OAH 20-1901-37445

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Roslyn Robertson, Commissioner, Minnesota Department of Labor and Industry,

Complainant,

v.

Authentic Property Investments, LLC, d/b/a Eagles Nest Resort,

Respondent.

ORDER DENYING RESPONDENT'S MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY AND CERTAIN PORTIONS OF THE REPORT OF DR. FRANK RHAME

This matter came before Administrative Law Judge Steven M. Bialick on a Motion In Limine To Exclude Certain Testimony And Certain Portions Of The Report Of Dr. Frank Rhame, filed by Authentic Properties Investments, LLC, d/b/a Eagles Nest Resort, (Respondent) on January 31, 2022.

Roslyn Robertson, Commissioner, Minnesota Department of Labor and Industry, (Complainant) filed a response in opposition to Respondent's motion on February 11, 2022. Respondent submitted a reply to Complainant's response on February 17, 2022.

Bradley D. Simon and Scott A. Grosskreutz, Assistant Attorneys General, have appeared on behalf of Complainant. Thomas W. Wexler, Attorney, has appeared on behalf of Respondent.

Respondent's motion seeks relief in limine to exclude the following testimony and evidence:

1. Any testimony of Complainant's medical expert, Dr. Frank Rhame, as to whether Respondent's alleged failure to enforce masking and social distancing creates a substantial probability of death or serious physical harm, and

2. The language of the paragraph heading on page 7 of Dr. Rhame's report stating that "Covid-19 . . . is likely to cause death and serious injury and harm".

In the alternative, Respondent moves the Administrative Law Judge to schedule a rule 702 hearing to determine the issues addressed above.

Based upon all the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS HEREBY ORDERED THAT:

Respondent's Motion In Limine To Exclude Certain Testimony And Certain Portions Of The Report Of Dr. Frank Rhame is **DENIED**.

Dated: February 18, 2022

STEVEN M. BIALICK
Administrative Law Judge

MEMORANDUM

I. BACKGROUND

This contested case is an enforcement action brought by Complainant, alleging that Respondent violated Minnesota Occupational Safety and Health Administration (MNOSHA) standards

Minn. Stat. § 182.653, subd. 2 (2020), requires employers to furnish its employees with conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to the employees. This requirement is referred to as the "General Duty Standard."

Minn. Stat. § 182.651, subd. 12 (2020), defines "serious violation" as follows:

> "Serious violation" means a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The issues presented in this case include whether Respondent's alleged failure to enforce COVID-19-related precautions to protect its employees from potential exposure to the COVID-19 virus violated the General Duty Standard and, if so, whether the violation was a serious violation. Specifically, Complainant alleges that Respondent failed to enforce social distancing and employee mask-wearing requirements at Respondent's bar.

Complainant has disclosed a medical expert, Dr. Frank Rhame, who it intends to call as an expert witness at the evidentiary hearing in this matter.

Respondent filed this motion in limine on January 31, 2022, (current motion). This motion seeks to exclude testimony of Dr. Frank Rhame regarding whether Respondent's alleged failure to enforce masking and social distancing created a substantial probability of death or serious physical harm. It also seeks to exclude the language in a paragraph heading on page 7 of Dr. Rhame's report which states that "Covid-19 . . . is likely to cause death and serious injury and harm."

In the alternative, Respondent moves the Administrative Law Judge to schedule a "rule 702" hearing to determine the issues addressed above.

The following orders were previously issued regarding Respondent's prior motions relating to Dr. Rhame:

- In an order dated December 6, 2021, the Administrative Law Judge denied Respondent's motion for the production of a copy of Dr. Rhame's file, because the information Complainant had already produced regarding Dr. Rhame and his opinions complied with the First Prehearing Order, dated May 17, 2021, and applicable rules. Further, Respondent had not met its burden of showing that the production of Dr. Rhame's file was needed for the proper presentation of its case, as required by Minn. R. 1400.6700, subp. 2, (2021).

- In an order dated January 3, 2022, the Administrative Law Judge denied Respondent's request for the issuance of a subpoena directing Dr. Rhame to produce various documents. That request was another attempt by Respondent to obtain documents, the compelled production of which was denied by the December 6, 2021, order. The Administrative Law Judge determined that the Respondent should not be allowed to do by subpoena that which it was not allowed to do by motion.

- In an order dated January 25, 2022, the Administrative Law Judge denied Respondent's motion in limine seeking an order excluding the testimony of Dr. Rhame, excluding from evidence the report of Dr. Rhame, and excluding from evidence the medical articles referenced by Dr. Rhame and which were generated after the MNOSHA inspection on September 12, 2020.

In the current motion, Respondent argues that defects in Dr. Rhame's report should be fatal to the admissibility of his opinions regarding likely consequences of Respondent's alleged failure to enforce COVID-19-related precautions.[1]

Respondent also argues that Dr. Rhame is not a legal expert and cannot offer legal opinions as to what "likely" means.[2]

Respondent also argues that Dr. Rhame's report fails to show that his opinions regarding substantial probability of a serious violation of MNOSHA standards would be relevant or that his opinions would be reliable or trustworthy, as required by rule 702 of the Minnesota Rules of Evidence.[3] Rule 702 relates to testimony by experts and states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that

[1] Respondent's Memorandum In Support Of Motion In Limine To Exclude Certain Testimony And Certain Portions Of The Report Of Dr. Frank Rhame (Respondent's Memorandum), at 5.
[2] Respondent's Memorandum, at 6.
[3] Respondent's Memorandum, at 8, 9.

the underlying scientific evidence is generally accepted in the relevant scientific community.

Complainant states that Dr. Rhame is a medical doctor who specializes in infectious diseases. Dr. Rhame described his background and the basis for his knowledge of COVID-19 in the report he issued.[4]

Complainant argues that Dr. Rhame's opinions regarding the nature of the COVID-19 virus and the likelihood that the virus will cause death or serious injury are directly relevant to material issues in this case. Complainant also argues that, given his knowledge, experience, and expertise, Dr. Rhame's opinions on these topics are the type of evidence reasonable, prudent people would rely on in the conduct of their serious affairs. Therefore, Complainant argues that Dr. Rhame's testimony and report are admissible under both Minn. Stat. § 14.60, subd. 1 (2020), and Minn. R. 1400.7300 (2021).[5]

Minn. Stat. § 14.60, subd. 1, provides that, in contested cases, agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. That statute also provides that effect shall be given to the rules of privilege recognized by law and that incompetent, irrelevant, immaterial and repetitious evidence may be excluded.

Minn. R. 1400.7300 provides that the judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The judge shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial, or unduly repetitious shall be excluded.

Complainant also argues that administrative rules of evidence are applicable to this case, and that the Minnesota Rules of Evidence may provide guidance but are not controlling.[6]

Complainant also argues that Dr. Rhame's testimony and report are admissible, that Dr. Rhame is qualified to testify as an expert, that Dr. Rhame's opinions are foundationally reliable, that Dr. Rhame's opinions will be helpful to the judge, and that a separate "rule 702" hearing is unnecessary.[7]

Complainant also points out that it anticipates Dr. Rhame will testify in Complainant's case-in-chief, during which Dr. Rhame will describe the foundation for his opinions. Complainant notes that, if Respondent has objections to Dr. Rhame's testimony, it will have the opportunity to make those objections at that time.[8]

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[4] Complainant's Response In Opposition To Second Motion In Limine To Exclude Evidence (Complainant's Response), at 4.
[5] *Id.*
[6] Complainant's Response, at 2.
[7] Complainant's Response, at 3-8.
[8] Complainant's Response, at 8.

II. ANALYSIS

In jury cases, care must be taken to prevent inadmissible evidence from being suggested to the jury. This concern is reflected in Rule 103(c) of the Minnesota Rules of Evidence, which provides:

> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

However, this is not a jury case and there is no need to keep potentially inadmissible expert evidence away from a jury by holding a separate "rule 702" hearing or by issuing an order excluding some expert testimony or portions of an expert report prior to the evidentiary hearing.

If Complainant calls Dr. Rhame as an expert witness at the evidentiary hearing and offers his report into evidence, Complainant will be given the opportunity to establish the foundation, relevancy, and admissibility of Dr. Rhame's opinions and report, and Respondent will have the opportunity to cross examine Dr. Rhame and make any objections at that time.

Accordingly, Respondent's Motion In Limine To Exclude Certain Testimony And Certain Portions Of The Report Of Dr. Frank Rhame is **DENIED**.

S. M. B.