OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, **Complainant,** **v.** **TOWER MAINTENANCE CORPORATION,** **Respondent.**	**OSHRC DOCKET NO. 13-0777**

ORDER
REGARDING SECOND SANCTIONS MOTION

Complainant, the Secretary of Labor, filed a second Motion requesting that Respondent, Tower Maintenance Corporation, be sanctioned for failing to comply with Respondent's discovery obligations in this matter. The Secretary seeks sanctions in connection with the May 20, 2014, deposition of Peter Vlahopoulos, Respondent's Rule 30(b)(6) corporate designee. *See* Fed.R.Civ.P. 30(b)(6). The Secretary also seeks sanctions in connection with the late cancellation of Mr. Vlahopoulos' previously scheduled May 6, 2014 deposition. Respondent filed an Opposition to the Secretary's Motion.

I have reviewed and carefully considered the Motion, Opposition, and supporting documents, including the select excerpts from Mr. Vlahopoulos' May 2014 deposition provided by the parties. As discussed below, the Secretary's second Motion for sanctions is denied.

Background:

Pleadings

The Avenel, New Jersey, Area Office of the Occupational Safety and Health Administration (OSHA) inspected Respondent's worksite, located at Route 1 North, (at or near #1120 Rte. 1), Edison, New Jersey 08818, between October 25, 2012 and April 5, 2013. As described in the citations, this worksite included an "Electric Transmission Tower – Lattice Steel Structure" – approximately 131 feet in height 26 KV at the lower level and 138 KV from the

middle to the upper levels. On April 8, 2013, OSHA issued two citations and a notification of penalty to Respondent (citation). Respondent President Elizabeth Vlahopoulos filed a notice of contest dated April 12, 2013.

The Secretary filed a Complaint dated August 2, 2013. The citations were attached to and made a part of the Complaint and, pursuant to Commission Rule 34(a)(3),[1] the citations were amended in the Complaint. On July 14, 2014, the Secretary filed an unopposed Motion to further amend the Complaint, together with an Amended Complaint. The Complaint citations, as amended, allege serious, repeat and willful violations. The Amended Complaint alleges violations of the personal protective equipment, electrical, and electric power generation, transmission and distribution standards. As amended, the standards cited allege violations regarding training, selection and use of work practices, fall protection, and work on or near exposed energized parts, among others.[2] The total proposed penalty stated in the Amended Complaint is $67,200.00.

On August 19, 2013, Respondent filed an Answer and Affirmative Defenses, to the Secretary's August 2013 Complaint, denying that Respondent violated each of the citation items as amended in that Complaint.[3] Respondent alleged that if any violations occurred they were non-serious, that the citations were not issued with reasonable promptness, and that this proceeding constituted vindictive prosecution. Regarding the alleged violations of specific cited standards, Respondent raised various affirmative defenses including, among others, unpreventable employee misconduct, unpreventable third-party and/or owner misconduct, unforeseen unsafe work performance, impossibility or infeasibility of compliance, third-party and/or owner assurance that Respondent's employees would not come into contact with energized electrical lines, adequate safety program run by knowledgeable supervisory personnel, training provided by previous employers and/or third parties and/or training contractors prior to employees being allow to work, Respondent ensured effective training, and employees having the knowledge and skills needed to perform the operations safely.

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[1] 29 C.F.R. § 2200.34(a)(3). *See* Occupational Safety and Health Review Commission Rules of Procedure, 29 C.F.R. § 2200.00, et seq.

[2] The July 2014 Amended Complaint amends the citations to withdraw any alleged violation of the construction standards set forth in 29 C.F.R. § 1926. *See* Amended Complaint para. X.

[3] The August 2013 Complaint and Answer are described, in detail, in the December 2013 Order. *See* footnote 4 below.

Prehearing Discovery

Prehearing discovery and case preparation has progressed toward hearing, on occasion with judicial guidance and intervention.[4] Prehearing preparation was somewhat complicated and delayed by the approved withdrawal of Respondent's initial counsel, on January 28, 2014, and the entrance of appearance by Respondent's current counsel, Mr. Eli Rogers, on February 27, 2014.

On March 17, 2014, a Notice of Rescheduled Hearing, Revised Scheduling Order and Special Notices issued. (March 2014 Revised Scheduling Order). As agreed by the parties, the hearing was rescheduled from May 2014, to August 26 through 29, 2014, to give Respondent's recently retained counsel an opportunity to fully prepare for the hearing and to give both parties an opportunity to complete prehearing discovery. The parties agreed to revised prehearing scheduling.

On May 5, 2014, the parties filed a Joint Motion for the entry of a Consent Order, regarding, in part, upcoming depositions of individuals who were employed by Respondent at the time of the accident that prompted the OSHA inspection resulting in the instant citations. On May 12, 2013, the Consent Order was granted.

On May 12, 2014, an Order[5] issued, including a Notice of Second Revised Scheduling and a detailed deposition schedule.[6] (May 2014 Second Revised Scheduling Order). The Second Revised Scheduling Order had been agreed to by the parties during conference calls held on May 6 and 8, 2014.

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[4] On December 27, 2013, an Order issued granting, in part, and withdrawing, in part, the Secretary's Motion to Compel regarding Interrogatories, and approving the withdrawal of the Secretary's Motion to Compel regarding Document Requests. (December 2013 Order). Compliance with the December 2013 Order was impacted by Respondent's change in representation. Revised compliance dates regarding the December 2013 Order were set forth in the March 2014 Notice of Rescheduled Hearing, Revised Scheduling Order and Special Notices. (March 2014 Revised Scheduling Order).

As set forth in the April 9, 2014 Order, Respondent complied with the December 2013 Order, by providing to the Secretary complete responses to Interrogatories 12 through 18, on April 4, 2014, and by providing written confirmation of the representation made in Respondent's December 17, 2013 cover letter regarding the Secretary's document requests, on April 8, 2014. In light of Respondent's compliance with the December 2013 Order, during the April 8, 2014, conference call, Counsel for the Secretary orally withdrew the Secretary's April 2, 2014, Motion for Sanctions. *See* April 9, 2014 Order.

[5] The May 2014 Second Revised Scheduling Order also addressed the Secretary's May 6, 2014 Motion to Compel the attendance of Nikolaos Psareas at a scheduled May 7, 2014 deposition. As a result of the agreed revised deposition schedule, Mr. Psareas' deposition was not conducted on May 7, 2014. The Secretary's Motion to Compel was denied.

[6] The May 2014 Second Revised Scheduling Order also resolved discovery disputes raised in letters to the undersigned from Respondent Counsel, dated May 2, 2014, and from Counsel for the Secretary, dated May 5, 2014. *See* May 5, 2014 Order.

On June 3, 2014, the parties filed a Joint Motion to amend the Second Revised Scheduling Order, again including a detailed deposition schedule. On June 5, 2014, an Order issued granting, in part, the Joint Motion to amend the Prehearing Scheduling Order and Notice of Third Revised Scheduling Order. (June 2014 Third Revised Scheduling Order).

Throughout the prehearing process, numerous conference calls have been held with counsel for the parties, to assist with scheduling and the resolution of discovery disputes, including on September 24 and December 20, 2013, and on February 28, March 14, April 8, May 6, May 8, and June 20, 2014. While the prehearing process has not been without some delayed responses and rescheduling issues, during prehearing conference calls, present Respondent Counsel and Counsel for the Secretary generally report overall cooperation and progress during discovery and prehearing preparation.

During the June 20, 2014 conference call, counsel reported that the prehearing deposition schedule had proceeded smoothly, in accord with the agreed schedule set forth in the May 2014 Second Revised Scheduling Order, the May Consent Order, and the June 2014 Third Revised Scheduling Order, described above, with the sole exception of Mr. Peter Vlahopoulos' May 20, 2014 incomplete deposition. At the time of the June conference call, four depositions had been completed and the parties had agreed to a schedule for four additional depositions. During the June conference call, Counsel were strongly encouraged to amicably resolve the present dispute regarding the completion of Mr. Vlahopoulos' deposition and the completion of prehearing discovery, by agreeing to schedule a second deposition date for Mr. Vlahopoulos and agreeing to schedule any additional depositions, including, if needed, the deposition of Respondent President Elizabeth Vlahopoulos.

During the June conference call, I advised counsel that I was reluctant to issue the very broad sanctions requested by the Secretary in the second Motion for sanctions, including precluding Mr. Vlahopoulos from testifying, excluding evidence, and broadly foreclosing Respondent from asserting positions at the hearing. As I only reviewed select excerpts from Mr. Vlahopoulos' May 20th deposition, provided with the Secretary's sanctions Motion, the complete scope of the deposition testimony was unknown to me and, therefore, the breath and scope of the broad sanctions requested in the Secretary's Motion was unknown. I reminded the parties that the Commission has a stated preference for deciding cases on their merits, rather than on technical or procedural flaws. That said, I cautioned the parties that sanctions may be

appropriate in this case at the hearing, when any sanctions requested will be considered in the context of a fully developed record. The parties were encouraged to speak with one another and clarify in writing whether any issues regarding requested documents remained outstanding.

Secretary's Second Motion for Sanctions:

On June 13, 2014, the Secretary filed a second Motion requesting that Respondent be sanctioned for failing to comply with Respondent's discovery obligations.[7] The Secretary seeks sanctions in connection with the May 20, 2014, deposition of Peter Vlahopoulos, Respondent's Rule 30(b)(6) corporate designee. The Secretary contends that Mr. Vlahopoulos failed to prepare for his deposition, was unable to provide responses to several questions asked by the Secretary during the deposition, and that Mr. Vlahopoulos left the deposition early. The Secretary contends that Respondent's failure to prepare Mr. Vlahopoulos for the Rule 30(b)(6) deposition and Mr. Vlahopoulos' inability to answer certain questions posed by the Secretary at the deposition are analogous to his non-appearance at a deposition. *See* Motion at p. 10. The Secretary also seeks sanctions in connection with Respondent's alleged late cancellation of Mr. Vlahopoulos' previously scheduled May 6, 2014 deposition.

The Secretary contends that Respondent is not participating in the discovery process in good faith. The Secretary's requested sanctions are (1) that Respondent be prohibited "from asserting a position or introducing evidence contrary to the positions Mr. Vlahopoulos asserted during his deposition," (2) that Mr. Vlahopoulos be precluded from testifying at trial, and (3) that Respondent be ordered to pay the $610.96 deposition cancellation fee, incurred by the Secretary, for the cancellation of Mr. Vlahopoulos' previously scheduled May 6, 2014 deposition. *See* Motion at p. 2-3, 6.

The Secretary asserts that Respondent's continued efforts to disrupt the discovery process have prejudiced the Secretary. The Secretary contends it was unable to fully explore the contents of documents and discovery responses that Respondent provided to the Secretary, due to Respondent's failure to prepare Mr. Vlahopoulos for the deposition. The documents and discovery responses include any agreement or contract between Respondent and Public Service Enterprise Group (PSE&G) regarding Respondent's work on the Route 1 Project and Respondent's responses to the Secretary's First Set of Interrogatories, First Request for

[7] Attached to the Secretary's Motion are several exhibits, including the deposition Notices, and select, heavily redacted, nonconsecutive, pages from Mr. Vlahopoulos' May 20, 2014 deposition.

Admissions, and First Request for the Production of Documents, including any documents allegedly lost or destroyed. *See* Motion at p. 13-14, and p. 14 fn.8. The Secretary contends that it has been precluded from exploring Respondent's theory regarding the cause of the accident that resulted in the citations at issue in this case. The Secretary notes that Mr. Vlahopoulos testified that Respondent performed an investigation into the cause of the accident and generated a report detailing the investigation findings; however, Respondent had not produced this report to the Secretary during discovery and Mr. Vlahopoulos was unable to testify regarding the report's contents at the deposition. *See* Motion at p. 14. *See also* Secretary's First Request for Production of Documents #2. The Secretary contends that it has been prejudiced by Mr. Vlahopoulos' inability to testify about the training Respondent provided to employees present at the worksite on the date of the accident, as Mr. Vlahopoulos failed to review Respondent's training records for pertinent information. *See* Motion at p. 14. Further, as Mr. Vlahopoulos left the deposition before the Secretary had completed his inquiry, the Secretary alleges that it was unable to fully explore the rules and procedures in place at the worksite to ensure compliance with the cited standards, the substance of Respondent's affirmative defenses, and Respondent's safety history. *See* Motion at p. 14.

The Secretary contends that Respondent should be ordered to pay a court reporting service late deposition cancellation fee, in the amount of $610.96, that the Secretary incurred. Mr. Vlahopoulos' deposition originally scheduled for April 21, 2014, was rescheduled, by agreement of the parties, to May 6, 2014. The Secretary contends that Respondent notified the Secretary, with less than 24 hours' notice, that Mr. Vlahopoulos could not attend the Tuesday, May 6, 2014 deposition, without offering a legitimate explanation for his failure to attend the scheduled deposition, knowing that the Secretary would incur a late notice cancellation fee. *See* Motion p. 15-16.

While the Motion states that the Secretary conferred with Respondent's Counsel who opposes the Motion, there is no certification regarding the parties' good faith efforts to settle this matter before the sanctions Motion was filed. In fact, during the June 20, 2014 conference call, Counsel for the Secretary confirmed that following the May 20, 2014 deposition, he had not discussed rescheduling the completion of Mr. Vlahopoulos' deposition with Respondent Counsel and Counsel for the Secretary was not interested in deposing Respondent President Elizabeth Vlahopoulos.

Respondent's Opposition:

On June 24, 2014, Respondent filed an Opposition to the Secretary's Motion.[8] Respondent contends that the Secretary's second Motion for sanctions is premature as the Secretary has taken no steps to complete Mr. Vlahopoulos' deposition, despite Respondent Counsel's proffer of an additional day of testimony. *See* Opposition p. 2, 7-8, 13; Rogers' Declaration. Respondent contends that the Secretary made no good faith efforts to resolve this alleged discovery dispute and failed to submit an accompanying certification regarding good faith efforts. Opposition at p. 2-3, 7-8. Respondent states that the Secretary reserved the right to request the deposition of an additional Respondent Rule 30(b)(6) corporate designee, but has not done so. *See* Opposition at p. 13.

Respondent disputes the Secretary's theory that a Rule 30(b)(6) corporate designee, who appears at a deposition and provides testimony, but who allegedly is unprepared for the deposition, is tantamount to a witness who has failed to appear, thereby warranting sanctions. Respondent argues that this theory is explicitly disavowed by certain Federal Appellate Courts. Respondent argues that prudence requires that this Motion be denied. *See* Opposition at p. 8-9.

Respondent notes that the "selectively chosen, heavily redacted quotes" from Mr. Vlahopoulos' deposition transcript, relied upon by the Secretary to support the requested sanctions, are undermined by a "wider review of Mr. Vlahopoulos' transcript." *See* Opposition at p. 9-10; Rogers' Declaration. Respondent argues that while the corporation is bound by Mr. Vlahopoulos' testimony, as Respondent's Rule 30(b)(6) corporate designee, Respondent is not more bound than any witness would be by prior deposition testimony. *See* Opposition at p. 11.

Respondent contends that Mr. Vlahopoulos had pressing personal issues, regarding childcare, that required him to leave the deposition when he did. Mr. Vlahopoulos left the May 2014 deposition after approximately five hours of examination, without a lunch break. *See* Opposition at p. 3-4, 11; Rogers' Declaration.

Respondent contends that the sanctions the Secretary requests are unduly prejudicial to Respondent's rights. *See* Opposition at p. 11. Respondent asserts that the Secretary failed to pursue less prejudicial alternatives to the sanctions requested and failed to explore good faith

[8] Respondent's Opposition included attachments: Respondent Counsel Eli Rogers' Declaration and select, unredacted, nonconsecutive, pages from Mr. Vlahopoulos' May 20, 2014 deposition.

alternatives to resolve this dispute. *See* Opposition at p. 2-3, 7-9, 13. Therefore, the Secretary's sanctions request should be denied.

Discussion:

Prohibiting positions, excluding evidence, and precluding Mr. Vlahopoulos' hearing testimony.

Regarding Mr. Vlahopoulos' May 2014 deposition, the Secretary requests that Respondent be sanctioned by prohibiting Respondent from asserting a position or introducing evidence contrary to the positions Mr. Vlahopoulos asserted during the deposition and by precluding Mr. Vlahopoulos from testifying at the hearing. The Secretary's request for these broad sanctions is denied.

Well established Commission policy is to decide cases based on their merits, rather than on procedural flaws. The Commission consistently has held that dismissal of a party's case is too harsh a sanction for failure to comply with certain prehearing orders, absent evidence of prejudice to the opposing party, contumacious conduct by the noncomplying party, and/or a pattern of disregard for Commission Rules by the noncompliant party. *See Stone and Webster Construction*, 23 BNA OSHC 1939, 1944 (No. 10-0130 *et al*, 2012); *Waterford Aluminum Co.*, 23 BNA OSHC 1438, 1439-40 (2011); *Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991); *Duquesne Light Co.*, 8 BNA OSHC 1218, 1222-23 (No. 78-5034, *et al*, 1980); *ASARCO, Inc.*, 8 BNA OSHC 2156, 2163 (Nos. 79-6850 et al., 1980).

Commission Rules regarding prehearing procedures and discovery provide for the imposition of sanctions when a party refuses or obstructs discovery.[9] A Commission judge may impose any sanction stated in Fed.R.Civ.P. 37 for failing to comply with a discovery order;

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[9] *Failure to cooperate; Sanctions.* A party may apply for an order compelling discovery when another party refuses or obstructs discovery. For purposes of this paragraph, an evasive or incomplete answer is to be treated as a failure to answer. If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. . . . The orders may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:

(1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;

(2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed . . . .

Commission Rule 52(f); 29 C.F.R. § 2200.52(f).

however, the sanction imposed must not be "too harsh under the circumstances of the case." *St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1473 (No. 04-1734 *et al*, 2006).

The Commission has held that the "extreme sanction" of the "exclusion of critical evidence" to a party's case, for failure to comply with a prehearing order, is not normally imposed without evidence that a party "willfully deceived" the Commission or "flagrant disregarded" a Commission order. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167 (No. 90-1307, 1993). *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). Noncritical evidence to a party's case may be excluded where its admission is prejudicial to the opposing party. *Jersey Steel Erectors*, 16 BNA OSHC at 1167-68. *See Greenleaf Motor Express*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007).

When reviewing a sanction order regarding the exclusion of noncritical evidence, the Commission considers whether admission of the evidence would be prejudicial to the party against whom it is being offered, whether the noncomplying party's conduct was contumacious, and whether admission of the evidence would unduly interrupt the proceedings. *Jersey Steel Erectors*, 16 BNA OSHC at 1167. *See also Duquesne Light Co.*, 8 BNA OSHC at 1222-23; *Sealtite Corp.*, 15 BNA OSHC at 1136-37 (A consistent pattern of failure to comply with Commission Rules and with judge's orders, delaying a proceeding, constitutes contumacious conduct.).

The Commission hearing judge has broad discretion to decide whether sanctions should be ordered. *See Architectural Glass & Metal Co.*, 19 BNA OSHC at 1547 *Jersey Steel Erectors*, 16 BNA OSHC at 1167; *Sealtite Corp.*, 15 BNA OSHC at 1136; *Duquesne Light Co.*, 8 BNA OSHC at 1222.

The Commission Rules allow for prehearing depositions of parties or witnesses "only by agreement of all the parties, or on order of the Commission or Judge following the filing of a motion of a party stating good and just reasons." *See* Commission Rule 56(a). In this case, the May 20, 2014 deposition of Peter Vlahopoulos, Respondent's Rule 30(b)(6) corporate designee, was scheduled by agreement of the parties. *See* May 2014 Second Revised Scheduling Order.

A deposition notice pursuant to Rule 30(b)(6) may name as the deponent a private corporation. The corporation must then designate an officer or other people who will testify

about information known or reasonably available to the corporation.[10] The corporate designee must be able to provide "complete, knowledgeable and binding answers on behalf of the corporation." *United States v. Taylor*, 166 F.R.D. 356, 360-6161 ((M.D.N.C. 1996), *quoting Marker v. Union Fidelity Life Ins. Co.*, 125 F.D.R. 121, 126 (M.D.N.C. 1989); *See Boland Marine & Mfg. Co. v. M/V Bright Field*, No. 97-3097, 1999 WL 280451, at *3 (E.D. La. May 3, 1999).

The court where the matter is pending, on motion, may order sanctions if the Rule 30(b)(6) designee fails to appear for that person's deposition, after having been served with proper notice. Fed.R.Civ.P. 37(d)(1)(A)(i). As the Secretary notes, several Federal Courts have read the phrase "fails to appear" in Rule 37(d) pragmatically, in conjunction with the purposes of Rule 30(b)(6) and the parties' obligations to designate knowledgeable persons for Rule 30(b)(6) depositions. *See Black Horse Lane Assoc. v. Dow Chemical Corp.*, 228 F.3d 275, 303 (3rd Cir. 2000) and cases cited therein.

> When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.

Resolution Trust Corp v. Southern Union Co., 985 F.2d 196, 197 (5th Cir. 1993).

As argued by Respondent, other Federal Courts have rejected this pragmatic approach, instead literally interpreting the Rule 37(d) phrase "fails to appear" when considering a sanctions motion for non-appearance. *See Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 124 (1st Cir. 2012); R.W. *International Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 n.2 (1st Cir. 1991). *See also Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986).

Several Federal Court's that follow the pragmatic reasoning set forth in *Southern Union*, before imposing sanctions pursuant to Rule 37(d) for a Rule 30(b)(6) deponent's "failure to

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[10] Fed.R.Civ.P. 30(b)(6) – *Notice or Subpoena Directed to an Organization.*

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

appear," have stated that "the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas." *Boland Marine & Mfg.*, 1999 WL 280451, at *3; *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, No. 94-1942, 1995 WL 686715, at *8 (S.D.N.Y. Nov. 17, 1995).

When sanctions have been requested, the Rule 30(b)(6) witness' deposition testimony has been reviewed and evaluated by the court in which the matter is pending. Inadequate preparation of a Rule 30(b)(6) corporate designee may be sanctioned "based on lack of good faith, prejudice to the opposing side, and disruption of the proceedings." *United States v. Taylor*, 166 F.R.D. at 363. *See Black Horse Lane Assoc.*, 228 F.3d at 304. A deponent's inability to answer completely every question posed is not equivalent to a complete failure to appear and does not demonstrate bad faith on the part of the party whose witness is deposed. *Boland Marine & Mfg.*, 1999 WL 280451, at *3.

The Secretary contends that Respondent's conduct in this case is "remarkably similar" to the conduct sanctioned by the court in *Black Horse Lane Assoc.*, 228 F.3d 275 (3rd Cir. 2000). *See* Motion at 8-10. I disagree. In this case, the facts do not reveal that Respondent has refused or obstructed discovery. Respondent's conduct during the prehearing discovery process has not been contumacious and does not reflect a pattern of disregard for the Commission's Rules. As summarized above, the numerous prehearing orders, scheduling orders and conference calls in this case disclose that both parties have participated in a substantial prehearing discovery process, including written discovery, document requests, and numerous depositions of party and third party witnesses. As noted above, while there has been some judicial guidance and assistance prehearing, generally the parties have cooperatively engaged in prehearing discovery. This is not a case where a party has refused to participate in discovery or has actively obstructed the prehearing discovery process.

This also is not a case where a party's designated Rule 30(b)(6) corporate designee has refused to participate in or actively obstructed the prehearing deposition process. A review of the select deposition excerpts submitted by the parties, confirms Respondent Counsel's assertion that a wider review of Mr. Vlahopoulos' deposition transcript, casts a different light on the limited, heavily redacted, deposition excerpts relied upon by the Secretary in support of the

second sanctions Motion.[11] The wider review reveals Mr. Vlahopoulos' answers to deposition questions and some effort by the deponent to respond to the examination queries.[12] I have neither received nor reviewed Mr. Vlahopoulos' complete deposition testimony.[13] In fact, as discussed above, at the time the second sanctions Motion was filed, Mr. Vlahopoulos' prehearing deposition had not been completed.

At the hearing, Respondent will not be precluded from asserting a position or introducing evidence contrary to the positions Mr. Vlahopoulos asserted during his May 20, 2014 deposition. Based on the limited excerpts from the May 20, 2014 deposition before me, the breath and scope of the requested sanctions are undefined. I find the very broad sanctions requested unwarranted.[14]

Mr. Vlahopoulos will not be precluded from testifying at the hearing. Review of the limited deposition transcript before me, discloses that Mr. Vlahopoulos left the May deposition following approximately five hours of examination. *See* Peter Vlahopoulos Deposition (PV dep.) p. 365. The limited transcript excerpts reveal that Mr. Vlahopoulos indicated his inability to stay for many hours at the deposition that day and his agreement to "come back" if the deposition was not concluded before he needed to leave. *See* PV dep. p. 290. It appears that family responsibilities prevented his ability to stay longer on May 20, 2014. *See* PV dep. p. 246, 366.

Importantly, while Mr. Vlahopoulos will not be precluded from testifying, his deposition testimony may be used at the hearing in accordance with the Commission Rules, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure. *See* Commission Rule 56; Fed.R.Civ.P. 32. Mr. Vlahopoulos' deposition testimony may be used on cross-examination and for purposes of impeachment. Mr. Vlahopoulos testified as Respondent's Rule 30(b)(6) corporate designee and his deposition testimony, offered at the hearing, will be reviewed and weighted accordingly. Where appropriate, inferences and adverse inferences may be drawn.

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[11] *Compare* Motion at p. 9, and attached redacted VP dep. pp. 37-43, 47-48; *with* Opposition at pp. 9-10, Rogers' Declaration at p. 2, para.8, and Exh. A. attached unredacted VP dep. pp. 37-49.

[12] This is in contrast to the meaningless, uncooperative deposition testimony at issue in *Black Horse Lane Assoc.* that was sanctioned by the court. *See* 228 F.3d at 295-96, 300-01, 304-05.

[13] I have not reviewed Mr. Vlahopoulos' complete May 2014 deposition. This contrasts with the sanctions ordered by the court in *Black Horse Lane Assoc.*, regarding the deposition testimony of the Rule 30(b)(6) corporate designee. In that case sanctions were ordered based on the totality of the facts and a review of the full deposition record by the magistrate judge and reviewing courts. *See* 228 F.3d at 300-01, 304.

[14] *See Black Horse Lane Assoc.* 228 F.3d at 301 n.16 (3rd Cir. 2000)(Note: The broad sanction of precluding a party from asserting at trial a position different from that stated during the Rule 30(b)(6) corporate witness' deposition testimony was not addressed by the Appellate Court).

Should Respondent attempt at the hearing to introduce evidence that contradicts or changes the statements or opinions stated by Mr. Vlahopoulos' in his deposition testimony, the Secretary may explore why the statement or opinion has been altered through cross-examination or impeachment.

In summary, I find that Respondent's conduct and participation in the prehearing discovery process has not been contumacious and does not reflect a pattern of disregard for the Commission's Rules. I find that the Secretary has not shown that it suffered prejudice as a result of Mr. Vlahopoulos' May 20, 2014 deposition, which was incomplete at the time the second sanctions Motion was filed. Any alleged prejudice arising from unanswered questions at the May 2014 deposition may be resolved through the completion of Mr. Vlahopoulos' deposition, as discussed by counsel for the parties on May 20, 2014, as discussed during my June 20, 2014 conference call with counsel, and as specifically offered by Respondent in its Opposition. Further, the Secretary may use Mr. Vlahopoulos' May 2014 deposition testimony, at the hearing, in accordance with the Commission Rules, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure.

Therefore, the Secretary's requests that Respondent be sanctioned by prohibiting Respondent from asserting a position or introducing evidence contrary to the positions Mr. Vlahopoulos asserted during his May 2014 deposition and by precluding Mr. Vlahopoulos from testifying at the hearing are denied.

The Deposition Late Cancellation Fee.

The Secretary requests that Respondent be ordered to pay the $610.96 cancellation fee incurred by the Secretary from the court reporting service when Respondent advised the Secretary, on Friday evening, May 2, 2014, that Mr. Vlahopoulos could not attend the deposition scheduled for Tuesday May 6, 2014.[15] The May 6, 2014 date set for Mr. Vlahopoulos' deposition had been agreed to by the parties, not specifically set forth in a scheduling Order.[16] It is unclear that Respondent understood that the Secretary would incur this large cancellation fee

[15] The Secretary's initial request that Respondent Counsel be ordered to pay "all reasonable expenses incurred by the Secretary as a result of the late deposition cancellation," was in connection with the cancellation of the scheduled May 7, 2014, deposition of Nikolaos Psareas. *See* May 2014 Second Revised Scheduling Order. No supplemental Motion for costs in connection with Mr. Psareas' May 7, 2014 scheduled deposition was filed. *See* footnote 5 above.

[16] *See* footnote 6 above, and May 5, 2014 Order.

based on the notice provided by Respondent Counsel regarding Mr. Vlahopoulos' inability to attend the May 6th deposition. On the facts presented, it is unclear why notification to the court reporting service early Monday morning, May 5, 2014, would not have satisfied the 24 hour advance notification requirement.

Under the circumstances presented, I find an order requiring Respondent to pay the deposition cancellation fee to be unjust. Therefore, the Secretary's request that Respondent be ordered to pay the $610.96 deposition cancellation fee is denied.

Order:

For the reasons stated above, the Secretary's second Motion for sanctions is denied.

Dated: July 31, 2014
Washington, D.C.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC