UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

REPLY IN SUPPORT OF RESPONDENTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

Complainant attempts to avoid summary judgment by (1) declaring that a disputed fact must exist because Complainant does not know whether or not she relies on NFPA 61 in establishing a recognized hazard; (2) arguing that Imperial should have ignored provisions of NFPA 61; (3) threatening an allegedly disruptive interlocutory appeal if things do not go well for Complainant regarding this motion; and (4) attempting to impugn the integrity of Imperial's employee and undersigned counsel. None of these arguments address whether there exists a genuine issue of a material fact.

1. Complainant's Response to Respondents' Motion for Partial Summary Judgment ("Complainant's Br."), Paragraph II, Page 7. Imperial's argument is clear. If Complainant bases its general duty allegations on the requirements of NFPA 61, then NFPA 61 clearly exempts the bucket elevators from the requirements Complainant seeks to impose. After an inspection of Imperial's Port Wentworth facility involving 5 to 14 compliance officers continuously on site for four months, Complainant very publicly leveled allegations against Imperial that it had "willfully" violated certain standards at issue, including one of the items at issue in this motion. Now, in an attempt to avoid summary judgment, Complainant takes the unusual position that

Complainant does not know whether the citations at issue are based on NFPA 61, and argues that it is somehow Imperial's job to establish the basis for Complainant's allegations herein. Complainant's strategy fails for two reasons. First, Federal Rule of Civil Procedure 56(e)(2) provides that "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." Second, it is the Complainant's burden to establish that either the employer or its industry recognized the hazard. *See Sec'y of Labor v. Otis Elevator Co.*, 21 O.S.H. Cas. (BNA) 2204, 2007 O.S.H.D. (CCH) ¶ 32920 (OSHRC 2007). Given the notations in Complainant's inspection file and the fact that the purported requirements and recommended abatement methods for the bucket elevators set out in Citation 1 Item 5 and Citation 2 Item 2 are identical to those set forth in NFPA 61, it seems clear that Complainant did so rely upon NFPA 61. While the Complainant states that she has "made no such representation" (Complainant Br. at 6 n.2) regarding the purported requirements, notably absent from her response brief is any contention that she does not in fact rely upon NFPA 61 as evidence of the industry standard. Complainant either does rely upon NFPA 61 or she does not so rely.

2. Complainant's Br., Paragraph II(A), Page 7-8. Complainant also attempts to explain away NFPA 61's exemptions for bucket elevators, apparently urging that NFPA 61 is a confusing, vague and conflicting standard. That may be, but the exemption at issue explicitly provides an "[e]xception" for "[l]egs that have . . . belt speeds below 2.5 m/sec (500/ft/min)." Implicit in Complainant's response is her position that Imperial should have ignored a clear exemption for its bucket elevators under NFPA 61. Imperial submits that the Complainant is not free to choose between those parts of the NFPA she finds advantageous and those which she would prefer to disregard, or flip-flop her position on the issue as she sees fit from case to case. Assuming

Complainant relies upon NFPA 61 as a basis for industry recognition, given NPFA 61's clear exemption, Complainant cannot establish as a matter of law that the sugar industry recognized a hazard with respect to bucket elevators that run at less than 500 FPM.

3. Complainant's Br., Paragraph II(B), Page 8-9. Complainant cannot establish that Imperial recognized a hazard related to the items at issue. While Complainant argues that Imperial is "aware of the fire and explosion hazards associated with sugar," it does not follow that Imperial thus recognized a hazard with respect to bucket elevators explicitly exempted from NFPA 61, one of the sources from which Complainant alleges Imperial's knowledge regarding the combustibility of sugar dust was gleaned. (Complainant's Br. at 8 (noting that "Doug Sikes, Imperial's Corporate Safety Manager, maintained a subscription to the NFPA and possessed a copy of NFPA 61")).

Complainant further argues that "[t]he fact that [one of Imperial's] bucket elevator[s] had explosion relief venting raises the inference that Imperial recognized that there was an explosion hazard even at the slower speeds." (Complainant Br. at 9, 12 (noting that "Imperial chose to equip some elevators with protective devices in accordance with NFPA").) The law is clear, however, that employer precautions, standing alone, are insufficient to establish employer recognition of a hazard. *See Secretary v. Oberdorfer Indus., Inc.*, 20 O.S.H. Cas. (BNA) 1321, 2002 O.S.H.D. (CCH) ¶ 32697 (OSHRC 2003) (explaining that employer "precautions do not establish hazard recognition in the absence of other supporting evidence"); *see also S&H Riggers & Erectors, Inc. v. O.S.H. Review Comm'n*, 659 F.2d 1273, 1284 (5th Cir. 1981) (rejecting contention that recognition of hazard could be established by fact that employer made voluntary safety efforts reducing the hazard and noting the "folly of discouraging an employer" from taking voluntary precautions).

3. Complainant's Br., Paragraph II(C), Page 10; Paragraph III. Contrary to Complainant's contention that Imperial's declaration and exhibits are somehow insufficient,

Imperial has established via the Declaration of Dwayne Zeigler and the exhibits attached thereto that its bucket elevators operated at belt speeds of far less than 500 FPM. While Zeigler did not know the speed of the belts on Imperial's bucket elevators when asked in his administrative deposition, as is clear in his testimony, he explained to Complainant where and how such information could be found. After realizing the importance of the speed of the bucket elevators following the issuance of the citations, Imperial followed up on this information in the manner suggested by Zeigler. As a representative of Imperial, Zeigler then authenticated and interpreted the information regarding the speed of the bucket elevators in his Declaration, wherein he clearly states that Imperial's "[p]acking house elevators did not operate at speeds at or in excess of 500 FPM."[1] (Zeigler Decl. ¶ 6).

[1] Complainant's suggestions that Dwayne Zeigler or undersigned counsel somehow acted improperly are calumnious. During the investigation, Complainant was given a guided tour of all documents it claimed it needed and received 30,000 pages of same. (*See, e.g.*, Letter from Charles H. Morgan to Karen E. Mock dated March 26, 2008, attached hereto as Exhibit "A"). Additionally, Zeigler testified exactly where and how information regarding belt speeds could be obtained, but it appears that Complainant never followed up on this advice. Despite these numerous opportunities to obtain the information at issue during its investigation, Complainant now complains that Imperial did not produce the documents relating to belt speeds of the bucket elevators in response to Complainant's discovery requests prior to the submission of its Motion for Partial Summary Judgment. (Complainant's Br. at 12). Importantly, it is not clear to Imperial that the documents in question are even responsive to Complainant's discovery requests. Several of Complainant's requests are targeted specifically at certain citations and items within those citations, yet none of these seek information regarding the items at issue. (*See* Complainant's First Requests for Prod. of Documents Nos. 26-32). In any event, Imperial has now produced the documents in question, and did so on January 27, 2009, just fifteen (15) days after it served its written discovery responses. By contrast, Imperial continues to wait for Complainant to produce the remaining non-privileged portions of her own inspection file. Additionally and ironically, Complainant now insists on discovery on industry standards relating to bucket elevators, while at the same time resisting discovery on industry standards regarding any other issue in this action. (*See* Respondents' Motion to Depose OSHA Compliance Officers).

Respectfully submitted, this 9th day of March 2009.

/s/ Charles H. Morgan
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Secretary of Labor v. Imperial Sugar Company and Imperial-Savannah, L.P.
OSHRC Docket No. 08-1104
Reply in Support of Respondents' Motion for Partial Summary Judgment

The Hon. Covette Rooney

Exhibit A
March 26, 2008 Letter to Karen E. Mock from Charles H. Morgan

Served electronically
on March 9, 2009

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March 26, 2008

VIA E-MAIL

Karen E. Mock, Esq.
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61 Forsyth Street, SW
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Re: Imperial Sugar

Dear Karen:

Thank you for your letter dated March 25, 2008 regarding the status of our document production in response to the several subpoenas served by OSHA in connection with this investigation.

As you know, to date, OSHA has served Imperial Sugar Company and Savannah Foods & Industries, Inc. (collectively referred to, for purposes of this response, as "Imperial Sugar") with four subpoenas requesting documents, with a total of 134 separate requests for documents. On Friday, March 21, 2008, you informed me to expect a fifth subpoena with additional requests for documents. Enclosed with this letter are our formal responses to the February 19, 2008 subpoena, which shows the requests that we have completed and those requests for which we are continuing our search. We will follow up with responses to the subsequent subpoenas.

As we have discussed, the process of gathering, reviewing and producing documents after the explosion here on February 7, 2008 has been difficult for several reasons, including as follows: (1) much of the plant has been destroyed; (2) as a result of the explosion, Imperial Sugar's computer servers were down for an extended period of time; and (3) our access to the Administration Building, where many responsive documents are located, was restricted for an extended period of time because of industrial hygiene sampling results. Notwithstanding those difficulties, Imperial Sugar has produced a large volume of documents to OSHA and has made available a large volume of documents for OSHA's review at OSHA's convenience. Specifically:

(1) Prior to the issuance of the subpoenas, OSHA made several informal requests for documents, and Imperial Sugar provided documents relating to employee information, hazardous

materials, asbestos abatement, contractor employees and relationships, and safety information during the weeks of February 11-15 and 18-22, 2008.

(2) In response to the subpoenas, Imperial Sugar has, to date, produced approximately 20,375 pages of documents to OSHA on the following dates: February 20 and 27, March 5, 6, 7, 11, 13, 19, and 21.

(3) The following requests for documents from OSHA call for engineering, mechanical, and technical documents (including diagrams, historical files, and manuals): Subpoena No. 1, Request Nos. 4, 19, 25, 26, 27, 31, 33, 34, 35, 36, and 37; Subpoena No. 2, Request Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36, 37, 40, 46, 51, 52; Subpoena No. 3, Request Nos. 4, 5, 6; and Subpoena 4, Request Nos. 12, 13, 14. Responsive documents are voluminous. On March 5, 2008, we provided OSHA an index of potentially responsive documents. We also offered to meet on March 7, 2008 with OSHA and the custodians of the documents to review the index and explain what responsive documents may be available for review. OSHA's response was that they could not meet until March 12, 2008. Accordingly, on March 12, 2008, we had the initial meeting, and on that same day we brought OSHA to Imperial's Administration Building, where they were given unfettered access to review and flag documents for production. We also provided one of the company's senior engineers to assist in this process and answer any questions that arose. The next day (March 13), we provided the same set-up, and OSHA again reviewed documents without limitation and with the assistance of a senior Imperial engineer. On both occasions, we copied, Bates labeled, and produced the flagged documents within 24 hours. We offered to continue this process until OSHA is satisfied that it has all the documents it needs, but to date, OSHA has not scheduled another session. We remain ready to provide OSHA access to all of these documents. I understand that OSHA does not wish to share the cost of copying these documents, so Imperial Sugar is agreeable to continue paying for the cost of copying these documents.

(4) Several of OSHA's requests are broad requests for two years of work orders. As we have explained, there are thousands of documents that could be responsive to these requests. OSHA has indicated that, at least initially, it is interested in work orders for the packaging house area for the last 6 months. On March 14, 2008, we provided to OSHA a summary report of those work orders, and on March 20, OSHA identified those work orders they would like Imperial to produce. On March 21, 2008, we produced those work orders (a total of 525 pages).

(5) Several of OSHA's requests seek data that is contained in the company's Wonderware data base. Last week, we arranged a meeting between OSHA and the system's custodian, in order to educate OSHA on the system's capabilities and enable OSHA to identify the specific categories of data it needs for its investigation. OSHA provided specific collection parameters on March 21. The queries have already been run, and the responsive documents will be produced in the next two days.

The parties have had several detailed meetings/conference calls with Kurt Petermeyer, John Deifer, you, Matt Gilligan and me regarding the status of document requests, including on March 5, 13, and 24, 2008. In these meetings, we have discussed the status of each document

request. I view these meetings as productive avenues for discussion regarding documents. Indeed, on March 24, Mr. Petermeyer indicated to me that he was satisfied, for now, with the flow of documents from Imperial Sugar. If you or Mr. Deifer believe differently, please let me know as soon as possible so that we may resolve any disagreement immediately.

Regarding an email search protocol, as you know, Matt Gilligan has emailed you a proposal today and I understand you will review it and get back to us.

Regarding documents that I view as covered by the self-audit policy, my concern was whether OSHA still viewed its policy regarding self-audits to be in effect, and I appreciate you confirming that OSHA's self-audit policy is indeed in effect. Imperial Sugar has already produced over 300 pages of documents that we believe are covered by the self-audit policy that are responsive to OSHA's requests. We are continuing to review documents that are responsive to these requests and will shortly be prepared to produce self-audit documents that relate to the issues of fires, explosions, or housekeeping and dust control.

Regarding the concern expressed in your March 25 letter about OSHA's access to the facility, on March 24 I discussed that concern with our structural engineer and with Kurt Petermeyer. We are providing the services of our structural engineer at our cost to help evaluate and manage the risks of entering near or in the area damaged by the explosion and fire. As the OSHA personnel fully know, they are nevertheless proceeding into an extremely dangerous area and they proceed at their own risk. My discussions with our structural engineer have convinced me that his only interest is to attempt to reduce the risk of entry by OSHA and others into the damaged areas, and he fully understands that we wish to make as many areas available to OSHA as soon as we can, so long as the access is deemed safe under the circumstances. Prior to our call on March 24, I discussed with Mr. Petermeyer his concerns about access to the site, relayed to him my previous discussion with the structural engineer, and Mr. Petermeyer indicated to me that he was satisfied for now that I had addressed his concerns. I believe he indicated that to you on the March 24 call. So, if there are continuing concerns about access, please let me know immediately.

Finally, while it is accurate to say that Imperial Sugar has not yet been able to produce all documents responsive to OSHA's numerous and continuing document requests, I think the above shows our good faith efforts and diligence in producing and making available a very large amount of documents in a short amount of time. We continue our diligent search for such documents and we will continue to produce these documents as soon as we can. We fully understand OSHA's urgency and we are working our hardest to accommodate that urgency. As you know, Matt Gilligan and I, along with other Alston & Bird lawyers, have been on-site almost continuously since February 8, 2008. We are devoting our full time and attention to this matter and to ensuring that OSHA gets the information it needs to complete its investigation.

Sincerely,

s/Charles H. Morgan

Charles H. Morgan

CHM:chm
Enclosures
cc: Matthew J. Gilligan, Esq.

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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.	)	
	)	

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 REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT was electronically served on March 9, 2009 on the following counsel for Complainant:

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