UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | ) | OSHRC DOCKET NO. |
| | ) | 19-1093 |
| Complainant, | ) | REGION IV |
| | ) | |
| v. | ) | Inspection No. |
| | ) | 1367260 |
| RINALDI GROUP OF FLORIDA, LLC, | ) | |
| and its successors, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE DESIGNATION AND EXCLUDE TESTIMONY OF RESPONDENT'S PURPORTED EXPERT ROBERT KONING**

## I. BACKGROUND

This case stems from an Occupational Safety and Health Administration (OSHA) inspection of The Rinaldi Group of Florida, LLC's (Respondent) worksite at 2000 Park Avenue, Miami Beach, Florida, that began on December 17, 2018. On June 11, 2019, OSHA issued one citation to Respondent containing five items, with penalties totaling $43,758. Respondent filed a Notice of Contest on July 1, 2019. This matter was docketed by the Occupational Safety and Health Review Commission (Commission) on July 12, 2019. The Secretary filed his complaint on July 27, 2019 and Respondent filed its answer on August 21, 2019.

On September 16, 2019, the Court issued its initial scheduling order scheduling the trial to commence on January 14, 2020. The original Scheduling Order established the prehearing deadlines in this matter, specifically that expert disclosures must be made no later than 45 days prior to the hearing date. The trial was subsequently continued on five occasions.

Per the Court's February 19, 2021 Order Rescheduling Hearing and Pretrial Order (Scheduling Order), the trial is now scheduled for September 9-10, 2021, and expert designations were due to be submitted no later than July 26, 2021. Full expert reports were

further due to be submitted within 14 days of the expert's designation; i.e. by August 9, 2021.[1] Discovery, including the completion of any expert depositions, closed on August 10, 2021.

On August 10, 2021, Respondent filed a Designation of Expert Witness naming Mr. Robert Koning, and included in this filing Mr. Koning's Curriculum Vitae.[2] No expert report was included with this filing and none has yet been submitted to Complainant.

On August 12, 2021, the Secretary filed his Motion to Strike Designation and Exclude Testimony of Respondent's Purported Expert Robert Koning. The Secretary requests that the Court enter an order striking the expert designation of Robert Koning and barring Respondent from eliciting expert witness testimony from Mr. Koning at the hearing in this matter. The Secretary asserts that Respondent's designation of Mr. Koning was untimely under the applicable Prehearing Order, and the scope of Mr. Koning's expected expert report and testimony represent improper legal opinions.

Respondent's response to the Secretary's Motion to Strike Designation and Exclude Testimony of Respondent's Purported Expert Robert Koning was due to be filed with the Court by August 26, 2021. *See* 29 C.F.R. § 2200.40(h). Respondent did not file any response to the Secretary's Motion to Strike Designation and Exclude Testimony of Respondent's Purported

[1] The Court's February 19, 2021 order stated:

A report must be produced for each expert and shall be completed and delivered to opposing counsel no later than **fourteen days** after the expert is identified. 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. (emphasis in the original)

[2] Respondent's expert disclosure stated:

Mr. Koning is a construction site safety expert, and his Curriculum Vitae is attached hereto as **"Exhibit A"**. Mr. Koning is expected to testify as to the Standard of Care of the General Contractor, and Rinaldi's compliance with the Occupational Safety and Health Administration regulations. Mr. Koning's testimony will be based on his experience, background, responses to discovery, and deposition testimony, and his knowledge of Occupational Safety and Health Administration regulations as a Certified General Contractor. (emphasis in the original)

Expert Robert Koning with the Court.

## II. DISCUSSION

### A. Respondent's Expert Disclosure is Untimely and Incomplete

Respondent's designation of Mr. Koning as an expert witness occurred on the final day of this matter's discovery period. This untimely disclosure prevented the Secretary from taking Mr. Koning's deposition within the prescribed discovery period. The Scheduling Order allowed the parties sufficient time to take expert depositions based on not only the designation, but on the required expert report itself. Respondent's late expert designation and failure to provide an expert report prejudiced the Secretary from fully preparing for a trial in the event Mr. Koning was permitted to present his expert testimony.

This matter has been docketed before the Commission for more than two years. Respondent's attempt to introduce expert testimony at this point in the proceeding, a month before trial, when discovery has closed, does not comply with the Court's February 21, 2021 Scheduling Order.

Respondent has not provided any explanation to the Court for its delay, nor did it request that it be excused for its delay or assert that it was harmless. Under these circumstances, the Court concludes that Respondent's disclosure of its proposed expert was untimely and its failure to produce an expert report was inexcusable. *See Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872, 1876-77, 2007 WL 962961 at **5-6 (No. 03-1305, 2007) (Judge's exclusion of expert untimely disclosed not an abuse of discretion.).

### B. Mr. Koning's legal opinions, to the limited extent disclosed, are excluded because they would not assist the Court as required under Federal Rule of Evidence 702, and are ultimate conclusions of law, which are generally not permitted under Federal Rule of Evidence 704.

The Secretary asserts that any expert testimony by Mr. Koning would be inadmissible because his testimony essentially invades the province of the Court and he cannot tell the fact

finder what conclusions to reach.[3] Federal courts have found testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *See U.S.* v. *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991). Fed. R. Evid. 704 was amended so as not to preclude testimony on an ultimate issue. Fed. R. Evid. 704, Advisory Committee Notes, 1972 Proposed Rules, reprinted in Thomson Reuters, Federal Civil Judicial Procedure and Rules at 409 (2016 Rev. Ed.), 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 by the instant rule." However, the amendment was not intended to allow a witness to advise the court on what outcome to reach. *See U.S. v. Roper*, 874 F.2d 782, 790 (11th Cir. 1989); *Sparton Corp. v. U.S.*, 77 Fed. Cl. 1, 8 (2007).[4]

Respondent is not entitled to present its legal arguments from the witness stand in the guise of expert opinion 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. U.S.,* 930 F.2d 867, 871 n.2 (Fed.Cir.1991)).

Trial judges have wide discretion in determining the admission or exclusion of opinion evidence. *DaSilva v. Am. Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988). For instance, in

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[3] *See J.C. Watson Co.,* 22 BNA OSHC 1235, 1238 n.3 (No. 05-175, 2008) (consolidated), as an example where the Commission held that opinion testimony on questions of law are inadmissible. The employer in *J.C. Watson Co.,* argued the judge erroneously refused to permit its expert witness, an occupational safety and health consultant, to testify that the activities conducted at its facility constituted agricultural operations. The Commission determined that the judge properly refused to permit the expert's testimony since its intended purpose was to testify regarding a conclusion of law.

[4] 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 Corp. v. U.S.*, 77 Fed. Cl. at 8.

*N. Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 467-68 (1st Cir. 1988), the First Circuit Court of Appeals upheld the judge's decision to exclude a professional engineer's testimony as to the "legality" of specific conditions or the "meaning" of particular regulations since such testimony would not have assisted the trier of fact in any significant way. *Id*. at 468.

While the Secretary is not in possession of Mr. Koning's expert report, Respondent's designation indicates that Respondent intends to introduce his testimony in order to present legal opinions that are not the proper subject of expert testimony. Respondent's designation notes that Mr. Koning "is expected to testify as to the Standard ofCare [sic] of the General Contractor, and Rinaldi's compliance with the Occupational Safety and Health Administration regulations." Respondent indicates that Mr. Koning's testimony will be based upon "his experience, background, responses to discovery, and deposition testimony, and his knowledge of Occupational Safety and Health Administration regulations." Respondent's designation does not contain any reference to Mr. Koning's firsthand experience at the worksite or any factual or scientific knowledge whatsoever. The standard of care of a general contractor and Respondent's compliance with OSH Act regulations are subjects within the purview of the Court and not that of a designated expert witness.

An expert witness's report and testimony must comply with Federal Rule of Evidence 702. *See Greenleaf Motor Express, Inc.*, 21 BNA OSHC at 1876-77. Under Federal Rule of Evidence 702, expert witness opinions on ultimate issues of law "should not be received, much less considered." *Mola Dev. Corp. v. U.S.*, 516 F.3d 1370, 1379 n.6 (Fed. Cir. 2008). Rule 702 provides that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (finding

that judge serves as a "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony). The proponent of an expert's testimony bears the burden of showing that Rule 702's requirements are met. Here, Respondent has failed to meet its burden. *See Menz v. New Holland N. Am. Inc.*, 507 F.3d 1007, 1114 (8th Cir. 2007); *U.S. v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (*en banc*). Applying Rule 702, the Commission upheld the exclusion of an expert witness where "the report does not address any factual issue that required scientific or technical expertise to understand, nor did it rely on any methodology to support the stated opinions." *Greenleaf,* 2007 WL 962961 at *5.

"Expert" opinions regarding the legal issues in a case do not "assist the trier of fact" within the meaning of Rule 702. *See Burkhart v. Wash. Metro. Area Trans. Auth*., 112 F.3d 1207, 1212 (D.C. Cir. 1997); *see also, e.g.*, *Erickson Air-Crane, Inc*., 2012 WL 762001, at *3 n.7 (No. 07-0645, Mar. 2, 2012) (concluding that the judge correctly refused to allow testimony of a former OSHA official regarding the notice OSHA provided to the regulated community in its interpretations and OSHA's duty not to mislead the regulated community as to safety obligations because such testimony only pertained to legal conclusions); *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers Inc.*, 320 F.3d 838, 841 (8th Cir. 2003); *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994); *Pelletier v. Main St. Textiles LP*, 470 F.3d 48, 54-55 (1st Cir. 2006) (affirming judge's decision to exclude expert testimony regarding application of OSHA standard to defendant's conduct).

Federal Rule of Evidence 704 provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." But Rule 704 applies to ultimate questions of *fact*, not ultimate questions of law. *See Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 217-18 (3d

Cir. 2006) (ruling that an expert could not testify "as to whether Berckeley complied with legal duties that arose under the federal securities laws"); *Burkhart v. Wash. Metro. Area Trans. Auth*., 112 F.3d at 1212-13) (finding error when the trial court permitted Burkhart's expert to testify regarding impermissible legal conclusions rather than permissible factual opinions); *Greenleaf Motor Express Inc.*, 21 BNA OSHC at 1876-77 (upholding judge's exclusion of expert whose proffered testimony did not "address any factual issue that required scientific or technical expertise to understand"); *Cooper Tire & Rubber Co.*, No. 11-1588, 2015 WL 9854708 at *12 (O.S.H.R.C.A.L.J., March 17, 2015) ("an expert may [not] render conclusions of law"). Likewise, in *Killion v. KeHE Distrib., LLC*, 761 F.3d 574, 593 (6th Cir. 2014), the Sixth Circuit held that the district court did not abuse its discretion when it determined that although an expert's report contained permissible conclusions embracing the ultimate issue, it also contained impermissible legal conclusions.

Mr. Koning's legal opinions, to the limited extent disclosed, are excluded because they would not assist the Court as required under Federal Rule of Evidence 702, and are ultimate conclusions of law, which are generally not permitted under Federal Rule of Evidence 704.

## III. CONCLUSION

For all of the above foregoing reasons, Complainant's Motion to Strike Designation and Exclude Testimony of Respondent's Purported Expert Robert Koning is found to be of merit.

## IV. ORDER

WHEREFORE IT IS ORDERED THAT the Complainant's Motion to Strike Designation and Exclude Testimony of Respondent's Purported Expert Robert Koning is GRANTED.

**SO ORDERED.**

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

Dated: August 27, 2021
Washington, D.C.