



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ALRO STEEL CORPORATION,

Respondent.

OSHRC DOCKET NO. 13-2115

**ORDER DENYING
RESPONDENT'S MOTION *IN LIMINE***

On September 3, 2014, Respondent filed a Motion *in limine* to exclude the expert testimony of James Washam, the Secretary of Labor's (Secretary's) identified expert witness. Respondent also filed a supporting memorandum (Motion). The Secretary filed a Response in opposition to Respondent's Motion, together with a supporting memorandum, dated September 17, 2014 (Opposition). Respondent filed a Reply motion and memorandum in support of the Motion to exclude, on September 24, 2014 (Reply). On October 3, 2014, during a prehearing conference call, I advised Counsel that I had reviewed and considered the Motion, Opposition, and Reply. I advised that Respondent's Motion to exclude the expert testimony of James Washam was denied. Mr. Washam's apparent experience, technical, and specialized knowledge may "help the trier of fact to understand the evidence or to determine a fact in issue." See Federal Rule of Evidence (FRE) 702(a).

Background.

The Toledo, Ohio Area Office of the Occupational Safety and Health Administration (OSHA) inspected Respondent's job site, located at 3003 Airport Highway, Toledo, Ohio 43609, on July 12, 2013. On November 14, 2013, OSHA issued to Respondent a one item serious

citation, with subparts, and notification of penalty (citation). The serious citation items allege that, on or about July 10, 2013, at the jobsite, Respondent violated standards regarding the control of hazardous energy (lockout / tagout) exposing employees to caught-in and amputation hazards if the saws unexpectedly started while changing the machines' blades.¹ The total penalty proposed was \$4,250.00. Respondent filed a Notice of Contest.

The Secretary filed a Complaint, attaching and adopting by reference the November 14, 2013 serious citation. Respondent filed an Answer denying specific Complaint allegations and asserting the following affirmative defenses, (1) insufficient service of process, (2) failure to state a claim upon which relief can be granted, (3) inspection procedures noncompliant with section 8(a) of the Act, (4) alleged violations not described with reasonable particularity, (5) claims barred by the statute of limitations, (6) cited regulations unenforceable as unconstitutionally vague, and (7) citation items 1(a) and 1(b) are duplicative and must be dismissed as they arise from a single violative act. A Notice of Rescheduled Hearing, Scheduling Order and Special Notices issued setting the hearing in this matter for October 15 and 16, 2014.

Respondent filed a Motion *In Limine* to preclude the expert testimony of James Washam regarding “(1) his interpretation of the lockout standard, (2) the specific operation of the subject band saws, and (3) his understanding of the operation of other band saws and /or their generic electrical problem scenarios.” Motion at p. 3.

¹ Citation I, item 1(a), alleges a violation of Standard 1910.147(c)(4)(i): “Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: (a) . . . the employer did not ensure that energy control procedures were utilized to control hazardous energy when employees engaged in blade changing activities on the Amada (Model HA-250W) manufactured horizontal band saw . . . [and] (b) . . . on the HEM, Inc. (Model V125HA-1) #1191 manufactured vertical band saw.”

Citation I, item 1(b), alleges a violation of Standard 1910.147(d)(3): “All energy isolating devices that were needed to control the energy to the machine or equipment were not physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s): (a) . . . the employer did not ensure that employees isolated energy sources on the Amanda (Model HA-250W) manufactured horizontal band saw . . . [and] (b) . . . on the HEM, Inc. (Model V125HA-1) #1191 manufactured vertical band saw prior to engaging in blade changing activities.”

Each citation violation described alleges that “employees were exposed to caught-in and amputation hazards if the saw were to unexpectedly start while changing the machine’s blade.”

In its Motion, Respondent states that in this case the Secretary contends that Respondent's blade changing procedures can result in the unexpected energizing of the saws where the power is not locked out at the main disconnect. Respondent disagrees with the Secretary's contention. To the contrary, Respondent contends that the lockout standard does not apply to the cited activities as there can be no unexpected energizing when the subject machines are locked out at the control panel. Motion at p. 8; Reply at p. 1-2. Respondent argues that pursuant to FRE 702, Mr. Washam's opinions and testimony regarding the cited machines and regarding other machines are inadmissible as unreliable and untrustworthy. Motion at p. 15.

Respondent anticipates that the Secretary's expert witness Washam will testify, regarding that lockout standard, that there is a "bright line" rule that machines locked out using motor circuitry devices automatically violate the standard. Motion at p. 5. Respondent argues that Mr. Washam's interpretation of the lockout standard constitutes an impermissible legal opinion. Therefore, he should be precluded from testifying as to his interpretation of the lockout standard and whether Respondent was in violation of the standard. Motion at p. 8.

Respondent notes that it is not anticipated that Mr. Washam will offer testimony regarding the specific operation of the subject machines. Nevertheless, Respondent argues that Mr. Washam must be precluded from testifying as to the operation of the cited machines.² Respondent contends that Mr. Washam's opinion in this case is based on his generic understanding of other band saws and not on the electrical design of the specific band saws cited. Motion at pp. 8-11, 14; Reply at p. 4.

Respondent contends that Mr. Washam must be precluded from testifying about generic "odd" problems regarding other band saws, as this testimony is irrelevant to the operation of the cited machines in this case. Respondent argues that Mr. Washam's opinion that the cited machines will start up if not locked out at the main power disconnect is speculative as it is based on anecdotal electrical problems arising in other machines. Motion at pp. 11-14; Reply at p. 4.

² Respondent argues that Mr. Washam did not visit the worksite, inspect the subject machines or their operation, or review the schematics for the two cited band saws. Respondent contends that Mr. Washam does not have the educational background to opine regarding the electrical design of the cited band saws. Motion at pp. 8-11; Reply at pg. 3-4.

In its Opposition, the Secretary states that Mr. Washam, the Secretary's identified expert witness, will opine that Respondent is relying on a control circuit device to isolate electrical energy during the cited blade changing procedures. The Secretary argues that the hazardous energy standard is clear that control circuit type devices are not energy isolating devices. See 29 CFR § 1910.147(b). Therefore, the Secretary does not intend to elicit testimony from Mr. Washam regarding the interpretation of the standard. Opposition at p. 1.

The Secretary notes that it is within the broad discretion of the trial court to admit expert testimony. The Secretary argues that there is no reasonable basis to exclude Mr. Washam's expert testimony in this case. Opposition at p. 2.

Discussion

Pursuant to Commission Rule 71, Federal Rules of Evidence are applicable to Commission proceedings. Federal Rule of Evidence 702, Testimony of Expert Witnesses, states:

A witness who is qualified as an expert witness 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 the case.

The Advisory Committee Notes to FRE 702 state that when expert witness testimony is based "solely or primarily" on experience, "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." The Advisory Committee Notes further provide that the "facts or data" language in FRE Rule 702 is "broad enough to allow an expert to rely on hypothetical facts that are supported by evidence." Citing the original Advisory Committee Note to FRE 703. Where facts are disputed, experts may reach different conclusions based on different versions of the facts. See FRE 702 (Advisory Committee Notes: 2000 Amendments).

Federal Rule of Evidence 704(a), states that "[a]n opinion is not objectionable just because it embraces an ultimate issue."

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993), the Supreme Court held that the Federal Rules of Evidence, especially FRE 702, assigns to the trial judge a “gatekeeping role” to ensure that any and all expert scientific testimony or evidence admitted “rests on a reliable foundation and is relevant to the task at hand.” In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 147-49 (1999) the Supreme Court clarified that the trial court’s gatekeeping role applies to all expert testimony, and is not limited to scientific expert testimony.

Regarding the gatekeeping role, the trial judge has “considerable leeway” in deciding what factors to consider when determining the reliability of an expert witness. *Kumho* 526 U.S. at 152; *Bureau v. State Farm Fire and Casualty Co.*, 129 Fed.Appx. 972, 976 (C.A.6 Mich. 2005). The trial court may permit voir dire testimony regarding an expert’s qualifications and methodology, and then weight the testimony based, in part, on the methods employed by the expert. See *United States v. Demjanjuk*, 367 F.3d 623, 634-35 (6th Cir. 2004)

Noting the role of the adversary system and the capabilities of the fact finder in evaluating expert evidence, the *Daubert* Court stated:

Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. 509 U.S. at 596.

While an expert opinion may be admissible, the “weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury.” *American Milling Co. v. Trustee*, 623 F.3d 570, 573-74 (8th Cir. 2010)(internal quotes and citation omitted),

I have carefully considered the positions articulated by the parties. Based upon the formal papers, Motion, Opposition, and Reply, I find that Mr. Washam’s apparent experience, technical, and specialized knowledge may “help the trier of fact to understand the evidence or to determine a fact in issue.” See FRE 702(a). Therefore, Respondent’s Motion is denied.

In the instant case, the parties disagree regarding whether Respondent violated the cited standards, at the jobsite, on or about July 10, 2013. Mr. Washam’s anticipated opinion testimony, as set forth in the Motion and Opposition, may be reasonably viewed as setting forth Mr. Washam’s opinion regarding whether the cited standards would be violated based upon specified hypothetical facts. This would be permissible expert testimony. Pursuant to FRE 704

“an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied.” *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997). See also *Berkeley Investment Group, Ltd. V. Colkitt*, 455 F.3d 195, 217 (3rd Cir. 2006)(Under FRE 704 an expert witness is prohibited from giving a legal opinion; however, expert testimony that “embraces an ultimate issue to be decided by the trier of fact” is permitted). Generally, testimony regarding industry customs and practices are proper subjects for expert testimony, where the testimony is probative but not determinative. See *Berkeley Investment Group, Ltd. V. Colkitt*, 455 F.3d 195, 218-19 (3rd Cir. 2006). See also, *Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006).

Order

Respondent’s Motion *In Limine* is denied. Mr. Washam’s apparent experience, technical, and specialized knowledge may “help the trier of fact to understand the evidence or to determine a fact in issue.” See FRE 702(a). At the hearing, Respondent will have the opportunity to conduct a voir dire examination of Mr. Washam. Respondent also will have the opportunity to cross examine Mr. Washam and challenge the basis for his opinions. I will consider and rule on objections, if any, to Mr. Washam’s testimony on direct and cross-examination. I will determine the appropriate weight to attribute to Mr. Washam’s testimony.³

For these reasons, Respondent’s Motion *In Limine* to exclude the expert testimony of James Washam is denied.

SO ORDERED.

Dated: October 14, 2014
Washington, D.C.

/s/ Carol A. Baumerich
Honorable Carol A. Baumerich
Judge, OSHRC

³ This Order is without prejudice to Respondent’s right to raise objections to Mr. Washam’s testimony on grounds not set forth in Respondent’s Motion, or to renew objections set forth in the Motion based upon a more fully developed record at the hearing.