

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 20-1001
)	
Dura-Bond Steel Corporation,)	
)	
)	
Respondent.)	
)	

ORDER GRANTING SECRETARY’S MOTION FOR PROTECTIVE ORDER

I. BACKGROUND

On June 2, 2020, the Secretary cited Respondent for a total of nineteen serious violations (many of them grouped) and four other-than-serious violations. Two of the violations relate to a highly specialized type of work that Respondent performs at its worksite, namely spray painting very large products such as I-beams. This spray-painting work is at issue in Citation 1, Item 2a (alleging a violation of 29 C.F.R. § 1910.107(m)(1)) and Citation 1, Item 2b (alleging a violation of 29 C.F.R. § 1910.94(c)(2)). Citation, attached as Ex. A to Complaint. Item 2a essentially alleges that Respondent was required to, and failed to, conduct its spray-painting operations in an approved sprinklered spray booth. Item 2b essentially alleges that Respondent was required to, and failed to, use a spray booth or spray room to enclose or confine the same type of spray-painting operations.

On June 25, 2020, Respondent filed its notice of contest.

The Secretary filed his complaint on August 28, 2020. In its Answer filed on September 18, 2020, Respondent asserted the affirmative defense of technological and economic infeasibility for both of these alleged violations. Answer at ¶¶ 6-7.

Respondent identified in its discovery responses approximately seven companies or individuals with whom Respondent had consulted, and Mr. Tim Baer was included in that list, but the Secretary's counsel did not initially make that connection. *Id.* at ¶ 4.

In February and March of 2021, Counsel for the Secretary engaged in efforts to find a consulting expert. Declaration of Judson H. Dean, attached as Ex. A, at ¶ 1 to Secretary's Motion for Protective Order (Dean Decl.). Over the course of approximately two weeks, the Secretary's counsel spoke with approximately five or six individuals or companies about trying to find an expert witness. *Id.* at ¶ 2. One of those companies suggested contacting an individual named Tim Baer and provided Mr. Baer's number to Attorney Dean. *Id.* at ¶ 3.

Complainant's Interrogatory No. 1 of Complainant's First Set of Interrogatories requested:

1. Identify all entities with whom Respondent has consulted regarding the feasibility of modifying its spraying/coating operations in the coating building at the worksite (2658 Puckety Street in Export, PA) to comply with the requirements of 29 C.F.R. § 1910.107(m)(1) and/or 29 C.F.R. § 1910.94(c)(2), including: name of person or company; if a company, name of company representative(s) with whom Respondent consulted; and address and contact information. Identify all relevant documents.

On March 15, 2021, Respondent served its initial Objections and Responses to Complainant's First Set of Interrogatories and First Set of Requests for Production of Documents (Respondent's Initial Responses). Respondent's Initial Responses identified approximately seven companies or individuals with whom Respondent had consulted, including Mr. Baer of Finishing Systems, Inc.

On March 16, 2021, Complainant's counsel contacted Respondent's counsel to set up a call regarding Respondent's Initial Responses. By March 18, 2021, Complainant's counsel

alleged deficiencies in Respondent's Initial Responses, including by claiming that Complainant is "entitled to gather financial/economic information about" Respondent.

After receiving and reviewing Respondent's Initial Responses, Attorney Dean contacted Mr. Baer by telephone. Attorney Dean did not take specific note of who Respondent named in response to Interrogatory No. 1 when he initiated the call to Mr. Baer. Attorney Dean did not initially make the connection of Mr. Baer to those named by Respondent in its response to Interrogatory No. 1 before he initiated his call to Mr. Baer. Dean Decl., ¶¶ 4-6. Attorney Dean did not seek out Mr. Baer because he had been listed in Respondent's discovery responses, and he did not seek out or speak with any of the other companies or individuals listed by Respondent in its discovery responses. *Id.* at ¶ 5.

Attorney Dean called Mr. Baer and, after explaining the nature of the case, Mr. Baer stated that he had already visited Respondent's worksite and provided an estimate of the cost of performing certain work for Respondent. *Id.* at ¶ 6. At that point, counsel for the Secretary confirmed that Mr. Baer had not been retained by Respondent as an expert; that Mr. Baer did not have any kind of contractual relationship with Respondent; and that there were no non-disclosure agreements between Mr. Baer and Respondent. *Id.* at ¶ 7. Attorney Dean also explained in detail who he was and his role in the litigation as the attorney for OSHA and made clear that he did not want the individual to provide any information about communications with opposing counsel or any information specific to Respondent at all. *Id.* at ¶ 9. Mr. Baer expressed to Attorney Dean that he understood these limitations and did not reveal any such confidential information at any time during the course of the conversation. *Id.* at ¶ 10.

The Secretary's counsel spoke with Mr. Baer about his knowledge and experience

regarding general principles of designing protective measures for spray painting operations, and industry standards related to spray painting operations, such as NFPA guidelines. *Id.* at ¶ 11. The Secretary's counsel says he in no way pressured Mr. Baer to speak with him. Attorney Dean believes that Mr. Baer appeared eager to speak with him. *Id.* at ¶ 12. The Secretary did not express any interest in actually hiring Mr. Baer as the Secretary's expert and when the conversation ended there was no mention of any possibility of further discussions. *Id.* at ¶ 13.

The Secretary does not have any information on whether Respondent has subsequently retained Mr. Baer in an expert witness capacity. *Id.* at ¶ 8.

On April 9, 2021, Respondent provided the Secretary with its First Supplemental Responses to Complainant's First Set of Interrogatories and advised Complainant that Complainant's contact with Mr. Baer was "patently unacceptable." Respondent's Response in Opposition to Secretary's Motion for Protective Order (Opposition). Opposition, Ex. 7, at 3. Attorney Dean responded to the First Supplemental Responses by email dated April 11, 2021, denied he had engaged in any misconduct, and defended his ability to communicate with Mr. Baer. Opposition, Ex. 3. In response, by email dated April 12, 2021, Respondent noted its disagreement with Complainant's position, and advised that Complainant had not disclaimed attempts "to obtain Tim Baer's opinions, thoughts, or mental impressions regarding this matter, including regarding his work for Dura-Bond Steel Corporation and costs/affordability." *Id.*

On April 12, 2021, Respondent served its First Set of Requests for Admissions, First Set of Interrogatories, and First Set of Requests for Production of Documents directed to Complainant (collectively, Respondent's Discovery Requests). Respondent's Discovery Requests seek information regarding Complainant's counsel's contact with, and questioning of,

Mr. Baer, including regarding the cost of his work, the affordability of his work, and economic feasibility. Respondent's requests for production of documents seek Attorney Dean's phone records and voicemails; interrogatories which seek detailed information about the Secretary's counsel's own actions, including the content of the conversation with Mr. Baer and how long the conversation lasted; and eleven requests for admissions. Motion for Protective Order, at 5-6.

On May 12, 2021, Complainant produced objections and responses to Respondent's Discovery Requests, and did not provide any of the requested information pertaining to Attorney Dean's contact with Mr. Baer or any of the other consultants previously identified in Respondent Initial Responses. Opposition at 4.

On May 15, 2021, Complainant filed his Motion for Protective Order. The Secretary moves for entry of a protective order to protect the Secretary from having to respond to certain of Respondent's discovery requests to disclose information and produce documentation that he asserts is protected by the work product doctrine and wholly irrelevant to the subject matter of the case. Specifically, the Secretary seeks an order protecting the Secretary from having to respond to the following Respondent's Discovery Requests:

Requests for Production of Documents

5. All documents and communications, including without limitation phone records and voicemails, related to Complainant's response to Respondent's Interrogatory No. 1.

Interrogatories

1. Refer to Respondent's Responses to Interrogatories, particularly Interrogatory No. 1 and the entities and persons identified therein. Identify:
 - a. Each entity identified in Respondent's Responses to Interrogatory No. 1 who Complainant attempted to contact on or after March 15,

- 2021.
- b. The date of each attempt identified in response to this Interrogatory No. 1.a.
 - c. Each person participating in each communication resulting from each attempt identified in response to this Interrogatory 1.b.
 - d. The duration of each communication identified in response to this Interrogatory No. 1.c, in minutes and seconds (e.g., as reflected in phone records).
 - e. The reason for each attempt identified in response to Interrogatory No. 1.
2. Describe in detail the substance of each communication identified in Complainant's response to Interrogatory No. 1 above, including without limitation all questions asked by Complainant during each communication.

Requests for Admissions

1. Prior to March 18, 2021, Complainant reviewed Respondent's Responses to Complainant's First Set of Interrogatories dated March 15, 2021.
2. After March 17, 2021, Complainant contacted Finishing Systems Inc.
3. When Complainant contacted Finishing Systems Inc., Complainant asked for Tim Baer.
4. When Complainant contacted Finishing Systems Inc., Complainant called Tim Baer directly.
5. On behalf of Complainant, Judson Dean communicated with Tim Baer by phone.
6. During a phone communication, Judson Dean discussed the above-captioned matter with Tim Baer.
7. During a phone communication, Judson Dean asked Tim Baer about his work for Dura-Bond Steel Corporation.
8. During a phone communication, after asking Tim Baer about his work for Dura- Bond Steel Corporation, Judson Dean asked Tim Baer about the cost of his work.
9. During a phone communication, after asking Tim Baer about his work for Dura- Bond Steel Corporation, Judson Dean asked Tim Baer about the affordability of his work.
10. During a phone communication, Judson Dean asked Tim Baer questions

related to the economic feasibility defense.

11. Prior to March 15, 2021, Complainant contracted with an expert, other than Finishing Systems Inc., related to Complainant's economic feasibility defense in the above-captioned matter. (Collectively, "Respondent's Discovery Requests at Issue.").

On June 1, 2021, Respondent filed its Opposition. Respondent contends Complainant's Motion for Protective Order "is an attempt to conceal Complainant's circumvention of discovery rules regarding consulting experts." Opposition at 1. Respondent asserts Complainant has not: 1) demonstrated "good cause" for the protection order he seeks, and 2) shown that the information sought by Respondent is irrelevant and/or protected from disclosure by the attorney work product privilege. *Id.* at 5-21. Respondent states that Attorney Dean's actions from a professional conduct and disciplinary standpoint are questions "not currently before this Court."¹ *Id.* at 11.

On June 14, 2021, Complainant filed his Reply to Respondent's Response in Opposition to Secretary's Motion for Protective Order (Reply). The Secretary argues that this dispute should be ended because the Secretary has voluntarily offered a declaration that establishes that no information related to Respondent's work or workplace was disclosed during Attorney Dean's conversation with Mr. Baer, and no contradictory evidence has been provided by Respondent to the Court. *Id.* at 1-3, 6-7. The Secretary reiterated his arguments that the information and documents sought by Respondent's Discovery Requests at Issue are not relevant and are protected by the work product doctrine. *Id.* at 3-6.

On June 23, 2021, Respondent filed its Sur-reply. In it, Respondent asserts that there are eight reasons that show that Complainant has failed to establish that Respondent's Discovery

¹ Accordingly, the Court need not decide whether any Rules of Professional Conduct were violated under these circumstances.

Requests at Issue are not relevant.² First, the Secretary as the moving party cannot shift to Respondent the Secretary's burden of establishing good cause for the protective order. Second, evidence is not needed to support a discovery request. Third, Respondent is not required to provide a declaration to support its discovery requests. Fourth, Complainant is attempting to further embroil Mr. Baer in this matter to the extent that it chills Respondent's work with Mr. Baer and the ultimate resolution of this matter. Fifth, Attorney Dean's declaration is not a valid substitute for responding to Respondent's Discovery Requests. Sixth, Complainant is inviting the Court to enable the Secretary to control and limit the broad scope of discovery without weighing the *Pansy* factors. Seventh, Attorney Dean's declaration is neither uncontroverted, nor complete. Eighth, Attorney Dean's declaration does not establish that Respondent's Discovery Requests at Issue lack relevance. Respondent also asserted that Attorney Dean circumvented established rules and procedures governing discovery when he contacted Mr. Baer and that Complainant is not entitled to raise the work product doctrine as a shield to prevent the disclosure of any work product resulting from Attorney Dean's contact with Mr. Baer.³

Discovery is ongoing. The trial is scheduled to commence on February 7, 2022.

II. DISCUSSION

*A. The Information Sought in Respondent's Discovery Requests at Issue Is Not Relevant to the Subject Matter of the Litigation.*⁴

The moving party has the burden of justifying the need for a protective order. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). In the context of Review Commission proceedings specifically, "good cause" must be shown before protective orders

² The Court has considered all eight of these reasons and found them all to be without merit.

³ See footnotes 1 and 4 herein.

⁴ Since the information sought by Respondent in Respondent's Discovery Requests at Issue is not relevant to the subject matter of the litigation, the Court need not decide whether it is protected by the Attorney Client Work Product Privilege.

may be issued. 29 C.F.R. § 2200.52(e). “[W]here a showing of good cause has been made, the Commission or the Judge may make any order including, but not limited to, one or more of the following: (1) That the discovery not be had; . . . (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.” *Id.*

Here, the information sought by Respondent in its Discovery Requests at Issue is outside of the permissible scope of discovery pursuant to the Review Commission’s Rules of Procedure. Rule 52 provides, in pertinent part:

(b) The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(c) Limitations. The frequency or extent of the discovery methods provided by these rules may be limited by the Commission or the Judge if it is determined that:

- (1) The discovery sought is unreasonably cumulative or duplicative, or it is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or
- (3) The proposed discovery is outside the scope permitted by paragraph (b) of this section.

29 C.F.R. § 2200.52(b) and (c). The information and documentation sought by Respondent’s Discovery Requests at Issue is not relevant to the subject matter of the litigation, which involves alleged violations of safety and health standards by Respondent. The details of the Secretary’s counsel discussion with Mr. Baer beyond those already provided to Respondent in Attorney Dean’s affidavit, and Attorney Dean’s telephone and voicemail records, are not related to the subject matter of the case.

At the time of his conversation with Mr. Baer, Attorney Dean confirmed that Mr.

Baer had not been retained by Respondent as an expert; he did not have any kind of contractual relationship with Respondent; and there were no non-disclosure agreements between he and Respondent. The Secretary's counsel explained who he was and his role in the litigation as the attorney for the Occupational Safety and Health Administration. Attorney Dean made clear that he did not want Mr. Baer to provide any information about communications with Respondent's counsel or any information specific to Respondent at all. The Secretary's counsel did not ask for, or obtain, any confidential information. Mr. Baer expressed that he understood these limitations on the discussion, and he did not reveal any such confidential information to Attorney Dean.

The Secretary's counsel and Mr. Baer discussed general principles of designing protective measures for spray painting operations, and industry standards related to spray painting operations. Mr. Baer willingly spoke with Attorney Dean and provided general information about measures that can be taken to address spray painting hazards, which information was not specific to Respondent.

There is a scarcity of case law addressing the circumstances of Attorney Dean's telephonic communication during discovery with a potential expert or consultant for Respondent who had done some preliminary, exploratory work for Respondent, but who had not yet been retained by Respondent as either a testifying expert or non-testifying consultant in the case. *Erickson v. Newmar Corp. et al.*, 87 F.3d 298, 302 (9th Cir. 1996) (*ex parte* contact with an expert witness "seldom happens"). *But see Rawlings Sporting Goods Co. v. East Muskingum Baseball League*, No. C2-86-0274, 123 F.R.D. 271, 281 (S.D. Ohio, 1988) (Expert permitted to be engaged and serve as plaintiff's expert even though he had previously had several contacts, where the expert's hourly rate and specific tasks were discussed, with

defense counsel who believed he had retained the expert in the case, but where the Court described those prior contacts with defense counsel as “minimal.”). Here, Mr. Baer provided Attorney Dean with an estimate of the cost of performing certain work for Respondent. As in *Rawlings Sporting Goods Co. v. East Muskingum Baseball League*, this Court finds Attorney Dean’s one telephone contact with Mr. Baer, including a discussion of the cost estimate, to be minimal.⁵ *Id.*

Respondent has produced nothing to evidence that Mr. Baer had been officially retained by it to serve as an expert in this case when Attorney Dean spoke with Mr. Baer. *Olson v. Snap Prod., Inc.*, No. Civ. 97-2437 RHK/RLE, 183 F.R.D. 539, 543 (D. Minn., 1998) (Plaintiff’s counsel not disqualified where the Court was not persuaded that the experts had actually been retained by the defense when the contact between plaintiff’s counsel and the later retained experts occurred, or that counsel should have been reasonably aware that these experts were to be retained by the defense.). Similarly, in *Procter & Gamble Co. v. Haugen*, 183 F.R.D. 571 (D. Utah 1998), the defendant consulted with an expert but did not retain the expert as either a testifying or consulting expert. Plaintiff thereafter not only communicated with that expert (as in the present case), but actually hired the individual as its own expert for litigation (a significant step further than the instant circumstances). Thereafter, the expert produced a report for the plaintiff. The defendant moved to disqualify the plaintiff’s counsel on the grounds that the plaintiff’s counsel’s contact with the expert violated the defendant’s counsel’s work product protection. The Court noted that “[a]ttorneys who consult an expert do not own the expert,” since that would allow a party to

⁵ See also *Cody-Zeigler, Inc.*, No. 99-912 (Consol.) 2000 WL 33310836, at *2 (O.S.H.R.C.A.L.J. Jun. 12, 2000), *Aff’g* 19 OSHC BNA 1410 (O.S.H.R.C. 2001), *pet. for review denied* 2002 WL 595167 (D.C.Cir. 2002) (Trial Judge granted Secretary’s Motion for a Protective Order denying discovery where Respondent failed to offer sufficient

consult many experts and then preclude the other party from consulting with them. *Id.* at 573. The Court held that, where one party has consulted an expert but has not retained that expert as a consulting or testifying expert, disqualifying the opposing party's counsel for communicating with that expert (and even potentially retaining that expert) would only be appropriate "if a real interference with work product or a similar interest is demonstrated, or shown to be likely." *Id.* In this case, the Secretary's counsel did not request, and took steps to ensure that he did not obtain, any confidential information from Mr. Baer.

B. Notwithstanding the Irrelevancy of the Material, the Information Sought in Respondent's Discovery Requests at Issue Has Already Been Obtained by Respondent and/or is Obtainable Through Mr. Baer.

Respondent has access to the information it seeks. The discovery sought in Respondent's Discovery Requests at Issue beyond that already provided in Attorney Dean's affidavit is obtainable by Respondent from another source, Mr. Baer. 29 C.F.R. § 2200.52(b) and (c)(1).

It is telling that Respondent has not offered a declaration from Mr. Baer stating anything to the contrary to Attorney Dean's account of his contact with Mr. Baer. Consequently, the Court finds Attorney Dean's account of his contact with Mr. Baer to be accurate. It is factually undisputed that the conversation did not involve a discussion of any actual work done at Respondent's facility by Mr. Baer. Attorney Dean did not seek or obtain Mr. Baer's opinions about Respondent's work. The Court has Attorney Dean's declaration establishing these facts, and they are uncontroverted.

III. CONCLUSION

The Court finds that the required good cause has been shown warranting the issuance

of a protective order⁶ and resulting in the Court ruling that the discovery sought by Respondent in Respondent's Discovery Requests at Issue not be had. 29 C.F.R. § 2200.52(b) and (c).

The Secretary is protected from responding to Respondent's Discovery Requests at Issue because the information sought is not relevant to the subject matter of the litigation and is obtainable from Mr. Baer himself.

IV. ORDER

WHEREFORE, Complainant's Motion for Protective Order is GRANTED and IT IS FURTHER ORDERED that Complainant need not respond to the Respondent's Discovery Requests at Issue.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: June 25, 2021
Washington, D.C.

⁶ When finding good cause exists for the entry of this protective order, the Court considered the factors enumerated in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir., 1994).