



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,
Complainant,

v.

OSHRC DOCKET No.

Respondent.

JOINT PROPOSED DISCOVERY AND TRIAL PLAN

1.

The proposed trial date(s) (excluding Mondays, unless conducted in Atlanta, Georgia) are at **9:00 a.m.** in .

The parties anticipate a total of days will be needed to try the case to completion. The parties will be notified at a subsequent date as to the exact Court location.

2.

Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery. A party who fails to disclose an expert may not present that individual's testimony at trial. [*Greenleaf Motor Express, Inc.*](#), 21 BNA OSHC 1872, 1877 (No.03-1305, 2007) (affirming Judge's exclusion of untimely designated expert).¹

¹ The Court reminds the parties that Rule [701](#) permits a lay witness to give opinion testimony if it is (a) "rationally based on the witness's perception," (b) "helpful to clearly understanding the witness's testimony or to determining a

3.

The date by which the parties must exchange in writing the names, organizational affiliations and subject matter areas of expertise of expert witnesses it may call at the trial is

4.

The date by which Reports prepared by the expert witnesses shall be exchanged with opposing counsel is . Absent a stipulation, the exchanges must occur at least 60 days before the date set for trial or for the case to be ready for trial. Each expert witness shall complete and deliver to counsel who retained the experts 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, then the report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) 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
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

fact in issue,” and (c) “*not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*” (Emphasis added.) In adopting the 2000 amendment to Rule 701, the Advisory Committee stated that the distinction between lay and expert testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.” [701 2000 Advisory Notes](#). Thus, the Commission has held that “Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an expert in that area.” *Kaspar Electroplating Corp.*, 16 BNA 1517, 1519 (No. 90–2866, 1993).

If the witness is one **not** retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee **does not** regularly involve giving expert testimony, then the report must contain:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence [702](#), [703](#), or [705](#); and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

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 the Court based upon a showing that the failure to comply was justified.

5.

Any motions to exclude expert testimony, including objections to an expert's testimony based upon [*Daubert v. Merrell Dow Pharms., Inc.*](#), 509 U.S. 579, 113 S.Ct. 2786 (1993), shall file a motion no later than **thirty (30) days after the close of discovery**, or entry of the Court's ruling on any pending motions for summary judgment, whichever is later. Otherwise, such objections will be waived, unless expressly authorized by court order based upon a showing that the failure to comply was justified. The motion shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, *e.g.*, relevancy, sufficiency of facts and data, or methodology. *See* Fed. R. Evid. [702](#). Upon the filing of such a motion, the Court, in its discretion, may set a hearing to determine whether the challenged opinions are admissible. The setting of such hearing does not obviate the need for opposing counsel to respond to such motion.

6.

In conformity with the Review Commission's Rules, any party may, without leave of the Court, obtain discovery on any matter that is not privileged and that is relevant to the subject

matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at trial, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof. Any party may, without leave of the Court, obtain discovery by one or more of the following methods:

- a. Production of documents or things or permission to enter upon land or other property for inspection and other purposes to the extent provided in Commission Rule [53](#);
- b. Requests for admission to the extent provided in Commission Rule [54](#); and
- c. Interrogatories to the extent provided in Commission Rule [55](#).

7.

Depositions of parties, intervenors, or witnesses shall be allowed only by agreement of all the parties, or on order of the Court following the filing of a motion of a party stating good and just reasons. All depositions shall be before an officer authorized to administer oaths and affirmations at the place of examination. The deposition shall be taken in accordance with the Fed. R. Civ. P., particularly Rule [30](#).

8.

a. Any objection to the use of a deposition designated by another party, together with the grounds for it, shall be filed no later than **fourteen (14) calendar days after service of the designation**.

b. Any objection that may be made to the admissibility of any exhibit that the opposing party has identified that it expects to offer at trial and those it may offer if the need arises, together with the grounds for it, shall be filed no later than **fourteen (14) calendar days after service of the identification**.

c. Motions to compel shall be filed no later than **fourteen (14) calendar days** after service of the disclosure, or discovery response upon which the motion is based, whichever is earlier.

d. Any objection or motion not so made, except for one under Fed. R. Evid. [402](#) or [403](#), is waived unless excused by the Court for good cause.

9.

Amended and supplemental pleadings shall be filed no later than **fourteen (14) calendar days** after the close of discovery. Fed. R. Civ. P. [15](#) shall govern amended and supplemental pleadings. *See* additional requirements in Commission Rule [34](#)(3) for amendments to a citation.

10.

Dispositive or partially dispositive pretrial motions, including summary judgment motions, shall be filed no later than **thirty (30) calendar days** after the close of discovery. Motions for summary judgment shall be filed in accordance with the provisions of Fed. R. Civ. P. [56](#) and the Court's *Standing Order on Conventional Cases*.

11.

Responses to dispositive or partially dispositive pretrial motions, including responses to summary judgment motions, shall be filed no later than **twenty-one (21) calendar days** after service of the motion. The response to a motion for summary judgment shall be filed in accordance with the provisions of Fed. R. Civ. P. [56](#) and the Court's *Standing Order on Conventional Cases*. **If the nonmoving party fails to submit the necessary sworn affidavits or concise statement of material facts, the Court will accept all material facts set forth in the motion supported by record evidence as true.**

12.

A *Joint Proposed Pretrial Order* shall be filed no later than **thirty (30) calendar days** after the close of discovery, or entry of the Court's ruling on any pending motions for summary judgment, whichever is later, using the Court's mandatory form. It shall be the responsibility of Complainant's counsel to contact Respondent's (and where applicable, Intervenor's) counsel to arrange a date for the conference. If there are issues on which counsel for the parties cannot agree, the areas of disagreement must be shown in the proposed pretrial order. In those cases in which there is a pending motion for summary judgment, the Court may in its discretion and upon request extend the time for filing the *Joint Proposed Pretrial Order*.

13.

The parties shall file proposed findings of fact, conclusions of law, and briefs no later than **thirty (30) calendar days** after receipt of the trial transcript.

14.

Any other time limits or deadlines the parties suggest as appropriate or necessary for the efficient management of the pretrial and trial activities: .

15.

Lead counsel for the parties certifies that by signing and submitting this Plan that:

a. A Fed. R. Civ. P. 26(f) conference was held on _____ and that they participated in settlement discussions.

b. All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

a possibility of settlement before discovery;

a possibility of settlement after discovery;

a possibility of settlement, but a conference with the judge is needed; or
no possibility of settlement.

c. The following specific problems have created a hindrance to settlement of this case:

Date:

(Signature)

(Signature)

Name of Counsel for Complainant

Name of Counsel for Respondent