



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of: )  
 )  
GreenBuild Design & Construction, LLC, ) Docket No. TSCA-10-2021-0006  
 )  
Respondent. )

**ORDER ON COMPLAINANT’S MOTION TO ACCEPT AN  
AFFIDAVIT IN LIEU OF TESTIMONY**

On April 8, 2022, Complainant U.S. Environmental Protection Agency, Region 10 (“Complainant”) filed a Motion to Accept an Affidavit in Lieu of Oral Testimony (“Motion”). In the Motion, Complainant asserts that its witness, Mr. Rob Hamlet, is unable to testify at the forthcoming penalty hearing because Mr. Hamlet has recently undergone four surgeries, including an emergency surgery on March 28, 2022. Mot. at 1. As such, Complainant requests that this Tribunal accept Mr. Hamlet’s affidavit, which was placed into the record as part of its initial prehearing exchange, *see* CX 05, in lieu of Mr. Hamlet’s testimony. *Id.* at 1-2. Respondent GreenBuild Design and Construction, LLC (“Respondent”) filed its Response to the Motion on April 15, 2022, in which it requested this Tribunal deny the Motion (“Response”). On April 20, 2022, Complainant filed its Reply to Respondent’s Response to the Motion (“Reply”), again asking this Tribunal to accept Mr. Hamlet’s affidavit in lieu of his testimony.

For the reasons that follow, the Motion shall be **DENIED**.

**A. Arguments of the Parties**

Complainant argues that this Tribunal should grant its motion because, under the Rules governing this proceeding, this Tribunal “may admit into evidence affidavits of witnesses who are unavailable.” 40 C.F.R. § 22.22(d). Complainant asserts that its witness, Mr. Hamlet, is “unavailable” as defined by the Federal Rules of Evidence. *See* Fed. R. of Evidence (“FRE”) 804(a)(4) (explaining that a declarant is unavailable if the declarant “cannot be present or testify at trial or hearing because of death or then-existing infirmity, physical illness, or mental illness”).<sup>1</sup> Complainant contends that the “physical toll” of the surgeries have rendered Mr. Hamlet “unavailable to testify.” Mot. at 1. Thus, Complainant requests that this Tribunal accept Mr. Hamlet’s affidavit in lieu of his testimony. *Id.* at 2.

In response, Respondent requests that this Tribunal deny the Motion. Respondent

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<sup>1</sup> 40 C.F.R. § 22.22(d) provides that “[t]he term ‘unavailable’ shall have the meaning accorded to it by Rule 804[(a)(4)] of the Federal Rules of Evidence.”

contends that granting the Motion would provide Complainant with an “unfair advantage as it [would] prevent[] Respondent from thoroughly cross-examining Complainant’s witness. Response at 1. Respondent contends that it is “entitled” to the “the right and privilege” of cross-examining Complainant’s witnesses. *Id.*

In Reply, Complainant reasserts that Mr. Hamlet is “unavailable to testify according to FRE 804(a)(4)” and that it has “already provided this [Tribunal] with an affidavit sworn under penalty of perjury[.]” Reply at 1-2. Complainant disagrees with Respondent’s contention that granting the Motion will afford it an “unfair advantage.” Reply at 2. First, Complainant asserts that Respondent does not have the right to cross-examine Mr. Hamlet, as 40 C.F.R. §22.22(b) provides only the right to “cross-examine a witness *who appears at the hearing*[.]” Reply at 2-3 (emphasis added). Therefore, Complainant contends that the Rules do not grant Respondent an “unfettered right to cross-examine an unavailable witness[.]” *Id.* at 4. Next, Complainant argues that Respondent “had plenty of opportunities to argue against the reliability of Mr. Hamlet’s affidavit” but that Respondent “has chosen not to[.]” *Id.* Complainant asserts that it placed the affidavit into the record over a year ago, as part of its initial prehearing exchange, yet Respondent never “offered this Court any argument against its reliability.” *Id.* Finally, Complainant argues that Respondent still has the opportunity to cross-examine its other witnesses, particularly its primary witness, Ms. Socky Tartaglia. Reply at 5.

Additionally, Complainant asserts that the timing of its Motion was “unavoidable” because, for the “past few months,” it was “generally aware of Mr. Hamlet’s medical issues but was under the impression that Mr. Hamlet would still be available to testify.” *Id.* Complainant contends that it “did not learn about the full ramifications” of Mr. Hamlet’s emergency surgery until April 4, 2022, and that it “filed the underlying motion just four days later.” *Id.* Complainant further argues that the timing of the motion “has not negatively impacted Respondent.” *Id.*

## **B. Discussion and Conclusion**

As stated, 40 C.F.R. § 22.22(d) grants the Presiding Officer discretion to “admit into evidence affidavits of witnesses who are unavailable.” Here, I find, first, that Complainant has not proven that Mr. Hamlet is indeed unavailable to testify at a virtual hearing due to an existing “infirmity” or “physical illness.” *See* FRE 804(a)(4). Complainant asserts that Mr. Hamlet is still recovering from his recent surgery and that he cannot attend the hearing. However, Complainant has not demonstrated that Mr. Hamlet will be unable to testify at the upcoming virtual hearing from his own home and without the need to travel. While sympathetic to the “physical toll” that multiple surgeries have had on Mr. Hamlet, without further documentation, I am unable to find that Mr. Hamlet is “unavailable” to testify at a virtual hearing.

Additionally, if Mr. Hamlet is truly “unavailable” as defined by the FRE, I still find that accepting his affidavit in lieu of his testimony will deny Respondent the opportunity to cross-examine Mr. Hamlet. The Rules provide that “[p]arties shall have the right to cross-examine a witness who appears at the hearing[.]” 40 C.F.R. § 22.22(b). Allowing the affidavit to be accepted in lieu of Mr. Hamlet’s live testimony will prevent Respondent from exercising that right. Certainly, as the Rules provide, documents *may* be admitted in lieu of testimony. Here,

however, Complainant has not provided Respondent with sufficient notice of Mr. Hamlet's absence to allow Respondent to question Mr. Hamlet before the hearing. At this time, the penalty hearing begins in less than two weeks. As such, without his appearance at the hearing, Respondent lacks any opportunity to cross-examine Mr. Hamlet. Therefore, Complainant's Motion shall be denied.

Furthermore, I disagree with Complainant's suggestion that Respondent had earlier opportunities to cross-examine Mr. Hamlet yet chose not to do so. Complainant suggests, as stated above, that Respondent could have raised earlier arguments about the reliability of Mr. Hamlet's affidavit and that Respondent could have sought to depose Mr. Hamlet. However, Complainant did request that this Tribunal accept Mr. Hamlet's affidavit in lieu of his testimony until April 8, 2022, which is less than one month before the penalty hearing is set to begin. Complainant contends that the timing of the Motion was "unavoidable." Reply at 6. However, Complainant also asserts that it has been "generally aware of Mr. Hamlet's medical issues" for the "past few months." *Id.* While Complainant learned of Mr. Hamlet's most recent surgery just days before filing the Motion, Mr. Hamlet's unavailability is not entirely unpredictable. Complainant, thus, could have scheduled an earlier deposition to provide Respondent with the opportunity to cross-examine Mr. Hamlet in the case that his health continued to decline. Thus, I find that accepting Mr. Hamlet's affidavit in lieu of testimony would hinder Respondent's rights as provided by the Rules governing this proceeding, 40 C.F.R. § 22.22(d); Section 556 of the Administrative Procedures Act, 5 U.S.C. §556(d); the Due Process Clause of the United States Constitution, U.S. Const. Amend. 5; and general principles of fairness.

For these foregoing reasons, I conclude that accepting the affidavit in lieu of testimony will thwart Respondent's right to cross-examine Mr. Hamlet. As such, the Motion is **DENIED**.

**SO ORDERED.**



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Susan L. Biro

Chief Administrative Law Judge

Dated: April 25, 2022  
Washington, D.C.

GreenBuild Design & Construction, LLC, Respondent.  
Docket No. TSCA-10-2021-0006

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Order on Complainant's Motion to Accept an Affidavit in Lieu of Testimony**, dated April 25, 2022, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



Emilie Schwartz  
Attorney Advisor

Original by Electronic Delivery to:

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
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*For Respondent*

Dated: April 25, 2022  
Washington, D.C.