United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor,
Complainant
v.
Tarkett Alabama, Inc.
Respondent.

OSHRC Docket No.: **15-1673**

Order Denying Respondent's Motion in Limine

Before me is Respondent's Motion *in Limine* to Exclude Evidence. In it, Respondent seeks to preclude the Secretary from presenting certain evidence during the hearing in this matter. Because Respondent's Motion is without support, it is **DENIED**.[1]

In its Motion, Respondent seeks to exclude two types of evidence from the hearing. Respondent seeks to exclude "Any evidence that the Secretary may attempt to introduce at the hearing" that is either additional or contradictory to testimony provided by Compliance Safety and Health Officer (CSHO) Jennifer McWilliams during a deposition taken pursuant to Fed. R. Civ. P. 30(b)(6). Respondent also seeks to have excluded evidence "offered from unidentified individuals." Respondent argues such evidence is inadmissible hearsay. Based on the posture of the case and the information submitted by Respondent, I disagree a ruling on admissibility of either is appropriate at this time.

In its motion, Respondent asserts during the discovery phase of this case it noticed a deposition pursuant to Fed. R. Civ. P. 30(b)(6). Rule 30(b)(6) allows a party to name as a deponent a corporation, partnership, association, government agency, or other entity for deposition on specified factual matters. The named entity is required under the rule to then designate one or more "agents" to testify on its behalf. The notice of deposition specified the

[1] Commission Rule 40(c) allows the judge to rule on procedural motions prior to the expiration of the 10-day response period. I also find it appropriate to rule on a motion prior to receipt of the opposing party's response if, as here, the motion on its face lacks merit.

information sought was the facts related to the inspection and in support of the citations in this matter. The Secretary designated CSHO McWilliams and Respondent took her deposition on February 9, 2016.[2] Respondent contends the Secretary is "prohibited" from introducing evidence at the hearing that contradicts or expands on the testimony provided by CSHO McWilliams during this deposition. Respondent is incorrect.

The purpose of Fed. R. Civ. P. 30(b)(6) was to "reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a 'managing agent.'" *See* Fed. R. Civ. P. 30(b)(6) Advisory Committee's Note (1970). The rule was also intended to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization." *Id*. Although statements provided during a Rule 30(b)(6) deposition are binding on a party in the sense such statements are admissible against it, they are not binding in the sense the party is forbidden from presenting contradictory evidence. *See AstenJohnson, Inc. v. Columbia Casualty Co*., 562 F.3d 213, 229 (3d Cir. 2009); *A.I. Credit Corp. v. Legion Ins. Co*., 265 F.3d 630, 637 (7th Cir. 2001); and *R & B Appliance Parts, Inc. v. Amana Co., L.P*. 258 F.3d 783, 786 (8th Cir. 2001). As the court noted in *U.S. v. Taylor*, 166 F.R.D. 356, 362 n. 6 (N.D.N.C. 1996), a case cited by Respondent,

> When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered.

The district court case law relied upon by Respondent is both non-binding precedent and, more importantly, inapposite. For example, *Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544 (S.D.N.Y. 2001), addresses only whether an individual designated as a corporate representative for purposes of a Rule 30(b)(6) deposition and as an individual witness can be subject to two seven-hour depositions. The remaining cases cited by Respondent address

[2] Respondent's motion provides little in the way of facts regarding the circumstances leading up to CSHO McWilliams's deposition. I assume, for purposes of ruling on this motion, the deposition was taken in compliance with Commission Rule 56.

sanctions when a party has failed to comply with its discovery obligations under Fed. R. Civ. P. 30(b)(6) or situations in which a party attempted to present evidence by affidavit or deposition of an individual contradicting Rule 30(b)(6) deposition testimony in order to create an issue of fact in response to a motion for summary judgment.[3] Neither situation is presented here.

Respondent speculates the Secretary may present some testimony, from some unnamed witness that may contradict CSHO McWilliams's deposition testimony. The Secretary is not prohibited from doing so and the Court may consider it. *See Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (*citing L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C.Cir.1982) ("the Commission is not bound by the representations or interpretations of OSHA Compliance Officers."). If presented, Respondent may address such contradictory testimony on cross examination and I will give it the appropriate weight.

With regard to Respondent's contention the Secretary cannot present testimony regarding statements made by confidential witnesses,[4] I decline to exclude such evidence at this juncture. Respondent does not specify those documents it seeks to have excluded. Ruling on the admissibility of unspecified documents would be arbitrary at best. Respondent contends testimony regarding statements made to CSHO McWilliams must be excluded as hearsay. Respondent's motion does not identify what statements it seeks to exclude. The Commission has long held statements made by employees of a cited employer that concern matters within the scope of their employment are not hearsay and are admissible under Fed. R. Evid. 801(d)(2)(D). *Atlantic Battery* Co., 16 BNA OSHC 2131, 2185 (No. 90-1474, 1994); *Regina Construction Co*., 15 BNA OSHC 1044, 1047 (87-1309, 1991); *StanBest, Inc.*, 11 BNA OSHC 1222, 1227 (No. 76-

[3] The latter has been referred to by the courts as the "sham affidavit doctrine." *See* 8A Wright, Miller, and Marcus, Federal Practice and Procedure, §2103 (2010).

[4] Respondent has never sought to compel production of unredacted documents or disclosure of the identity of confidential witnesses. The Commission has long recognized the informer's privilege in protecting, during the discovery phase of OSHA proceedings, the identity of individuals supplying information to the Secretary. *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1657 (No. 13401, 1981); *Forte Brothers, Inc*. 9 BNA OSHC 1065, 1066 (No. 79-5655, 1980); *Quality Stamping Products Co*., 7 BNA OSHC 1285, 1287 (No. 78-235, 1979). The Secretary is not now, and has not been at any point in this proceeding, obligated to produce such information. *See Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1654 (No. 13401, 1981) (holding unredacted copies of the inspector's notes must be turned over after the inspector testifies, but "any material in the statements that would reveal the identity of confidential informants need not be produced." *citing Massman-Johnson (Luling),* 8 BNA OSHC 1369, 1376 (No. 76-1484, 1981)). None of the cases relied upon by Respondent compel a contrary result.

4355, 1983); *Morris Enterprises Inc*., 5 BNA OSHC 1248, 1249 (No. 12283, 1977); *see also Astra Pharmaceutical Products*, 681 F.2d 69, 73 n. 8 (1st Cir. 1982).[5] This evidence may also fall within one of the exceptions to the rule against admissibility of hearsay found in Fed. R. Evid. 803. Respondent's failure to identify with specificity what statements it seeks to exclude makes a response from the Secretary and a ruling on their admissibility impossible. Respondent has essentially asked the Court for an advisory ruling prohibiting the Secretary from presenting inadmissible hearsay. Such a ruling would be premature and serve no purpose.

For the foregoing reasons, Respondent's Motion *in Limine* is DENIED.

SO ORDERED.

Date: June 16, 2016

Heather A. Joys
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[5] Assuming the Secretary can make the requisite showing of the existence of the employment relationship. *Reed Engineering Group, Inc*., 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005).