

§ 20.606

33 CFR Ch. I (7-1-05 Edition)

recording are provided to parties requesting them, the person recording the deposition shall immediately place the videotape in a sealed envelope or a sealed videotape container, attaching to it a statement identifying the proceeding and the deponent and certifying as to the authenticity of the video recording, and return the videotape by accountable means to the ALJ. The deposition becomes a part of the record of the proceedings in the same manner as a transcribed deposition. The videotape, if admitted into evidence, will be played during the hearing and transcribed into the record by the reporter.

§ 20.606 Protective orders.

(a) In considering a motion for an order of discovery—or a motion, by a party or other person from whom discovery is sought, to reconsider or amend an order of discovery—the ALJ may enter any order that justice requires, to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. This order may—

- (1) Confine discovery to specific terms and conditions, such as a particular time and place;
- (2) Confine discovery to a method other than that selected by the party seeking it;
- (3) Preclude inquiry into certain matters;
- (4) Direct that discovery occur with no one present except persons designated by the ALJ;
- (5) Preclude the disclosure of a trade secret or other proprietary information, or allow its disclosure only in a designated way or only to designated persons; or
- (6) Require that the person from whom discovery is sought file specific documents or information under seal for opening at the direction of the ALJ.

(b) When a person from whom discovery is sought seeks a protective order, the ALJ may let him or her make all or part of the showing of good cause *in camera*. The ALJ shall record any proceedings *in camera*. If he or she enters a protective order, he or she shall seal any proceedings so recorded. These shall be releasable only as required by law.

(c) Upon motion by a person from whom discovery is sought, the ALJ may—

- (1) Restrict or defer disclosure by a party either of the name of a witness or, if the witness comes from the Coast Guard, of any prior statement of the witness; and
 - (2) Prescribe other appropriate measures to protect a witness.
- (d) The ALJ will give any party an adequate opportunity to prepare for cross-examination or other presentation concerning witnesses and statement subject to protective orders.

§ 20.607 Sanctions for failure to comply.

If a party fails to provide or permit discovery, the ALJ may take such action as is just. This may include the following:

- (a) Infer that the testimony, document, or other evidence would have been adverse to the party.
- (b) Order that, for the purposes of the proceeding, designated facts are established.
- (c) Order that the party not introduce into evidence—or otherwise rely upon, in support of any claim or defense—the evidence that was withheld.
- (d) Order that the party not introduce into evidence, or otherwise use in the hearing, information obtained in discovery.
- (e) Allow the use of secondary evidence to show what the evidence withheld would have shown.

§ 20.608 Subpoenas.

- (a) Any party may request the ALJ to issue a subpoena for the attendance of a person, the giving of testimony, or the production of books, papers, documents, or any other relevant evidence during discovery or for any hearing. Any party seeking a subpoena from the ALJ shall request its issuance by motion.
- (b) An ALJ may, for good cause shown, apply to the United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence.
- (c) A person serving a subpoena shall prepare a written statement setting forth either the date, time, and manner

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of service or the reason for failure of service. He or she shall swear to or affirm the statement, attach it to a copy of the subpoena, and return it to the ALJ who issued the subpoena.

(d) Coast Guard investigating officers have separate subpoena power in S&R proceedings under 46 CFR 5.301.

§ 20.609 Motions to quash or modify.

(a) A person to whom a subpoena is directed may, by motion with notice to the party requesting the subpoena, ask the ALJ to quash or modify the subpoena.

(b) Except when made at a hearing, the motion must be filed:

(1) 10 days or less after service of a subpoena compelling the appearance and testimony of a witness or the production of evidence or

(2) At or before the time specified in the subpoena for compliance, whichever is earlier.

(c) If the subpoena is served at a hearing, the person to whom it is directed may, in person at the hearing or in writing within a reasonable time fixed by the ALJ, ask the ALJ to quash or modify it.

(d) The ALJ may quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue.

Subpart G—Hearings

§ 20.701 Standard of proof.

The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence.

§ 20.702 Burden of proof.

(a) Except for an affirmative defense, or as provided by paragraph (b) of this section, the Coast Guard bears the burden of proof.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order bears the burden of proof.

§ 20.703 Presumptions.

In each administrative hearing, a presumption—

(a) Imposes on the party against whom it lies the burden of going for-

ward with evidence to rebut or meet the presumption; but

(b) Does not shift the burden of proof in the sense of the risk of non-persuasion.

§ 20.704 Scheduling and notice of hearings.

(a) With due regard for the convenience of the parties, and of their representatives or witnesses, the ALJ shall, as early as possible, fix the date, time, and place for the hearing and notify all parties and interested persons.

(b) The ALJ may grant a request for a change in the date, time, or place of a hearing.

(c) At any time after commencement of a proceeding, any party may move to expedite the proceeding. A party moving to expedite shall—

(1) Explain in the motion the circumstances justifying the motion to expedite; and

(2) Incorporate in the motion affidavits supporting any representations of fact.

(d) After timely receipt of the motion and any responses, the ALJ may expedite pleadings, pre-hearing conferences, and the hearing, as appropriate.

§ 20.705 Failure to appear.

The ALJ may enter a default under § 20.310 against a respondent threatening to fail, or having failed, to appear at a hearing unless,—

(a) Before the time for the hearing, the respondent shows good cause why neither the respondent nor his or her representative can appear; or,

(b) 30 days or less after an order to show good cause, the respondent shows good cause for his or her failure to appear.

§ 20.706 Witnesses.

(a) Each witness shall testify under oath or affirmation.

(b) If a witness fails or refuses to answer any question the ALJ finds proper, the failure or refusal constitutes grounds for the ALJ to strike all or part of the testimony given by the witness or to take any other measure he or she deems appropriate.