United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. C.W. Driver, Inc., and its successors Respondent.	OSHRC DOCKET NO. 16-0411

ORDER

Presently before this Court is the Secretary's Motion *In Limine* to Exclude Purported Expert Opinions of Stephen P. Andrew ("Motion") dated October 19, 2016. The Secretary alleges that C.W. Driver, Inc. ("C.W. Driver" or "Respondent") failed to timely produce a sufficient expert report and also raises substantive concerns with Mr. Andrew's proposed testimony. Respondent filed a timely Opposition to the Motion, raising both procedural and substantive grounds for dismissal. For the reasons set forth below, the Motion is GRANTED, in part, and DENIED in part.

Timeliness

The Secretary filed the Motion with the Commission via the agency's electronic filing system ("E-file system") and served Respondent via email. The E-file system stamped the document as filed at 2:31 AM on October 20, 2016. The undersigned's Notice of Hearing,

Scheduling Order and Special Notices ("Scheduling Order") issued April 22, 2106, required "non-dispositive pre-trial motions including motions *in limine*" to be filed "in such a manner as to be received by all parties and the administrative law judge no later than October 19, 2016." (Scheduling Order at 2.)

Respondent acknowledges that the Motion was filed on October 19, 2016 at approximately 11:40 p.m. Pacific time and that it received the Motion around that time.[1] (Resp't Opp'n at 3.) As Respondent and its counsel are both located in places that observe Pacific Time, the undersigned finds that the Motion partially complied with the Scheduling Order's deadline that parties receive motions *in limine* by October 19, 2016. However, because the Commission is located in a place that observes Eastern Time, the undersigned did not receive the Motion until October 20, 2016, after the date specified in the Scheduling Order. Nonetheless, as the Scheduling Order did not specify Eastern or Pacific Time, and given that the deadline was exceeded by less than three hours, the undersigned finds that there is both good cause and no prejudice, and therefore accepts the Motion for consideration.[2]

Electronic Filing and Service

Respondent also alleges that the Secretary impermissibly filed its Motion via the E-file system and served it via email. (Resp't Opp'n at 4.) Commission Rule 8(c) specifies that unless otherwise ordered, filings may be accomplished by "electronic transmission," and Commission

[1] The Declaration of Tom Song asserts that the Motion "was made on October 19, 2016, at or around 11:40 p.m., **Pacific Standard Time**." (emphasis in original) (Song Aff. At ¶ 10.) The undersigned notes that most of the United States, including the State of California, where Respondent and its counsel are located, and Washington, D.C., was observing Daylight Savings Time on October 19, 2016.

[2] The undersigned also notes that, as discussed in more detail below, the Secretary received the expert report that forms the basis of this Motion past both the original deadline specified in the Scheduling Order and the agreed upon extension.

Rule 8(g) requires that the method of electronic transmission be in the manner specified by the Commission's website (www.oshrc.gov). 29 C.F.R. § 2200.8(c), (g). As of October 1, 2016, the Commission's website has indicated that documents may be filed and served electronically only when "all parties consent to use the E-file system and a representative for each party has registered as an E-File user." *See* http://oshrc.gov/publications/OSHRC_E-Filing.html, last visited Nov. 1, 2016.

The undersigned finds that Respondent consented to electronic service and filing in this matter. On April 20, 2016, the parties submitted Joint Planning Recommendations indicating that: "all parties have consented that all papers required to be served may be served and filed electronically." The parties Joint Prehearing Statement makes a similar assertion. Likewise, Respondent's own Motion to Extend Time to Complete Discover and its Opposition to this Motion both include declarations from counsel specifying: "[b]ased on a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail address listed below."

Respondent bases its objection to Secretary's method of filing and service on its assertion that at the time the Secretary filed the Motion, its counsel had not registered with the E-file system. The new E-file system first became available on September 1, 2016 and permits parties to simultaneously file a document with the Commission and serve it on all registered parties.[3] Even before the launch of the E-file system, the Commission permitted parties to file and serve documents electronically, but the mechanics of the process differed in that documents were filed

[3] *See* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION LAUNCHES NEW ELECTRONIC FILING (E-FILING) SYSTEM, dated Aug. 25, 2016, available at http://oshrc.gov/press/r16-2.html, last visited Oct. 31, 2016.

and served via email. As of October 1, 2016, the Commission ceased accepting documents for filing via email and began requiring parties wishing to file documents electronically to use the E-file system.[4]

The undersigned finds that in light of Respondent's consent and use of service by electronic means, and the recent change in Commission procedure, the undersigned will not dismiss the Motion for improper service. There is no contention that Respondent did not receive the Motion within minutes of when the Commission received it.

Similarly, in light of the change of procedures that occurred during the pendency of this matter, the undersigned will excuse the Secretary's improper filing method. The Motion was still received by the Commission even though Respondent's counsel had not registered with the E-file system.[5] There is no evidence that the failure to follow the recently adopted procedures resulted in any prejudice against any party or otherwise impeded these proceedings. *See Hamilton Foundry Div.*, 6 BNA OSHC 1946 (No. 77-1300, 1978) (finding failure to comply with a Commission rule related to depositions harmless); Commission Rule 107, 29 C.F.R. § 2200.107 (permitting waiver of Commission rules in special circumstances).

[4] *See* E-File System, available at http://oshrc.gov/publications/OSHRC_E-Filing.html, last visited Oct. 31, 2016. The Office of Chief Administrative Law Judge also notified the parties of the change in procedure via a letter.

[5] The undersigned notes that the E-file system cannot ordinarily accommodate filings when all parties have not registered and consented to its use. The Secretary's counsel is advised that in the future electronic filings may not be accepted or received by the Commission if all parties have not consented to the use of the E-file system and registered with it at https://oshrc.entellitrak.com.

Timeliness of Respondent's Expert Witnesses Report

The Scheduling Order required the parties to serve reports for expert witnesses by September 9, 2016, with rebuttal reports due one week later on September 16, 2016.[6] The Secretary agreed to extend these deadlines to September 23, 2016 for serving expert reports, and to September 30, 2016, for any expert rebuttal reports. (Ex. B.)

On September 23, 2016, the Secretary disclosed James D. Humphrey as an expert and served his witness report ("Humphrey Report"). On the same day, Respondent disclosed that it intended to proffer Stephen P. Andrew as an expert witness, but did not provide any report as required by the Scheduling Order. One week later, on the agreed upon extended deadline for the designation of rebuttal experts and the exchange of reports for any such experts, Respondent identified Mr. Andrew as a rebuttal expert, but still did not provide a report from him (again, as required by the Scheduling Order). The Secretary informed Respondent that the failure to provide an expert report made the disclosures untimely. (Ex. E.) Eventually, on October 7, 2016, Respondent provided what it characterized as an "expert rebuttal report" for Mr. Andrew ("Andrew Report"). (Ex. M)

The Scheduling Order specifies that: "[w]itnesses may not be permitted to testify and exhibits may not be accepted into evidence unless they have been identified in a timely pre-hearing exchange." (Scheduling Order at 4.) Here, although Respondent timely identified Mr. Andrew as an expert, it failed to provide a timely and compliant report from him by the Scheduling Order's deadline either for the disclosure of reports by experts or rebuttal experts. *Id.* at 4-5. The Andrew Report also fails to comply with Scheduling Order's requirement that it include a list of the information considered by the witness in forming his opinions and the

[6] The parties proposed and agreed to the deadlines set forth in the Scheduling Order.

compensation paid to him.[7] *Id.* at 4. Respondent must promptly rectify these deficiencies by filing and serving a correct and up to date report that complies with all the requirements set forth in the Scheduling Order and Fed. R. Civ. Proc. 26(a)(2)(B)(i)[8] no later than 5:00 p.m. EDT on November 4, 2016. Any failure to comply with this Order may result in the undersigned striking Mr. Andrew's designation as a rebuttal expert and precluding his testimony.[9] Fed. R. Civ. Proc. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence … , unless the failure was substantially justified or is harmless"); *English v. District of Columbia*, 651 F.3d 1, 12 (D.C. Cir. 2011) (discussing the requirement to supplement expert reports). *See also* Scheduling Order at 5 ("All parties must comply literally with all parts of the above order. Failure to do so may result in appropriate sanctions including dismissal of claim or defense.").

Concerns with Admissibility of Mr. Andrew's Testimony

In addition to failing to comply with the Scheduling Order, the Andrew Report also fails to provide sufficient evidence from which it can be determined that Mr. Andrew has sufficient specialized knowledge of the equipment involved in this matter so as to render his testimony

[7] In addition, if the witness has testified as an expert in other cases within the last four years those must also be disclosed. (Scheduling Order at 5).

[8] Commission Rule 2, 29 C.F.R. § 2200.2, specifies that in the absence of a specific provision procedure is in accordance with the Federal Rules of Civil Procedure.

[9] The undersigned notes that the Scheduling Order requires the supplementation of any expert's disclosure report if there are any additions or changes to the initial report. (Scheduling Order at 5.) Failure to comply with this requirement may also result in the exclusion of any testimony by Mr. Andrew and/or the Andrew Report. *See Greenleaf Motor Express Inc.*, 21 BNA OSHC 1872, 1876 (No. 03-1305, 2007) (upholding exclusion of expert when report was late and there were concerns with his expertise), *aff'd*, 262 F. App'x. 716 (6th Cir. 2008) (unpublished); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1107 (9th Cir. 2001) (upholding the exclusion of the testimony of a party's only damages expert).

admissible. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-48 (1999). Fed. R. of Evid. 702[10] permits opinion testimony from a "witness who is qualified as an expert by knowledge, skill, experience, training, or education," when such testimony meets four specified criteria. The expert's specialized knowledge must "help the trier of fact understand the evidence," be "based on sufficient facts or data," be "the product of reliable principles and methods," and be result of the expert's reliable application of those "principles and methods to the facts of the case." Fed. R. Evid. 702. It is unclear whether Mr. Andrew examined the construction personnel hoist at C.W. Driver's worksite or has other familiarity and specialized knowledge of this specific type of equipment.[11] Neither the Andrew Report nor the expert's resume sufficiently describes Mr. Andrew's experience with construction personnel hoists in general or the one at C.W. Driver's worksite in particular. (Exs. G, N.) *See Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 871 (7th Cir. 2001) (upholding judge's decision to exclude expert testimony regarding the safety of a forklift when it did not go beyond lay person's knowledge or common sense). If Mr. Andrew has specialized knowledge of the equipment at issue in this matter, and if the Andrew Report is timely updated to identify that experience, he may testify on the following topics addressed in the Humphrey Report, provided Respondent establishes that the testimony will aid the undersigned's

[10] Pursuant to Commission Rule 71, 29 C.F.R. § 2200.71, the Federal Rules of Evidence are applicable to Commission proceedings.

[11] The undersigned notes that when expert witness testimony is based solely or primarily on experience, "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Advisory Committee Notes on 2000 Amendment, Fed. R. Evid. 702.

understanding of the evidence.[12] *See Daubert,* 509 U.S. at 593 n.10 (party proffering the party the expert witness has the burden to establish that the testimony meets the relevant tests). First, if Respondent establishes that Mr. Andrew has specialized knowledge, skill, experience or training of the interlocks on C.W. Driver's construction personnel hoist, then he may offer testimony regarding the checking of interlocks as discussed on page one in paragraph 4 of the body of the Humphrey Report.[13] Second, if Respondent establishes that Mr. Andrew has specialized knowledge, skill, experience or training of the pre-operation checks for C.W. Driver's construction personnel hoist, then he may offer testimony regarding the steps Mr. Hernandez took, as discussed in the last paragraph on page 1, and paragraphs 1, 3, and 4 on page 2 of the Humphrey Report. Third, if Respondent establishes that Mr. Andrew has specialized knowledge, skill, experience or training regarding the use WD-40 on the type of joystick present on C.W. Driver's construction personnel hoist, then he may offer testimony regarding the second full paragraph on page two of the Humphrey Report. If Respondent fails to establish that Mr. Andrew has specialized knowledge of the equipment at issue in this matter, his testimony and the Andrew Report will be excluded for failure to satisfy Fed. R. of Evid. 702(c). *See Daubert*, 509 U.S. at 589. *See also* Fed. R. Evid. 401 (relevant evidence).

The Secretary also argues that the lateness of the disclosure is not justified and resulted in prejudice. (Mot. at 5-9.) Respondent counters that the late disclosure was justified because third party witnesses' depositions were not completed until one day before the expert rebuttal report

[12] Even though an expert's opinion may be admissible, in the absence of a jury, the weight accorded to it "is solely within the discretion of the judge." *Am. Mill Co. v. Tr. of the Distribution Trust,* 623 F.3d 570, 573-74 (8th Cir. 2010).

[13] This paragraph begins with the sentence "[t]here is no evidence that the car door interlocks were completely checked by C.W. Driver prior to the fatal accident." (Humphrey Report at 1).

was due and also argues that the Secretary has not been prejudiced by its conduct because it provided the expert's name, resume "and the substance of his opinion" on September 23, 2017. (Opp'n at 5-6.)

First, the undersigned rejects the justification offered by Respondent for its failure to comply. The Scheduling Order initially directed the parties to complete fact discovery by September 2, 2016, and to finish all discovery by September 23, 2016. (Scheduling Order at 1.) On September 2, 2016, Respondent filed an untimely motion seeking additional time to complete discovery. In a September 19, 2016 Order, the undersigned found that Respondent had not demonstrated due diligence in the months leading up to the discovery deadline and granted only a limited extension to permit four depositions to be taken by September 29, 2016. Respondent's failure to exercise due diligence to comply with the initial discovery deadlines does not justify subsequent failures to comply with the deadlines for providing expert witness reports.[14]

Second, the undersigned rejects Respondent's argument that the Secretary was not prejudiced because it was provided with some information about the expert before the deadlines set out in the Scheduling Order (as modified) passed. (Opp'n at 4-5.) There is no dispute that Respondent did not provide "a written report prepared and signed by the witness" until October 7, 2016. (Scheduling Order at 2, 5; Ex. M.) Further, Respondent's contention that it provided the Secretary with "the substance of the opinion to be rendered" is not supported. (Opp'n at 4.) The limited information provided by Respondent prior to October 7, 2016 fell well short of what the Scheduling Order specifies. Indeed, even the information provided to date fails to comply.

[14] The undersigned notes that in seeking to extend the discovery deadlines, the Respondent did not identify any known or potential impact the extension would have on the Scheduling Order's requirements to identify and provide reports for expert witnesses.

Nonetheless, the undersigned finds that if Respondent cures the deficiencies in the Andrew Report (as explained above), limiting Mr. Andrew's testimony solely to the rebuttal of the opinions set out in the Humphrey Report, will likely sufficiently address any prejudice suffered by the Secretary as a result of the late disclosure.[15] Respondent provided the Andrew Report one month in advance of trial (and one week after the deadline for rebuttal expert reports). The Secretary does not allege that he needs more time to identify another expert or to depose Mr. Andrew.[16] Importantly, because Mr. Andrew will not be permitted to offer opinions on topics not addressed in the Humphrey Report, his testimony will solely concern topics known to the Secretary by the deadline set out in the Scheduling Order. *See Mid-Am. Tablewares, Inc. v. Mogi Trading Co*., 100 F.3d 1353, 1363 (7th Cir. 1996) (noting that a judge is given broad discretion to determine whether a disclosure violation is justified or harmless or upholding a decision to allow testimony despite a late disclosure).

The undersigned agrees with the Secretary that Mr. Andrew's opinion that electromechanical devices "will eventually fail" and may fail without warning does not rebut anything in the Humphrey Report. (Ex. N at 2.) The function of rebuttal testimony is to contradict or rebut evidence on the same subject matter as the adverse party's evidence. Fed. R. Civ. Proc. 26(a)(2)(D); *Marmo v. Tyson Fresh Meats, Inc*., 457 F.3d 749, 759 (8th Cir. 2006). Mr. Humphrey offered no opinion on the cause or timing of the failure of the electrical interlocks.

[15] As discussed, Respondent must supplement the Andrew Report. If it fails to do so, or if any new information provided results in actual prejudice, the undersigned will entertain an objection at the hearing on that basis.

[16] The undersigned notes that the delay in the Secretary's receipt of the report gave it less time to evaluate the document before motions *in limine* were due. (Scheduling Order at 2.) However, as the Secretary could have sought an extension of that deadline and because, as discussed above, the undersigned permitted the late filing of such a motion, any prejudice is harmless.

Instead, the Humphrey Report offers opinions on the competency of the individuals who operated the lift. (Humphrey Report at 1-2.) Thus, the information contained under the heading "**Use of Electromechanical Devices**" in the Andrew Report is not rebuttal evidence and is excluded. (Ex. N. at 2.)

Finally, the undersigned notes that the Joint Prehearing Statement filed by the parties on October 26, 2016 identifies Mr. Andrew as both an expert witness and an expert rebuttal witness. (Jt. Pre-Hr'g at 9-10.) For the reasons set forth herein, any testimony by Mr. Andrew that is inconsistent with this Order, including but not limited to any testimony that is not rebuttal in nature, is excluded. Likewise, Respondent will need to establish that any testimony by Mr. Andrew meets the criteria set forth in Fed. R. Evid. 702.[17]

So ordered.

/s/Covette Rooney
Covette Rooney
Chief Judge, OSHRC

Dated: 11/2/16
Washington, D.C.

[17] This Order is without prejudice to the Secretary's right to object to Mr. Andrew's testimony and the Andrew Report on grounds not set forth in the Motion, or to renew the objections set forth in the Motion based upon a more fully developed record at the hearing.