OAH 82-1901-34701

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,

Complainant,

vs.

Ebert Inc., d/b/a Ebert Construction,

Respondent.

ORDER GRANTING MNOSHA'S MOTION TO EXTEND DEADLINES

This matter came before Administrative Law Judge Barbara J. Case pursuant to a motion to extend the discovery deadline brought by Minnesota Occupational Safety and Health (MnOSHA). MnOSHA filed its motion on April 25, 2018, and Ebert Inc. (Ebert) responded on May 9, 2018.

Bradley D. Simon, Assistant Attorney General, represents MnOSHA. Aaron A. Dean and Douglas Mac Arthur, Moss & Barnett, represent Ebert (Respondent).

Based on the submissions of counsel and for the reasons articulated in the attached Memorandum, the Administrative Law Judge issues the following:

ORDER

1. MnOSHA's motion to extend deadlines is **GRANTED**.

2. The terms of the First Prehearing Order remain in effect if they are not changed in this order.

3. The deadlines in this proceeding are hereby amended to be:

Close of discovery:	July 13, 2018
Dispositive motions:	Unchanged (May 18, 2018)
Subpoenas for attendance of witnesses or production of documents:	August 8, 2018

Close of discovery:	July 13, 2018
Exchange and file proposed pre-labeled exhibits, index of proposed exhibits, and proposed exhibits, and witness lists:	4:30 p.m., August 15, 2018 (originally 4:30 p.m., July 9, 2018)
Evidentiary hearing:	August 28 and 29, 2018

Dated: May 16, 2018

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

MnOSHA's motion requests that the Administrative Law Judge issue an Order extending the discovery deadline in this proceeding by 60 days. The Administrative Law Judge finds good cause for extending the discovery deadline by 60 days, and amends other deadlines accordingly.

I. Factual Background and Procedural History

In this proceeding, MnOSHA seeks to enforce a citation against Ebert. The citation stems from a worksite injury suffered by a drywall subcontractor who fell from a stairway that had no railing on a jobsite at which Ebert, the general contractor, was responsible for ensuring safety.[1]

One material question in this proceeding appears to be whether Ebert's project superintendent told the drywall subcontractors that they were not to use the stairway in question until the railing could be reinstalled. Another is whether the superintendent otherwise instructed or permitted the drywall subcontractors to use the stairway while the railing was removed.

Another subcontractor, Steven Mocreia, allegedly witnessed the incident.[2] Mr. Mocreia's witness statement appears to be a material witness for four reasons. First, the reason that the railing was taken down was so that Mr. Mocreia could take precise measurements to design a new railing.[3] Mr. Mocreia stated that the plan was for the railing to be taken down for a short period so that he could take these measurements, after which the original railing would be temporarily reinstalled. Second, Mr. Mocreia stated that Ebert's superintendent had the entrances to the stairway closed off and

[1] Ebert's Mem. In Opp. to Mot. (May 9, 2018), Exhibit (Ex.) A.
[2] Ebert's Mem., Ex. B.
[3] *Id.*, ¶¶ 10-12.

surrounded with yellow caution tape.[4] Third, Mr. Mocreia stated that he personally witnessed and overheard the conversation between the drywall subcontractors and Ebert's superintendent, and that the superintendent directed the drywall contractors to wait before using the stairway.[5] Fourth, Mr. Mocreia stated that he witnessed the events leading up to the incident in which one of the subcontractors fell; he stated that the subcontractors ignored the superintendent and used the staircase, and that one of the subcontractors acted in a "pushy" and "reckless" manner, leading the other to fall.[6]

MnOSHA initiated this contested case proceeding in a notice dated September 26, 2017.[7] The Administrative Law Judge issued a First Prehearing Order on November 2, 2017, setting the close of discovery at April 13, 2018.[8] MnOSHA did not serve its written discovery until about three months into the discovery period and allowed Ebert two extensions to file its discovery responses.[9] Ebert first disclosed Mr. Mocreia's witness statement on April 2 or April 3, 2018, when it responded to MnOSHA's discovery.[10]

After attempting unsuccessfully to negotiate with Ebert for an extension of the discovery deadline, MnOSHA obtained leave from this Court to file this motion.

II. Analysis

Because the Minnesota Administrative Rules do not cover requests to extend Court deadlines, the Administrative Law Judge considers such motions under the Minnesota Rules of Civil Procedure.[11] Under those rules, the Court may modify scheduling deadlines upon a showing of good cause.[12]

MnOSHA argues that there is good cause for an extension because 60 additional days would give MnOSHA time to serve written discovery on Mr. Mocreia and Ebert, and to depose Mr. Mocreia. MnOSHA represents that "further discovery regarding Mr. Mocreia's knowledge of the incident and relationship to the parties would help clarify and narrow the issues for the hearing, and may even potentially assist the parties in resolving the matter prior to hearing."[13]

Ebert argues that the investigative report indicates that MnOSHA knew Mr. Mocreia's identity as a potential witness and had his contact information all along,

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[4] *Id.*, ¶¶ 13-15.
[5] *Id.*, ¶ 17.
[6] *Id.*, ¶¶ 18-24.
[7] Notice and Order for Hearing and Pre-Hearing Conference (September 26, 2017).
[8] First Prehearing Order (Nov. 2, 2017), at ¶ 2.
[9] Affidavit (Aff.) of Bradley D. Simon (Apr. 25, 2018), at ¶¶ 4-5.
[10] *Id.*, ¶ 6.
[11] Minn. R. 1400.6600 (2017).
[12] Minn. R. Civ. P. 16.02.
[13] MnOSHA's Mem. at 6.

and thus, that there is no good cause for an extension that would allow MnOSHA to conduct discovery that it should have already done.

The Administrative Law Judge finds good cause for an extension for three reasons.

First, and most importantly, the Administrative Law Judge finds that extending the discovery deadline by 60 days will allow MnOSHA to discover information from a key witness that may lead to a speedier resolution of this proceeding. Discovery on Mr. Mocreia's credibility and potential testimony may, as MnOSHA represented in its memorandum, assist the parties in resolving this dispute prior to hearing.

Second, although MnOSHA had Mr. Mocreia's contact information, it was not on notice of Ebert's intent to use Mr. Mocreia as a key witness until receiving Mr. Mocreia's statement with Ebert's written discovery responses in early April, less than two weeks before the close of discovery.[14] Part of the reason for this tight turnaround was that MnOSHA agreed to two extensions of time for Ebert to file its responses.[15]

Third, although the Administrative Law Judge previously expressed concerns about whether MnOSHA's relatively delayed service of its written discovery led to this request for an extension,[16] the motion record lessens those concerns.[17] Ebert's counsel's declaration states that Ebert was "not able to speak to Mr. Mocreia until months into the discovery period."[18] Thus, it appears that Mr. Mocreia's witness statement would have been disclosed fairly late in the discovery period regardless of when MnOSHA's written discovery was served.

The parties' positions on whether other deadlines must be pushed back as a result of granting MnOSHA's motion are not entirely aligned. MnOSHA believes that the hearing date, currently scheduled for July 16 and 17, 2018, does not necessarily need to be changed.[19] Ebert believes that all deadlines would have to be moved.[20]

The Administrative Law Judge will move the deadlines for the close of discovery; for the issuance of subpoenas for the attendance of witnesses and production of documents; for the exchanging and filing of exhibits, exhibit indices, and witness lists. The Administrative Law Judge will change the date of the evidentiary hearing. Because Ebert has already made a motion for summary disposition, and because MnOSHA represents that it believes there are "clear genuine issues of material fact that exist in

[14] Aff. of Bradley D. Simon (Apr. 25, 2018), at ¶ 6.
[15] *Id.*, ¶¶ 4-5.
[16] *See* MnOSHA's Mem. in Support of Mot. to Extend Discovery Deadline (Apr. 25, 2018), at 4.
[17] Even if MnOSHA's own delay had more obviously led to this motion, the Administrative Law Judge may well have decided that the importance of Mr. Mocreia's credibility and potential testimony, and its potential to lead to the resolution of this dispute before a hearing, warranted an extension anyway.
[18] Ebert's Mem., Second Declaration of Aaron A. Dean, at ¶ 4.
[19] MnOSHA's Mem. at 5.
[20] Ebert's Mem. at 7.

this case" and will likely not make a dispositive motion for that reason,[21] the dispositive motion deadline will not change. The amendments to the scheduling order are as set forth above.

For the foregoing reasons, MnOSHA's motion is granted, and the dates in this proceeding are amended as set forth above.

B. J. C.

[21] MnOSHA's Mem. at 5.