

**§ 1955.33**

**29 CFR Ch. XVII (7-1-04 Edition)**

served on all parties and filed with the administrative law judge.

(b)(1) The testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any person designated by the administrative law judge or having power to administer oaths.

(2) Any party desiring to take the deposition of a witness may make application in writing to the administrative law judge setting forth:

(i) The time when, the place where, and the name and post office address of the person before whom the deposition is to be taken;

(ii) The name and address of each witness; and

(iii) The subject matter concerning which each witness is expected to testify.

(3) Such notice as the administrative law judge may order shall be given by the party taking the deposition to every other party.

(c)(1) Each witness testifying upon deposition shall be sworn, and the parties not calling him shall have the right to cross-examine him. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing and shall be read to or by the witness unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness and certified by the officer before whom the deposition was taken. Thereafter, the officer shall seal the deposition, with copies thereof, in an envelope and mail the same by registered or certified mail to the administrative law judge.

(2) Subject to such objections to the questions and answers as were noted at the time of taking the deposition, and to the provisions in §1955.40(b)(1), any part or all of a deposition may be offered into evidence by the party taking it as against any party who was present, represented at the taking of the deposition, or who had due notice thereof.

(d) Whenever appropriate to a just disposition of any issue in the proceeding the administrative law judge may allow discovery by any other appropriate procedure, such as by interrogatories upon a party or request for production of documents by a party.

(e) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to limit or condition discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

**§ 1955.33 Sanctions for failure to comply with orders.**

(a) If a party or an official or agent of a party fails, without good cause, to comply with an order including, but not limited to, an order for the taking of a deposition, written interrogatories, the production of documents, or an order to comply with a subpoena, the administrative law judge or the Secretary or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding, the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, on a motion or other submission by the party, concerning which the order or subpoena was issued, be

stricken or that decision on the pleading be rendered against the party, or both.

(b) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in the initial decision of the administrative law judge or an order or opinion of the Secretary. The parties may seek, and the administrative law judge may grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence.

#### § 1955.34 Fees of witnesses.

Witnesses, including witnesses for depositions, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

### Subpart E—Hearing and Decision

#### § 1955.40 Hearings.

(a)(1) Except as may be ordered otherwise by the administrative law judge, the Department of Labor shall proceed first at the hearing.

(2) The Department of Labor shall have the burden of proof to sustain the contentions alleged in the notice of proposed withdrawal, published under § 1955.10(b)(1) but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b)(1) A party shall be entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any oral or documentary evidence may be received, but the administrative law judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(2) The testimony of a witness shall be upon oath or affirmation administered by the administrative law judge.

(3) If a party objects to the admission or rejection of any evidence, or to the

limitation of the scope of any examination or cross-examination, or to the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the administrative law judge may be relied upon subsequently in the proceeding.

(4) Formal exception to an adverse ruling is not required.

(c) Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice, or concerning which the Department of Labor by reason of its functions is presumed to be expert: Provided, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's and the Secretary's decision of the matters so noticed and shall be given adequate opportunity to show the contrary.

(d) When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of proof of what the party expects to prove by the answer of the witness orally or in writing. Written offers of proof, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(e) Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties and the public upon payment of the actual cost of duplication to the Department of Labor in accordance with 29 CFR 70.62(c).

(f) Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections may be ordered by the administrative law judge or agreed to in a written stipulation by all parties or their representatives. Where the parties are in disagreement, the administrative law judge shall determine the corrections to be made and so order. Corrections may be interlineated in the official transcript so as not to obliterate the original text.