UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket Nos. 13-1101 and
	)	13-1102
American Recycling & Manufacturing Co., Inc.,	)	
	)	
	)	CONSOLIDATED FOR DISCOVERY
Respondent.	)	AND TRIAL PURPOSES
	)	
	)	

ORDER DENYING WITHOUT PREJUDICE SECRETARY'S RENEWED MOTION *IN LIMINE* TO EXCLUDE THE TESTIMONY OF DOUGLAS MILLER

I. FACTS

An Occupational Safety and Health Administration (OSHA) compliance officer conducted inspections of Respondent's worksite in Rochester, New York from December 30, 2012 through January 30, 2013. On May 30, 2013, OSHA issued two willful and serious citations with a proposed penalty of $152,400 in a case later docketed as no. 13-1101.[1] On the same day, OSHA also issued a two item, serious citation with a proposed penalty of $7,000 in a case later docketed as no. 13-1102. Thereafter, Respondent filed its notices of contest. On August 22, 2013, the Secretary filed his complaints in these two cases. In September, 2013, Respondent filed its answers. These two cases have been consolidated for discovery and trial purposes.

On August 11, 2014, Respondent served its expert report by Douglas Miller upon the Secretary. The scope of Mr. Miller's expert report encompasses all the citation items at issue, except in Docket No. 13-1101, Citation 1, Items 6, 8, 9, and 12, and Docket No. 13-1102,

Citation 1, Item 1. It is unclear whether it includes in Docket No. 13-1101, Citation 1, Items 11b and 14b, or in Docket No. 13-1102, Citation 1, Item 2b. On August 12, 2014, Complainant filed his Motion *in Limine* to Exclude the Testimony of Douglas Miller (Original Motion *in Limine*). Complainant sought to exclude Mr. Miller's testimony at trial because it is not reliable and will not assist the trier of fact.

On August 29, 2014, Respondent timely filed its Opposition to Complainant's Motion *in Limine* (Opposition to Original Motion *in Limine*). Among other substantive arguments, Respondent asserted that the Secretary filed his Original Motion in *Limine* without first consulted with Respondent about the motion and without including a certification with the Original Motion *in Limine* that Complainant had conferred with Respondent beforehand in violation of the Court's Notice of Hearing and Scheduling Order.

On September 10, 2014, the Court denied, without prejudice, the Secretary's Original Motion *in Limine* because it was not accompanied by Complainant's counsel's certification that stated that: 1) the parties had discussed the matter, 2) there was or was not any objection to the motion, 3) the parties had made a good faith effort to settle the matter and had been unable to do so, and 4) the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any. The Order stated that Complainant may refile his Motion *in Limine* by September 25, 2014 provided it is accompanied by a certification that fully complies with the requirements set forth in the Court's Scheduling Order, at pp. 3-4, n. 7.

On September 15, 2014, the Secretary filed his Renewed Motion *in Limine* to Exclude the

[1] Docket No.13-1101 also involves a worker amputation.

Testimony of Douglas Miller (Renewed Motion *in Limine*).[2] The Secretary seeks an order excluding the testimony of Mr. Miller from testifying as an expert at the hearing. Complainant argues that Mr. Miller's proposed testimony falls far short of satisfying the expert testimony requirements of Federal Rule of Evidence (Fed. R. Evid.) 702. He argues that Mr. Miller's testimony is not reliable and will not assist the Court as the trier of fact. The Secretary further asserts that Mr. Miller is not qualified as an expert because his educational background is unclear, he has no specific expertise on the types of machinery involved in the case, and he has not previously qualified as an expert witness in a case before the Occupational Safety and Health Review Commission (Commission). The Secretary also argues that the proposed expert testimony invades the province of the Court and is more akin to closing argument.

On September 24, 2014, the parties filed their Joint Pre-Hearing Statement. In it, Respondent stated its intention to call Mr. Douglas Miller as an expert witness. Respondent indicated that Mr. Miler is expected to testify with regard to his expert report, including his inspections of the American Recycling & Manufacturing Co., Inc. (ARM) facility, and his observations and opinions including those identified within the Joint Pre-Hearing Statement, at pp. 8-10.[3]

On September 25, 2014, Respondent filed its Memorandum of Law in Opposition to Complainant's Motion *in Limine* and in Support of Cross-Motion.[4] Respondent asserts that Mr.

[2] Complainant's Renewed Motion *in Limine* included a Certificate of Conference certifying that the Secretary had conferred via telephone with Respondent regarding the Renewed Motion *in Limine* on September 15, 2014.
[3] In its Opposition to the Secretary's Renewed Motion *in Limine*, Respondent asserts that Mr. Miller is "an expert in occupational safety as to safe practices, typical industry practices, or the practices at Respondent's facility." Opposition to Renewed Motion *in Limine* at p. 12.
[4] In its Cross-Motion, Respondent seeks, in the alternative, to exclude any opinion testimony of Compliance Officers Nick Donofrio and Kimberly Mielone regarding the alleged safety hazards because they have not been disclosed as experts in this case. The Cross-Motion is pending Complainant's response which is due by October 9, 2014. This Order does not rule upon Respondent's Cross-Motion, which will be ruled upon later by separate court order.

Miller qualifies as a safety expert and his testimony is reliable. Citing to Fed. R. Evid. 704, it also asserts that Mr. Miller should be allowed to testify as to ultimate issues of fact. Respondent further states that Mr. Miller's testimony will assist the Court as the trier of fact.

The case is set for a hearing commencing on October 20, 2014.

II. DISCUSSION

Complainant asserts that Mr. Miller's expert report does not comply with Fed. R. Evid. 702[5] and with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) because it "employs no scientific methodology" and will not assist the trier of fact.[6] As advanced by Respondent, there is no dispositive requirement that a non-scientist expert use a particular scientific method to formulate the expert's opinions. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Experts may present expert testimony on a multitude of non-scientific topics. *Id.* at 150. Trial judges have great latitude to decide whether an expert's testimony is reliable. *Olin Corp. v. Certain Underwriters at Lloyd's London,* 468 F.3d 120, 133 (2nd Cir. 2006)[internal citations omitted]. Any such inadequacy regarding the absence of any scientific methodology can be addressed by *voir dire* at the hearing before Respondent offers Mr. Miller's testimony or expert report into evidence, or by cross-examination. *See Yankee Atomic Elec. Co. v. United States,* No. 98-126C, 2004 WL 1535686 (Fed. Cl. June 28, 2004). Respondent asserts

[5] *Fed.R.Evid. 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 witness has reliably applied the principles and methods to the facts of the case.

[6] In *Daubert*, the Supreme Court used a four-prong test of reliability: 1) Has the methodology been subjected to a peer reviewed publication? 2) Is there a known or knowable error rate for the methodology? 3) Is the methodology generally accepted in the relevant scientific field? and 4) Has the methodology been tested or is it testable?

that Mr. Miler's report and expected testimony address factual issues that require technical expertise to understand*; e.g*. provide facts on how the equipment is operated and maintained. Here, the Court finds that Respondent has sufficiently demonstrated to the extent necessary to survive the Secretary's Renewed Motion *in Limine* that Mr. Miller's may have adequate technical, or other specialized knowledge, that may help the trier of fact to understand the evidence or to determine a fact in issue.

Complainant's also asserts that Mr. Miller is unqualified as an expert because his educational background is unclear, he has no specific expertise on the types of machinery involved in the case, and he has not previously qualified as an expert witness in a case before the Commission. The standard of qualification for an expert witness is a liberal one. *United States v. Parra*, 402 F.3d 752 (7th Cir. 2005)(court should consider proposed expert's full range of practical experience as well as academic or technical training when determining whether expert is qualified to render an opinion in a given area). Mr. Miller is an OSHA Compliance and Safety Consultant and President of Occupational Safety Consultants. During his career, he has worked as an auditor, project manager and trainer, addressing health and safety issues, developing written safety and health programs, and site-specific procedures. For the past fourteen years, he has taught for the Region II OSHA Education Centers, where he frequently trains OSHA inspectors. His clients included Exxon Mobil, DuPont, Xerox, Corning, #M, Siemens, a significant number of educational institutions, and many varied state and local government entities. His knowledge base includes machine guarding, safety compliance, employee safety, training, OSHA and ANSI, and Accident Investigation. His training accreditations include a Trainer Course in OSHA Standards for General Industry, Introduction to Industrial Hygiene, Machinery and Machine

Guarding Standards, Electrical Standards, Hazards Recognition, Public Warehousing and Storage, Introduction to Machinery and Machine Safeguarding, and Introduction to Evacuation and Emergency Procedures. He has expert witness experience in matters relating to floor holes and amputation. He attended St. Bonaventure University.

The Commission normally accords wide latitude to administrative law judges in determining whether proffered expert testimony will be helpful to the Court. *See Secretary of Labor v. United States Postal Service,* 21 BNA OSHC 1767, 1775 (No. 04-0316, 2006). The Court finds that Respondent has presented information pertaining to Mr. Miller's qualifications sufficient to justify the Court not granting the Secretary's Renewed Motion *in Limine* at this time before the hearing. Such material shows that Mr. Miller may qualify at trial as an expert in subject matter areas pertinent to this case that are included within his expert report, *e.g.;* Machine guarding, industrial hygiene, uncovered floor holes, safe practices, typical industry practices, and/or the practices at Respondent's facility. Experts in general industry who are not specialists in a particular discipline may, nonetheless, render expert testimony relating to general industry.[7] For example, experts in construction who are not specialists in a particular discipline such as soil composition and the operation of heavy earthmoving equipment on soil close to water may, nonetheless, render expert testimony relating to construction. *See also Gaydar v. Sociedad Institute Gineco-Quirurgicon y Planificacion*, 345 F.3d 15, 24 (1st Cir. 2003) (A "proffered expert physician need not be a specialist in a particular medical discipline to render expert

[7] The Secretary's objections as to Mr. Miller's qualifications and helpfulness to the Court, do not raise real *Daubert* or *Kumho Tire* reliability issues. In this instance, they go to weight, not admissibility. *See Avcon, Inc., Vasilios Saites and Nicholas Saites*, 2000 WL 14660990, at *29 (Nos. 98-775, 98-1168, O.S.H.R.C.A.L.J., Sep. 19, 2000) (expert testimony entitled to little weight where no specialized knowledge relevant to the case present); *see also Taylor v. TECO Barge Line, Inc. et al.,* 2009 WL 1684420 at * 4 (W.D. Kentucky June 16, 2009) (questions regarding expert's precise experience on various bodies of water are valid questions for cross-examination, but not determinative of expert status).

testimony relating to that discipline."). That the extent of Mr. Miller's educational background is unclear at the moment or that he has not previously qualified as an expert witness in a case before the Commission is not by them sufficient to now justify a finding that Mr. Miller is unqualified to present expert testimony at this proceeding. For the above reasons, the Court defers until the hearing making a finding that Mr. Miller possesses sufficient qualifications through knowledge, skill, training or experience in particular subject matter areas of expertise that are pertinent to the facts of this case that will assist the Court to understand the evidence in this case.

The Secretary further asserts that Mr. Miller's testimony is inadmissible because it invades the province of the Court and he cannot tell the fact finder what conclusions to reach. Federal courts have found expert testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *See United States* v. *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991). Fed. R. Evid. 704 was amended so as not to preclude expert testimony on the ultimate issue.[8] Fed. R. Evid. 704, Advisory Committee Notes, 1972 Proposed Rules, reprinted in Thomson Reuters, Federal Civil Judicial Procedure and Rules at 468 (2014), states "The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished but the instant rule." The amendment was not intended to allow an expert to advise the court on what outcome to reach. *See United States v. Roper*, 874 F.2d 782, 790 (11th Cir. 1989); *Sparton Corporation v.*

---

[8] *Fed.R.Evid. 704* states in relevant part: "An opinion is not objectionable just because it embraces an ultimate issue."

United States, 77 Fed. Cl. 1, 8 (2007).[9]

Respondent is also not entitled to present its legal arguments from the witness stand in the guise of expert testimony. While patent law experts have occasionally been used in bench trials to inform the judge on the intricacies of patent law, "[a]n expert's opinion on the ultimate legal issue is neither required nor indeed 'evidence' at all." *Mendenhall v. Cedarapids, Inc.,* 5 F.3d 1557, 1574 & n. 17 (Fed.Cir.1993) (quoting *Nutrition 21 v. United States,* 930 F.2d 867, 871 n. 2 (Fed.Cir.1991)).

Respondent asserts that Mr. Miller "uses his observations at the scene, his review of the file and his knowledge as an expert to come to conclusions as an expert in occupational safety as to safe practices, typical industry practices, or the practices at Respondent's facility." The Fifth Circuit has determined that "industry custom and practice will generally establish the conduct of the reasonably prudent employer…." *See Cotter & Co. v. OSHRC*, 598 F.2d 911, 913 (5th Cir. 1979); *but cf. Secretary of Labor v. Bratton Corp.*, 14 BNA OSHC 1893, 1898 (No. 83-132, 1990)(No federal circuit court other than the Fifth Circuit has found evidence of industry custom to be dispositive). Commission and other circuits apply a test as to what a reasonable person familiar with the circumstances surrounding the cited condition and with *industry practice* would have done)(emphasis added). Accordingly, Respondent may offer expert testimony by Mr. Miller regarding industry custom and practice to the extent that he is found by the Court to be qualified in that particular subject matter area of expertise and the industry custom is relevant.[10]

Here, Respondent assets that Mr. Miller "never concludes whether or not a specific

[9] In *Sparton,* a law school professor's testimony to serve the sole purpose of advising the Court on how to interpret the Armed Services Procurement Regulations (ASPR), contract provisions, and whether to apply the *Christian* doctrine to the facts of the case was excluded because such legal conclusions were found to be within the province of the Court. *Sparton Corporation v. United States*, 77 Fed. Cl. at 8. Such is not the case here.

regulation is violated" and "does not make legal opinions." Accordingly, Mr. Miller may present testimony on the ultimate issues in this case to the extent that he may not tell the Court what conclusion to reach.[11]

This case will be handled by a bench trial. There is no concern with protecting a jury from "being bamboozled by technical evidence of dubious merit." *American Home Assurance Company v. Masters' Ships Management S.A. et al.,* No. 03 Civ. 0618(JFK), 2005 WL 159592, at *1 (S.D.N.Y. Jan. 25, 2005), *SmithKline Beecham Corp. v. Apotex Corp.,* 247 F.Supp.2d 1011, 1042 (N.D.Ill.2003). Whereas, in a jury trial, expert testimony on the law may be excluded in part to prevent jury confusion, the primary reason for exclusion of such testimony in a bench trial is that it invades the province of the court and is not helpful. *Marx Co., Inc. v. Diners' Club Inc.,* 550 F.2d 505, 509-10 (2nd Cir. 1977). In the context of a non-jury trial, the Court may allow challenged expert testimony to be presented at trial and then later determine issues of admissibility and reliability. *See N.W.B. Imports and Experts, Inc. v. Eiras*, No. 3:03-cv-1071-J-32-MMH, 2005 WL 5960920, at *1 & n.2 (M.D. Fl. March 22, 2005). The fact that this is a bench trial weighs heavily in favor of denying without prejudice the Secretary's Renewed Motion *in Limine* and addressing the issues raised therein if and when they come up at trial. *See Lifetime Homes, Inc. v. Residential Development Corp.,* 510 F. Supp.2d 794, 811 (M.D. Fl. 2007).

Furthermore, "vigorous cross-examination" and "presentation of contrary evidence" are among the means for "attacking shaky, but admissible evidence." *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. at 596.

---

[10] *See e.g.*; Summary of Opinion, Docket No. 13-1101, Citation 1, Item 10, at Opposition to Renewed Motion *in Limin*e, at p. 13.

[11] Though an expert's opinion may be admissible at trial, the admissibility of the expert's opinion does not equate with its utility in satisfying a party's burden of proof. *See In re Lake States Commodities,* 272 B.R. 233, 243 (N.D.

III. CONCLUSION

It cannot be said at this stage that Mr. Miller lacks specialized knowledge, skill, or experience related to the matters about which he intends to offer expert testimony in this case or to make a finding that his methodology is flawed.

For all of the above foregoing reasons, Complainant's Renewed Motion *in Limine* is found by the Court to be without merit at this time.

IV. ORDER

WHEREFORE IT IS ORDERED THAT the Complainant's Renewed Motion *in Limine* is DENIED, without prejudice to further renewal by objection during the trial for the matters raised herein.

SO ORDERED.

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

Dated: 10/1/2014
Washington, D.C.

Ill., Jan. 11, 2002).