

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
LYNCHBURG DIVISION**

<b>BANKER STEEL COMPANY, LLC,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>Civil Action No. 6:10cv00005</b>
<b>v.</b>	)	
	)	
<b>HERCULES BOLT COMPANY, INC.</b>	)	<b>By: Hon. Michael F. Urbanski</b>
	)	<b>United States Magistrate Judge</b>
<b>Defendant.</b>	)	

**REPORT AND RECOMMENDATION**

This matter is before the court on plaintiff’s Motion to Exclude Certain Expert Testimony and Opinions by Charles A. Eroh, P.E. (Dkt. # 51). Plaintiff Banker Steel Company, LLC (“Banker Steel”) asserts that Eroh, an engineer designated as an expert witness for defendant Hercules Bolt Company, Inc. (“Hercules Bolt”), lacks experience to testify concerning Banker Steel’s compliance with certain steel construction standards and that his opinions regarding Banker Steel’s claimed damages lack factual foundation. By Order dated January 24, 2011, all dispositive motions were referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b)(1). The issues have been fully briefed and were argued by counsel at a hearing held on February 24, 2011.

As explained herein, Eroh is qualified by his knowledge, skill, experience, training and education to testify as to Banker Steel’s compliance with certain steel construction industry standards, even though he has not had occasion to consider these specific standards in the past. Further, as to damages, Eroh’s knowledge, skill, experience, training and education and his review of Banker Steel’s records are sufficient to support his conclusion that the construction records for this project are too sketchy and indeterminate to establish that all of the damages

claimed by Banker Steel are attributable to the failure of the steel rods supplied by Hercules Bolt. As such, it is **RECOMMENDED** that plaintiff's motion to exclude be **DENIED**.

## I.

This case involves the failure of threaded steel rods used in the construction of a large steel and glass atrium roof at the Gaylord National Resort and Conference Center project in Oxon Hill, Maryland (the "Gaylord Project"). The Perini/Tompkins Joint Venture ("PTJV"), the general contractor, hired Banker Steel as the steel subcontractor responsible for the steel fabrication, installation and erection of the atrium roof. Banker Steel issued a Purchase Order to Hercules Bolt, a bolt manufacturing company in Nashville, Tennessee, to supply certain component parts, steel rods and clevises, integral to the trusses supporting the atrium roof.

During the erection of the atrium roof trusses, two steel rods manufactured by Hercules Bolt separated from their clevises, causing a truss to collapse. Investigation revealed that the rods were threaded improperly. After testing revealed that a large percentage of the rods were not threaded according to specification, PTJV required Banker Steel to perform certain repair and retrofit work to remedy the problem. This repair work included welding and installing steel plates on the other rod/clevis connections. Banker Steel claims direct damages for this remediation effort in the amount of \$2,654,239.01 ("2.6 million").

After the truss collapse, litigation ensued between Banker Steel and PTJV in Maryland state court. Banker Steel filed mechanic's liens against PTJV for payment of \$6,787,469.00 ("6.7 million") owed on the work performed pursuant to the subcontract. PTJV counterclaimed, alleging that the truss collapse resulted in millions of dollars of backcharges owed to other subcontractors. Of these backcharges, PTJV claimed that \$5,366,308.00 ("5.3 million") were specifically related to the truss collapse and repairs. Banker Steel and PTJV

ultimately settled their claims, entering into an agreement to cooperate in the prosecution of claims for the roof truss collapse, with each party pursuing claims through their own insurers and others in privity with them. As such, Banker Steel agreed to pursue the claim against Hercules Bolt and now seeks recovery of the backcharges related to the truss collapse in the amount of \$5.3 million.

## II.

The court is obligated to serve as gatekeeper where expert opinion evidence is offered to determine whether an expert witness is qualified and whether an expert opinion is grounded in objective underlying scientific methodology, as opposed to mere speculation or conjecture. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-590, 595 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141-142 (1991). The court's obligation is codified in the Federal Rules of Evidence 702 and 703. The applicable rule governing admissibility of testimony by experts is Federal Rule of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. See also Advisory Committee Notes to Rule 702, 2000 Amendments (“A review of the case law after Daubert shows that the rejection of expert testimony is the exception rather than the rule.”) The applicable rule governing the legitimacy of underlying bases of opinion testimony by experts is Federal Rule of Evidence 703, which provides in part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied

upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Fed. R. Evid. 703. In other words, expert testimony that can assist the trier of fact is to be admitted at trial where the witness is qualified and a preliminary assessment of his testimony finds “the reasoning or methodology underlying the [proffered] testimony is scientifically valid and . . . that reasoning or methodology properly can be applied to the fact at issue.” Daubert, 509 U.S. at 592-593.

In order to qualify as an expert, an individual must possess the requisite knowledge, skill, experience, training or education. Virginia Vermiculite, Ltd. v. W.R. Grace & Co. Conn. & The Historic Green Springs, Inc., 98 F. Supp. 2d 729, 732 (W.D. Va. 2000). An expert need not “possess all five requisites -- as long as he possesses one, he may be deemed an expert.” Id. Rule 702 was intended to liberalize the introduction of relevant expert evidence.” Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999); see also Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989) (recognizing that the test for exclusion of an expert is a strict one). As such, a court need not determine whether the expert’s testimony is correct, but should leave such conclusions to the jury after “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.” Westberry, 178 F.3d at 261 (quoting Daubert, 509 U.S. at 596, 113 S.Ct. 2786). However, courts also must be mindful that experts have the potential to be misleading if their testimony is not reliable. Expert testimony with a greater potential to mislead than to aid the jury should be excluded. See Westberry, 178 F.3d at 261 (citing United States v. Dorsey, 45 F.3d 809, 815-16 (4th Cir. 1995)).

### III.

Hercules Bolt designated Charles A. Eroh, P.E. (“Eroh”), a professional engineer employed by a forensic engineering firm, as an expert in the field of civil engineering and construction project management. Eroh is expected to testify as to both liability and damages issues, addressing (1) Banker Steel’s obligations to inspect the rods supplied by Hercules Bolt; (2) the cost to repair and remediate the atrium roof following the truss collapse; and (3) the absence of documentary support for Banker Steel’s backcharge claim.

As to the first issue, Hercules identified Eroh’s expected testimony as follows:

Mr. Eroh is expected to address Banker Steel’s obligations and duties as set forth in the American Institute of Steel Construction, of which Banker Steel is a certified fabricator. Banker Steel had the ultimate responsibility for the quality of the subcontracted products and services and verification of quality control. Banker Steel failed to undertake any activities in conformance with the AISC standards to ensure that threaded rods were in compliance with its specifications and as such failed to mitigate its damages.

Hercules Bolt Expert Witness Designation at 6.

On the issue of damages, Eroh is expected to testify that Banker Steel’s claimed \$2.6 million in damages for the remediation effort is overstated because it contains charges unrelated to the rod failure. Id. at 3. Specifically, Eroh will provide his opinion that the Gaylord Project experienced delays prior to the truss collapse and that there is no evidence that certain remediation costs are linked solely to specific delays resulting from the truss collapse. Id. at 4. He will address the lack of a “properly maintained schedule,” and the resulting inability “to determine what delays actually affected the schedule or by how much.” Id.

Banker Steel moves to exclude Eroh’s testimony concerning Banker Steel’s alleged non-compliance with certain industry standards and deficiencies in Banker Steel’s documentation of its damages.

**A.**

In support of its motion to exclude, Banker Steel asserts that “Eroh is not qualified to render opinions regarding the American Institute of Steel Construction (“AISC”) certification programs for structural steel fabricators, any standards adopted by the AISC, or Banker Steel’s alleged compliance or non-compliance with any AISC standards.” Banker Steel Motion to Exclude at 6. In support of its argument, Banker Steel argues that Eroh has never taken any AISC courses, never attended an AISC meeting, never served on an AISC committee, and has never testified in court concerning the meaning of AISC standards. Id. at 4-5.

Hercules Bolt disagrees, asserting that Eroh’s experience and education qualifies him to render testimony concerning Banker Steel’s alleged non-compliance with AISC standards. Hercules Bolt argues that Eroh, a professional engineer with over thirty years of experience, “regularly reviews and relies upon AISC standards.” Hercules Bolt Opposition to Motion to Exclude at 2. Additionally, Eroh “has had consulting experience analyzing and interpreting AISC standards as they relate to practices for who is responsible for connection detail.” Id. at 2-3. Hercules Bolt also contends that Eroh’s “failure to testify at trial is no measure of qualification,” and that he is qualified to testify as an expert on the basis of his training, education and experience as a certified civil engineer and years of working in the construction and fabrication industry. Id. at 3.

Banker Steel’s motion is predicated on Eroh’s lack of experience with the specific AISC standards at issue in this case. While Eroh has not considered the precise AISC issue raised in this case before, he does have prior experience with the AISC standards relating to steel erection and connection. Deposition of Charles A. Eroh, P.E. (“Eroh Dep.”) at 250-253. Furthermore,

Eroh has “34 years of experience in working with fabricators and as an engineer of record or as a design engineer.” Eroh Dep. at 239.

Fourth Circuit precedent does not support Banker Steel’s argument. Eroh is not automatically disqualified simply because he has not previously considered the application of AISC standards in the specific context raised in this case. Eroh has prior experience with the analysis of AISC standards concerning steel fabrication and is familiar with AISC materials because of his extensive experience in the field of civil engineering and construction project management. As such, Eroh possesses the requisite knowledge, skill, experience, training and education to analyze the relevant AISC sections and apply them to the facts of this case. See Friendship Heights Assocs. v. Vlastimil Koubek, A.I.A., 785 F.2d 1154 (4th Cir. 1986) (Claimed lack of practical experience with paint delamination did not bar chemical engineer from testifying as a expert based on her education, knowledge and training); Garrett v. Desa Industries, Inc., 705 F.2d 721 (4th Cir. 1983) (Lack of prior experience with design of product at issue was no bar to otherwise qualified expert’s ability to testify); Lacayo v. Sodoma Farms, No. 97-1101, 1997 WL 583639 (4th Cir. Sept. 22, 1997) (Firefighter/fire investigator was permitted to testify regarding defendant’s failure to provide a smoke detector).

Banker Steel also argues that Eroh’s “opinions regarding these issues lack sufficient factual support.” Banker Steel Motion to Exclude at 10. While it is certainly the case that “a court should disregard expert opinion if it is mere speculation, not supported by facts,” Anderson v. Nat’l R.R. Passenger Corp., 866 F. Supp. 937, 943 (E.D. Va. 1994), aff’d, 74 F.3d 1230 (4th Cir. 1996), Eroh’s testimony rests upon a sufficient factual basis to support his conclusion that Banker Steel failed to comply with certain AISC standards. Eroh bases his opinion upon the fact that while reviewing records provided by Banker Steel, he “found no record of subcontractor

supplier evaluations for Hercules Bolt and no documentation of activities undertaken by Banker Steel to ensure that the threaded rods were in compliance with the specifications.” Hercules Bolt Opposition to Motion to Exclude, Ex. 2; see also Eroh Dep. at 245. Banker Steel only measured the overall length of the rods and did not check to see if the rods were threaded in accordance with the specifications. Rule 30(b)(6) Deposition Transcript of Banker Steel, Chesley F. McPhatter, III (“McPhatter Dep.”) at 43. In addition, Banker Steel never visited the Hercules Bolt’s plant to inspect or evaluate their fabrication process. Id. at 46. As such, Eroh’s opinion appears to be sufficiently grounded in the facts of this case.

Neither of the cases cited by Banker Steel support the argument that Eroh is not qualified or lacks sufficient facts to render an opinion in this case. In Virginia Vermiculite, the district court found that a geological engineer lacked the requisite knowledge, training and experience to render opinions on antitrust economics. 98 F. Supp. 2d at 736. Having no background in antitrust economics, the district court appropriately precluded his testimony on that subject. Likewise, in Anderson, the district court declined to allow an expert, by his opinion alone, to create a duty on behalf of a railroad to use switch-point locks, even though such locks were not required by prevailing industry regulations, customs and standards. In short, the expert witness in Anderson created a duty out of whole cloth, which the district court appropriately found to be speculative. 866 F. Supp. at 945. Here, in contrast, Eroh simply applies the facts of this case to the standard prescribed by the steel construction industry. Eroh’s proposed testimony does not suggest that he possesses infirmities similar to the experts in either the Virginia Vermiculite or Anderson cases cited by Banker Steel.

Certainly, the extent of Eroh’s experience, investigation and factual underpinnings for his conclusions remain properly the subject of cross-examination at trial. At this stage, it cannot be

concluded that he should be precluded from testifying. Accordingly, it is **RECOMMENDED** that Banker Steel's motion to exclude Eroh's testimony regarding AISC certification programs for structural steel fabricators and Banker Steel's alleged non-compliance with those AISC standards be **DENIED**.

**B.**

As to damages, Banker Steel moves to exclude Eroh's "opinion that the information presented by Banker Steel cannot be utilized to determine an accurate cost for the repair of the out of tolerance threaded rods supplied by Hercules." Banker Steel Motion to Exclude at 1. Banker Steel also moves to exclude Eroh's testimony and opinions "that the information provided by Banker Steel does not clearly or accurately identify the cost of the damage that resulted to the lower atrium roof structure from the threaded rod to clevis connection failure at the H/4 truss, or the cost to perform corrective work or repair damage at other threaded rod to clevis locations." Id. at 2.

Eroh testified that he could not determine from Banker Steel's records what portion of the \$2.6 million claimed as damages to repair and retrofit the atrium roof trusses were actually related to the rod failure. Eroh testified generally that his review of project documents showed that there were problems with the project prior to the truss collapse and that Banker Steel's records were not detailed enough to permit a calculation of damages caused by the rod failure. Eroh testified as follows:

[O]ur analysis shows that there was acceleration prior to the truss failure from causes unrelated to the Hercules Bolt incident. Our analysis also shows that during the repair activities, there was accelerations that were due to causes other than the Hercules truss failure. And our analysis shows that because there lacks sufficient information, that you cannot do a calculation that comes out with a dollar value that breaks out those various acceleration costs to specific numbers.

Eroh Dep. at 123. To some extent, Eroh's opinion is corroborated by Banker Steel's Rule 30(b)(6) deposition testimony. Banker Steel's Chesley F. McPhatter, III testified that other problems arose during the course of the Gaylord Project, including issues related to the building exterior, interior guest room construction problems, concrete problems, and embed problems. McPhatter Dep. at 116. In addition to delayed completion of the concrete structure, there also is evidence that there were delays associated with Naturalite's completion of glass work prior to the truss collapse. Id. at 117, 125. Such evidence, coupled with the fact that PTJV failed to put a critical path schedule into place, provides sufficient factual support for Eroh's criticism of Banker Steel's damage claim.

Banker Steel is critical of Eroh's assessment, noting that when he was asked what portion of the \$2.6 million was attributable to reasons other than the rod failure, Eroh testified that "there isn't enough information provided to us that we could do that calculation." Eroh Dep. at 104-05. Although Eroh testified that this investigation shows "evidence of acceleration costs . . . unrelated to Hercules," he testified that in order to quantify those specific acceleration costs, he would need a "detailed schedule that was basically maintained and up to date throughout the project." Id. at 105, 106. Because such a schedule did not exist, Eroh testified that he was unable to calculate the specific costs associated with problems with the Gaylord Project before the truss collapse versus those costs linked directly to it. Banker Steel argues that Eroh's inability to provide a specific number renders his criticism speculative because "[h]ow he reached this conclusion is entirely unclear." Banker Steel Motion to Exclude at 11.

Banker Steel's argument that Eroh's critique of its damages evidence is too speculative turns Banker Steel's burden to prove its damages with reasonable certainty on its head. It is not Hercules Bolt's obligation to prove what portion of the claimed damages are attributable to the

truss collapse and what portion stems from other causes. That burden is Banker Steel's. Eroh's proposed testimony that Banker Steel's documents are so indeterminate that a proper causation conclusion cannot be reached is simply a commentary on the state of Banker Steel's project documents based on Eroh's years of engineering and fabrication experience. It is for the jury to determine the appropriate weight to be accorded this testimony along with the other damages evidence presented by Banker Steel.

Accordingly, it is **RECOMMENDED** that Banker Steel's motion to exclude Eroh's testimony regarding the specificity of Banker Steel's project documentation be **DENIED**. Eroh should be permitted to testify, based on his knowledge, skill, experience, training and education, that Banker Steel's project documentation does not permit him to differentiate costs associated with the truss collapse from costs associated with the project unrelated to the truss collapse.

### **III.**

Accordingly, it is **RECOMMENDED** that Banker Steel's Motion to Exclude Certain Expert Testimony and Opinions by Charles A. Eroh, P.E. (Dkt. # 52) be **DENIED** in its entirety.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Norman K. Moon, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk is directed to send copies of this Report and Recommendation and accompanying Order to all counsel of record.

Entered: May 6, 2011

*/s/ Michael F. Urbanski*

Michael F. Urbanski  
United States Magistrate Judge