSION

### A. *Plaintiff's Motion to Compel Production of an Unredacted Copy of Defendant's Supervisor's Investigation Report of Personal Injury*

Pursuant to Fed. R. Civ. P. 26(b)(1), a party may discover any relevant matter which is “not privileged.” Fed. R. Evid. 501 provides the framework for determining whether information is “privileged.” See Robinson v. Magovern, 83 F.R.D. 79, 84 (W.D. Pa. 1979). Under Fed. R. Evid. 501, the federal common law of privilege applies to federal question cases.<sup>1</sup> This court has employed the “critical self-analysis” privilege where public policy outweighs the needs of litigants and the judicial system for access to information relevant to litigation. See, e.g., Granger v. Nat'l Passenger Corp., 116 F.R.D. 507 (E.D. Pa. 1987); Webb v. Westinghouse Electric Corp., 81 F.R.D. 431 (E.D. Pa. 1978). The “critical self-analysis” privilege requires that:

- (1) The material must have been prepared for mandatory government reports or for a critical self-analysis and undertaken by the party seeking protection;
- (2) The privilege extends only to subjective, evaluative materials, but not to objective data in reports; and
- (3) The policy favoring exclusion must clearly outweigh plaintiff's need for the documents.

Clark v. Pennsylvania Power & Light Co., Inc., 1999 WL 225888, at \*2 (E.D. Pa., April 14, 1999) (citing cases). The doctrine is designed to encourage confidential self-analysis and self-criticism.

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<sup>1</sup>Fed. R. Evid. 501 provides in relevant part:  
Except as otherwise required by the Constitution of the United States or provided by Acts of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.

Plaintiff moves to compel the production of an unredacted copy of Defendant's supervisor's investigation report of personal injury ("Report"). Specifically, Plaintiff seeks to discover text of a section entitled "What Steps Were Taken to Prevent Similar Injuries." Plaintiff argues that the unredacted Report is discoverable on two grounds: (1) the Report was created in the normal course of business and is therefore unprotected by the work product doctrine; and (2) the Report fails to meet the requirements for protection under the "critical self-analysis" privilege. Defendant concedes that the Report was prepared in the normal course of business. However, Defendant argues that the portion Plaintiff seeks is protected by the "critical self-analysis" privilege. Defendant contends that the redacted portion of the Report is "subjective and evaluative, not objective." (Def.'s Resp. at 8.)

The instant motion was deferred pending an in camera inspection of the unredacted Report. (See Order, April 5, 2001.) Upon review, I find that the redacted portion of the Report is discoverable and does not fall under the "critical self-analysis" privilege, because (1) the information contained therein appears to be objective, rather than subjective; and (2) the public policy favoring exclusion does not clearly outweigh Plaintiff's need to discover the redacted portion of the Report.<sup>2</sup> Thus, Plaintiff's Motion to Compel Production of an Unredacted Copy of Defendant's Supervisor's Investigation Report of Personal Injury will be granted.

***B. Defendant's Motion to Resettle the Order dated April 5, 2001***

By Order of this Court, dated April 5, 2001, Defendant's Motion to Compel the Psychiatric Examination of Plaintiff was granted. (See Order, April 5, 2001.) Under said Order, Plaintiff was required to "submit to a psychiatric examination by a psychiatrist chosen by

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<sup>2</sup>The court reserves ruling on the admissibility of the Report at trial.

Defendant by or before April 27, 2001.” (Order, April 5, 2001.)

Defendant now moves to resettle the April 5, 2001 Order. Defendant asserts that it did not receive the Order until April 20, 2001 and, as a result, was unable to comply with the deadlines stated therein. Specifically, Defendant states that it was unable to schedule an independent psychiatric examination of Plaintiff by April 27, 2001. Defendant requests a resettlement of the Order to permit an independent psychiatric examination of Plaintiff by Dr. Harvey Hammer, which is scheduled for June 27, 2001.<sup>3</sup> Although the specific reason for the delay and receipt of the Order is unknown, Defendant’s attorney states that her offices relocated on April 1, 2001 and her telephone system and facsimile were not fully operational until April 9, 2001. Plaintiff opposes Defendant’s motion. Plaintiff contends that Defendant’s failure to abide by the Order was an intentional obfuscation of the discovery process. Plaintiff states that Defendant’s non-compliance with the Order results in delay which is unduly prejudicial.

The court accepts Defendant’s representation that it did not receive the Order for timely compliance with its deadlines. Based on the aforementioned representation and Defendant’s assertion that a psychiatric examination of Plaintiff has been scheduled for June 27, 2001, a resettlement of the April 5, 2001 Order is appropriate and does not unduly prejudice Plaintiff. Thus, Defendant may conduct a psychiatric examination of Plaintiff by or before June 27, 2001. The April 5, 2001 Order will be resettled accordingly.

An appropriate Order follows.

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<sup>3</sup>Defendant stated in its motion that Plaintiff’s examination was scheduled for July 17, 2001. Defendant subsequently informed the court that the examination was rescheduled for June 27, 2001.

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NEW JERSEY TRANSIT RAIL	:	
OPERATIONS, INC.,	:	
Defendant.	:	

**ORDER**

**AND NOW**, this        day of May, 2001, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Compel Production of an Unredacted Copy of Defendant's Supervisor's Investigation Report of Personal Injury is **GRANTED** and Defendant must produce said document within ten (10) days of this Order;
2. Defendant's Motion to Resettle the April 5, 2001 Order is **GRANTED** and Plaintiff must submit to a psychiatric examination by a psychiatrist chosen by Defendant by or before June 27, 2001.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.