UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant	)	
	)	
v.	)	Docket No. 08-1104
	)	
IMPERIAL SUGAR COMPANY; IMPERIAL-SAVANNAH, L.P.	)	
	)	
Respondents.	)	
	)	

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to 29 C.F.R. § 2200.2(b), Federal Rule of Civil Procedure 56, and other applicable law, Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") respectfully submit this Memorandum of Law in support of their Motion for Partial Summary Judgment. As explained below, the allegations contained in Item 5(b) of Citation 1 and Item 2(a) of Citation 2 with respect to bucket elevators fail as a matter of law because there is no genuine factual issue as to whether Imperial's bucket elevators that are the subject of those citations are exempt from the purportedly applicable requirements. Summary judgment, therefore, should be entered in Imperial's favor regarding the Complainant's allegations with respect to bucket elevators.

I. ALLEGATIONS AND FACTS

The Citations and Notifications of Penalty that are the basis for Complainant's Complaint are set out in Exhibits A-C to the Complaint. (Compl. ¶ VI.) Item 5(b) of Citation 1 alleges, in pertinent part, the following violation of OSHA's General Duty Clause:

> **Citation 1 Item 5 Type of Violation: Serious**
> P.L. 91-596 Section 5(a)(1) of the Occupational Safety and Health Act of 1970:
> The employer does not furnish employment and a place of employment which are

free from recognized hazards that are causing or likely to cause death or serious physical harm to employees in that employees are exposed to the hazard(s) of explosion and fire:

. . .

b. South Packing House & Bosch Packing House - On or about 02/07/2008, inside legs (bucket elevators) used to convey granulated sugar were not equipped with bearing temperature, belt alignment, and vibration detection monitors at the head and tail pulleys to shut down equipment and/or notify the operator before the initiation of a fire and/or explosion, exposing employees to explosion and fire hazards.

One feasible means of abatement is to install bearing temperature, belt alignment, and vibration detection monitors at the head and tail pulleys of all steel belt conveyors and inside legs (bucket elevators), as referenced in National Fire Protection Association (NFPA) 61, 2008 & 2002, Chapter 7.3.

(Compl. Ex. A.) Item 2(a) of Citation 2 alleges, in pertinent part, the following violation of OSHA's General Duty Clause:

Citation 2 Item 2 Type of Violation: Willful
P.L. 91-596 Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer does not furnish to each of his employees employment and a place of employment which are free from the recognized hazards of the propagation of a fire, deflagration, and/or explosion outside the area of the initial fire, deflagration, and/or explosion which are causing or likely to cause death or serious physical harm to employees:

a. South Packing House & Bosch Packing House - On or about 02/07/2008, bucket elevator legs ("legs") or portions of legs that were located inside were not equipped with explosion relief venting to prevent secondary dust explosions and/or rupture of the elevator housing.

. . .

One feasible means of abatement would be to design and install appropriate deflagration/explosion protection systems for all sugar conveyance and processing equipment, as referenced in National Fire Protection Association (NFPA) 61, 2008 & 2002 edition, Chapter 4, Construction Requirements, paragraph 4.1.2; Chapter 6, Ventilation and Venting, paragraphs 6.2.1 and 6.3.1; and Chapter 7, Equipment, paragraph 7.4.3.3.

(Id. Ex. B.) Both of these citations allegedly pertain to the bucket elevators that were present in the sugar packing house at Imperial's Port Wentworth, Georgia refinery on February 7, 2008. (Id.)

There were 14 bucket elevators in the packing house as of February 7, 2008. (Attachment 1 (Decl. of Dwayne Zeigler ("Zeigler Decl.") ¶ 4 & Ex. A).) All of these bucket elevators operated at a speed of less than 500 linear feet per minute ("FPM"). (Id. ¶¶ 6-9.) Indeed, an operating speed below 500 FPM was absolutely essential to effective operation of the packing house as sugar would not move properly within the bucket elevator system at speeds significantly higher than 350 FPM. (Id. ¶¶ 5-6.) The bucket elevators in the packing house were designed to operate at speeds far below 500 FPM, were installed to ensure an operating speed far below 500 FPM, and actually operated at speeds far below 500 FPM. (Id. ¶¶ 6-7.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate in Review Commission proceedings. See 29 C.F.R. § 2200.2(b) ("In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.") Accordingly, Federal Rule of Civil Procedure 56, which governs summary judgment, applies in this case. *See Sec'y of Labor v. Simpson, Gumpertz & Heger, Inc.*, 15 O.S.H. Cas. (BNA) 1851, 1992 O.S.H.D. (CCH) ¶ 29828 (OSHRC 1992) (affirming grant of summary judgment to respondent and noting "[t]he criterion for review of a grant of summary judgment is whether there is any issue of fact pertinent to the ruling"), aff'd, 3 F.3d 1 (1st Cir. 1993); *Sec'y of Labor v. Lumex Med. Prods., Inc.,* 18 O.S.H. Cas. (BNA) 2002, 1999 O.S.H.D. (CCH) ¶ 31981 (OSHRC 1999) (affirming grant of summary judgment to employer).

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted where the evidence shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The Supreme Court has observed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of pointing out "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Specifically, the moving party should identify those portions of the pleadings, depositions, affidavits and written discovery responses that demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. Rule 56 requires the non-movant to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. Moreover, "[t]he nonmoving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law; 'there must be a substantial conflict in evidence to support a jury question.'" *Tidwell v. Carter Prods.*, 135 F.3d 1422, 1425 (11th Cir. 1998). *See also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) ("*We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts*.") (emphasis original).

III. ARGUMENT AND CITATION OF AUTHORITY

Section 5(a)(1) of the Occupational Safety and Health Act (the "Act"), also known as the General Duty Clause, provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To establish a violation of the General Duty Clause, Complainant must show that: "(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. . . . In addition, the evidence must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition." *Sec'y of Labor v. Otis Elevator Co.*, 21 O.S.H. Cas. (BNA) 2204, 2007 O.S.H.D. (CCH) ¶ 32920 (OSHRC 2007) (citations omitted). "Hazard recognition may be shown by either the actual knowledge of the employer or the standard of knowledge in the employer's industry-an objective test. . . . Industry standards and guidelines such as those published by ANSI are evidence of industry recognition." *Sec'y of Labor v. Kokosing Constr. Co.*, 17 O.S.H. Cas. (BNA) 1869, 1995-1996 O.S.H.D. (CCH) ¶ 31207 (OSHRC 1996) (citations omitted).

Here, Complainant cannot establish the basic, threshold requirement of a violation of the General Duty Clause – the existence of a recognized hazard – for the citation items pertaining to Imperial's bucket elevators. The citations at issue reference the "recognized hazards of the propagation of a fire, deflagration, and/or explosion," *see supra* part I, but do not provide any basis for a finding that these alleged hazards were actually recognized or objectively should have been recognized with respect to the alleged deficiencies with the bucket elevators in Imperial's

packing house. In fact, the purported requirements for the bucket elevators that are set out in the citations at issue appear to be taken directly from National Fire Protection Association ("NFPA") 61, which the citations expressly reference. *See supra* Part I.

To the extent Complainant contends NFPA 61 is an industry standard providing the basis for recognition of the purported hazards associated with bucket elevators, the citations fail as a matter of law because NFPA 61 specifically exempts the bucket elevators in Imperial's packing house from its requirements. While NFPA 61 provides that bucket elevator "[l]egs or portions of legs that are located inside shall have the maximum practicable explosion relief area through the roof directly to the outside," it provides the following exception to that purported requirement:

> Exception: Legs that have either belt speeds below 2.5 m/sec (500 ft/min) or capacities less than 106m^3/hr (3750 ft^3/hr).

NFPA 61, § 7.4.3.3 (2008 Ed.)[1] *See* Compl. Ex. B., Citation 2, Item 2(a) (alleging that Imperial's "bucket elevator legs ('legs') or portions of legs that were located inside [the packing house] were not equipped with explosion relief venting" and referencing NFPA 61, § 7.4.3.3.) Similarly, while "[i]nside [bucket elevator] legs shall have bearing temperature or vibration detection, head pulley alignment, and belt alignment monitors at head and tail pulleys," the same exception quoted above applies. NFPA 61, § 7.4.1.10 (2008 Ed.) *See* Compl. Ex. A., Citation 1, Item 5(b) (alleging that Imperial's "inside legs (bucket elevators) used to convey granulated sugar [in the packing house] were not equipped with bearing temperature, belt alignment, and vibration detection monitors at the head and tail pulleys" and referencing NFPA 61).

It is undisputed that all of the bucket elevators in Imperial's packing house operated at a belt speed of far less than 500 FPM. (Zeigler Decl. ¶¶ 4-9.) Thus, these bucket elevators fall squarely within the exception to the NFPA 61 provisions on which Complainant purports to rely

[1] The provisions of the 2008 edition of NFPA 61 cited in this brief are identical to those in the 2002 edition.

in support of her burden to demonstrate a recognized hazard regarding operation of the bucket elevators. Given these undisputed facts, Complainant cannot establish the existence of a recognized hazard as required to prevail on her claim that Imperial violated the General Duty Clause. The citations regarding the bucket elevators in Imperial's packing house therefore fail, and judgment as a matter of law is warranted.

IV. CONCLUSION

For the foregoing reasons, Imperial respectfully requests that the Commission enter summary judgment in its favor on Complainant's claims relating to bucket elevators based upon Item 5(b) of Citation 1 and Item 2(a) of Citation 2.

Respectfully submitted this 27th day of January 2009.

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of the RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT and MEMORANDUM IN SUPPORT was electronically served on January 27, 2009 on the following counsel:

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