12-1901-16863-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner, Complainant, vs. Maguire Iron, Inc, Respondent.	**PROTECTIVE ORDER**

This matter is before Administrative Law Judge Steve M. Mihalchick on Respondent's Motion to Compel Discovery that was filed on January 30, 2006. The Motion requests that the Minnesota Department of Labor and Industry, Occupational Safety and Health Division (Department or MNOSH), produce a full and unredacted copy of its investigative file related to a workplace fatal injury accident that occurred at one of Respondent's work sites on August 31, 2004.

Oral argument on the Motion was heard by telephone conference on February 6, 2006. Rory H. Foley, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department. Edward Q. Cassidy, Felhaber, Larson, Fenlon & Vogt, 444 Cedar Street, Suite 2100, St. Paul, MN 55101-2138, appeared on behalf of Respondent. At that time, the Administrative Law Judge ordered that unredacted copies of the documents be provided for *in camera* review by the Administrative Law Judge. Those copies were provided by the Department on February 13 and 17, 2006

The Administrative Law Judge has conducted an *in camera* review of the redacted and unredacted documents at issue. Based on the files herein, and for the reasons stated in the accompanying memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. MNOSH shall forthwith produce to Respondent's counsel unredacted copies of the documents requested.

2. MNOSH's response shall include the names of every employee and other individuals whose names appears in the original, unredacted versions of the documents produced.

3. Disclosure of the names of each such employee shall be made only to the following persons, and only to the extent necessary for that person to prepare for or participate in the hearing of this matter, related discovery, and related settlement negotiations:

4. The Administrative Law Judge and other employees of the Office of Administrative Hearings who may be involved in further proceedings in this matter;

5. The parties to the above-entitled matter, their counsel, and counsel's legal assistants and other staff;

6. Court reporters and their employees; and

7. Persons consulted or retained as witnesses in this matter.

8. Recipients of the employees' names and data shall not disclose that private information to any other person to whom disclosure is not authorized by the terms of this Order, nor use the information for purposes other than hearing, hearing preparation, or settlement negotiations related to this matter.

9. Any recipient of the employees' names, by accepting receipt thereof, agrees to be subject to the jurisdiction of the Administrative Law Judge in connection with any proceeding or hearing relating to that information and this Order, including but not limited to, any proceeding relating to enforcement of this Order.

10. There shall be no reproduction of the employees' names and data disclosed pursuant to this Order, except that copies, excerpts, or summaries may be shown or given to those authorized to receive such information pursuant to this Order.

11. Upon conclusion of this matter, counsel for Respondent shall:

12. Return all documents containing the information that is the subject of this Order to the Department's counsel.

13. Provide to the Department's counsel a complete and accurate list of the name, employer and employment position (if applicable) of each person to whom the private information was disclosed.

14. This Protective Order does not alter the classification of data under Minn. Stat. § 182.659, subd. 8, (that the identity of individuals who provide data to the Department as part of an OSHA investigation is private data under to the

Minnesota Government Data Practices Act) and does not constitute a waiver of the Department's ability to invoke and claim the benefit of Minn. Stat. §§ 175.27, 182.659, subd. 8, or 595.02, subd. 1(e), in the future.

Dated: March 8, 2006

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Background

Following its investigation, MNOSH issued citations and assessed penalties of $93,000 to Maguire Iron for violations it alleges existed at the worksite. Maguire Iron appealed. In discovery MNOSH provided Maguire Iron with redacted copies of certain documents, but Maguire Iron believes that access to the unredacted copies of those documents is necessary to prepare for the contested case hearing.

MNOSH opposed Maguire Iron's motion on the basis that the information is classified by statute as confidential or protected nonpublic data and may not be disclosed. MNOSH claims that it redacted only the names of individuals employed by Maguire Iron on August 31, 2004, who gave statements to MNOSH investigators, as required by Minn. Stat. § 182.659, subd. 8. MNOSH has provided Maguire Iron with a list of individuals that were expected to be called as witnesses at the hearing.

The identity of individuals who make a report or provide information to MNOSH is classified as private data on individuals.[1] However, when the protected data would ordinarily be discoverable in the course of a judicial or administrative proceeding, the party seeking disclosure may seek access to the data before the appropriate administrative law judge. The administrative law judge shall first determine whether the data are discoverable, and, if so, "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data."[2]

[1] Minn. Stat. § 181.932, subd. 2.
[2] Minn. Stat. § 13.03, subd. 6.

In making the decision the administrative law judge shall consider whether notice to the data subject is warranted, and, if so, what type of notice is appropriate.[3]

The discovery standard is liberal:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[4]

In this case, the information that Maguire Iron seeks is discoverable since it is the information that MNOSH relied upon to issue the citations and penalties that have been appealed. Since the requested data is discoverable, it is necessary to balance the benefit to the requesting party with the privacy interests of the data subjects.

Data Reviewed

MNOSHA supplied the Administrative Law Judge with the redacted and unredacted versions of documents for review. They include:

1. Handwritten notes, dated October 11, 2004, and August 31, 2004.

2. A list of persons who attended Safety Meetings (4 pages), and materials apparently presented at one or more meetings (22 pages).

3. A U.S. Department of Labor Investigation Summary (1 page). The redacted information is the names of the three injured employees involved in the incident on August 30, 2004.

4. Interview Statement of employee taken by Bob Darling, September 9, 2004, (26 pages).

5. Inspection Report, dated November 22, 2004.

6. Interview Statement of employee, September 9, 2004, at hospital (3 typed pages).

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[3] *Id.*
[4] Minn. R. Civ. P. 26.02 (a); see also Minn. R. 1400.6700.

Handwritten Notes

The handwritten contemporaneous notes reflect information from interviews and were likely relied upon by the investigator to complete his report. Names of persons providing the information and the names of persons who were working on the job site were all redacted. The names of people other than those providing information at the time are not protected by the referenced statutes. The fact that they are employees or may have themselves provided information to the Department at some other time does not make their names private on these notes.

The privacy interests of people responding to questions from the investigator must be considered. They well may be subject to retaliation by Maguire Iron. Nonetheless, the identity of witnesses to the incident is already known by Maguire Iron and Maguire Iron knows that retaliation is prohibited by law. Balancing these interests, the Administrative Law Judge concludes that Maguire Iron should have the opportunity to review the unredacted version in order to compare the notes to the inspection report.

Safety Meeting Attendance

There is no apparent basis for redacting the names of persons who attended safety meetings on February 19, 2004, February 20, 2003, and February 7, 2002, since these are company records that were apparently turned over to MNOSH by the company. Once again, these names are not the names of persons who provided information to the Department. It is possible that the Department interviewed all these people at some point. Even if that is the case, the fact that their names appear on some list or in some other context does not make their names private. Moreover, releasing them would not appear to present any risk to the employees who attended the training since their identities and attendance are already known to the company.

U.S. Department of Labor Investigation Summary

The only redacted information is the names of the three employees injured at the job site. This information is already known to Maguire Iron. Nothing in the document is information provided to the Department by an individual and nothing in the report indicates who provided the information to the US Department of Labor. There is no apparent reason for not providing the unredacted version to assure Maguire Iron that there is no discrepancy in the MNOSH records.

Employee Statements Taken September 9, 2004.

MNOSH has redacted information from the interview statements that could identify the person from whom the statement was taken, and also the names mentioned by that employee. Again, Minn. Stat. § 181.932 protects the disclosure of the employee making the report, but there is no apparent basis for redacting the names of other employees who may be mentioned in the

statement, except that the references reinforce the identity of the person who gave the statement. Minnesota Stat. § 175.27 may prohibit disclosure of the names of any persons supplying information to MNOSH, but it does not limit the right to disclose the names of others mentioned by that individual.

The identity of the individuals who gave the statements should be clear to Maguire Iron from the information provided in the redacted versions because it is familiar with the work, the work site, and the work crews. However, the classification as "private" also means that others who are not familiar with the employees at the work site do not access to the information about that individual. On balance, Maguire Iron may benefit from reviewing the unredacted version to assure that there are no inconsistencies in the witnesses' statements or information that may relate to the citations. Although it is reasonable to retain the classification of the data as private, there is no apparent harm from releasing the full version to Maguire Iron. The employees are protected from retaliation, and his identity is surely known to the company.

Inspection Report

There appears to be only one page of the Inspection Report that has redacted information, but the unredacted version of that page was not included in the submitted material. It appears from the redacted version to include the names of individuals were interviewed. Since the interviews provided much of the basis for the report, Maguire Iron should be provided with the unredacted list. Once again, it is likely that the employees are aware that Maguire Iron knows their identities, and the employees are protected from retaliation. The document should remain classified as private to assure that its access by third parties is limited, but Maguire Iron should have the opportunity to review the list in preparation to defend the MNOSH citations.

Police Reports

Although redacted police reports are referenced in Maguire Iron's submission, no redacted or unredacted copies were provided to the Administrative Law Judge. It is unclear what basis MNOSH would have for redacting information from the police reports prepared by Officer VanLeeuwe and Officer Bresson. Police reports are ordinarily public documents, and their collection into the MNOSH file does not necessarily alter the classification of the data. Under the Government Data Practices Act, data received by MNOSH would ordinarily retain the classification that the data was given by the providing agency.[5] They do not become private data because they contain the name of an employee the Department interviewed at some point. The unredacted versions must be provided.

S.M.M.

[5] *See* Minn. Stat. § 13.03, subd. 4 (c).