

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR,	:	
	:	OSHRC No. 21-0986
Complainant,	:	
	:	
v.	:	Inspection No. 1529328
	:	
KANE LOGISTICS, dba KANE	:	
WAREHOUSING, INC,	:	Judge Dennis L. Phillips
and its successors,	:	
	:	
Respondent.	:	
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**ORDER GRANTING COMPLAINANT’S MOTION TO COMPEL
ENTRY UPON LAND**

I. Background

On or about May 5, 2021, an employee operating an electric pallet truck (EPC) (specifically an End Control Pallet Truck, model PE 4500, heading towards aisle 92 in Kane Logistics, dba Kane Warehousing, Inc.’s (Respondent or Kane) Distribution Center 6 located at 24 Stauffer Industrial Park, Taylor, Pennsylvania 18517 (Worksite), ran into the bottom horizontal support bar of the material storage racking system, which resulted in fatal injuries. At the time, the employee was driving the EPC forward with the forks trailing behind him. (Opposition at 1).

The following day, the Occupational Safety and Health Administration (OSHA) initiated an inspection of the Worksite. Two OSHA Compliance Officers (CO) visited the Worksite. During their visit, they reportedly took more than 20 pictures of the Worksite and the accident scene and took measurements of the height and length of the storage rack. During the inspection, Kane also reportedly provided OSHA with the more than 20 pictures it took of the accident scene on the night of the incident and video surveillance from the moments before the incident. Kane

also provided OSHA documents related to employee powered industrial truck training and certain powered industrial truck operator manuals. (Opposition at 1-2).

On September 16, 2021, OSHA issued a citation to Respondent alleging two violations: (1) a violation of the general duty clause based on the recognized hazard of employees operating forklift trucks in areas where there are storage racks with horizontal crossbars or beams that could enter the operator areas, potentially resulting in crushing injuries; and (2) a violation of 29 C.F.R. § 1910.178(l)(3)(ii)(I) for failing to train employees about these kinds of “under-ride hazards” while operating the pallet trucks.

The alleged violation description for the general duty clause violation states:

a) Kane DC6 Warehouse – On or about May 5, 2021, employees operated pallet trucks in the warehouse in areas where the bottom shelves of storage racks were approximately 55 inches from the ground, such that the horizontal crossbars or beams of the shelves could enter into the operator areas and come into contact with, and potentially crush, the pallet truck operators. One example of the potential for crushing injuries occurred on May 5, 2021: a worker operating a Crown End Control Pallet Truck, model PE 4500 Series, serial number 10250215, was killed when a storage rack shelf that was 55 inches from the ground entered into the operator area and came into contact with him and crushed him. The pallet truck had been traveling with the forks trailing (or power unit first) and the platform and power unit went under the shelf.

To establish the general duty clause violation with respect to this citation, the Secretary will be required to prove: (1) an activity or condition in Respondent’s workplace presented a hazard to employees; (2) either Respondent or the industry recognized the condition or activity as a hazard; (3) the hazard was likely to or actually caused death or serious physical harm; and (4) a feasible means to eliminate or materially reduce the hazard existed. *See Fabi Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007).

The Secretary has the burden of proof to establish the elements of each alleged violation, and is entitled to gather the information through discovery necessary to prove his case in accordance with the Commission’s Rules of Procedure. *See* 29 C.F.R. §§ 2200.52 through 2200.56. The Secretary intends to rely on expert witness testimony to help prove his case.

The Secretary served a Request to Permit Entry (Request) upon Respondent on February 17, 2022, pursuant to Rule 53(a). The Request specified that the Secretary is asking Respondent to “permit the Secretary’s outside expert, attorney, and CO to enter the warehouse facility located at 24 Stauffer Industrial Park, Taylor, Pennsylvania, 18517, on a date and at a time to be mutually agreed upon, but occurring no later than April 15, 2022.” The Secretary explained that the “purpose of the entry will be to examine the warehouse areas that are the subject of the current contest and to take measurements, photographs, and videos of those areas, including shelving, aisleways, and travelways.” The Secretary specified that the areas to be examined would be “any areas where pallet trucks are operated and there are shelf racks positioned at heights such that the shelf racks could make contact with the operators of the pallet trucks.”

The Secretary further explained the basis for requesting a site visit: “The information gathered during the entry regarding the conditions and activities at the worksite is information that is necessary for purposes of the Secretary’s expert forming his opinions and conclusions about the violations issued in this matter.” Finally, the Secretary provided additional details about the scope of the worksite visit: “In addition, the request includes the opportunity to inspect, measure, photograph, and videotape all pallet trucks that are presently being used at the facility as well as any pallet trucks that were in use at the facility in May of 2021, even if such pallet trucks are not presently in use.”¹

Respondent served upon the Secretary its Objection and Response to Complainant’s Request to Permit Entry. In its Objection and Response, Respondent asserted that the Secretary

¹ The Secretary asserted that he needs to inspect the pallet trucks themselves in order to determine whether there are any warning labels on the trucks similar to the warnings contained in the Operator Manual, such as the warning on page 4 that states: “You could be pinned or crushed by objects intruding or poking into the operator area.”

did not provide enough specificity as to “the areas of the warehouse facility that the Secretary wants to inspect.” Respondent refused to allow the Secretary to inspect the premises.

On March 21, 2022, the Secretary filed his Motion to Compel Entry upon Land (Motion to Compel Entry upon Land or Motion to Compel). The Secretary requests the Court issue an order requiring Respondent to allow the Secretary to visit the worksite with an expert and a party representative.

On March 29, 2022, Respondent filed its Opposition to Complainant’s Motion to Compel Entry Upon Land (Opposition). Kane requests this Court deny the Secretary’s Motion to Compel in its entirety. Alternatively, if this Court grants the Secretary’s Motion to Compel, Kane requests this Court order that: (1) only the Secretary’s expert attend the discovery inspection; (2) the discovery inspection be limited to two (2) hours and confined to the main thoroughfare of the Worksite, aisle 92, and the EPC involved in the May 5, 2021 incident; and (3) the Secretary reimburse Kane for all reasonable costs that result from the discovery inspection, if any. (Opposition at 8).

On March 30, 2022, the Secretary filed his Reply to Respondent’s Opposition to Motion to Compel Entry upon Land (Reply). In his Reply, the Secretary asserts that there is no basis for excluding the Secretary’s counsel and a party representative from the discovery inspection.

He asserts that there are only a few federal court cases addressing motions to exclude persons from discovery inspections. *See Hillesheim v. RVD Real Est. Properties LLC*, 8:18 CV 449, 2019 WL 1900384, at *4 (D. Neb., Apr. 29, 2019).² He further argues that Respondent’s request that the Court order the Secretary to reimburse for costs associated with the discovery inspection has little or no basis in law.

² In *Hillesheim*, the defendant sought to exclude the plaintiff’s chosen property inspector from entry upon defendant’s land based solely upon conclusory statements challenging his credibility. The Court found that good cause was not established and denied the motion for protective order.

II. DISCUSSION

Rules 52(a)(1)(i) and 53(a)(1) allow parties to “enter upon land,” and contemplate that an entry upon land may be utilized as a legitimate method of discovery. 28 C.F.R. §§

2200.52(a)(1)(i) and 2200.53(a)(1).

Review Commission Rule 53 provides for the use of worksite visits for purposes of discovery. The rule provides, in pertinent part:

(a) Scope. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:

.....

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

29 C.F.R. § 2200.53(a). The rule also specifies the procedure to be used for requesting entry, and the procedure to follow if entry is refused:

(b) Procedure. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. It shall specify a reasonable time, place, and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time. The Commission or the Judge may allow a shorter time or a longer time, should the requesting party deny an extension. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. To obtain a ruling on an objection by the responding party, the requesting party shall file a motion conforming to § 2200.40 with the Judge and shall annex its request to the motion, together with the response and objections, if any.

29 C.F.R. § 2200.53(b). (Motion to Compel at 4).

Conducting a discovery inspection with an expert is an appropriate method of gathering information during discovery. *See Owens-Illinois, Inc.*, No. 77-648, 1978 WL 7118

(O.S.H.R.C., Dec. 20, 1978) (possibility that trade secrets will be disclosed does not warrant barring discovery inspections by non-federal employees such as outside experts since trade

secrets can be adequately protected by issuance of protective order). Guidance discussing applicable legal standards when an employer objects to the Secretary's request to enter upon land may be found in the case law dealing with Fed. R. Civ. P. 34(a)(2), which sets forth a provision similar to Commission Rule 53(a)(2). Fed. R. Civ. P. 34(a)(2) states, in part:

A party may serve on any other party a request within the scope of Rule 26(b) . . . to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Fed. R. Civ. P. 34(a)(2). The reference to Rule 26(b) indicates that the request to enter upon land must be:

relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). (Motion to Compel at 5).

“Judges have wide discretion in deciding whether to permit discovery.” *FMC Corp.*, No. 85-226, 1985 WL 44754, at *2 (O.S.H.R.C., Nov. 13, 1985).

Rule 52(b) of the Rules of Procedure outlines the scope of discovery.

The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 52(b). Rule 52(b) is virtually identical to Rule 26(b) of the Federal Rules of Civil Procedure.

Respondent asserts that the information sought must be relevant and proportional to the needs of the case. *See e.g., Ehrlich v. Inc. Vill. of Sea Cliff*, No. 04-4025, 2007 WL 1593211, at *6 (E.D.N.Y. May 31, 2007) (denying motion to compel entry and inspection because plaintiff failed to prove such inspection was relevant). That is, “the degree to which the proposed inspection

will aid in the search for truth must be balanced against the burdens and dangers created by the inspection.” *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978). Respondent argues the Secretary must establish a need for the discovery inspection, and even if the Secretary does that, the discovery inspection must still be limited or proportional to the needs of the case. (Opposition at 4). The Court finds that the Secretary has established that he needs to perform the sought-after discovery inspection and it is proportional to the needs of the case, which involves a fatality. The Court further finds that the requested discovery inspection will not be duplicative.

“The touchstone for analysis of a Rule 34 inspection is reasonableness.” *McConnell v. Canadian Pac. Realty*, 280 F.R.D. 188, 191 (M.D. Pa. 2011). “A party seeking discovery bears the initial burden of proving the relevance of the requested information.” *Id.*, at 193 (citing *Morrison v. Philadelphia Hous. Auth.*, 203 F.R.D. 195, 196 (E.D. Pa. 2001)). “Once that initial burden is met, ‘the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.’” *McConnell*, 280 F.R.D. at 193 (quoting *In re Urethane Antitrust Litig.*, 261 F.R.D. 570, 573 (D. Kan. 2009)). (Motion to Compel at 5-6).

Inspections are typically allowed where “the specific location relates to the subject matter of the cause of action.” *Welzel v. Bernstein*, 233 F.R.D. 185, 186 (D.D.C. 2005) (collecting cases and granting motion to compel inspection and allowing photographs or video); see *Alonso v. Sch. Bd. of Collier Cty., Fla.*, No. 2:16-CV-379-FtM-38 MRM, 2018 WL 9617238, at *2 (M.D. Fla., Nov. 20, 2018) (granting motion to compel entry upon land with expert where plaintiffs alleged violation of Equal Educational Opportunities Act and expert would observe

classes and inspect school facility). (Motion to Compel at 6).

For cases that involve expert witnesses, visiting the worksite or facility in question “is the best way for [an] expert to gain an accurate understanding of the conditions there. And [the] expert can be expected to produce a report and testimony that is more useful to the Court if the expert observes conditions at the facility firsthand.” *Chunn v. Edge*, No. 20-CV-1590 (RPK), 2020 WL 1872523, at *1 (E.D.N.Y., Apr 15, 2020) (granting petitioners’ motion to compel entry upon land with expert in case involving constitutional challenge to conditions of confinement at detention center). “Site inspections under RCFC [Rules of the Court of Federal Claims] 34(a)(2) and Fed.R.Civ.P. 34(a)(2) can readily involve experts because their knowledge and skills are at times required to render the inspection fruitful for the inspecting party.” *Ark. Game & Fish Comm'n v. United States*, 74 Fed. Cl. 426, 430 (2006). (Motion to Compel at 6).

Parties are routinely permitted to visit sites with experts during discovery. See *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 72, 75 (D.D.C. 1999) (permitting plaintiff’s expert to inspect the defendant’s “facilities, equipment, and machinery”); *Chem. Bank v. First Chicago Bank of Ravenswood*, No. 93 c 5220, 1993 WL 524715, at *1 (N.D.Ill., Dec. 14, 1993) (permitting plaintiff’s general contractor and subcontractors to conduct “environmental inspecting and measuring, surveying, photographing, testing or sampling” of defendant’s premises); *New York State Ass’n for Retarded Children v. Carey*, 706 F.2d 956, 960–62 (2d Cir. 1983) (upholding a district court’s order permitting plaintiffs’ consultants and experts to inspect the defendants’ facilities to “take photographs, make observations, take notes, form conclusions”); *Eirhart v. Libbey–Owens–Ford Co.*, 93 F.R.D. 370, 371-72 (N.D.Ill. 1981) (granting plaintiffs’ consultants access to the defendant’s plant to observe an experimental production line). (Motion to Compel at 7).

For purposes of formulating his opinions regarding the existence of hazardous conditions

and feasible means of abatement, the Secretary's expert witness is expected to benefit from an opportunity to view the conditions and activities that are alleged to be hazardous in the general duty clause violation. *See, e.g., Welzel*, 233 F.R.D. at 186 (inspections typically allowed where "the specific location relates to the subject matter of the cause of action"). A site visit would provide the Secretary's expert with an opportunity to view relevant conditions and activities including the layout and design of the warehouse and aisles, the height and locations of the storage racks and shelves, the pallet trucks used in the warehouse, and the operation of the pallet trucks.

Here, the Secretary, has satisfied his initial burden "of proving the relevance of the requested information." *McConnell*, 280 F.R.D. at 193. The conditions and activities here are "relevant" to the subject matter of the litigation. *See* Fed. R. Civ. P. 26(b)(1) (request to enter upon land must be "relevant to any party's claim or defense). Respondent has not established a lack of relevance "by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *McConnell*, 280 F.R.D. at 193. The Court also finds that there would be little burden or expense for Respondent resulting from the Secretary visiting the worksite. *Id.* (factors include "whether the burden or expense of the proposed discovery outweighs its likely benefit").

The Court further finds that the Secretary provided Respondent with reasonable and sufficient specificity pertaining to the areas of the warehouse facility that the Secretary wants to inspect. The Secretary identified "any areas where pallet trucks are operated and there are shelf racks positioned at heights such that the shelf racks could make contact with the operators of the pallet trucks." Respondent also complains that the Secretary failed to identify which of its

multiple warehouses will be inspected. The Secretary indicated that he would be visiting DC6, where the fatality occurred. (Motion to Compel at 9). Respondent also objected because the Secretary's Request "does not specify how long the Secretary intends to be on-site for the inspection." The Secretary proposed that the parties could begin with an agreement that the visit would initially last one day, and that if the Secretary's expert needed additional time, the Secretary would communicate the reasons for needing a second day so that Respondent could decide whether to object or not. (Motion to Compel at 9). The Court finds the terms and conditions of the duration of the visit as proposed by the Secretary to be reasonable.

Respondent further contends that the Secretary should be satisfied with his expert being limited to the photographs and measurements taken by the OSHA CO during the OSHA inspection.

Photographs and measurements taken by the CO during his inspection are not a substitute for an expert's first-hand observations and measurements. *See Chunn*, 2020 WL 1872523, at

*1 (visiting worksite or facility in question "is the best way for [an] expert to gain an accurate understanding of the conditions there"). Respondent's expert has had, and will continue to have, full access to the area where the accident occurred and the entire warehouse, and the Secretary would be at a significant disadvantage if his expert cannot also produce a report and testimony based on firsthand observations. *Id.* ("expert can be expected to produce a report and testimony that is more useful to the Court if the expert observes conditions at the facility firsthand"). (Motion to Compel at 10-11). Additionally, the Secretary's general duty clause violation is not limited to the conditions involved in the accident or the specific shelf related thereto. It may encompass all areas of the warehouse where these kinds of pallet jacks are operated near storage rack shelves that could come into contact with the operators. That is the hazard alleged by the Secretary. Consequently, the Secretary's expert is entitled to examine all such areas first-hand and determine what conditions should be photographed

and measured. (Motion to Compel at 11). Respondent also claims that the expert's site visit will be cumulative and duplicative because Respondent has produced more than 3,000 pages of documents.³ Documents produced during discovery and depositions that may be taken of management employees do not alleviate the need for a site visit by the Secretary's expert.

Respondent also asks the Court to require the Secretary reimburse Kane for its reasonable costs that result from the discovery inspection. Respondent cites to *FMC Corp.*, 1985 WL at 44754, in support of this request. (Opposition at 8). That case is readily distinguished from the matter herein. *FMC Corp.* involved an alleged violation of the general duty clause for "fail[ing] to prevent or control exposure to a potential methylisocyanate uncontrolled reaction." *Id.* at *1. There, the Secretary had conducted "a number of inspections" prior to issuing the citation, and, after Respondent contested the citation, the Secretary conducted additional inspections on March 25, 26, and May 9-11, 1985. *Id.* After filing a complaint, the Secretary conducted another inspection on May 29, 1985. *Id.* When the Secretary sought "to conduct still another inspection," Respondent objected and the Judge denied the Secretary's motion to compel. On interlocutory appeal, the Commission allowed the Secretary to conduct another inspection because of the "unusual" circumstances (potential catastrophic consequences from an uncontrolled release of methylisocyanate). *Id.* at *2. Because, Respondent had "already been subjected to considerable expense" as a result of the approximately nine days the Secretary had already visited the facility, the Court required the Secretary "to reimburse the company for the reasonable costs it incurs as a result of the discovery inspection." *Id.* (Motion to Compel, Reply, at 2-3).

In this case the Secretary visited Respondent's warehouse a single time during the OSHA

³ The Secretary asserts that these documents provide minimal, if any, information that will be helpful to the Secretary's expert in forming his opinions. He argues they do not support Respondent's refusal to permit entry. (Motion to Compel at 11-12).

inspection and has not inspected the warehouse since the citation was issued. Unlike in *FMC Corp.*, Respondent has not offered any evidence that there were any costs associated with that inspection. Nor has Respondent offered any persuasive evidence that a discovery inspection with an expert would entail any significant costs.

Respondent's request for the Secretary to reimburse Kane for its reasonable costs that result from the discovery inspection is without merit.

III CONCLUSION

The Secretary has established that the site visit would produce relevant information, and Respondent has not shown that the numerous benefits of a site visit would be outweighed by any burden or expense to it.

IV. ORDER

Having reviewed Complainant's Motion to Compel Entry Upon Land, Respondent's Opposition, and the Secretary's Reply, it is hereby ORDERED that the Motion to Compel is GRANTED. It is further ORDERED that:

1. Respondent shall permit Complainant's counsel, Complainant's expert witness, and a party representative (to be selected by Complainant) to visit the DC6 warehouse located at 24 Stauffer Industrial Park, Taylor, Pennsylvania, 18517.

2. Complainant shall identify and communicate to Respondent three dates on or before April 29, 2022 when Complainant's counsel, expert, and party representative are available to visit the worksite. Respondent's counsel shall immediately confer with all necessary individuals and select one such date for the site visit and communicate such date to Complainant's counsel within 48 hours after the three options are proposed.

3. The worksite visit may last for up to eight hours, and may continue for additional days only upon mutual agreement of the parties, or an order from the Court.

4. Complainant's expert, Complainant's party representative, and Complainant's counsel may make

observations, take measurements, take photographs, take videos, and take any other steps Complainant deems appropriate to gather relevant information during the worksite visit, other than conducting employee interviews.

5. At least ten days prior to the site visit, Respondent's counsel shall confer with the necessary individuals and identify and communicate to Complainant in writing all areas of the DC6 warehouse where, in May 2021, any pallet trucks or pallet jacks (including but not limited to all "walkie/rider pallet trucks" and all Crown PE 4500 Series pallet trucks) were operated and there were shelf racks positioned at heights such that the shelf racks could make contact with the operators of the pallet trucks. If the parties are unable to come to an agreement as to which areas are to be inspected, Complainant shall be permitted to inspect the entire DC6 warehouse on the day of the worksite visit and make an independent determination as to which areas will be inspected.

6. Respondent shall ensure that all pallet trucks or pallet jacks (including but not limited to all "walkie/rider pallet trucks" and all Crown PE 4500 Series pallet trucks) that are presently being used at the facility, or that were in use at the facility in May of 2021 and are in, or under, Respondent's control, even if they are no longer in operation, are conveniently located and ready to be inspected by Complainant.

7. Respondent's request for the Secretary to reimburse Kane for its reasonable costs that result from the discovery inspection is DENIED.

SO ORDERED.

/s/ _____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: April 14, 2022
Washington, D.C.