United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. ALDRIDGE ELECTRIC, INC., Respondent.	OSHRC DOCKET NO. 13-2119

ORDER ON SECRETARY OF LABOR'S MOTION TO STRIKE RESPONDENT'S EXPERT REPORT AND PRECLUDE RESPONDENT'S EXPERT FROM TESTIFYING REGARDING FACTS GATHERED AFTER JANUARY 9, 2014

The underlying citation in this matter was issued following an OSHA investigation that was precipitated by the death of an employee of the Respondent which occurred while the employee was performing electrical duct work on the Dan Ryan Red Line Project on June 24, 2013.

On April 10, 2015, Secretary filed a Motion to Strike Respondent's Expert Report And Preclude Respondent's Expert From Testifying Regarding Facts Gathered After January 9, 2014. On February 10, 2015, Respondent provided the Secretary with a 17-page amended Expert Report prepared by Dr. Shirley Conibear, MD, MPH. The Secretary asserts that this report "substantially departed from her original Expert Report," in that it contained additional materials not identified in this original report, omitted information contained in the original report, and contained new information and opinions that were not included in the original report. The Secretary seeks the exclusion of the amended report and any testimony based on information learned after January 9,

2014.

Respondent filed a response in opposition to the Secretary's motion on April 22, 2015. Respondent requests that the undersigned permit Dr. Conibear to testify as to the issues identified in her initial and amended report.

The undersigned's April 4, 2014, Notice of Hearing, Scheduling Order and Special Notices states:

> C. Complainant and Respondent must disclose the names, organizational affiliations and subject matter areas of expertise of all affirmative expert witnesses, if any, no later than **October 8, 2014**. A report must be produced for each expert and shall be completed and delivered to opposing counsel no later than **October 8, 2014**. This written report shall be prepared and signed by the expert witness, and shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
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> D. Complainant must disclose the names, organizational affiliations and subject matter areas of expertise of its rebuttal expert witnesses, if any, no later than **October 29, 2014**. A report (see above at C) must be produced for each rebuttal expert and shall be completed and delivered to opposing counsel no later than **October 29, 2014**.

Pursuant to this same Notice, as a part of its joint prehearing submission, Respondent submitted Dr. Conibear's January 9, 2014 expert report.

The hearing in this matter commenced on February 3, 2015, in Chicago, IL. On February 5, 2015, based upon statements made during Respondent's counsel's opening remarks, the Secretary orally moved *in limine* to prevent Dr. Conibear from testifying regarding facts and opinions not contained within her original expert report dated January 9, 2014. Counsel for the Secretary asserted that this lack of notice was a due process violation and that the government was at a severe disadvantage because the hearing had already started. (Hr'g Tr. 709-13, 743-751).

In an effort to cure the prejudice alleged, counsel agreed that during the upcoming break a new report would be sent to the Secretary and Dr. Conibear would be deposed at the expense of

the Respondent. (Hr'g Tr. 735). In spite of these steps, the next day, the Secretary again alleged prejudice. (Hr'g Tr. 743). Accordingly, to further cure any other conceivable prejudice, the parties agreed to the Secretary's requests to:

1. Prohibit Dr. Conibear from taking into account any information obtained during the hearing;
2. Permit Dr. Levin to review Dr. Conibear's deposition testimony prior to his hearing testimony;
3. Permit Dr. Levin to sit in during Dr. Conibear's and John Dobby's hearing testimony so that he can "testify and rebuttal about things that may be outside the scope of his reports because we didn't have that ability to supplement his report";
4. Require Respondent to bear the cost of Dr. Conibear's hourly rate during the Secretary's deposition of Dr. Conibear.

Id. at 742-746.

The following week, the Secretary again alleged prejudice in light of the fact that counsel for the Respondent had the hearing transcript for use at the time the amended report was prepared. The undersigned stated that the report should not encompass any of the hearing proceedings and that the report and deposition would be based upon facts known at the time the January 9, 2014, report was prepared. (Hr'g Tr. pp. 1028-30).

Federal Rule of Civil Procedure 26(a)(2)(B) provides that expert witnesses must prepare and sign a written report containing a complete statement of all opinions to be expressed. Fed. R. Civ. P. 26(a)(2)(B). The statement must provide the basis and reasons for the opinions, the data the expert considered in reaching the opinion, the witness's qualifications, and other specified information. *Id*. The purpose of the report is to provide adequate notice of the substance of the expert's forthcoming testimony and to give the opposing party time to prepare for a response. *Walsh v. Chez*, 583 F.3d 990, 993 (7th Cir. 2009); *Jenkins v. Bartlett*, 487 F.3d 482, 487 (7th Cir. 2007). The consequence of non-compliance with Rule 26(a)(2)(B) is exclusion of an expert's testimony, unless the failure was substantially justified or is harmless. The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the court. *Gicla v. United States*, 572 F.3d 407, 410 (7th Cir. 2009) (quoting Fed. R. Civ. P. 37(c)(1));

see also Fed. R. Civ. P. 26(a)(2) advisory committee's note to 1993 amendments. Courts may set a time by which the parties must submit their experts' reports. Federal Rule of Civil Procedure 26(e)(1) provides that if any correction or addition is necessary for complete disclosure of an expert opinion, that process must take place before the time for disclosure has expired under Rule 26(a)(3). Fed. R. Civ. P. 26(e)(1). Supplemental disclosures must be submitted by the time that prehearing disclosures are due, Fed. R. Civ. P. 26(e)(2), which is either the date ordered by the court or, if there is no court order, 30 days before hearing. Fed. R. Civ. P. 26(a)(3)(B). The sanction for failing to abide by these rules can be substantial: Federal Rule of Civil Procedure 37(c)(1) states that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) ... is not, unless such failure is harmless, permitted to use as evidence at [hearing], at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). The Seventh Circuit has recognized "the propriety of ... measures to correct Rule 26 violations," and considers four factors to determine if a failure to timely disclose was harmless: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the [hearing]; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date." *Tribble v. Evangelides*, 670 F.3d 753, 760 (7th Cir. 2012).

The undersigned recognizes the Secretary's continuing assertion of prejudice in this matter. The undersigned also recognizes the brevity of Respondent expert's January 9, 2014 report. The amended report contains information and findings which were not included within Dr. Conibear's original report. Counsel for the Secretary has deposed Dr. Conibear about this additional information. Any prejudice to the Secretary was curable and has been cured by the measures counsel agreed to implement. The undersigned further finds that expert reports and testimony in this matter will assist the court.[1] The probative value in assisting the undersigned outweighs the prejudice alleged, which prejudice has been cured by counsels' own agreement,

[1] The Federal Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact. *Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 780 (3d Cir. 1996). Rule 702, which governs the admissibility of expert testimony, has a liberal policy of admissibility. *Id*.

noted *supra*. *See* Fed. R. Evid. 703.[2]

Respondent contends that Respondent's expert witness testimony will be based on facts known as of July 23, 2014, a date six months after the January 9, 2014 expert report. (Resp't Resp. in Opp'n, p. 3-4). Respondent asserts that the Secretary should not be surprised by those facts, as the Secretary met with Dr. Conibear during a settlement conference on that date.[3] As discussed above, by agreement of the parties, the Secretary had an opportunity to depose Respondent's expert on those facts, the Secretary's expert may be present at the hearing during Dr. Conibear's testimony, and the Secretary may present rebuttal evidence. The undersigned notes that Federal Rule of Civil Procedure 26(a)(2)(B) does not limit an expert's testimony simply to reading his report. The rule contemplates that the expert will supplement, elaborate upon, explain, and be cross-examined about this report. *See Thompson v. Doane Pet Care Co.,* 470 F.3d 1201, 1203 (6th Cir. 2006).

The undersigned further finds that disruption in the hearing schedule has been remedied in light of the fact that the undersigned, to her dismay, has rearranged her calendar to accommodate the deposition schedule and availability of the expert witnesses for hearing in this case.

The record contains no finding of bad faith or willfulness on the part of Respondent. Respondent's expert report was submitted pursuant to the April 4, 2014 scheduling order. The contents of the report were vague in some respects. The amended report nullifies that finding. (Secretary's Motion, Exhibit G).

For the foregoing reasons, the Court finds an insufficient basis upon which to grant the

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[2] Under Rule 703, "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed" so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject … ." The facts which the expert's opinion are based upon can be derived from three main sources: (1) firsthand observation of the witness (i.e., treating physician); (2) presentation at [hearing] through a hypothetical question or having the expert attend the [hearing] and hear the testimony establishing the facts; or (3) presentation of data to the expert outside of court and other than by his own perception (*i.e.*, review of documents). Fed. R. Evid. 703 advisory committee's note to 2000 amendments; *see also Sommerfield v. City of Chicago*, 254 F.R.D. 317, 328 (N.D. ILL. 2008) (The testimony adduced at trial can be made known. . . either through listening to trial testimony or hypothetical questioning and could form the basis of his opinions.)

[3] Discovery closed in this matter on November 19, 2014, and neither party deposed the other's expert witness. The undersigned is really in no position to direct what discovery should have been conducted, however, depositions may have led to a different hearing strategy.

Secretary's Motion to Strike and the motion is hereby DENIED.

/s/
Dated: April 23, 2015 Chief Judge Covette Rooney
OSHRC