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

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

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Under consideration is Respondents' January 27, 2009, Motion for Partial Summary Judgment, Complainant's February 27, 2009, Response thereto, and Respondents' March 9, 2009, Reply. Respondents allege that summary judgment should be entered in their favor regarding the Complainant's general duty allegations with respect to bucket elevators contained in Item 5(b) of Citation 1 and Item 2(a) of Citation 2.[1] The subject citation items allege violations of Section 5(a)(1) of the Act, in that the bucket elevators, which convey sugar and generate combustible dust, presented recognized fire, deflagration, and/or explosion hazards.[2] It is Respondents' position that the

[1]In the absence of a specific Commission rule as to summary judgement, Rule 56 of the Federal Rules of Civil Procedure applies by virtue of Commission Rule 2, 29 C.F.R.§ 2200.2. The Federal Rule provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[2]The subject citations allege violations of Section 5(a)(1), the general duty clause which was enacted to cover serious hazards to which no specific standard applies. To prove a Section 5(a)(1) violation, the Secretary must establish that the employer failed to render its workplace free of a hazard, which was recognized by the employer or its industry, and which was causing or likely to cause death or

allegations fail as a matter of law because there is no genuine factual issue as to whether the bucket elevators are exempt from the purportedly applicable requirements and that the Secretary thus cannot establish the threshold requirement to establish a prima facie case, that is, the existence of a recognized hazard. Respondents allege that it is undisputed that all the bucket elevators in Imperial's packing house operated at or below belt speeds of 500 FPM, meeting the exemption requirements from the National Fire Protection Association ("NFPA") 61, which appears to be the industry standard relied upon by the Secretary in providing the basis for the recognition of the purported hazards. To the motion, Respondents have attached a declaration from Dwayne Zeigler, Imperial's Senior Manager Construction Engineering, which states, inter alia, that to his knowledge none of the bucket elevators listed operated at belt speeds at or above 500 FPM.

The Secretary disputes Respondents' allegation that there are undisputed facts which entitle Respondents to judgment as a matter of law. In support of her position, the Secretary, through the declaration of Kurt Petermeyer, OSHA Area Director, alleges that at the time of the inspection the speed of the bucket elevators was unknown to Mr. Zeigler,[3] and others; the declaration also cites additional evidence disclosed during the inspection in support of the Secretary's position. Furthermore, the Secretary disputes the fact that the exemptions found at NFPA 61 are evidence of Respondents' or the industry's recognition of fire and explosion hazards associated with the subject bucket elevator usage.[4] It is the Secretary's position that even at reduced speeds a recognized hazard can exist; therefore, the speed issue is not determinative of whether or not Respondents are entitled to judgment as a matter of law.

The Commission has long recognized that summary judgment is not appropriate where material facts are in dispute. *Van Buren-Madawaska Corp.,* 13 BNA OSHC 2157 (No. 87-214, 1989). Respondents have not met the initial burden of showing the absence of a genuine issue of material fact. I find that there is not an adequate record before me to establish that there are no material facts requiring trial for their resolution and that Respondents are entitled to relief as a matter of law.

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serious physical harm. In addition , the Secretary must demonstrate the feasibility and likely utility of specific abatement measures.

[3]The Secretary points to the narrow scope of the declaration in support of her position that there are material facts in dispute; she also questions Mr. Ziegler's competency to make such a statement.

[4]The Secretary's citation references NFPA 61 as a feasible means of abatement.

Respondents' Motion for Partial Summary Judgment is DENIED.

SO ORDERED this 13th day of March, 2009.

/s/ Covette Rooney
COVETTE ROONEY
U.S. OSHRC JUDGE

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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 Order Denying Summary Judgement was electronically served on March 13, 2009 on the following parties:

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