United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,
Complainant
v.
Tower King II, Inc.,
Respondent.

OSHRC Docket No.: **18-0553**

ORDER DENYING COMPLAINANT'S MOTION IN LIMINE

Before me is the Secretary's *Motion to Exclude Respondent's Identified Expert Witnesses and the Expert Report of Jocko Vermillion* filed February 12, 2019. In it, the Secretary seeks an order excluding the testimony and report of Jocko Vermillion, Respondent's expert, on the ground Mr. Vermillion lacks expertise sufficient to render opinions requiring knowledge of engineering. The Secretary argues to the extent Mr. Vermillion does have expertise relevant to the communications tower industry, his opinions based on that expertise are not admissible because they constitute legal opinions or are about matters not relevant to this proceeding. Respondent responds Mr. Vermillion has the necessary background to testify as an expert on communications tower safety and has done so in the past. Respondent contends it does not intend to have Mr. Vermillion testify regarding matters requiring engineering expertise and the testimony it intends to elicit from Mr. Vermillion is relevant to the issue of abatement. For the foregoing reasons, the Secretary's Motion is **DENIED**.

BACKGROUND

This matter involves an accident in which three of Respondent's employees were killed when they fell from a 1,042-foot communications tower. Respondent had been hired to remove certain equipment from the tower. The accident occurred when the gin pole to which the employees were tied off detached and fell to the ground, taking the employees with it.

Following an investigation by the Fort Lauderdale Area OSHA Office, the Secretary issued a single serious citation alleging a violation of § 5(a)(1) of the Act or the general duty clause. In it, the Secretary alleged Respondent violated § 5(a)(1) when it exposed employees to fall and struck-by hazards by allowing employees to perform

> work on a communications tower without a complete rigging plan and exceeded the capacity of the rigging attachments of a gin pole that was attached to the tower and used to hoist loads, exposing employees who were tied off to the gin pole to fall hazards and employees on the ground, to struck-by hazards.

The Secretary contends Respondent can abate the hazard by ensuring

> A complete rigging plan is developed and implemented, including, when appropriate, having a qualified engineer review the pertinent parts of the plan such as the means and methods of rigging attachments of the gin pole to the tower.

Respondent timely contested the citation. Chief Judge Rooney assigned the matter to me and I issued a pretrial scheduling order.

Pursuant to my scheduling order, Respondent disclosed Mr. Vermillion as an expert witness and provided the Secretary with his report. During discovery, the Secretary took Mr. Vermillion's deposition. The Secretary contends the opinions contained in Mr. Vermillion's report and provided during his deposition testimony are outside of his area of expertise or otherwise inadmissible legal conclusions or not relevant to any material issue in dispute. [1]

ANALYSIS

Federal Rules of Evidence 702 and 704 govern the admissibility of expert opinions and are made applicable to Commission proceedings pursuant to Commission Rule 71. 29 C.F.R. § 2200.71. Federal Rule of Evidence 702 provides,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of this case.

In determining the admissibility of expert testimony under Rule 702, the Commission has consistently applied the Supreme Court's holdings in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See, e.g., Southern Pan Services Co.,* 21 BNA OSHC 1274 (No. 99-0933, 2005); and *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872 (No. 03-1305, 2007). In *Southern Pan*, the Commission interpreted the holding in *Daubert* to set out a two-pronged test. The Commission held,

> Under the first prong, the judge must consider whether the expert's proffered testimony is sufficiently reliable to warrant admission. [*Daubert*, 509 U.S.]at 590. In making this inquiry, the judge may consider factors including, but not limited to: (1) whether the theory or technique can be tested; (2) whether it has been subject to peer review and published; (3) the known or potential error rate; and (4) the degree of acceptance within the relevant scientific community. *Id.* at 593-94. Under the second prong, the judge must determine whether the proffered testimony is relevant, *i.e.*, whether it "logically advances a material aspect" of the case. *Id.* at 591.

[1] Although the Secretary addresses the opinions contained in Mr. Vermillion's report, he does not directly address the admissibility of the report itself.

Southern Pan, 21 BNA OSHC at 1277. Federal Rule of Evidence 704(a) provides, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Although this rule was amended to allow admission of expert testimony regarding an ultimate issue, it was not intended to advise the court on what outcome to reach. *See Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1574 (Fed. Cir. 1993).

The Secretary contends Mr. Vermillion does not have the expertise required under the Rule 702(a) to render opinions regarding certain facts in dispute because he lacks an engineering background. The Secretary further contends Mr. Vermillion's testimony fails the second prong of the *Daubert* test because it contains inadmissible legal conclusions and does not advance any factual issue material to the case.

Is Mr. Vermillion Qualified to Testify under Rule 702?

The Secretary contends Mr. Vermillion does not has the necessary expertise to render the opinions contained in his report at numbered paragraphs 1, 2, 3 and 9. These opinions each reference allegedly flawed engineering calculations contained in Respondent's rigging plan. The Secretary contends Mr. Vermillion does not have the necessary engineering background to render these opinions. Respondent does not dispute Mr. Vermillion "is not qualified to render opinions that require engineering expertise." (Respondent's Response at p. 6) As articulated in Mr. Vermillion's report, each paragraph referenced by the Secretary contains an opinion regarding load calculations. To render these opinions Mr. Vermillion would have to possess the engineering expertise Respondent concedes he does not have. Because Respondent does not intend to elicit this testimony, however, the Secretary's argument is moot.

The Secretary does not appear to take issue with Mr. Vermillion's qualifications as they relate to the communications tower industry or communications tower safety. Nor could he. Since 1990, Mr. Vermillion has been involved, in some capacity, in the communications tower industry. Much of that time, his work has focused on safety issues in that industry. He is a member of several industry trade groups and of the American National Standard Institute (ANSI) committee on communications tower erection. He has been recognized by Commission judges as an expert in that industry in past proceedings. To the extent Respondent seeks to have Mr. Vermillion render opinion testimony on the subject matter of communications tower practices and safety, Mr. Vermillion has the necessary qualifications to do so.

Will Mr. Vermillion's Testimony Help the Trier of Fact to Understand the Evidence or to Determine a Fact in Issue?

Elements of a General Duty Clause Violation

The citation at issue in this case is an alleged violation of § 5(a)(1) of the Act or the general duty clause. To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3)

the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower,* 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). In addition to the above enumerated elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.,* 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris,* 535 Fed. Appx. 386 (5th Cir. 2013). To be admissible, the proffered expert testimony must assist the trier of fact in understanding the facts relevant to one of the four elements of the Secretary's prima facie case or Respondent's defenses thereto.

Are Mr. Vermillion's Proffered Opinions Inadmissible Legal Conclusions

The Secretary first argues certain of Mr. Vermillion's opinions are legal conclusions. Courts have consistently excluded expert testimony that attempts to instruct the trier of fact on the applicable law or the application of that law to the facts, because such testimony does not assist the trier of fact but tells it what result to reach. *See, e.g., Nimely v. City of New York,* 414 F.3d 381, 397 (2nd Cir. 2005); *citing, U.S. V. Bilzerian*, 926 F.2d 1285, 1294 (2nd Cir. 1991). Under Federal Rule of Evidence 704(a), testimony is not objectionable simply because it embraces an ultimate issue. However, Rule 704(a) was not intended to allow a litigant to present its legal arguments from the witness stand. The Commission has found proper exclusion of proffered expert testimony that addresses a legal, rather than factual issue, finding such testimony does not meet the second prong of Rule 702. *Greenleaf*, 21 BNA OSHC at 1876-77.

The Secretary objects to the admission of the preliminary opinion and the opinion contained in numbered paragraph 12 of Mr. Vermillion's report. Respondent did not specifically respond to this objection raised by the Secretary. Both these statements in Mr. Vermillion's report expressly address the ultimate issue to be decided in this case – whether the Secretary has met his burden to establish the alleged violation. They are not admissible and will be excluded.

The Secretary also objects to the admissibility of Mr. Vermillion's opinion regarding applicability and interpretation of ANSI standard A10.48.[2] Courts have held it is inappropriate for an expert witness to opine on the meaning or application of administrative regulations. *Mola Dev. Corp v. U.S.* 516 F.3d 1370, 1379 n. 6 (Fed. Cir. 2008). Respondent again concedes Mr. Vermillion's testimony would not assist the trier of fact with regard to the unambiguous language of the ANSI standard. Such testimony is inadmissible. So too is Mr. Vermillion's opinion regarding the applicability of the ANSI standard provisions to the conditions sited.[3] Such conclusory testimony is inadmissible.

[2] Neither party included the ANSI standard referenced in their submissions.

[3] The Secretary takes issue with Mr. Vermillion's statements in his report that the ANSI standard is the "gold standard" and "aspirational in nature." An ANSI standard is a voluntary industry standard. It does not have the force and effect of law. As such, Mr. Vermillion's statements are not helpful to the trier of fact.

On the other hand, Mr. Vermillion does have the background necessary to assist the trier of fact to understand technical language contained in the ANSI standard. Such testimony does not constitute impermissible legal conclusions, would assist the trier of fact, and may be admissible.

Are Mr. Vermillion's Proffered Opinions Regarding Industry Practice Relevant?

The Secretary objects to Mr. Vermillion's testimony regarding industry practice as not relevant. The Secretary argues whether Respondent's industry was following the ANSI standard is not relevant to whether the hazards addressed in the citation were recognized by the industry. Respondent counters that the Secretary misunderstands the purpose of the testimony. Rather than rebutting the Secretary's evidence of industry recognition, Respondent contends Mr. Vermillion's testimony regarding industry practice will rebut the Secretary's contention a feasible means of abatement existed to materially reduce the hazard. To the extent Mr. Vermillion's testimony will address the feasibility of abatement, it is admissible.

To establish the alleged general duty clause violation, the Secretary must show feasible means of abatement existed to eliminate or materially reduce the hazard of falling or being struck by falling objects due to an incomplete rigging plan. The Secretary has the burden of establishing both the feasibility of the abatement and that it is effective in materially reducing the hazard. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1190 (Nos. 91-3144, et. al., 2000). "Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in 'prescribing a safety program.'" *Id*. at 1191 *quoting National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

To meet his burden in this case, the Secretary must demonstrate methods of developing and implementing a rigging plan exist, other than those implemented by Respondent, that would materially reduce the hazard. *See Chaplin Petroleum Co. v. OSHRC,* 593 F.2d 637, 642 (5th Cir, 1979). As the Commission most recently instructed in *MidSouth Waffles, Inc. d/b/a Waffle House #1283*, (No. 13-1022, 2019), Slip Op. at 12, "when an employer already has a safety program designed to eliminate the recognized hazard, the Secretary must 'show [the] *specific additional measures*' required to abate the hazard." *Id*. (citations omitted; emphasis in the original) At the outset, the Secretary must show the methods undertaken by Respondent to address the hazard were inadequate. He must then establish a reasonable safety expert, familiar with the industry, would include in a safety program other methods of developing and implementing a rigging plan that would materially reduce the fall and struck-by hazards. "If the proposed abatement 'creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility ....'" *CSA Equip. Co., LLC,* 24 BNA OSHC 1476 (*quoting Kokosing Constr. Co*., 17 BNA OSHC 1869, 1875 n.19 (No. 92- 2596, 1996); *Royal Logging C*o., 7 BNA OSHC 1744, 1751 (No. 15169, 1979) (finding it proper to reject proposed

abatement methods that "cause consequences so adverse as to render their use infeasible"), *aff'd*, 645 F.2d 822 (9th Cir. 1981)).

Mr. Vermillion's testimony that Respondent followed industry practice and that the additional requirements proposed by the Secretary would cause a greater hazard are relevant to the issue of whether a feasible means of abatement existed to materially reduce the hazard. Among other issues, it is directly applicable to the question of whether a "reasonable safety expert, familiar with the industry" would include the proposed abatement in its safety program. As such it is relevant to a material issue in this proceeding. The Secretary's contention Mr. Vermillion's testimony regarding industry practice is inadmissible as irrelevant is rejected.

CONCLUSION

For the reasons stated herein, the Secretary's motion to exclude the testimony of Jocko Vermillion is **DENIED**.[4]

SO ORDERED.

/s/

Date: **February 27, 2019**

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[4] Because the Secretary did not address it in his motion, I have not ruled on the admissibility of Mr. Vermillion's report.