

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

SECRETARY OF LABOR, Complainant,
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v.

PALMER MANUFACTURING & TANK, INC.,
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Respondent.

OSHRC DOCKET NO. 13-0658

**ORDER ON COMPLAINANT'S MOTION TO COMPEL**

This matter comes before the Court on *Complainant's Motion to Compel Responses to Discovery*. On January 30, 2014, Complainant propounded interrogatories and requests for production on Respondent. Respondent provided responses to Complainant's requests for discovery on March 7, 2014. According to Complainant, Respondent's responses were "incomplete, evasive, and objections to proper Answers and Responses are without support." *Compl't Motion to Compel* at 1. In response, Respondent filed its *Response to Complainant's Motion to Compel Discovery*, within which it attempts to explain certain omissions, agrees to provide previously withheld information, and reasserts its right to withhold certain documents.

Standard on Motions to Compel

Commission Rule 52(b) states, "The information . . . sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case." 29 C.F.R. § 2200.52(b). The information sought need not be admissible at hearing so long as it appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* When another party refuses or obstructs discovery, the requesting party may apply for an order compelling discovery. *Id.* § 2200.52(f). The Court has broad discretion regarding discovery. *See Del Monte Corp.*, 9 BNA OSHC 2136 (No. 11865, 1981). The Review

Commission has stated:

The decision whether to allow discovery is within the judge's sound discretion. This sound discretion should be guided by the objective of providing a fair and prompt hearing to the parties. Moreover, the judge should consider the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and, on balance, any undue delay in the proceedings that may occur. Given the judge's broad discretion, a judge's disposition of discovery matters is reversible only if the judge's actions constitute an abuse of discretion resulting in substantial prejudice.”).

*Id.* Based on the foregoing principles of law, the Court issues the following Order.

Interrogatory No. 14

This particular interrogatory requests that Respondent “[i]dentify by name and last known address and telephone number, all employees who manufacture fiberglass tanks for the six-month period on and before December 6, 2013.” *Compl’t Motion* at 2. Respondent initially objected to this request; however, as indicated in its *Response*, during the teleconference held on March 10, Respondent agreed to provide said information provided that it would be protected against disclosure through a protective order. Respondent represents to the Court that it has begun preparing such an order for review by Complainant.

The Court accepts the representations of Respondent. The Court ORDERS the Protective Order to be completed and submitted to the Court for approval within five business days from the date of this Order. Once the Protective Order is entered as an Order of the Court, Respondent shall provide its amended response to Complainant within five business days of the date of that Order. Accordingly, subject to the foregoing, Complainant’s *Motion* is GRANTED with respect to this Interrogatory No. 14.

Request for Production No. 3

This request for production seeks “all documents to or from Respondent and all individuals, vendors, or business entities who conducted any air sampling as identified in paragraph 6 of Respondent’s Answer to the Complaint.” Respondent initially objected on the

basis that the request was overly broad and unduly vague and sought materials covered by the work product privilege. In its *Response*, Respondent states that it has produced all documents pertaining to air sampling results. *Response* at 2. Respondent also notes that Complainant, in its Motion, clarified that it seeks docs pertaining to air sampling “post-citation” and that the documents “would specifically address the hazard(s) at issue in this matter . . . .” *Id.* Because Respondent claims it has already produced such documents, it claims that the matter is moot.

To the extent that Respondent has not already produced all documents related to post-citation air sampling the Court ORDERS that such documents be produced within 10 days of the date of this Order. Accordingly, Complainant’s *Motion* is GRANTED with respect to Request for Production No. 3.

#### Request for Production No. 10

This request for production seeks “all documents from whatever source including but not limited to or from all insurance carriers, insurance agents or brokers, state or local government agencies, private consultants, municipal fire departments, etc. regarding any workplace safety inspection, safety evaluation or insurance underwriting of Respondent’s workplace.” For the most part, Respondent’s initial objections were similar to those mentioned above (overly broad, unduly burdensome, not limited as to time, etc.); however, according to Respondent, this request also seeks a Section 21(d) Consultation Program inspection report that is confidential. *See* 29 U.S.C. § 670(d); 29 C.F.R. §§ 1908.6(g)(2), 1908.7(a)(3). Complainant does not agree that the report is confidential, nor does he agree that the request needs to be limited in terms of time. That said, Complainant “will agree to limit this Request to documents which address confined space hazards and other safety or health related hazards concerning the fiberglass tanks in issue.” *Compl’t Motion to Compel* at 6.

According to Section 21(d) of the OSH Act, the Secretary is obliged to establish and support cooperative agreements with the States, wherein employers subject to the Act can consult with State personnel and request voluntary consultative inspections to help establish and maintain safe and healthful employment. 29 U.S.C. §§ 670(d)(1)–(2). These inspections are intended to take place independent of the enforcement arm of OSHA. *Id.* § 670(d)(3). Only in instances where an employer fails to take immediate action to correct an imminent danger or fails to correct serious hazards within a reasonable time after such are identified by the consultant shall a report be made to the appropriate enforcement authority. *Id.*; *see also* 29 C.F.R. § 1908.7(a)(1) (“Consultative activity by a State shall be conducted independently of any OSHA enforcement activity.”).

Not only are the consultative functions of the State and the enforcement activities of OSHA to remain independent, the reports issued by the State consultation authority are to remain confidential:

Because the consultant’s written report contains information considered confidential, and because disclosure of such reports would adversely affect the operation of the OSHA consultation program, the state shall not disclose the consultant’s written report except to the employer for whom it was prepared and as provided for in § 1908.7(a)(3).

29 C.F.R. § 1908.6(g)(2). Section 1907.7(a)(3), which is referenced in the preceding passage, states:

The identity of employers requesting onsite consultation, as well as the file of the consultant’s visit, *shall not be provided to OSHA for use in any compliance activity*, except as provided for in § 1908(6)(f)(1) (failure to eliminate imminent danger), § 1908.6(f)(4) (failure to eliminate serious hazards), paragraph (b)(1) of this section (inspection deferral), and paragraph (b)(4) of this section (recognition and exemption program).

29 C.F.R. § 1908.7(a)(3) (emphasis added). The importance of the confidentiality of these reports is reiterated time and again in the regulatory history associated with Part 1908. As noted in the Federal Register, “OSHA regulations have always maintained the strict confidentiality of

employer-specific consultation information from OSHA enforcement personnel, in order to assure employers who avail themselves of this service that their use of the consultation service will not be the basis for scheduling an OSHA enforcement inspection or for other enforcement-related purposes.” Consultation Agreements: Proposed Changes to Consultation Procedures, 64 Fed. Reg. 35,972, 35,974 (July 2, 1999) (citing 29 C.F.R. § 1908.7(a)(3)). “[T]he success of OSHA’s consultation program depends to a great extent on the voluntary cooperation of employers who request its services; the confidentiality of the consultant’s report has long been viewed by OSHA and state consultants as essential to continued participation by employers in this important program.” *Id.*

The Court can find no basis in fact—there has been no allegation that Respondent failed to correct an identified serious hazard or imminent danger during its consultative inspection—or law to undermine the confidentiality of the Section 21(d) Consultation Report. Accordingly, to the extent that Complainant seeks to gain access to this report, Complainant’s *Motion to Compel* is DENIED.

To the extent that Complainant seeks to gain access to previous enforcement-related inspections, the Court finds that such documents need not be produced because Complainant is in as good a position as Respondent to have them in his possession. Finally, although the Court denies Complainant’s *Motion* as to the aforementioned documents, the Court does find that Complainant is entitled to documents (assuming they exist) that are defined by the following parameters: As indicated in Complainant’s *Motion*, Respondent shall produce any and all documents, including, but not limited to, inspections and evaluations that address confined space hazards and other safety or health related hazards concerning the fiberglass tanks in issue that were created no earlier than six months prior to the beginning of the inspection. Contrary to Complainant’s assertion, a reasonable restriction on time is appropriate in a case involving only

“serious” violations of the standard. Respondent shall produce such documents within 10 days of the date of this Order. Accordingly, Complainant’s *Motion* is DENIED in part and GRANTED in part.

Request for Production No. 12

This request for production seeks “all documents regarding the mechanical ventilation of any buildings at Respondent’s workplace in which the manufacturing of fiberglass tanks occur, including but not limited to, documents dealing with the rate of air exchange/air movement in such buildings, limitations of any ventilation systems, and protocols for use of such ventilation during the manufacturing of fiberglass tanks.” In his *Motion*, Complainant specifically identifies, as the target of this request, air horns that replace and circulate air inside the fiberglass tanks, which he argues is “directly relevant to the issue of whether any potentially hazardous atmospheres could exist within the tanks.” *Compl’t Motion* at 7–8. Accordingly, Complainant argues that it is entitled to all such documents from the manufacturer/vendor, including instructions and warnings, pertaining to those air horns.

Respondent, with the above description in mind, stated that it does not object to the production of “all documents in its possession regarding the air horns and their use”; rather, its objection was to the broad-based nature of the request, which seemed to indicate a request for information regarding the general ventilation of all buildings at its facility. *Response* at 10. Based on the foregoing, the Court ORDERS Respondent to produce any and all documents in its possession regarding the air horns and their use within ten days of the date of this Order. Accordingly, Complainant’s *Motion* is GRANTED with respect to this request for production.

SO ORDERED.

Date: April 2, 2014  
Denver, Colorado

/s/ \_\_\_\_\_  
Patrick B. Augustine  
Judge, OSHRC