

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
HOUSING AUTHORITY OF THE)	
CITY OF MOUNDSVILLE, <i>ET AL.</i>,)	Docket No. CAA-03-2003-2011
)	
)	
Respondents.)	

ORDER ON MOTION IN LIMINE AND ALTERNATIVE MOTION TO COMPEL

I. Background

The Complaint initiating this proceeding charges Respondents, Housing Authority of the City of Moundsville, Earl P. Huffner, and Carpeting Unlimited, Inc., with violating Section 112 of the Clean Air Act and the National Emissions Standards for Asbestos (40 C.F.R. Part 61, Subpart M, “Asbestos NESHAP”), arising out of the removal of floor tiles containing asbestos in residential buildings in Moundsville, West Virginia. Specifically, Count I charges Respondents with failing to adequately inspect for asbestos prior to commencing a renovation activity, pursuant to 40 C.F.R. §61.145(a). Count II alleges the failure to provide EPA with notice of a regulated renovation activity, in accordance with the requirements of 40 C.F.R. §61.145. Count III alleges the failure to properly handle asbestos-containing material, by disturbing it and failing to wet the exposed material while stripping it, in violation of 40 C.F.R. §61.145. The Complaint proposes a penalty of \$37,400.

Respondents Housing Authority of Moundsville (MHA) and Carpeting Unlimited (CU) answered the Complaint, denying liability for the alleged violations, and filed Prehearing Exchanges. Respondent Earl Huffner has entered into a settlement agreement with Complainant.

On April 27, Complainant filed a Motion in Limine to Exclude Testimony Or, In The Alternative, a Motion to Compel Supplement to Prehearing Exchange (Motion). In the Motion, Complainant seeks to exclude the testimony of Marty Wright from being admitted into evidence at hearing, based on the description of the testimony included in CU’s Prehearing Exchange. In the alternative, Complainant moves to compel CU to provide a curriculum vitae or resume of Marty Wright as a supplement to its Prehearing Exchange.

No response to the Motion was filed. The Motion, however, indicated that counsel for Respondent CU opposes the relief sought in the Motion.

II. Discussion

A Prehearing Order issued on January 4, 2004, directed the parties in their prehearing exchanges to provide:

- 1(A) the names of the expert and other witnesses intended to be called at hearing, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called.
- 1(B) copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vitae or resume for each identified expert witness . . .

Respondent CU filed its Prehearing Exchange on or about February 23, 2004. Therein, CU listed Marty Wright as a witness, and summarized his testimony as follows:

It is expected Mr. Wright will testify that it was proper for Carpeting Unlimited to rely upon Huffner Contracting and the Housing Authority's representations that it was safe to proceed. It is expected that Mr. Wright will testify that it is not required that every entity involved perform its own asbestos test and that it was proper and legal for Carpeting Unlimited to rely upon a previous report and representations by the owner and contractor. It is expected Mr. Wright will testify that Carpeting Unlimited did not control or supervise the renovation.

Complainant seeks to exclude the testimony of Marty Wright, alleging that he is an expert witness who was not identified as such and for whom no curriculum vitae or resume was included in CU's Prehearing Exchange.

The Consolidated Rules of Practice which govern this proceeding provide that the presiding judge "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value . . ." 40 C.F.R. § 22.22(a). The Rules do not address the subjects of lay and expert testimony or motions in limine. In the absence of administrative rules on a subject, it is appropriate to consult Federal court practice, Federal Rules of Civil Procedure or the Federal Rules of Evidence as guidance in analogous situations. *See, Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 19, 10 E.A.D. ____ (EAB, July 31, 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

The rules of evidence governing proceedings in federal court have specific rules governing the admissibility of both lay and expert testimony. Lay testimony must be based on personal knowledge or observation, according to Rule 602 of the Federal Rules of Evidence. Rule 701 requires that any opinion testimony of lay witnesses must be limited to opinions or inferences which are rationally based on the perception of the witness. Lay witnesses may "offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived." *MCI Telecomm. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990). Under Rule 702, an expert

who is qualified by knowledge, skill, experience, training or education may provide testimony, which may be in the form of an opinion, of scientific, technical, or other specialized knowledge. An expert witness may not only provide an opinion or inference from facts or data perceived, but also from those "made known to the expert at or before the hearing." Fed. R. Evid. 703.

Marty Wright has not been explicitly identified either as a fact witness or as an expert witness. Complainant contends that, based on the narrative summary of Mr. Wright's expected testimony, it appears that CU intends for Mr. Wright to provide solely opinion testimony. The summary of testimony does not indicate that Mr. Wright has the personal knowledge or observation requisite to testify as a lay witness. CU has not described Mr. Wright's involvement in either the renovation project at issue in this case or his involvement with CU.

Complainant argues that if Marty Wright is introduced as an expert witness at the hearing, the introduction into evidence of expert opinion testimony would prejudice Complainant for two reasons. First, the introduction of such testimony might not afford Complainant sufficient opportunity to review Mr. Wright's qualifications for truthfulness, relevance, accuracy and completeness. Second, such testimony could impair Complainant's ability to prepare *voir dire*, cross examination, and/or a rebuttal case.

"[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that, without the context of the trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

In this case, CU's Prehearing Exchange does not provide sufficient information to determine whether Mr. Wright has the relevant personal knowledge requisite to testify as a lay witness, or whether Mr. Wright possesses any qualifications of an expert witness. If CU provides Mr. Wright's curriculum vitae or resume, as ordered below, Complainant will be able to review his qualifications and prepare for hearing, and therefore should suffer no prejudice. At this point in the proceedings, it cannot be determined that Mr. Wright's testimony is clearly inadmissible for any purpose. Thus, the Complainant's Motion In Limine to Exclude Testimony is **DENIED**.

Nevertheless, Complainant is entitled to prepare for a hearing and not be the subject of surprise. Therefore, in accordance with the Prehearing Order and with 40 C.F.R. § 22.19(a)(2) and (f), if CU anticipates offering Mr. Wright as an expert witness at the hearing, CU shall file a supplement to its Prehearing Exchange identifying Mr. Wright as an expert witness, and providing his resume or curriculum vitae. If, on the other hand, CU intends that Mr. Wright will

offer lay testimony, then CU must file a supplement to its Prehearing Exchange stating that he is a proposed fact witness and summarizing the facts to which he is expected to testify.

Accordingly, Complainant's Motion to Compel Supplement to Prehearing Exchange is hereby **GRANTED**. Respondent Carpeting Unlimited, Inc., shall file and serve, **on or before June 21, 2004**, a supplement to its Prehearing Exchange, either identifying Marty Wright as an expert witness and providing his resume or curriculum vitae, or identifying him as a fact witness and summarizing the facts to which he is expected to testify, or both as appropriate.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 7, 2004
Washington, D.C.