



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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JUDGE JOHN B. GATTO
STANDING ORDER ON CONVENTIONAL CASES

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General Provisions

This *Standing Order on Conventional Cases* applies to all cases assigned to the Conventional Case track in the United States Occupational Safety and Health Review Commission wherein Judge John B. Gatto is presiding. A copy of this *Standing Order on Conventional Cases* and applicable forms may be obtained electronically by accessing Judge Gatto's links in the "[Administrative Law Judge Practices](#)" section of the Commission's website (<http://www.oshrc.gov/ALJP/index.html>).

Any reference to "counsel" or "attorney" refers to any person representing a party in an action pending in the Review Commission, and to any person proceeding *pro se* in an action pending in the Review Commission. The Commission's Rules of Procedure, [29 C.F.R. Part 2200](#)), can be found on the Commission's website at <http://www.oshrc.gov/procrules/index.html>. In the absence of a specific Commission Rule, the proceedings shall be governed by the Federal Rules of Civil Procedure ([Fed. R. Civ. P.](#)), and the Federal Rules of Evidence ([Fed. R. Evid.](#)). See Commission Rule [2](#) and Commission Rule [71](#).

Designation of Lead Counsel

Counsel shall designate the name, address, and telephone number of the attorney who shall act as lead counsel in the case on the signature page of the first pleading filed in every action. In the absence of such designation, the first name appearing on the pleading shall be designated lead counsel. Any subsequent change in lead counsel shall be noted by the filing of a written notice with the Court. Counsel are required to designate their State(s) Bar Number(s) on each signature page.

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Representation at Trial

Unless the court permits otherwise, only one (1) attorney on each side shall examine or cross-examine a witness. Unless the court permits otherwise, the merits of an action or proceeding shall not be argued by more than two (2) attorneys on each side.

Disclosure of Corporate Parents, Subsidiaries, and Affiliates

All answers, petitions for modification of abatement period, or other initial pleadings filed by a corporation shall be accompanied by a separate declaration listing all parents, subsidiaries, and affiliates of that corporation, or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable. The declaration shall comply with the requirements of Commission Rule [35](#).

Electronic Filing

The Commission's Rules contemplate that at the commencement of the case, the parties will confer and agree to electronically file and serve all pleadings and documents. The Rules do not allow one party to electronically file with the Commission and serve a party by another means. If a party does not agree to electronic service, the opposing party may not unilaterally file documents electronically. However, there may be instances where the parties have not agreed to file and serve all documents electronically, but desire to electronically file and serve a single document, such as a settlement agreement. This is an accepted procedure.

When the parties agree in writing to electronically file and serve pleadings and documents (*see* the Consent to Electronic Filing form), E-file submissions are accomplished by sending an e-mail with the attached pleading(s) or document(s) in a searchable Adobe Portable Document Format (PDF) to: atlantaoshrcjudges@oshrc.gov.

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If the submission includes exhibits, affidavits, or other supporting documents filed electronically in support of a motion or brief, an index of the supporting documents shall also be included. An electronic copy of the *Consent to Electronic Filing* form can be obtained by accessing Judge Gatto's links under the "Administrative Law Judge Practices" section on the Commission's website at: <http://www.oshrc.gov/ALJP/index.html>.

The pertinent E-Filing Rules are Commission Rule [7\(g\)](#) (Service and notice - How accomplished) and Commission Rule [8\(g\)](#) (Filing - Electronic filing). The Commission's [E-File Rules](#) can also be found on the Commission's website at: http://www.oshrc.gov/publications/instructions_elecfileing.html.

Non-Electronic Filings

When the parties do not agree in writing to electronically file and serve pleadings and documents, to accommodate scanning into the internal Review Commission electronic document management system, parties are required to utilize the following guidelines to non-electronically file and serve pleadings and documents:

- A. Print on only one side of the paper.
- B. Secure pages with binder clips or other fasteners that do not puncture the pages (instead of staples or permanent binding).
- C. Use exhibit separator pages instead of exhibit tabs.

Redacted Filings

Unless the Court orders otherwise, in an electronic or paper filing with the court, the submitting party shall redact all information that contains an individual's social-security number, taxpayer-identification number, birth date, personal identifying number such as a driver's license, and medical records, as required by Commission Rule [8\(g\)](#) and Fed. R. Civ. P. [5.2](#).

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Motions

Any motion filed in this Court shall be made in compliance with the Commission's Rules, in particular, Commission Rule [40](#). **A motion will not be entertained unless accompanied by moving counsel's certification that the parties have discussed the matter and that there is either no objection to the motion or that the parties have made a good faith effort to settle the matter and have been unable to do so.** Commission Rule [40\(a\)](#). **A motion must be accompanied by an order prepared for the Court's signature.**

Restrictions on Letter Communications to Court. Communications to the Court seeking a ruling or order, including an extension of time, shall be by motion and not by letter. A letter seeking such action shall not be acted upon by the Court. Further, Counsel shall **not** provide the Court with copies of correspondence among themselves.

Continuances

A continuance of any trial, pretrial conference, or other hearing will be granted only on the basis of exceptional circumstances. No such continuance will be granted on stipulation of counsel alone, but shall require an order of the court.

Absence of Party, Lead Counsel, or Witnesses. Motions for continuance on account of the absence of any party, lead counsel, or witness must show the steps which have been taken to secure the attendance of the witness and must reveal the nature of the witness' testimony. **For purposes of court conflicts, only the lead counsel's conflicts shall be considered, not co-counsel, except when co-counsel is designated to examine or cross-examine specific witnesses on a specific trial day.**

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The motion must also state the time at which the party, lead counsel or witness will be available. The stipulation of the adversary as to the witness' testimony shall be sufficient reason for denial of the motion for continuance. **The motion must be supported by an affidavit or other evidence such as a certificate of a doctor when an illness is asserted, a copy of proof of travel when prearranged travel is asserted, or a copy of seminar itinerary when prearranged seminar attendance is asserted.**

Motion for Summary Judgment

Motions for summary judgment shall be filed in accordance with the provisions of Fed. R. Civ. P. [56](#) and this Standing Order. Only a reply brief by the movant is authorized, except upon order of the Court.

Time to File Motion for Summary Judgment. A motion for summary judgment shall be filed as soon as possible, but, unless otherwise ordered by the Court, at any time within thirty (30) days after the close of all discovery, as established by the expiration of the original or extended discovery period, or by written notice of all counsel, filed with the Court, indicating that discovery was completed earlier.

Time to File Response to Motion for Summary Judgment. A response to a motion for summary judgment shall be filed not later than twenty-one (21) days after service of the motion for summary judgment or a responsive pleading is due, whichever is later.

Form of Motion for Summary Judgment. The movant 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.**

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The Court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts.

Response to Motion for Summary Judgment. The responding party shall include with the responsive brief a response to the movant's statement of undisputed facts, which shall contain individually numbered, concise, non-argumentative responses corresponding to each of the movant's numbered undisputed material facts. **The Court will deem each of the movant's facts as admitted unless the responding party: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material.**

Motion for Reconsideration

A motion for reconsideration shall not be filed as a matter of routine practice and shall not be used to present the Court with arguments already heard and decided, or to offer new legal theories or evidence that could have previously been presented. A motion for reconsideration is **not** an opportunity for the moving party and their counsel to instruct the Court on how the Court "could have done it better" the first time. A motion for reconsideration is appropriate **only** where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact.

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Whenever a party or attorney for a party believes it is absolutely necessary to file a motion to reconsider an order or judgment, the motion shall be filed within seven (7) days after entry of the order or decision. Responses shall be filed no later than seven (7) days after service of the motion for reconsideration. There shall be no reply brief.

Amended and Supplemental Pleadings

Commission Rule [34\(a\)\(3\)](#) and Fed. R. Civ. P. [15](#) shall govern amended and supplemental pleadings.

Witnesses Generally

The parties must include in the *Joint Proposed Pretrial Order* separate lists of all the witnesses and their addresses for each party. The lists must designate the witnesses whom the party **will** have present at trial and those witnesses whom the party **may** have present at trial. Expert, impeachment and rebuttal witnesses, whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a specific summary of the expected testimony of each expert witness.

All other parties may rely upon a representation by a designated party that a witness **will** be present unless notice to the contrary is given at least ten (10) calendar days prior to trial to allow the other party to subpoena the witness or to obtain the witness' testimony by other means. **Any witnesses not included on a party's witness list (including expert, impeachment and rebuttal witnesses whose use should have been reasonably anticipated) shall not be permitted to testify.**

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Expert Witnesses

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 timely designate 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).

The Court reminds the parties that Rule [701](#) permits a lay witness to give opinion testimony only if it is: (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule [702](#)*. 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).

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Any party objecting 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 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.

Expert Reports

Each expert witness shall complete and deliver to counsel who retained the expert a written report, prepared and signed by the witness, copies of which shall thereafter be exchanged with opposing counsel pursuant to the Court's scheduling Order. 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.

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, the expert 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.

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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, the expert 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.

If a party or a witness fails to comply with these provisions, the party may not call the witness as an expert, and the witness shall not testify as an expert. There shall be no exceptions.

Exhibits

Each party shall provide the court reporter at trial with a paper copy of all trial exhibits, **AND** an electronic version of all trial exhibits in Adobe Portable Document format (.pdf) saved individually on a CD or flash drive. **The electronic version of the trial exhibits shall be the official trial exhibits.** Materials that cannot be converted to electronic form (*e.g.*, videotape, audiotape, etc.) should be submitted to the court reporter in original form. Electronic trial exhibits admitted in audio or video format must be in .mp3 (audio) or .mp4 (video) format.

The parties shall confer at the initiation of the Secretary's counsel and consolidate duplicate exhibits using a joint common numbering system for such exhibits to the extent feasible. Exhibits shall be sequentially numbered with a label placed in the lower right corner of each exhibit. **Each page of the exhibit shall be sequentially numbered using a Bate stamp.** Each exhibit shall be numbered C-1, C-2, C-3, etc. for Complainant's exhibits, and R-1, R-2, R-3, etc. for Respondent's exhibits, and I-1, I-2, I-3, etc. for Intervenor's exhibits.

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The pre-numbered exhibits must be securely placed in a three-ring binder, along with an index page located in the front of the binder. Each exhibit shall be separated by a tab properly labeled with the exhibit number. Each party shall prepare the following number of hard copies of their respective exhibit notebooks: (1) one copy for the court reporter (to be provided at trial), (2) one copy for the witness stand, (3) one copy for each opposing party, which shall be produced to each opposing party pursuant to the Court's Pretrial Order, and (4) a copy for the party offering the exhibits.

Exhibits smaller than 8½ by 11 inches, such as photographs, shall be mounted individually on 8½- by 11-sheets of paper. Over-size documents such as overheads, charts, graphs or demonstrative exhibits may be used during Court proceedings but they shall be reduced, photocopied or otherwise produced so that they can be submitted as a paper exhibit with 8½ by 11 inches dimensions. A full size copy of micro video cassettes shall be provided. If longer than five minutes, videotapes offered into evidence shall have time or other notations to permit identification of frames for the record.

The pretrial order shall include a separate, typed listing of each party's objections to the exhibits of another party. The objections shall 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 by the parties, and such documents will be admitted at trial without further proof of authenticity.

Discovery

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. *See* Commission Rule [52\(a\)\(2\)](#). Commission Rule [52\(a\)\(2\)](#) also provides that discovery shall be initiated early enough to permit completion of discovery no later than 7 days prior to the date set for hearing, *unless the Judge orders otherwise*. Accordingly, the Court hereby orders that depending on the complexity of the case, each case shall be designated to a discovery period not to exceed either two, three, or four months from the date the Court issues the *Order Requiring Filing of Mandatory Joint Proposed Discovery and Trial Plan*. All discovery requests must be served in time to assure that they are answered before the discovery deadline. An extension of the deadline will not be granted because of unanswered discovery requests.

All discovery requests, responses and objections are governed by the requirements of Commission Rule [52](#), and where applicable, Fed. R. Civ. P. Rule [26\(g\)](#), and counsel and parties shall be familiar with the requirements of these rules and the sanctions that may be imposed for failure to comply with them.

All discovery responses, answers (including answers to interrogatories and document production requests), and disclosures are to be complete and non-evasive. Evasive or incomplete discovery responses, answers or disclosures will be deemed to be a failure to respond, answer or disclose.

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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 Proposed Discovery and Trial Plan* was filed.

In conformity with Commission Rule [52\(a\)\(1\)](#), 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](#).

The discovery requests and responses shall not be filed until they are used in the proceeding, unless otherwise ordered by the Court. To file discovery, counsel must attach a signed statement certifying that the discovery documents have been either used in the proceedings or ordered filed by the Court.

The custodial party shall file with the Court at the time of use at trial or with the filing of a motion **only** those portions of depositions, interrogatories, requests for documents, requests for admission and answers or responses thereto which are used at trial or which are necessary to the motion. Where discovery materials not previously in the record are needed for appeal purposes, the Court, upon application, may order or counsel may stipulate in writing that the necessary materials be filed with the Court.

Discovery Disputes

The Court has adopted the following policy with respect to discovery disputes. **This policy shall be followed before the filing of any discovery motions.** In the event of a discovery disagreement, counsel shall notify opposing counsel of their intent to contact the Court's chambers to request a telephone conference. Counsel requesting such a conference shall check the availability of opposing Counsel and then shall e-file (even if the parties have not consented to e-filing) the Court at atlantaoshrcjudges@oshrc.gov (with a copy to the opposing party) with suggested dates and times. The conference call should take less than 30 minutes. Counsel shall dial-in to the Century Link Conferencing Center line at 1-877-446-3914, and enter Conference Pass Code Number 335359# on the designated date and time of the conference.

All Counsel involved in the dispute shall e-file (even if the parties have not consented to e-filing) at atlantaoshrcjudges@oshrc.gov short confidential (*ex parte*) statements (not more than two pages) setting forth their respective positions not later than 4:30 p.m. on the day prior to the scheduled telephone conference. Chambers will not tape record the conference call. The Court will attempt to resolve all disputes in this informal manner.

If, however, the Court determines that the issues require the formal filing of a motion and briefing, the Court will so advise counsel. In order for this informal discovery dispute policy to be successful, it is imperative that counsel exercise restraint. The Court does not have time to resolve each and every dispute that may arise during the course of discovery. The Court, however, recognizes the great advantage the Court can provide in quickly resolving many discovery issues.

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Mandatory Joint Proposed Discovery and Trial Plan

The purpose of the mandatory *Joint Proposed Discovery and Trial Plan* is to promote early analysis and planning of the case by counsel and to alert the Court to any specific case management needs. Lead counsel for all parties are required to confer in an effort to settle the case, discuss discovery, limit issues, and discuss other matters to be addressed in the mandatory *Joint Proposed Discovery and Trial Plan*. The conference shall comply with the requirements of Fed. R. Civ. P. [26\(f\)](#). Counsel are required to inform the parties promptly of all offers of settlement. The results of the conference must be reported in the *Joint Proposed Discovery and Trial Plan*.

Unless otherwise ordered, within **thirty (30) days** of the issuance of the Court's *Order Requiring Filing of Joint Proposed Discovery and Trial Plan*, Counsel are required to complete and file a *Joint Proposed Discovery and Trial Plan* using the Court's mandatory form. No deviations from the Court's form are permitted, except upon the express prior approval of the Court. A copy of the mandatory *Joint Proposed Discovery and Trial Plan* form can be obtained by accessing Judge Gatto's links under the "[Administrative Law Judge Practices](#)" section on the Commission's website at: <http://www.oshrc.gov/ALJP/index.html>.

For cases not settled earlier, counsel for Complainant shall contact counsel for all other parties to arrange a settlement conference among lead counsel and a person possessing settlement authority for each party to discuss, in good faith, settlement of the case **after the close of discovery**. The results of the conference must be reported in the *Joint Proposed Pretrial Order*.

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Mandatory Joint Proposed Pretrial Order

Counsel are required to jointly complete and file with the Court a *Joint Proposed Pretrial Order* using the Court's mandatory form (not 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). A copy of the mandatory *Joint Proposed Pretrial Order* form can be obtained by accessing Judge Gatto's links under the "[Administrative Law Judge Practices](#)" section on the Commission's website at: <http://www.oshrc.gov/ALJP/index.html>.

It shall be the responsibility of Complainant'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 proposed pretrial order.

A pretrial conference will not be scheduled in conventional cases, except in extraordinary circumstances. However, if counsel for either party believes extraordinary circumstances exist that warrant a pretrial conference, a motion must be separately filed. **A case shall be presumed ready for trial after the pretrial order is filed unless another time is specifically set by the Court.**

Settlement Practices

The parties are to provide notice to the Court at least **three business days** in advance of trial if a case has settled. If the case has not settled, but the parties are still engaged in settlement discussions, they may file a motion seeking a postponement of the trial.

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If a case has settled, but the Court was not timely informed at least three business days in advance of trial and the Judge is already in travel status, the parties must appear at the trial location (unless otherwise ordered).

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