

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

Docket No. 18-0731

UHS OF DELAWARE, INC. and PREMIER  
BEHAVIORAL HEALTH SOULDATIONS OF  
FLORIDA, INC. dba SUNCOAST BEHAVIORAL  
HEALTH CENTER,

Respondent.

**ORDER DENYING RESPONDENT’S MOTION *IN LIMINE*  
TO EXCLUDE THE TESTIMONY OF DR. HOWARD L. FORMAN  
TO THE EXTENT INDICATED HEREIN**

I. FACTS

On April 24, 2018, OSHA issued one repeat citation to Respondent alleging a violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the Act). The Citation alleged that employees at Suncoast’s worksite were exposed to the hazard of workplace violence caused by patients. Thereafter, Respondent filed its notice of contest.

On March 19, 2019, Complainant’s expert, Dr. Howard L. Forman, issued his expert written report. (Respondent’s Motion in Exclude, at Ex. A).

On April 2, 2019, Respondent deposed Dr. Forman. (Respondent’s Motion in Exclude, at Ex. B).

On April 12, 2019, the Respondent filed his Motion *in Limine* to Exclude the Testimony of Dr. Howard L. Forman. (Motion to Exclude). Respondent argues that Dr. Forman’s expert testimony should be excluded because: (1) Dr. Forman “lacks the expertise, training and/or experience to render opinions related to staff safety in a workplace environment involving

psychiatric patients; and (2) his testimony consists of legal conclusions, personal opinions, and speculation and does not assist the trier of fact through the application of scientific, technical or specialized expertise.” (Motion to Exclude, at 2). Respondent further argues that Dr. “Forman is not qualified to testify competently regarding the issue of whether Suncoast’s workplace violence policies and procedures were adequate to address patient to staff aggression.”<sup>1</sup>

Respondent asserts that he “also has conducted no analysis or relevant studies” that “looked at feasible means of abatement that would eliminate or materially reduce the hazard of patient to staff aggression.” (Motion to Exclude, at 10). Respondent also argues that OSHA “cannot meet its burden of proving [Dr.] Forman is qualified as an expert to render opinions concerning feasible means of abatement on the issue of workplace violence.” (Motion to Exclude, at 10).

Respondent summarizes six opinions presented by Dr. Forman in his expert report and identifies several discrepancies with regard to these opinions. (Motion to Exclude, at 5-9; Ex. A).

Respondent argues that all of Dr. Forman’s opinions are unreliable. (Motion to Exclude, at 12).

On April 19, 2019, Complainant filed his Response in Opposition to Respondent’s Motion *in Limine* to Exclude the Testimony of Complainant’s Expert Dr. Howard L. Forman, M.D. (Response to Motion to Exclude). Complainant argues that Respondent’s Motion to Exclude should be denied as Dr. Forman is qualified as an expert based on his impressive education, training and experience, including specialized knowledge regarding causes and prevention of patient on staff violence in a psychiatric hospital setting. Complainant argues that Dr. Forman’s opinions are based on sufficient facts and data gained from his overall education,

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<sup>1</sup> Respondent asserts that Dr. Forman “has never worked at a standalone behavioral health hospital that does not have forensic psychiatric patients.” (Motion to Exclude, at 4). It asserts that Dr. Forman “has limited knowledge or experience in dealing with specific policies and procedures associated with workplace violence.” (Motion to Exclude, at 5). Complainant asserts that Dr. Forman has completed a “fellowship in forensic psychiatry ... at a **standalone psychiatric hospital** ... known as the Bronx Psychiatric Center.” Response to Motion to Exclude, at 5). (emphasis in original).

training, and experience. (Response to Motion to Exclude).

Pleadings have been filed and discovery has closed.

The trial on the merits in this case commenced April 23, 2019 and continued through May 2, 2019.<sup>2</sup> On April 30, 2019, the Secretary closed his case in chief without calling Dr. Forman to testify; but stated his intent to call Dr. Forman as a rebuttal expert.<sup>3</sup> (Tr. 1954). The trial is scheduled to continue on August 20, 2019. (Tr. 2598).

## II. DISCUSSION

Respondent asserts that Dr. Forman's testimony should be excluded because Dr. Forman lacks the expertise, training and/or experience to render opinions related to patient to staff aggression and that his opinions are improper under the Federal Rules of Evidence, Rule 702. The Court disagrees. Dr. Forman is a highly qualified psychiatrist with over 15 years of medical and psychiatric education, training and experience. (Response to Motion to Exclude, at 1, 4-12; Ex. 82; Motion to Exclude, Ex. A). Dr. Forman's specialized knowledge qualifies him to testify regarding causes and prevention of patient on staff violence in a psychiatric hospital setting. (Ex. 82; Motion to Exclude, at A, at 2-6; Response to Motion to Exclude). The Court also finds Dr. Forman qualified as an expert to render opinions concerning feasible means of abatement on the issue of workplace violence. (Ex. 82; Motion to Exclude, at A, at 2-6; Response to Motion to Exclude). The Court further finds Dr. Forman is qualified to testify whether Respondent's workplace violence policies and procedures were adequate to address patient to staff aggression, including what clinical treatment is appropriate to address aggression and whether Suncoast provided such appropriate clinical treatment. The Court finds that Complainant has satisfied

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<sup>2</sup> Dr. Forman was present in the courtroom at least on April 23, 2019. (Tr. 61).

<sup>3</sup> Respondent has objected to the admission of Dr. Forman's expert report at Exhibit 83. Complainant has stated his intention to set the foundation for Dr. Forman's expert report and move to enter it into evidence when Dr. Forman is called to testify as a rebuttal witness. (Tr. 36-37, 1954-55).

Fed. R. Evid. 702(a) with regard to Dr. Forman's testimony on these topics. The Court further finds that Dr. Forman's testimony on these topics is also based on sufficient facts or data, thereby satisfying Fed. R. Evid. 702(b). (Ex. 82; Motion to Exclude, at A; Response to Motion to Exclude; Courtroom testimony observed by Dr. Forman).

Second, Respondent states that, because Dr. Forman's testimony does not contain any analysis requiring specialized knowledge, Complainant cannot show that his opinion would be useful in Court as required under the Federal Rules of Evidence 702.<sup>4</sup> (Motion to Exclude, at 2, 11). There is no dispositive requirement that a non-scientist expert use a particular scientific method to formulate the expert's opinions; but the methodology used must be reliable. *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 as to whether Dr. Forman's opinions are based on scientific, technical, or other specialized knowledge can be addressed by *voir dire* at the trial before Complainant offers Dr. Forman's testimony or expert report into evidence, or by cross-examination. *See Yankee Atomic Elec. Co. v. U.S.*, No. 98-126C, 2004 WL 1535686 at \*7 (Fed. Cl. June 28, 2004). The use of "vigorous cross-examination" and "presentation of contrary evidence" are among the means for "attacking shaky, but admissible evidence." *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

Respondent's objections to Dr. Forman's opinions and testimony not being helpful to the

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<sup>4</sup> 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.

Court do not necessarily raise real *Daubert* or *Kumho Tire* reliability issues. They may go to weight, not admissibility. See *Taylor v. TECO Barge Line, Inc. et al.*, 2009 WL 1684420 at \* 4 (W.D. Ky. 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).

Notwithstanding the above, expert testimony must also be reliable. (Fed. R. Evid. 702(c) and (d)). Respondent argues Dr. Forman’s opinions are “completely unreliable” and have not been shown to have been “based on sound and acceptable methodologies.” (Motion to Exclude, at 5,12). At this point in time, the Court is not making a finding that Dr. Forman’s opinions are all sufficiently reliable to the extent that his testimony and expert written report are the product of reliable principles and methods, and that he has reliably applied the principles and methods to the facts of this case. Such a finding shall await his courtroom testimony, including *voir dire* and cross-examination.

The Commission normally accords wide latitude to administrative law judges in determining whether proffered expert testimony will be helpful to the Court. See *Sec’y of Lab. v. U.S. Postal Serv.*, 21 BNA OSHC 1767 (No. 04-0316, 2006). Based upon the material before it, the Court finds that Dr. Forman’s expected testimony will assist it through the application of his scientific, technical or specialized expertise on the matters and topics set forth on pages 3 through 4 above and herein.<sup>5</sup> (Ex. 82; Motion to Exclude, at A; Response to Motion to Exclude).

In addition, 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.” *Am. Home Assurance Co. v. Masters’ Ships Mgmt. 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,

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<sup>5</sup> Subject to Complainant showing at trial that Fed. R. Evid. 702(c) and (d) have been satisfied.

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 (2<sup>nd</sup> Cir. 1977). The fact that this is a bench trial weighs heavily in favor of denying Respondent's Motion to Exclude to the extent indicated herein. Other issues regarding Dr. Forman's testimony, beyond his qualifications to provide testimony based upon sufficient facts or data that will be useful to the Court on the matters and topics set forth at pages 3-4 above and herein,<sup>6</sup> may still be raised at trial by Respondent and addressed by the Court, if and when they arise at trial. *See Lifetime Homes, Inc. v. Residential Dev. Corp.*, 510 F. Supp.2d 794, 811 (M.D. Fl. 2007).

### III. CONCLUSION

The Court finds that Complainant has presented information pertaining to the expert opinions of Dr. Forman sufficient to justify the Court not granting the Respondent's Motion to Exclude to the extent indicated herein.

For all of the foregoing reasons, Respondent's Motion to Exclude is found by the Court to be without merit to the extent indicated herein.

### IV. ORDER

WHEREFORE IT IS ORDERED THAT Respondent's Motion to Exclude is DENIED, with prejudice, to the extent that the Court has found Dr. Forman qualified to present expert testimony based on sufficient facts or data that will be useful to the Court with regard to the matters and topics identified on pages 3 through 4 above and herein;<sup>7</sup> and

IT IS FURTHER ORDERED THAT other issues regarding Dr. Forman's expert

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<sup>6</sup> Subject to Complainant showing at trial that Fed. R. Evid. 702(c)(d) have been satisfied.

<sup>7</sup> Subject to Complainant showing at trial that Fed. R. Evid. 702(c)(d) have been satisfied.

testimony, beyond the Court finding herein that Dr. Forman has satisfied Fed. R. Evid. 702(a) and (b) on the matters and topics set forth at pages 3-4 above and herein, may still be raised at trial by Respondent; e.g. whether or not Dr. Forman's expert testimony and written expert report satisfy Fed. R. Evid. 702(c) and (d); or whether Dr. Forman's testimony constitutes permissible rebuttal expert testimony.<sup>8</sup>

**SO ORDERED.**

/s/

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

Dated: July 19, 2019  
Washington, D.C.

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<sup>8</sup> See p. 5 herein.