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January 13, 2021

JONES BROTHERS INC., Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. SE 2016-0218-RM Citation No. 8817595; 04/06/2016 Docket No. SE 2016-0219-RM Citation No. 8817596; 04/06/2016 Mine: S.R. 141 Project, Dekalb Co. Mine ID: 40-03454
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JONES BROTHERS INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2016-0246 A.C. No. 40-03454-410595 Mine: S.R. 141 Project, Dekalb Co.

ORDER GRANTING IN PART THE SECRETARY'S MOTION IN LIMINE AND INSTRUCTIONS FROM THE COURT

On January 11, 2021, the Secretary of Labor ("Secretary") filed an Objection to the Scope of Expected Testimony and Motion in Limine ("Secretary's Motion") where the Secretary objected to the expected testimony of Respondent's witnesses Martin McCullough, Kevin Hinson, Anthony Williams, Joey Odom, Ben Coleman, and Steve Wright as "irrelevant and impermissibly exceed[ing] the scope of testimony permitted by lay witnesses," and further objected to the expected testimony of Wright as not expert testimony. Sec'y Mot. at 2.

After reviewing the filing and Respondent's list of witnesses, the court will permit McCullough, Hinson, Williams, Odom, Coleman, and Wright to testify as fact witnesses. However, Wright will not be permitted to testify as an expert.

Respondent has described the scope of Wright's proposed testimony as follows:

> For nearly 40 years [Wright] has seen and operated borrow pits similar to what Jones Bros. did at the SR-141 job to produce solid graded rock in Tennessee and other states and although MSHA would be aware of these borrow pits, on both private land near a road project right of way or on the right of way itself, MSHA never sought to exercise jurisdiction over them unless the rock was being processed substantially more than by use of a slotted bucket. Mr. Wright may offer both factual and expert testimony concerning how the Interagency Agreement has been interpreted and/or applied.

Witness List for Jones Brothers, Inc. at 3. Wright does not qualify as an expert, per Rule 702 of the Federal Rules of Evidence, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Wright's purported knowledge of borrow pits unrelated to this matter and prior MSHA enforcement practices will not help this Court "understand the evidence or determine a fact in issue"—specifically whether Respondent's operation falls under the jurisdiction of the Mine Act in this specific instance. Further, Wright's proposed testimony consists of legal conclusions, including that "MSHA never sought to exercise jurisdiction . . . unless the rock was being processed substantially more than by use of a slotted bucket" and testimony regarding "how the Interagency Agreement has been interpreted and/or applied." Witness List for Jones Brothers, Inc. at 3. "Expert testimony that consists of legal conclusions" is not admissible under Rule 702 because it "cannot properly assist the trier of fact" in "understand[ing] the evidence" or "determin[ing] a fact in issue." *Burkhart v. WMATA*, 112 F.3d 1207, 1212 (D.C. Cir. 1997). Therefore, this Court will not permit Wright to testify as an expert.

Additionally, the parties have submitted proposed exhibits in this matter. The Court has reviewed the documents and issues the following guidelines with respect to introduction of exhibits at trial. The Secretary has submitted what is identified as exhibit S-26, which is the 86-page contract between the Tennessee Department of Transportation and Respondent. The

document contains many pages of information pertaining to the hiring of illegal immigrants, prevailing wage pay scales and classification of workers, fuel adjustment worksheet forms (blank), non-discrimination provisions, certificate of liability insurance forms, surety bond forms (unsigned), information regarding traffic control, road markings and signage, and other extraneous information. The Secretary is directed to redact any extraneous pages not intended for use at trial from the exhibit before offering it into evidence. Similarly, any drawings contained in exhibit S-27 that the Secretary does not intend to rely on shall be redacted from the exhibit when offered at trial.

Respondent has submitted exhibit R-1, which is a copy of responses provided by the Secretary to propounded discovery. My Prehearing Order specifically states that discovery responses shall not be submitted to the Court. Additionally, the Court finds, as it did with respect to the Secretary's proffer of deposition transcripts, that it is not proper to offer the document as an exhibit in the Respondent's case in chief. It may be used by the parties for refreshing recollection, past recollection recorded, and for impeachment.

The Court recognizes that the Respondent has not submitted any proposed witnesses to testify to the underlying violations cited against it. The Court informed the parties at the inception of this matter that the hearing would encompass the jurisdiction issue as well as an adjudication of all related violations. The Respondent is directed to either inform the Court whether it intends to accept the violations as written, or confirm that they are prepared to litigate the violations at the January 26, 2021 hearing. This matter will not be bifurcated.

It is so **ORDERED** this thirteenth day of January 2021**.**

Priscilla M. Rae
Administrative Law Judge

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