UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	OSHRC DOCKET NO.
Complainant,	)	08-1104
v.	)	REGION IV
IMPERIAL SUGAR COMPANY, IMPERIAL-SAVANNAH, L.P.,	)	
Respondents.	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS

Respondents have moved to depose certain compliance officers of the Occupational Safety and Health Administration ("OSHA") and of Michigan and Maryland OSHA, which are "State plan" states.[1] Complainant objects to Respondents' Motion because Respondents have not shown that the information they seek from the depositions is relevant to the subject matter in this case, specifically the claims and defenses, and reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1) and Commission Rule 2200.52(b).

Respondents contend that the depositions are needed (1) to authenticate records of inspections of other facilities[2], which Respondents obtained pursuant to Freedom of

[1] Of the 15 depositions that Respondents seek to take, 10 are of Federal OSHA employees pursuant to Fed. R. Civ. P. 30(b)(6), 2 are of Maryland OSHA compliance officers identified by name, and 3 are of Michigan OSHA compliance officers identified by name. (Memorandum in Support of Respondents' Motion to Depose OSHA Compliance Officers, pp. 1-2).

[2] None of the facilities at issue were owned or operated by Respondents.

Information Act ("FOIA") requests, and (2) to "obtain testimony regarding the actual conditions that existed during the underlying inspections." (Memorandum in Support of Respondents' Motion to Depose OSHA Compliance Officers ("Memorandum"), p. 4). Respondents claim in their Motion only that they intend to use the depositions to find out what was seen during the other inspections concerning "large dust accumulations," whether the dust "was in fact combustible," and the "level of the accumulation." (Respondents' Memorandum, p. 9). They claim that the compliance officers' testimony is relevant to matters of industry practice. Complainant will stipulate to the authenticity of the records obtained pursuant to FOIA requests concerning inspections by Federal OSHA compliance officers, and anticipate that the State OSHA agencies will do the same. Therefore, the depositions of the compliance officers are not needed for purposes of authentication. As set forth below, the information sought by Respondents in the depositions is also not relevant to the claims or defenses in this matter.

I. Respondents Actually Seek Information Concerning OSHA Enforcement Of Standards Related To Combustible Dust Hazards, Which Is Not Relevant To Claims Or Defenses In This Matter.

In their Notice of Rule 30(b)(6) Deposition, Respondents seek the designation of one or more Federal OSHA employees to testify with respect to the following matters concerning inspections at other (non-Imperial) facilities:

- "the specific physical conditions found and facts gathered at" the inspection
- the authentication of documents in the inspection files
- "the identities of all Complainant's employees and agents who have conducted inspections of or otherwise entered the Location [of the

inspection] at any time since January 1, 2000, through the date of this Notice of Deposition"

- "the identities of all of Complainant's employees and agents who participated in, reviewed or approved the decision to issue the citations regarding the Location [of the inspection]"

(See "Notice of Rule 30(b)(6) Deposition for Complainant" included in Exhibit B attached to Respondents' Memorandum).

In their Motion and Memorandum in Support, Respondents failed to alert the Commission to the third and fourth items listed above, namely, that they seek the identification of all OSHA employees and agents who conducted inspections at the facilities, or "otherwise entered" the locations, in question for more than 9 years, and they seek the identification of all OSHA employees who "participated in, reviewed or approved the decision" to issue citations related to the inspections. (Id.). There is absolutely no relationship between decisions to issue citations or the identities of OSHA employees who inspected or entered these locations over a 9-year period and Respondents' claim that the depositions are intended to elicit information concerning industry practice. Respondents have not been forthcoming regarding the true purpose of the depositions that they seek.

Respondents actually seek to depose OSHA compliance officers in connection with their claim that they did not have fair notice of how to comply with the standards at issue, specifically where combustible dust accumulations are related to the allegations. Respondents seek information concerning dust accumulations at other facilities inspected by Federal and State OSHA in order to compare the citations that were issued in such

instances with the citations that were issued in the present case. In fact, Respondents claim that Federal OSHA and State OSHA agencies "fail[ed] to recognize hazards related to [hazardous combustible dust] accumulations," and they also cited Secretary v. Latite Roofing & Sheet Metal Co., 2005 O.S.H.D. (CCH) ¶ 32858 (Docket No. 02-0656, Sept. 16, 2005), for the proposition that an OSHA "pattern of administrative enforcement" is relevant. (Respondents' Memorandum, p. 3 and fn. 2 on p. 9). However, the evidence in Latite Roofing concerned a "lengthy and confusing" course of conduct between OSHA and the employer over several years, in which the employer sought OSHA's advice on providing fall protection to its employees, was told that it should not request a variance but should develop an alternative plan, and then the employer was cited for failing to comply with fall protection standards where the employer had an alternative plan in place. The Commission found that the Secretary had given the employer the impression that the employer's alternative plan would suffice, so the employer was found not to have fair notice at the time of the citation of a duty to implement the fall protection systems proposed by the Secretary, rather than its alternative plan. Therefore, the "pattern of enforcement" discussed in Latite Roofing concerned *only* the past interaction between OSHA and the sole employer at issue in that case.

It is well-settled that OSHA's failure to cite during previous inspections of an employer cannot support an employer's lack of fair notice claim. Secretary v. Fluor Daniel, 19 O.S.H. Cases (BNA) 1528 (Docket Nos. 96-1729 & 96-1730, Sept. 21, 2001). Rather, the employer must show affirmative misconduct by OSHA toward the employer at issue, and that a serious injustice will result from the misconduct. See, e.g., Latite Roofing, supra; Fluor Daniel, supra; Secretary v. Miami Indus., Inc., 15 O.S.H. Cas.

(BNA) 1258, 1261-62 (Docket No. 88-671, 1991), aff'd in part, set aside in part, 983 F.2d 1067 (6th Cir. 1993) (addressing the employer's "estoppel" arguments, including whether the employer was entitled to rely on prior statements and conduct by OSHA personnel indicating that certain machine guarding at issue was adequate); see also Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 430 (5th Cir. 2001) (company had valid fair notice complaint if previously informed by OSHA inspector that its procedures or processes at issue were safe and satisfactory and company was later cited for the same procedures).

Accordingly, any past conduct of OSHA that might be relevant to a "fair notice" complaint or estoppel argument would concern only OSHA's previous interaction with, or communication with, Respondents. None of the depositions that Respondents seek concern any such past interaction or conduct; rather, Respondents seek the depositions of Federal and State OSHA personnel from different states and regions, who conducted inspections unrelated to Imperial or its any of its sites. Whether or not Federal or State OSHA cited conditions at other employers' sites involves no facts relevant to the issues to be decided.

II. Respondents Have Not Established That Testimony Of A Diverse Number Of Federal and State OSHA Compliance Officers Concerning A Limited Number Of Inspection Sites Is Relevant To Matters Of Industry Practice Or Custom.

To the extent that Respondents seek testimony concerning the "actual conditions" at the inspection sites, Respondents do not explain why authenticated photographs and records documenting the inspections and the observations of the compliance officers would not suffice to identify the conditions that existed at the times of the inspections. As noted above, Respondents claim that they intend to use the depositions to find out

what was seen during the other inspections concerning "large dust accumulations," whether the dust "was in fact combustible," and the "level of the accumulation." (Respondents' Memorandum, p. 9). Again, Respondents do not claim that the inspection records fail to provide this information.

More importantly, Respondents fail to show how the testimony of various compliance officers concerning the existence of conditions at other sites, including levels of combustible accumulations, can demonstrate industry practice or custom, as such testimony does not address what the employers in the other inspections knew, or did not know, to be hazardous. Further, to the extent that Respondents seek to explore whether Federal OSHA and State OSHA agencies "fail[ed] to recognize hazards related to such accumulations," any such inquiry concerns the deliberative, pre-decisional process that is protected by the "deliberative process" privilege, which Respondents acknowledge is not a permissible area of discovery. (See Respondents' Memorandum, p. 4). Thus, the compliance officers may not be questioned concerning the pre-decisional process regarding whether to issue, or not issue, citations related to combustible dust accumulations. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (discussing the "deliberative process" privilege's protection against disclosure of opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated).

"Discussions among agency personnel about the relative merits of various positions . . . are as much a part of the deliberative process as the actual recommendations and advice agreed upon." Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977). The process of separating significant from insignificant facts

requires the exercise of judgment by agency personnel and are privileged. Cofield v. City of LaGrange, GA, 913 F. Supp. 608, 615 (D.D.C. 1996). An employee's analysis and evaluation of facts are clearly within the scope of the privilege. See Skelton v. Postal Service, 678 F.2d 35, 38 (5th Cir. 1978). As such, Respondents also may not ask the compliance officers whether in their view, the dust accumulations presented combustible dust hazards.

The cases cited by Respondents—for the proposition that a compliance officer may testify concerning industry practice—concern the Secretary's proffer of a compliance officer's testimony about personal protective equipment ("PPE") that had been observed in other places of employment. See Secretary v. Trinity Industries, Inc., 15 O.S.H. Cas. (BNA) 1481 (Docket No. 88-2691, Jan. 23, 1992); Secretary v. Lukens Steel Co., 10 O.S.H. Cas. (BNA) 1115 (Docket No. 76-1053, Oct. 27, 1981). In Trinity Industries, a senior Compliance Officer, with 15 years of experience, testified that other manufacturers of storage tanks used certain types of PPE, including height adjustable catwalks or height adjustable bars or static lines, when its employees had to walk over cylindrical tanks before working on them. The Commission noted that the testimony was relevant to whether the Secretary could establish a violation of 29 C.F.R. 1910.132(a), regarding a failure to provide PPE.

In Lukens Steel, the Compliance Officer, who had inspected over 50 steel producing facilities, testified concerning steel industry custom concerning the use of certain PPE to resist molten steel, including leggings, face shields, and asbestos or aluminized gloves. The Commission noted that evidence of industry practice or customary use of PPE, although not dispositive, may aid in determining whether a

reasonable employer would perceive a hazard. In addition to the Compliance Officer's testimony concerning other employers' use of PPE, the Secretary in Lukens Steel also presented evidence of previous citations to the employer in that case, previous incidents involving that employer, and union activity related to that employer. The Commission further noted that it will examine an employer's own understanding of the alleged hazard, and the employer's practices, which may demonstrate that the employer perceived the hazard.

As such, Trinity Industries and Lukens Steel both demonstrate that *the Secretary* in meeting her burden of proof, *may* present the testimony of experienced compliance officers, who through specialized and/or extensive experience may testify about PPE observed in the industry. Similarly, in Secretary v. Keating Building, 21 O.S.H. Cas. (BNA) 1513 n. 3 (Docket No. 04-0774, Feb. 16, 2006), also cited by Respondents, the Secretary's expert was not allowed to testify regarding current industry practice and custom in projects involving concrete, where during voir dire, the expert stated that for over a decade, his experience had been limited to technical design or deficiency issues and not industry practice. The expert in Keating Building stated he had no recent "hands on" involvement in an active concrete project, and thus he was not permitted to testify concerning current industry practice. The decisions in Trinity Industries, Lukens Steel, and Keating Building are consistent in allowing, on the question of industry practice, only the testimony of persons who are shown to a sufficient degree to be familiar with working conditions and practices within the industry at issue.

Here, however, Respondents seek to depose a number of different compliance officers, chosen by Complainant, concerning the conditions at diverse inspection sites,

and they seek to assemble this information allegedly to present evidence of industry practice or custom concerning combustible dust accumulations. This is not the manner in which a compliance officer's testimony was permitted or deemed relevant in Trinity Industries or Lukens Steel. Respondents' request for Rule 30(b)(6) depositions does not necessarily result in Complainant producing persons with particular industry knowledge or experience, but will only result in the designation of persons to testify about the particular topics listed in Respondents' Notice of Deposition. (See "Notice of Rule 30(b)(6) Deposition for Complainant" included in Exhibit B attached to Respondents' Memorandum). Respondents have not shown that testimony from these compliance officers about their observations of conditions at other inspection sites is reasonably calculated to lead to the discovery of admissible evidence concerning industry practice or custom.

Wherefore, Complainant requests that Respondents' Motion to Depose OSHA Compliance Officers be denied. Complainant will stipulate to the authenticity of the inspection files that Respondents obtained pursuant to FOIA requests to Federal OSHA, and the contents of such files speak for themselves. Respondents should not be permitted to pursue the true purpose of the depositions, which is to seek information about OSHA's enforcement history, or alleged enforcement patterns, concerning combustible dust accumulations. Such information is not relevant to claims or defenses in this matter and not reasonably calculated to lead to the discovery of admissible evidence.

Respectfully submitted this 18th day of March, 2009.

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the Complainant's Response to Respondents' Motion to Depose OSHA Compliance Officers was electronically served on March 18, 2009, on the following parties:

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