UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PROCEDURES AND PRACTICES IN CONVENTIONAL CASES BEFORE JUDGE JOHN B. GATTO

I. Preamble

Any rule referenced in these procedures is to the Federal Rules of Civil Procedure, unless otherwise indicated.[1] Any reference to a Commission Rule means the Commission's Rules of Procedure, 29 CFR Part 2200. All procedural motions shall be accompanied by a proposed order that would grant the relief requested in the motion. *See* 29 C.F.R. § 2200.40(e).[2] The court has established discovery and disclosure timeframes in these procedures that it has determined are appropriate and necessary for most conventional cases, which may not be altered except by order of the court upon motion of the parties.

II. Contacting Chambers

The court's Legal Assistant, **Sherice M. Dunham**, is your primary point of contact on matters relating to your case, and can be reached by e-mail at Sdunham@oshrc.gov, or by telephone at (404) 562-1640. Neither the parties nor their counsel are permitted to discuss the merits of the case with any court staff. **Subpoenas** may be requested *ex parte* through the court's Legal Assistant by email.

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[1] The Occupational Safety and Health Act of 1970 mandates that unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. 29 U.S.C. 661(g).

[2] **Mandatory Electronic Filing; Email Service.** ALL parties must file documents electronically in the Commission's E-File System unless you apply for and are granted an exemption from electronic filing by the Judge. Documents filed electronically must be served by *email* attachment to all parties. You are responsible for reviewing and complying with the Commission's Instructions for Electronic Filing located under the Featured Resources section on the Commission's web page (www.oshrc.gov). Failure to comply with the Instructions for Electronic Filing may result in the rejection of submissions. *If you have not yet registered, you must immediately do so* ***and notify the court's Legal Assistant that you have done so***. If you have not yet registered but included your email address in your notice of contest or notice of appearance, you will receive a *one-time courtesy* copy of the court's Initial Scheduling Order sent to your email address of record**.** *You will not receive any future court orders/notices until you register and notify the court's Legal Assistant that you have done so*.

III. Pleadings; Corporate Disclosure; Rule 26(f) Conference of the Parties; Planning for Discovery

A. Complaint. If the Secretary has not filed a complaint, he shall do so **within 21 days** from the date of the court's *Initial Scheduling Order*.

B. Answer. If the Respondent has not filed an answer, Respondent shall do so **within 21 days** from the date of the court's *Initial Scheduling Order*, or service of the complaint, whichever is later.

C. Corporate Disclosure. Respondent's answer shall not be accepted for filing, or if it has been filed it shall be stricken from the record, unless Respondent complies with Commission Rule 35's corporate disclosure requirements. *Respondent may be held in default pursuant to Commission Rule 35(b) and (d) if it fails to file an adequate disclosure declaration or an amended disclosure.*

D. Rule 26(f) Early Planning Conference. Lead counsel for all parties and *pro se* litigants are required to confer in person in an effort to settle the case, discuss discovery, limit issues, and discuss other matters addressed in the *Joint Preliminary Report and Discovery Plan* at a Rule 26(f).[3] Counsel and *pro se* litigants are jointly responsible for arranging the conference. Counsel are required to inform the parties promptly of all offers of settlement proposed at conference.

E. Joint Preliminary Report and Discovery Plan. For all cases not settled at the Rule 26(f) conference, the parties are required to file a *Joint Preliminary Report and Discovery Plan* **within 21 days** from the date of the court's *Initial Scheduling Order*, which shall state the parties' views and proposals as required by Rule 26(f)(3)(B)-(F), and in addition:

1. whether expert testimony will be used in this case, and if so the date by which expert designations must be served by complainant and by respondent; the date expert reports from retained experts must be served by complainant and by respondent; the date expert designations and reports by any rebuttal experts must be served by complainant and by respondent; and the date

[3] Although Federal Rule 30 does not require leave of the court for 10 or fewer depositions, the Commission has adopted Commission Rule 56(a), which provides that depositions "shall be allowed *only by agreement of all the parties, or on order of the Commission or Judge* following the filing of a motion of a party stating good and just reasons." (Emphasis added). Therefore, consideration should be given to the stipulation of the taking of depositions at the Rule 26(f) planning meeting.

any objections to such designations; must be served by complainant and by respondent (**all designations and reports must be completed and served within the discovery period**);

2. estimated total number of trial days and separately estimated number of days for each party to present their case;

3. all available trial date(s) and a proposed trial city/state with a Federal courthouse and a national or international *(not local)* airport;

4. whether all parties consent to the taking of depositions, and if not, whether any party intends to move to compel such depositions (a motion requesting an informal discovery dispute conference with the court is *not* required before filing a motion to compel such depositions);

5. any request for Language Access Services (oral, sign or written language services) and the scope of such services;[4]

6. the location of Respondent's principal place of business; and

7. any other matters appropriate to the circumstances of the case.

IV. Discovery

A. Scope and Limits of Discovery. Direct and informal communication between counsel is encouraged to facilitate discovery and resolve disputes. The Commission has adopted its own discovery rule, Commission Rule 52. Thus, Federal Rule 26(b) relating to the scope and limits of discovery does not apply. Commission Rule 52(b) places within the scope of discovery "any matter that is not privileged and that is relevant to the subject matter involved in the pending case" and "proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

B. Commencement. Commission Rule 52(a)(2) provides a party may initiate all forms of discovery in conformity with the Commission's Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss.

[4] Each party is responsible for securing Language Access Services required for their witnesses. However, upon timely notice to the Commission no later than 14 days before trial, we will provide such services to a *party (not a party's witnesses)*.

C. Length. Unless otherwise ordered, all discovery shall be completed within **4 months** from the date of the court's *Initial Scheduling Order*.[5] All discovery requests must be served early enough so that the response period is within **30 days** before the close of the discovery period, or within **30 days** after service of the discovery requests, whichever occurs first.

D. Filing of Discovery and Disclosures Prohibited. Commission Rule 8(a)(2) mandates that "[d]iscovery documents generated pursuant to [Commission Rules 52-56] shall not be filed with the Commission or the Judge. Filing and retention of such discovery documents shall comply with [Commission Rule 52(i) and (j)]." 29 C.F.R. § 2200. 8(a)(2). Similarly, Commission Rule 52(j) also mandates that discovery documents "shall not be filed with the Commission or the Judge. The party responsible for service of the discovery material shall retain the original and become the custodian." 29 C.F.R. § 2200.52(j).

E. Adjustments to Discovery Period. The court may, in its discretion, shorten or lengthen the time for discovery. Motions requesting extensions of time for discovery must be made **prior** to expiration of the existing discovery period and will be granted only in exceptional cases where the circumstances on which the request is based did not exist or the attorney or attorneys could not have anticipated that such circumstances would arise at the time the *Joint Preliminary Report and Discovery Plan* was filed.

F. General Principles. Counsel and *pro se* litigants should be guided by courtesy, candor, and common sense. The court does not allow evidence at trial that was requested and not revealed during the discovery period. The court will not enforce the private agreements between parties to conduct discovery beyond conclusion of the discovery period and will not compel responses to discovery requests that were not served in time for responses to be made before the discovery period ended.

G. Depositions. If the parties do not stipulate to the taking of depositions at their Rule 26(f) planning meeting, any motions to take depositions shall be filed early enough so that the depositions can be completed prior to the expiration of the discovery period. *Further, in order to be used at trial, the proponent must first establish that the deposition meets one of the conditions authorizing such use under Federal Rule of Civil Procedure 32.*

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[5] *See* Commission Rule 52(a)(2) ("Discovery shall be initiated early enough to permit completion of discovery no later than 14 days prior to the date set for hearing, *unless the Judge orders otherwise*.") (emphasis added).

H. Disclosures. Although Commission Rule 52(a)(1)(v) provides that the "required disclosures" requirements of Federal Rule 26(a) do not apply in Commission proceedings, "[t]his exception does not preclude any prehearing disclosures (including disclosure of expert testimony and written reports) directed in a scheduling order." 29 CFR § 2200. 52(a)(1)(v). Therefore, at or within **14 days** after the parties' Rule 26(f) conference, unless a different time is set by court order, each party must, without awaiting a discovery request, provide to the other parties:

1. the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; and

2. a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

I. Expert Witnesses. In addition to the disclosures required above, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The proponent of the expert testimony has the burden of establishing the admissibility requirements by a preponderance of the evidence. Any party objecting to an expert's testimony shall file an objection within the date that the proposed pretrial order is submitted. Otherwise, such objections will be waived, unless expressly authorized by court order based upon a showing that the failure to comply was justified; and

J. Expert Report. Unless otherwise or ordered by the court, the expert witness disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony—which must contain:

a. a complete statement of all opinions the witness will express and the basis and reasons for them;

b. the facts or data considered by the witness in forming them;

c. any exhibits that will be used to summarize or support them;

d. the witness's qualifications, including a list of all publications authored in the previous 10 years;

e. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

f. a statement of the compensation to be paid for the study and testimony in the case.

Unless otherwise ordered by the court, if the witness is not retained or specially employed to provide expert testimony in the case or whose duties as the party's employee do not regularly involve giving expert testimony, in lieu of a written report, the expert designation must include (1) a statement of the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (2) a summary of the facts and opinions to which the witness is expected to testify.

K. Time to Disclose Expert Testimony. Absent a court order, the disclosures must be made: (1) within **90 days** before the date set for trial or for the case to be ready for trial; or (2) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within **30 days** after the other party's disclosure. Any party who does not comply with these provisions shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified. The proponent of the expert testimony has the burden of establishing the admissibility requirements by a preponderance of the evidence. Any party objecting to an expert's testimony shall file an objection within the date that the proposed pretrial order is submitted. Otherwise, such objections will be waived, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

V. Discovery Disputes

A. Boilerplate Objections Prohibited. *Parties should not carelessly invoke the usual litany of rote objections*; i.e., attorney-client privilege, work-product immunity from discovery, overly broad/unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence.

B. General Objections Prohibited. *General objections are prohibited*; otherwise, it is impossible for the court or the party upon whom the discovery response is served to know exactly what objections have been asserted to each individual request. *For example, Counsel shall not include in a response to a discovery request a "Preamble" or a "General Objections" section stating an objection to the discovery request "to the extent that" it violates some rule pertaining to discovery*; e.g., the attorney-client privilege, work product immunity from discovery, the

requirement that discovery requests be reasonably calculated to lead to the discovery of admissible evidence, and the prohibition against discovery requests that are vague, ambiguous, overly broad, or unduly burdensome. *All such general objections shall be disregarded by the court.*

Instead, each individual discovery request must be met with every specific objection thereto – but only those objections that apply to that request. *Finally, a party who objects to a discovery request but then responds to the request must indicate whether the response is complete; i.e., whether additional information or documents would have been provided but for the objection(s).* For example, in response to an interrogatory, a party is not permitted to raise objections and then state, "Subject to these objections and without waiving them, the response is as follows . . ." unless the party expressly indicates whether additional information would have been included in the response but for the objection(s).

C. Motion to Compel. A motion to compel may be filed within **14 days** after a discovery dispute occurs, which shall:

1. quote verbatim each disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which objection is taken;

2. state the specific objection;

3. state the grounds assigned for the objection (if not apparent from the objection);

4. cite authority and include a discussion of the reasons assigned as supporting the motion;

5. shall be arranged so that the objection, grounds, authority, and supporting reasons follow the verbatim statement of each specific disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which an objection is raised; and

6. copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the court contemporaneously with the motion.

D. Response. A response to a motion to compel must be filed within **14 days** after service of the motion to compel, which shall also be arranged so that the objection, grounds, authority, and supporting reasons follow the verbatim statement of each specific disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which an objection is raised.

VI. Summary Judgment

A. Motions. Motions for summary judgment may be filed anytime within **30 days after** the close of discovery in accordance with the provisions of Rule 56. A movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. *The court will not consider a statement of material facts that fails to conform to these requirements.*

B. Response. A brief and response to a motion for summary may be filed within **14 days after** service of the motion for summary judgment. A party responding to a statement of material facts shall copy into its response document the numbered statement to which it is contending there is a genuine issue to be tried and provide its response to that statement immediately following. A party responding shall comply with the requirements of Paragraph A. *The court will not consider a response that fails to conform to this requirement.*

C. Responding Party Asserts Additional Material Facts. A party responding may also file with the response a *separate* concise, numbered statement of additional material facts to which the responding party contends there is no genuine issue to be tried. A responding party asserting additional material facts shall comply with the requirements of Paragraph A. *The court will not consider a statement of additional asserted material facts that fails to conform to this requirement.*

D. Movant's Reply to Responding Party's Additional Material Facts. If the party filing a response also provides a statement of additional material facts to which the responding party contends there is no genuine issue to be tried, the movant may file a reply to each of the responding party's additional facts within **7 days after** service of the response. A party that chooses to reply to a response shall comply with the requirements of Paragraph A. *The court will not consider a reply that fails to conform to this requirement.*

E. Citations to Record. The court will not consider any fact:

1. not supported by a citation to evidence (including page or paragraph number);

2. supported by a citation to a pleading rather than to evidence;

3. stated as an issue or legal conclusion; or

4. set out only in the brief and not in the movant's statement of undisputed facts or reply to the responding party's additional facts statement, or in the case of the responding party, its response to the movant's statement of undisputed facts.

All citations to the record evidence shall be contained in each party's brief, not just in the party's statement of undisputed or disputed facts. When filing a brief in support of or in opposition to a motion for summary judgment, the party shall include in the brief immediately following any deposition reference a citation indicating the page and line numbers of the transcript where the referenced testimony can be found. The party shall also attach to the brief a copy of the specific pages of any deposition that are referenced in the brief. The party shall not attach to the brief a copy of the entire deposition transcript. *The court will not consider any citation to the record that fails to conform to these requirements.*

F. Supplemental Briefs. Other than the Movant's Reply to the Responding Party's Additional Material Facts, the parties shall **not** be permitted to file supplemental briefs and materials except upon order of the court.

VII. Proposed Pretrial Order

Within **30 days after** the close of discovery, or entry of the court's ruling on any pending motions for summary judgment, whichever is later, the parties shall **jointly** file a proposed Pretrial Order, which shall be prepared and filed in conformity with the court's form Pretrial Order, a copy of which is available on the Commission's web page under the Administrative Law Judge Practices section. The Pretrial Order shall supersede the pleadings and shall govern the issues to be tried.

VIII. Pretrial Disclosures

A. Exhibit List. Within **14 days before** the first day of trial, each party shall file with the court an Exhibit List in the following format *and with the first two columns completed*:

EXHIBIT LIST OF _____ OSHRC Docket No. [Enter Docket No.]
CASE CAPTION: SECRETARY OF LABOR v. [Enter Case Name] Page No. ____ of ____

EXHIBIT NUMBER	DESCRIPTION	TENDERED	WITHDRAWN	ADMITTED	REJECTED

B. Evidence. Unless the court orders otherwise, *or unless disclosed in the parties' proposed pretrial order*, within **14 days before trial,** each party must provide to the other parties and promptly file with the court the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by

deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition;

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises; and

(iv) the portions of any interrogatories, requests, answers, responses, or depositions (by page and line number) to be offered at trial, which shall include a copy of the portion to be offered at trial, and the purpose of the use.

In order to use a deposition or any portion thereof at trial, the proponent must first establish by a properly supported motion filed at least 30 days before trial that the deposition meets all of the requirements of Federal Rule 32(a).

IX. Trial Exhibits

A. In-Person Trial. The parties shall have a joint duty to consolidate duplicate exhibits using a joint common numbering system for such exhibits to the extent feasible. Exhibits shall not include alphabetical or numerical subparts (e.g., A, B, C, I, ii, iii etc.). Rather, if subparts are necessary, separate exhibits must be used in lieu thereof. Prior to trial, each party shall number their exhibits using exhibit stickers, marked with the docket number, with a designation identifying the party or intervenor offering the exhibit, and numbered consecutively. Each page of each exhibit shall be numbered consecutively, preferably with a Bates stamp. The pre-numbered exhibits must be securely placed in a trial exhibit notebook and each exhibit separated by a tab labeled with the exhibit number. *The trial notebooks shall be presented to the court reporter at trial, along with a courtesy copy for the judge.*

Specific objections to another party's exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity, privilege, competency, and, to the extent possible, relevancy by the parties and shall be admitted at trial without such further proof.

Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of the court. Exhibits must be numbered, inspected by counsel, and marked with stickers prior to trial. Counsel shall familiarize

themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.

No later than **14 days before trial**, the parties must each deliver a copy of each exhibit in Adobe Portable Document Format (.pdf) to the court reporter AND to the court's Legal Assistant by email attachment in Adobe Portable Document Format (.pdf). The electronic pdf version of each exhibit must mirror the original paper version in all respects, including clarity and color.

B. Virtual Trial. If the trial is scheduled as a virtual trial rather than in-person, in lieu of the above instructions, no later than **14 days before trial**, the parties must each deliver:

1. A copy of each exhibit in Adobe Portable Document Format (.pdf) by email attachment in Adobe Portable Document Format (.pdf), or by mail on a CD or flash drive to the opposing party. ***The electronic pdf version of each exhibit must mirror the original paper version in all respects, including clarity and color;***

2. Their original trial exhibit notebooks to the court reporter, **along with** copies of each exhibit by email attachment in Adobe Portable Document Format (.pdf), or by mail on a CD or flash drive. *The electronic pdf version of each exhibit must mirror the original paper version in all respects, including clarity and color.* At trial, exhibits shall be viewed from the provided copies and will not be viewed using the screen sharing function;

3. A copy of each exhibit in Adobe Portable Document Format (.pdf) by email attachment to the Court's Legal Assistant. *The electronic pdf version of each exhibit must mirror the original paper version in all respects, including clarity and color;* and

4. The party calling a witness must deliver to the witness a copy of each exhibit to be addressed with the witness by email attachment in Adobe Portable Document Format (.pdf) or on a CD or flash drive. *The electronic pdf version of each exhibit must mirror the original paper version in all respects, including clarity and color.*

X. Personally Identifiable Information

A party filing a submission with the court or tendering an exhibit at trial containing Personally Identifiable Information (PII) **shall** comply with Commission Rule 8(g), which sets out the redaction procedures for applicable types of PII and medical records.

XI. Proposed Findings of Fact and Conclusions of Law and Briefs

The parties shall file proposed findings of fact and conclusions of law and separate post-trial briefs within **30 days** after receipt of the electronic trial transcript. *Reply briefs are not*

authorized without the approval of the court.

XII. Status Report; Settlement Practices

The parties shall file a joint status report of their intent to proceed to trial, settle, or withdraw the citation or notice of contest no later than **14 days before trial**. If the parties intend to settle, or a party intends to withdraw the citation or notice of contest, but the Court was not timely informed as required herein, the parties must appear at the trial location, unless otherwise ordered, to memorialize the settlement or withdrawal announcement on the record.

SO ORDERED.

/s/ John B Gatto

JOHN B. GATTO, Judge