

CCASE:
CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS
DDATE:
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
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Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

Master Docket No. 91-1

ORDER GRANTING IN PART MOTION TO
COMPEL FURTHER EXPERT DISCOVERY

On March 12, 1992, the Secretary of Labor (Secretary) filed a Motion to Compel Further Expert Discovery. In particular, the Secretary seeks an order compelling the production of documents utilized by expert witnesses identified by the law firms Buchanan Ingersoll, Crowell & Moring, Jackson & Kelly and Smith, Heenan & Althen (the four law firms) in preparing their reports, and those documents which reflect the results of tests performed by the experts. In addition the Secretary seeks access to the experimental filters created by those experts, for the purposes of inspection, photographing and videotaping.

A response to the motion was filed on behalf of the four law firms on March 16, 1992. On March 18, 1992, at the request of the parties, I heard further argument on the motion in a telephone conference call with Laura Beverage, Esq., representing the four law firms, and Richard Gilman, Esq., representing the Secretary. At the conclusion of the call, I announced my decision on the motion, and am reducing it to writing by this order.

I

The Secretary seeks the production of documents and access to the experimental filters in order to more effectively examine Contestants' experts in their scheduled depositions. Section II.C. of the Discovery Plan requires the parties to exchange expert witness lists by January 24, 1992. Each expert must prepare a report with his credentials and all opinions and conclusions to which he expects to testify and a summary of tests, studies, etc., forming the basis for his conclusions or opinions. Section II.C.3. provides that all costs associated with expert depositions shall be governed by Rule 26(b)(4) of the Federal Rules of Civil Procedure.

Because this motion relates to expert witness discovery, even though it deals with documents and tangible things, it is governed by Rule 26(b)(4) rather than 26(b)(3). The documents and tangible things are sought to assist in and facilitate the deposition of expert witnesses.

II

The nature of these cases and the evidence of which I am aware make it clear that expert opinion evidence will be important, perhaps critical, in arriving at a decision. For this reason, the depositions of expert witnesses are highly important to the parties and to the Commission, in order that the witnesses' opinions can be tested by informed cross-examination. The experts' reports are voluminous and involve complex tests, and physical and mathematical formulae. To conduct adequate and meaningful examination of the experts, counsel must understand the background and bases for their reports. Accordingly, I will grant the Secretary's motion to produce the documents and things referred to in the motion.

III

The "back-up data" referred to in the Secretary's motion consists of documents utilized by the experts in preparing their reports, and documents reflecting the results of tests performed by the experts. These documents are detailed in paragraphs numbered 3 through 8 in the letter of March 6, 1992 from Mr. Gilman to Ms. Beverage, appended as attachment A to the Secretary's motion. Because these are existing documents, copies should be made available to the Secretary without cost. Further, the identity of persons who assisted in the preparation of the reports and samples of the coal dust used in the experimental samples (numbers 9 and 10 of attachment A) should be made available to the Secretary without cost.

IV

Some or all of contestants' experts created and tested experimental dust filters as part of their studies. A large number of such filters were created and tested by two of the experts and they form an important part of their conclusions and reports. It is important that the Secretary be permitted to inspect these filters in preparation for her deposing the expert witnesses. However, examining, testing, photographing and videotaping these filters may take considerable time and involve some expense. I conclude that the Secretary, as the party seeking discovery, should be required to pay the reasonable expenses associated with making the filters available. (The parties agree that under Rule 26(b)(4)(c), the party seeking discovery will pay the expert a reasonable fee for the time spent in his deposition). I do not believe that manifest injustice will result from requiring the Secretary to pay these expenses. I have considered and reject the Secretary's contention that because she made the cited filters and other filters available in the fact discovery phase without cost to the operators, it is manifestly unjust to require her to bear the expenses incidental to making the experts' filters available in order that she may prepare for their depositions.

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The reasonable expenses associated with making the filters available will include the cost of providing technician(s) to assemble the filters and oversee the Secretary's inspection of them. The parties will attempt to agree on what the reasonable expenses are and, if they are unable to agree, will return to me for a further ruling.

V

The Secretary's motion states that Dr. Malloy and Dr. Yao (listed as expert witnesses by Smith, Heenan and Althen) are employees of a party and therefore Rule 26(b)(4)(C) does not apply to them. After discussion during the conference call, it was agreed that further consultation between counsel with respect to the status of these witnesses is necessary, and I am not now ruling on the applicability of Rule 26(b)(4)(C) to them.

ORDER

In accordance with the preceding discussion, the Secretary's Motion to Compel Further Expert Discovery is GRANTED, with the condition that the Secretary shall pay the reasonable expenses associated with making the expert witnesses' experimental filters available for inspection, photographing or videotaping.

James A. Broderick
Administrative Law Judge