

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner,
Department of Labor and Industry,

Commissioner,

vs.

**ORDER ON MOTIONS
IN LIMINE**

Building Restoration Corporation,

Respondent.

This matter came before Administrative Law Judge Kathleen D. Sheehy on the Department of Labor and Industry's Motion *in Limine* to Permit Telephone Testimony, dated December 2, 2008, and the Respondent's Motion *in Limine* to Exclude Exhibits, dated December 4, 2008. The motion record closed on December 15, 2008, upon receipt of the last responsive memorandum.

Jackson Evans, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared for the Department of Labor and Industry (Department). Timothy Sullivan, Best & Flanagan, LLP, Suite 4000, 225 South 6th Street, Minneapolis, MN 55402, appeared for Building Restoration Corporation (Respondent).

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

1. The Department's Motion *in Limine* to Permit Telephone Testimony is GRANTED; and
2. The Respondent's Motion *in Limine* to Exclude Exhibits is GRANTED in part and DENIED in part, as more fully explained in the attached Memorandum.

Dated: December 23, 2008

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Respondent is an employer engaged in the business of tuckpointing. On April 28, 2006, the Department conducted an occupational safety and health inspection of the Respondent's workplace that involved air sampling and the collection of respirable dust. The Department sent the samples to Data Chem Laboratories in Salt Lake City, Utah, for analysis of the quartz silica content. Data Chem has a contract with the State of Minnesota to perform this type of analysis. Data Chem employees performed the analysis and issued a report dated May 11, 2006.

The Department subsequently issued three Citations and Notifications of Penalty, alleging that (1) employees were exposed to airborne contaminants above permissible levels, in violation of 29 C.F.R. § 1926.55(a); (2) the employer did not establish and maintain an appropriate respiratory protection program, in violation of 29 C.F.R. § 1910.134(a)(2); and the employer did not implement feasible administrative or engineering controls to reduce employee exposure to crystalline quartz, in violation of 29 C.F.R. § 1926.55(b). The Department characterized all three violations as serious, proposed a total penalty of \$1,200, and required the Respondent to abate the violations by June 29, 2006. The Respondent contests the violations, the seriousness of the violations, the abatement dates, and the proposed penalty.¹ The hearing is scheduled to take place on January 26-27, 2009.

Motion to Permit Telephone Testimony

The Department has filed a motion *in limine* seeking permission to obtain the testimony of two witnesses by telephone. The witnesses are Paul Megerdichian and Peter Steen, employees of Data Chem in Salt Lake City, who performed the analysis of the air samples in this case. The purpose of calling these witnesses is to provide foundation for and to further explain the results documented in their report dated May 11, 2006. In proposing to take their testimony by telephone, the Department seeks to avoid the substantial travel expense associated with presenting their testimony in person at the OAH offices.

The Respondent objects, maintaining that telephone testimony is inherently defective because the fact finder cannot observe the demeanor of witnesses, and cross-examination is made less effective by distance and lack of in-person contact. The Respondent also argues that it has the right to confront any and all witnesses against it and that its confrontation rights are impaired where testimony is taken by telephone.

The Respondent cites Minn. R. Civ. P. 43.01 and cases based thereon for the proposition that allowing one party to use telephone testimony to provide

¹ Notice and Order for Pre-Hearing Conference and attached Complaint (Feb. 26, 2008).

foundation for records is an abuse of discretion.² Rule 43.01, which is applicable to the district courts of Minnesota, requires that trial testimony be taken orally in open court, unless otherwise provided by statute or by the rules of civil procedure.³

The statutes and rules applicable to administrative proceedings contain no similar requirement that testimony be taken in “open court.” Agencies are permitted to admit and give probative effect to evidence, including hearsay, “which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs.”⁴ All oral testimony at a hearing must be taken under oath or affirmation,⁵ and every party has the “right of cross-examination of witnesses who testify.”⁶ Cross-examination of witnesses shall be conducted in a sequence “and in a manner determined by the judge to expedite the hearing while ensuring a fair hearing.”⁷ The taking of testimony by telephone can comport with all of these requirements, if structured carefully. It may also be possible to take this testimony by videoconference.

The Department has demonstrated that it would be financially burdensome to require these witnesses to appear in Minnesota. Accordingly, the Department’s motion to permit the taking of this testimony by telephone or videoconference is GRANTED. The parties shall ensure that all documents they wish to use in the examination of these witnesses are pre-marked and provided to each other and to the witnesses one week prior to the hearing. In the alternative, if the Respondent wishes to take the depositions of these witnesses and submit the transcripts of their depositions in lieu of taking their testimony during the hearing, the Administrative Law Judge would grant any continuance of the hearing date necessary to accommodate such a request.

Motion to Exclude Department Exhibits

The Prehearing Order in this case set deadlines of October 8, 2008, and November 5, 2008, respectively, for the Respondent and the Department to disclose expert opinions in compliance with the requirements of Minn. R. Civ. P. 26.02(d).⁸ The Department disclosed no experts or expert opinions. The Prehearing Order also set a deadline of November 26, 2008, for exchanging exhibits and witness lists; at the conclusion of discovery, the parties agreed to

² *In re Bieganowski*, 520 N.W.2d 525, 528 (Minn. App. 1994); *In re Martin*, 458 N.W.2d 700 (Minn. App. 1990).

³ The Respondent also argues that it has a Sixth Amendment right to cross-examine any witness in person, as opposed to over the telephone, because a criminal penalty may be assessed for some future repeat violation. The Sixth Amendment to the U.S. Constitution is applicable, by its terms, to criminal prosecutions. This case is a civil enforcement action, not a criminal case.

⁴ Minn. Stat. § 14.60, subd. 1 (2008); Minn. R. 1400.7300, subp. 1 (2007).

⁵ Minn. R. 1400.7200

⁶ Minn. Stat. § 14.60, subd. 3 (2008).

⁷ Minn. R. 1400.7800 F.

⁸ Prehearing Order (June 3, 2008).

move this deadline to December 2, 2008. The Respondent has now moved to exclude the Department's Exhibits 7-14 and 16-20.

Exhibits 7 through 13

Exhibits 7 through 13 are apparently journal articles regarding engineering controls for respirable silica and measures for protecting tuckpointing workers from silica exposure.⁹ The Respondent contends these exhibits should be excluded on the basis that the Department has provided no foundation for them, and "[a]bsent a witness to testify as to the articles' authenticity and accuracy, such as the author of the articles, Exhibits 7-13 are unreliable hearsay." The Respondent also objects to these articles to the extent they purport to provide expert testimony that was not disclosed in compliance with the Prehearing Order. The Department asserts that these are peer-reviewed articles published in reputable scientific journals available to the public, and one of the articles was actually provided to the Department by counsel for the Respondent. In addition, the Department maintains that these articles may serve to impeach the testimony of Dale Zoerb, the Respondent's expert. Finally, the Department points out that the Respondent has identified similar articles on its Exhibit List.

These journal articles are not expert testimony, and the Department is not required to produce the authors of these articles in order to provide the foundation for them. Assuming the Department can establish that these articles are what they purport to be, the Department could establish an adequate foundation for their admission. They appear to be relevant to the issue whether there are other feasible administrative or engineering controls to reduce employee exposure to silica dust. The Respondent's motion to exclude these exhibits is DENIED.

Exhibit 14

Exhibit 14 is the Affidavit of Pamela Susie, the Exposure Assessment Program Director for the Center to Protect Worker's Rights in New Jersey. The exhibit describes some of her published research and references a March 18, 2008, survey regarding the use of vacuum attachments to control dust. The Respondent contends this exhibit should be excluded on the basis that it contains expert testimony that was not disclosed in compliance with the Prehearing Order. The Department maintains this is not expert testimony because Ms. Susie renders no opinions on the facts of this case.

Exhibit 14 contains unpublished survey information collected by an industry expert that is relevant to the issue of whether there are feasible administrative or engineering controls to reduce employee exposure. It is expert testimony, and it should have been disclosed as provided in the Prehearing

⁹ This description is based on the Department's Exhibit List, filed December 2, 2008.

Order, so that the Respondent would have an opportunity to respond to it. The Respondent's motion to exclude this exhibit is GRANTED.

Exhibits 15 through 20

Exhibits 15 through 20 apparently contain information about commercial products used to control dust obtained from manufacturers' catalogs and websites.¹⁰ The Respondent contends these documents should be excluded because only the makers or distributors who are familiar with these tools and accessories could testify as to their function, efficacy, durability, limitations, and cost. Moreover, the Respondent argues that the documents should be excluded because the Department may not specify a particular way of doing business or specify particular products that must be used in the Respondent's business.

The Department maintains these exhibits illustrate available technologies that can be used to implement feasible engineering controls and that the Respondent's objections go to the weight, as opposed to the admissibility, of the evidence. The Administrative Law Judge agrees. The documents may be relevant to the issue whether feasible administrative or engineering controls exist to reduce employee exposure. The Respondent's motion to exclude these documents is DENIED.

K.D.S.

¹⁰ The Respondent has provided copies of Exhibits 17-20 in connection with this motion.