

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Minnesota Department of Labor and Industry,

Complainant,

**ORDER REGARDING
DEPARTMENT'S MOTION TO
COMPEL DISCOVERY**

v.

Building Restoration Corporation,

Respondent.

This matter is pending before Administrative Law Judge Barbara J. Case pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings (OAH) on October 18, 2013.

Eric J. Beecher, Assistant Attorney General, represents the Minnesota Department of Labor and Industry (Department). Kerry Raymond, Best & Flanagan L.L.P., represents Building Restoration Corporation (Respondent).

On May 15, 2015, the Department filed a Motion to Compel Discovery. On June 1, 2015, Respondent filed a response to the motion, and the record was closed.

Based upon the motion and the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The Department's Motion and the Respondent's Response provided a full and complete record on which a proper decision could be made without a hearing, therefore the Department's request for a hearing on its Motion is **DENIED**.

2. The Department's request that Respondent supplement responses to Document Requests 3, 10, and 12 is **GRANTED**.

3. The Department's request that Respondent provide answers to the additional discovery requests submitted with its Motion to Compel Discovery as Exhibit 10 to the Affidavit of Eric Beecher is **GRANTED**.

4. If experts from either party wish to use the additional discovery provided pursuant to this Order as part of their opinions and analysis, their expert reports must be updated by August 7, 2015.

Dated: June 12, 2015

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

I. Factual Background

On October 17, 2013, the Department issued a Notice and Order for Hearing to initiate this contested case, which stems from Respondent's alleged violations of the Minnesota Occupational Safety and Health Act on a worksite in Eagan, Minnesota, in October 2012.¹ The Department alleges two of Respondent's employees cutting mortar during a tuck-pointing operation were exposed to crystalline silica in excess of the permissible exposure limit because feasible administrative or engineering controls were not implemented to reduce employee exposure.² The Department also alleges Respondent's employees were not provided with right-to-know training at the required frequency.³ Based on the alleged violations, the Department assessed Respondent penalty fines.⁴ Respondent appealed the penalty, denying the allegations and asserting multiple defenses, including that the allegations are barred "as a result of infeasibility of compliance."⁵

After commencement of this contested case, a deadline for completing all discovery was originally set for February 10, 2014,⁶ and later moved to April 4, 2014.⁷ On June 10, 2013, the Department served its First Set of Interrogatories and Requests for Production of Documents, including the following document requests:⁸

Request No. 3: Produce all documents, communications, photographs, videos, and all other evidence relating in any way to the Inspection, Citation, and/or your affirmative defenses.

Request No. 10: Produce all memos, emails, notes, directives, and other documents or communications that regard or reference employee safety –

¹ NOTICE AND ORDER FOR HEARING at Ex. 2 (October 17, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at Ex. 3.

⁶ FIRST PREHEARING ORDER at 1 (December 4, 2013).

⁷ THIRD PREHEARING ORDER at 1 (March 3, 2014).

⁸ Affidavit of Eric Beecher (Beecher Aff.), Ex. 3 at 10-12.

including but not limited to the use of administrative or engineering controls to prevent employee exposure to crystalline silica – during tuck-pointing operations.

Request No. 12: Produce all documents and/or communications relating to your annual or more frequent evaluations of employees to ensure compliance with OSHA regulations and your procedures, policies, rules, and requirements relating to or regarding employee safety – including but not limited to the use of administrative or engineering controls to prevent employee exposure to crystalline silica – during tuck-pointing operations.

On August 8, 2013, Respondent provided responses to the Department's first set of discovery requests.⁹ Within its responses, Respondent discussed its affirmative defense of infeasibility related to the use of vacuum-equipped tuck-pointing tools.¹⁰ However, Respondent did not produce any documents regarding the use or infeasibility of vacuum-equipped tuck-pointing tools. On April 25, 2014, Respondent served responses to the Department's second set of discovery requests.¹¹ Within its responses, Respondent admitted to owning vacuum-equipped tuck-pointing tools but claimed an inability to use them in all circumstances.¹²

In January 2015, the Department discovered a document produced by Respondent in a separate contested case proceeding containing photographs of Respondent's employees using vacuum-equipped tuck-pointing tools at a different worksite in Eagan, Minnesota, in September 2013.¹³ During a telephone conference on March 12, 2015, the Department informed Respondent and the Administrative Law Judge that a Motion to Compel Discovery would be filed based on discovery of the photographs in the unrelated contested case proceeding.¹⁴

On May 15, 2015, the Department filed a Motion to Compel Discovery, seeking an order requiring Respondent to supplement its responses to Document Requests 3, 10, and 12, as well as respond to additional discovery requests included with the motion as Exhibit 10 to the Eric Beecher Affidavit.¹⁵ The Department also requested permission for its expert witnesses to testify regarding the additional discovery without updating their already filed expert reports, or in the alternative, that time be allocated for experts to review the additional discovery and amend their reports.¹⁶

II. Legal Standard for Motion to Compel Discovery

The Minnesota Rules of Civil Procedure permit discovery “upon a showing of good cause and proportionality” of “any matter relevant to the subject matter involved in

⁹ Beecher Aff., Exs. 4-5.

¹⁰ Beecher Aff., Ex. 4 at 4, 7-8.

¹¹ Beecher Aff., Ex. 7.

¹² Beecher Aff., Ex. 7 at 7.

¹³ Beecher Aff., Ex. 9 at 10, 12.

¹⁴ Beecher Aff. ¶ 10.

¹⁵ Memorandum of Law Supporting Department's Motion to Compel Discovery (Dept. Mem.) at 1.

¹⁶ Dept. Mem. at 9-10.

the action.”¹⁷ The discovery rules are given “broad and liberal treatment” in order to ensure that litigants have complete access to the facts and can avoid surprises at the hearing or trial.¹⁸ “Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁹ Regardless of relevancy, however, requests for discovery will not be granted if “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.”²⁰

The OAH rules allow any means of discovery available under the Rules of Civil Procedure for the District Courts of Minnesota in a contested case hearing.²¹ The party seeking the discovery has the burden of proof to show the discovery is needed for the proper presentation of the party’s case, not for purposes of delay, and the issues or amounts in controversy are significant enough to warrant the discovery.²² The party opposing the discovery may raise any objections available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.²³

In administrative proceedings, information sought via discovery is considered to be relevant if the information “has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment.”²⁴ Administrative law judges at the OAH “have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts.”²⁵ However, the parties will not be allowed to engage in mere “fishing expeditions” in hopes of supporting their claims or defenses.²⁶

III. Legal Arguments

In its Motion to Compel, the Department argues that the additional discovery sought from Respondent regarding use of vacuum-equipped tuck-pointing equipment at another unrelated worksite should be produced as part of this case for several reasons. First, the Department claims the additional discovery is relevant because Respondent “raised the affirmative defense of infeasibility of compliance and has made clear that its defense to the silica-exposure citation is predicated on the notion” that the “equipment is not feasible” due to cost and safety concerns.²⁷ The Department concedes that

¹⁷ Minn. R. Civ. P. 26.02(b).

¹⁸ *Jeppesen v. Swanson*, 68 N.W.2d 649, 651 (Minn. 1955) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

¹⁹ Minn. R. Civ. P. 26.02(b).

²⁰ Minn. R. Civ. P. 26.02(b)(2).

²¹ Minn. R. 1400.6700 subp. 2 (2013).

²² *Id.*

²³ *Id.*

²⁴ G. Beck *et al.*, *Minnesota Administrative Procedure* § 9.2 (2d ed. 1998).

²⁵ *Id.* at § 8.5.2.

²⁶ *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. Ct. App. 1984).

²⁷ Dept. Mem. at 6.

Respondent could not have produced the photographs discovered as part of the separate unrelated contested case proceeding in this case, but the Department points to Respondent's continuing obligation to update and amend discovery in this case.²⁸ Second, the Department argues that the additional discovery is needed for the proper presentation of its case, is not for the purposes of delay, and is warranted by the significant issues in controversy.²⁹ The Department claims Respondent has "repeatedly indicated its intention to present evidence and argument that vacuum use is economically untenable and incompatible with swing stage scaffolding and/or tuck-pointing operations" and the Department "has a right to discover any and all evidence that counters or calls into question" Respondent's position.³⁰ Accordingly, the Department asks that its motion be granted.

Respondent opposes the Department's Motion to Compel Discovery, disputing "any contention that providing a report from an unrelated job site and obtained in another action against [it]" raises a legitimate claim by the Department that it produced "insufficient" discovery responses in this case.³¹ Respondent claims it produced all responsive documents directly relevant "to the Edina Towers Project that is the subject of this action" and no further supplementation of the Department's discovery requests is necessary.³² Respondent believes the Department's additional discovery requests are "untimely" and "duplicative" of information already provided, including Respondent's previous admission in this case that it "has vacuums" and "has used the vacuums" on other worksites.³³ Finally, Respondent argues that the Department's request to modify the opinions of its experts without notice should be denied because "the experts were not disclosed in a manner designed for one party to refute the opinions of the opposing experts," and the Department "is not entitled to surprise [Respondent at the hearing] with new expert opinions."³⁴ Thus, Respondent asks that the Department's motion be denied in its entirety.

IV. Legal Analysis

The central issue is whether discovery related to use of vacuum-equipped tuck-pointing equipment at a worksite other than the one involved in this case is relevant enough to warrant compelled production. The Department claims the additional discovery is relevant because Respondent "raised the affirmative defense of infeasibility of compliance and has made clear that its defense to the silica-exposure citation is predicated on the notion" that the "equipment is not feasible" due to cost and safety concerns.³⁵ The Department further claims Respondent has "repeatedly indicated its intention to present evidence and argument that vacuum use is economically untenable and incompatible with swing stage scaffolding and/or tuck-pointing operations" and the

²⁸ Dept. Mem. at 7.

²⁹ Dept. Mem. at 8-10.

³⁰ Dept. Mem. at 8.

³¹ Respondent's Response to the Department's Motion to Compel Discovery (Resp. Mem.) at 3.

³² Resp. Mem. at 4.

³³ Resp. Mem. at 5.

³⁴ Resp. Mem. at 6.

³⁵ Dept. Mem. at 6

Department “has a right to discover any and all evidence that counters or calls into question” Respondent’s position.³⁶ Respondent seeks to limit discovery available in this case to responsive documents directly relevant “to the Edina Towers Project that is the subject of this action” only.³⁷ Respondent believes the Department’s additional discovery requests are “untimely” and “duplicative” of information already provided, including Respondent’s previous admission in this case that it “has vacuums” and “has used the vacuums” on other worksites.³⁸

The Administrative Law Judge concludes that the Department’s request for additional discovery is relevant and legitimate. “Relevant information sought [during discovery] need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”³⁹ Certainly, Respondent’s use of vacuum-equipped tuck-pointing equipment at other worksites appears “reasonably calculated to lead to the discovery of admissible evidence” in this case where Respondent has expressly raised the affirmative defense of “infeasibility.” In response to the Department’s first set of discovery requests, Respondent discussed its affirmative defense of infeasibility related to the use of vacuum-equipped tuck-pointing tools, but did not produce any related documents.⁴⁰ In response to the Department’s second set of discovery requests, Respondent admitted to owning vacuum-equipped tuck-pointing tools but claimed an inability to use them in all circumstances.⁴¹ In essence, Respondent’s affirmative defense has opened the door of relevancy beyond evidence limited solely to the worksite involved in this matter. Therefore, the Department’s request for more information related to Respondent’s use of vacuum-equipped tuck-pointing equipment – specifically responses to Document Requests 3, 10, and 12, as well as responses to additional discovery requests included with the motion as Exhibit 10 to the Eric Beecher Affidavit – will be granted.

However, the Administrative Law Judge agrees with Respondent’s contention that “the experts were not disclosed in a manner designed for one party to refute the opinions of the opposing experts,” and the Department “is not entitled to surprise [Respondent at the hearing] with new expert opinions.”⁴² Thus, if experts from either party wish to use the additional discovery produced, their reports must be updated.

V. Conclusion

For the foregoing reasons, the Department’s request that Respondent supplement responses to Document Requests 3, 10, and 12, as well as provide answers to the additional discovery requests submitted with its Motion to Compel Discovery as Exhibit 10 to the Affidavit of Eric Beecher is GRANTED. If experts from

³⁶ Dept. Mem. at 8.

³⁷ Resp. Mem. at 4.

³⁸ Resp. Mem. at 5.

³⁹ Minn. R. Civ. P. 26.02(b).

⁴⁰ Beecher Aff., Ex. 4 at 4, 7-8.

⁴¹ Beecher Aff., Ex. 7 at 7.

⁴² Resp. Mem. at 6.

either party wish to use the additional discovery provided pursuant to this Order as part of their opinions and analysis, their expert reports must be updated by August 7, 2015.

B. J. C.