

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Commissioner, Department of Labor
and Industry v. PCi Roads, L.L.C.

**ORDER ON MOTION *IN LIMINE*
AND ORDER FOR HEARING**

The above matter is pending before Administrative Law Judge M. Kevin Snell pursuant to a Notice of and Order for Prehearing Conference and Hearing ("Notice of Hearing) issued on February 19, 2010, and a Prehearing Order and Order for Hearing issued on May 7, 2010.

On August 27, 2010, the Petitioner filed a Motion *In Limine* and supporting memorandum. On September 3, 2010, the Respondent filed a memorandum in opposition to the Petitioner's Motion *In Limine*.

Oral argument was heard with respect to the motion on September 8, 2010. At the oral argument the parties reached an agreement regarding a one-day hearing date of September 29, 2010.

Appearances: Jackson Evans, Esq., Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry. Gregory M. Bistram, Esq., Briggs and Morgan, 80 South 8th Street, Suite 2200, Minneapolis, MN 55402-2157, appeared on behalf of Respondent PCi Roads, L.L.C.

Based upon the files, record, and proceedings in this matter, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED as follows:

1. The Petitioner's motion *In Limine* is hereby GRANTED in part and DENIED in part.
2. The Petitioner's request to preclude expert opinion testimony by Respondent's proposed experts utilizing "industry customs" on the factual issue regarding whether or not Respondent violated the height requirement of 29 C.F.R § 1926.502 (b)(1) is granted.
3. Testimony regarding a proposed amendment to 29 C.F.R § 1926.502 (b)(1):

- a. Will be precluded on whether or not Respondent violated 29 C.F.R § 1926.502 (b)(1) on July 10, 2009; and
 - b. Will be permitted on the appropriateness of the amount of a fine, if any, concerning the alleged violation of 29 C.F.R § 1926.502 (b)(1) on July 10, 2009.
4. The remainder of Respondent's motion is DENIED.
 5. Except as stated above, Respondent may offer the testimony of proposed witnesses, whether as fact witnesses or expert witnesses¹, regarding the elements of the alleged violations.
 6. The Administrative Law Judge has taken judicial notice of the proposed amendment to 29 C.F.R § 1926.502 (b)(1).²
 7. The parties shall appear at the hearing with at least three copies of each exhibit they plan to offer into evidence. Exhibits shall be pre-marked using Arabic numbers without designation of the party offering the exhibit. The **Petitioner's exhibits** shall begin with the number **one**. The **Respondent's exhibits** shall begin with the **next consecutive number after the Petitioner's end**. The parties shall agree, prior to the hearing, the consecutive numbers of the exhibits.
 8. The remaining terms and conditions of the May 7, 2009, Prehearing Order shall remain in effect.
 9. The contested case hearing shall be held on **September 29, 2010**, commencing at **8:30 a.m.** at the Office of Administrative Hearings, 600 North Robert Street, St. Paul Minnesota, Minnesota.

Dated: September 10, 2010

s/M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

¹ Expert witnesses must meet foundational qualifications.

² Exhibit A, of Respondent's July 16, 2010, Request for Judicial Notice.

MEMORANDUM

Precluded Expert Testimony

The Petitioner correctly argues that expert testimony, utilizing a proposed amendment to a rule, regarding “industry customs” would be improper.

The proposed amendment to 29 C.F.R § 1926.502 (b)(1) is irrelevant to the issue of whether or not Respondent violated the rule as it read on July 10, 2009. 29 C.F.R § 1926.502 (b)(1) contains a specific height requirement for guardrails. Expert testimony on whether or not the highway bridge guardrail was or should be between 39 and 45 inches high will not assist the Administrative Law Judge in making that determination.³ The fact witnesses and documentary evidence will be sufficient for that task.

Permitted Expert Testimony

Qualified expert testimony may be offered by Respondent on the issue of employee exposure or access (the “zone of danger”) with regard to the alleged violation of 29 C.F.R § 1926.502 (b)(1), as it may be helpful and relevant.⁴

On the issue of an appropriate sanction for a violation of 29 C.F.R § 1926.502 (b)(1), the proposed rule change may be entitled to some weight in the determination of an appropriate sanction pursuant to Minn. Stat. § 182.666, subds. 2 and/or 3. Therefore, testimony regarding the new rule will be entertained for that purpose.

M. K. S.

³ See, *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

⁴ *Dun-Par Engineered Form Co.*, 12 O.S.H. Cas (BNA) 1949, 1986 WL 535, at *3 (Rev. Comm. 1986), 843 F.2d 1135 (8th Cir. 1988).