United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant v. National Material Company, LLC, Respondent.	OSHRC Docket No. **18-1387**

Order Denying Respondent's Motion for Leave to Take Deposition

Respondent seeks to take the deposition of OSHA Area Director Kim Nelson. As grounds for its request, Respondent contends Area Director Nelson has first-hand knowledge of the decision to characterize the violation as willful, the Secretary's proposed penalty calculation, and the issuance of a press release. The Secretary opposes the motion on the ground Respondent had failed to show good and just reason for taking Area Director Nelson's deposition because she has no first-hand knowledge of any facts relevant to the issues before the Commission. For the reasons discussed herein, Respondent's Motion is **DENIED**.

BACKGROUND

This matter arose following an inspection of Respondent's worksite by the OSHA Toledo Area Office. Pursuant to that inspection, the Secretary issued Respondent a citation alleging a willful violation of § 5(a)(1) of the Act or the general duty clause. The Secretary proposed the statutory maximum penalty for a willful violation of $129,336.00. Respondent timely contested the citation.

Following the filing of initial pleadings, the parties commenced discovery. In addition to written discovery, the parties conducted depositions. The Secretary produced to Respondent for deposition Compliance Safety and Health Officer (CSHO) Corrine Majoros who conducted the inspection and Assistant Area Director Chad Positano. Respondent produced three of its former managers. Respondent also sought to take the deposition of Area Director Nelson. The Secretary did not agree to the deposition and Respondent filed its motion seeking an order compelling the Secretary to produce Area Director Nelson for deposition.

Respondent identifies three matters about which Area Director Nelson has knowledge it asserts it is entitled to discover. Respondent contends it is entitled to discovery regarding Area Director Nelson's role in the decision to characterize the alleged violation as willful, her decision to propose the maximum penalty, and her statements contained in a press release. Area Director Nelson attests she did not participate in the inspection and has no first-hand knowledge of any facts upon which the allegations in the citation are based (Declaration of Kim Nelson, Exh. A of the Secretary's Reply, at ¶ 4). She further attests she has no "specialized expertise in any technical issues related to the citation." (Declaration of Kim Nelson at ¶ 5).

DISCUSSION

Under Commission procedural rules, a party may seek through discovery "any matter that is not privileged and that is relevant to the subject matter involved in the pending case." 29 C.F.R. §2200.52(b). A party may seek information that is inadmissible at the hearing, "if the information or response appears reasonably calculated to lead to discovery of admissible evidence." *Id*. Under Federal Rule of Evidence 401, the test for relevancy is whether evidence "has any tendency to make a fact more or less probable" and if that fact "is of consequence in determining the action." Fed. R. Evid. 401. Commission procedural rules limit the methods a party may use to obtain discovery. A party may only conduct depositions that are agreed upon by the parties or ordered by the Commission or Judge following the filing of a motion stating "good and just reasons." 29 C.F.R. § 2200.56(a). The Commission has held the decision to allow discovery is within the Judge's broad discretion and that in exercising that discretion the Judge must consider "the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and, on balance, any undue delay in the proceedings that may occur." *Del Monte Corp*., 9 BNA OSHC 2136 (No. 11865, 1981).

Based upon its submission, the undersigned finds Respondent has failed to establish good and just reasons for taking Area Director Nelson's deposition. Respondent has identified no matter about which Area Director Nelson has firsthand knowledge other than her reasons for taking certain discretionary actions. Because her reasons for taking discretionary actions is not a matter "of consequence in determining" any matter before the Commission, Respondent has failed to show a need for it.

The Commission has recognized, absent extraordinary circumstances, senior executive department officials should not be required to testify regarding their reasons for taking official actions. *Manganas Painting Co.,* 17 BNA OSHC1457, 1458 (No. 95-0588, 1995), *citing, United States v. Morgan,* 298 U.S. 468 (1936) *[[Morgan I];* 304 U.S. 1 (1938) *[Morgan II];* 307 U.S. 183 (1939) *[Morgan III];* 313 U.S. 409 (1941) *[Morgan IV]; Simplex Time Recorder Company v. Secretary of Labor,* 766 F.2d 575, 586 (D.C.Cir.1985). In *Managas*, the Commission also recognized a government decision-maker "will not be compelled to testify about his mental processes in reaching a decision, including the

manner and extent of his study of the record and his consultation with subordinates." *Id*. This is a purely discretionary decision concerning enforcement of the Act, inquiry into which the D.C. Circuit noted in *Simplex*, "runs counter to the cautions enunciated in *Morgan*." 766 F.2d at 586. Respondent has identified no extraordinary circumstances justifying compelling Area Director Nelson to be subject to deposition.

Whether the alleged violation is properly characterized as willful under Commission precedent is a matter of law the Commission determines *de novo*. Respondent has identified no facts of which Area Direction Nelson has firsthand knowledge relevant to the Commission's inquiry on this issue. Area Director Nelson's analysis of the facts and the application of those facts to the law has no bearing on the Commission's resolution of the issue. Area Director Nelson's decision to issue the violation with a willful characterization was an exercise of the Secretary's prosecutorial discretion and not, therefore, an appropriate matter for Commission review. *Cuyahoga Valley Railway Co. v. United Transportation Union, et al*., 474 U.S. 3 (1985); *Wetmore & Parman, Inc*., 1 BNA OSHC 1099, 1102 (No. 221, 1973). How or why Area Director Nelson reached her decision is neither a proper area of inquiry nor relevant evidence.

Equally lacking in relevance is the basis for Area Director Nelson's decision to assess the maximum penalty under the Act. It is well settled the Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975). Section 17(j) of the Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). Respondent has identified no facts of which Area Director Nelson has firsthand knowledge relevant to the Commission's consideration of the statutory penalty factors. How Area Director Nelson applied the facts in proposing a penalty has no bearing on the Commission's resolution of the issue.

Respondent seeks discovery of the basis for Area Director Nelson's statements made in a press release. In that press release Area Director Nelson is quoted as saying "This tragedy could

have been avoided if the company had changed its coil transfer procedures after experiencing this serious hazard in the recent past." (Exhibit D to Respondent's Motion) This conclusory statement contains Area Director Nelson's opinion about which she admits she has no "specialized expertise." It is not based on Area Director Nelson's firsthand knowledge of Respondent's procedures, as she has none. Respondent seems vexed by Area Director Nelson's public statements because it believes them to be based on an inadequate investigation and, consequently, inaccurate. Respondent argues it

> has relevant questions as to how AD Nelson concluded Respondent's procedures on moving coils were inadequate, absent the relevant investigation on how employees were trained to move the training (sic). Respondent further will question whether she made the public statement knowing that OSHA employees failed to do a competent investigation into all the meaningful, good faith efforts done by Respondent to reduce employee exposure to a hazard.

(Respondent's Motion at p. 6). That Respondent has these questions does not make answers to them relevant or discoverable. Although Respondent's good faith efforts to reduce employee exposure to a hazard is relevant to issues before the Commission, how Area Director Nelson assessed those efforts before making a public statement about them is not. Based upon Respondent's submissions, the undersigned cannot conclude inquiry into this area would lead to the discovery of relevant, admissible evidence material to any issue before the Commission.

Finally, Respondent points out the inconsistency in the Secretary's position that an employer's high-level executive can be subject to discovery and subpoenaed to testify in Commission proceeding, but high-level government officials cannot. Respondent misses the mark. The question is one of relevance. Because corporate employers can only act through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986). Because a violation is "willful" if it was committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety, *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1146 (8th Cir. 1996), the basis for the decisions of an employer's high-level officials regarding safety and health is relevant to the Secretary's showing of a prima facie case of a willful violation. Although the reasons an employer's officials make decisions may be relevant to matters before the

Commission, as previously discussed, Area Director Nelson's reasons for her discretionary decision-making are not.

For the foregoing reasons, Respondent has failed to establish good and just reasons for taking Area Director Nelson's deposition. *Respondent's Motion for Leave to Take Deposition* is **DENIED**.

SO ORDERED.

/s/

Judge Heather A. Joys
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Date: **September 11, 2019**