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
TO DEPOSE OSHA COMPLIANCE OFFICERS

1. Compliance Officer Testimony is Reasonably Calculated to Lead to Admissible Evidence Regarding Industry Practice.

Notably absent from Complainant's Response is any attempt to dispute the fact that industry practice and knowledge regarding combustible dust hazards is central to the Secretary's case. Apparently recognizing that she cannot now distance herself from the countless admissions that the Secretary has already relied, and intends in the future to rely, on evidence of industry practice, the Secretary argues that Imperial should be precluded from gathering its own evidence of industry practice because the Secretary does not like the way in which Imperial wishes to do so. (Complainant's Br., Paragraph II, Pages 5-9). Specifically, by making arguments regarding the ultimate admissibility of such evidence more appropriate for a motion in limine than a response to a motion seeking discovery, the Secretary contends, in essence, that better evidence than the testimony of compliance officers must exist (without explaining what that evidence is) and that the compliance officers that she selects to testify may not be those with the best knowledge about the practice in this industry. (*Id*.). The Secretary's arguments are wholly without merit.

Testimony from compliance officers regarding their recollection of inspections and the circumstances perceived during said inspections has frequently been *admitted* by the Commission as proof of industry practice and hazard recognition, and is thus undeniably *discoverable*. *See, e.g.*, *Sec'y of Labor v. Trinity Indus., Inc.*, 15 O.S.H. Cas. (BNA) 1481, 1992 O.S.H.D. (CCH) ¶ 29582 (OSHRC 1992); *Sec'y of Labor v. Lukens Steel Co.*, 10 O.S.H. Cas. (BNA) 1115, 1981 O.S.H.D. (CCH) ¶ 25742 (OSHRC 1981); 29 C.F.R. § 2200.52(b) and Fed. R. Civ. P. 26(b)(1). In fact, despite the Secretary's claim to the contrary, (Complaint's Br. at 6) Review Commission precedent makes it quite clear that compliance officers may not only opine about any hazards they encountered during inspections, but also whether the employer viewed the condition as a hazard.[1] *Sec'y of Labor v. Burkes Mech., Inc.*, 21 O.S.H. Cas. (BNA) 2136, 2007 O.S.H.D. (CCH) ¶ 32922 (OSHRC 2007) ("Indeed, both the compliance officer and a Gulf States manager recognized that the conveyor posed a danger to those who cleaned up debris while located in either of these areas"); *Sec'y of Labor v. S&G Packaging Co.*, 19 O.S.H. Cas. (BNA) 1503, 2001 O.S.H.D. (CCH) ¶ 32401 (OSHRC 2001) ("Additionally, CO Campbell testified that Scott Garner, S&G's plant manager, and Paul Wedyck, S&G's safety manager, told her during the investigation that they did not consider the rollers a hazard but admitted that they were aware of the rollers' unguarded condition").[2]

The Secretary now argues that, although *Trinity Industries* and *Lukens Steel* permitted compliance officer testimony regarding industry practice, such holdings should be narrowly

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[1] Imperial repeats that it does not seek to obtain any privileged information during the depositions. (Complaint's Br. at 6-7). If the Secretary prefers not to explain why she did not issue any citations for what would appear to be hazardous conditions, she is certainly free to do so.

[2] *See also Sec'y of Labor v. Rockwell Int'l Corp.*, 17 O.S.H. Cas. (BNA) 1801, 1995-1997 O.S.H.D. (CCH) ¶ 31150 (OSHRC 1996) (". . . the compliance officers concluded that the ramp also posed a fall hazard"); *Sec'y of Labor v. Miniature Nut & Screw Corp.*, 17 O.S.H. Cas. (BNA) 1557, 1995-1997 O.S.H.D. (CCH) ¶ 30986 (OSHRC 1996) ("The compliance officer hypothesized that MiniNut's operator was exposed to the hazard posed by this condition"); *Sec'y of Labor v. August Winter & Sons, Inc.*, 21 O.S.H. Cas. (BNA) 1381 (OSHRC ALJ 2005) ("Finally, CO Bubolz testified that although the load poses a hazard, should the excavator's hydraulics fail, the whole arm could jerk and catch Fezatte against the excavation wall, or it could fall and crush him").

limited to cases involving personal protective equipment and to cases in which the Secretary, as opposed to the employer, wants to use the testimony. (*See* Complainant's Br. at 7-8). As the Commission's rules make clear, however, "[i]t is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to the discovery of admissible evidence, *regardless of which party has the burden of proof*." 29 C.F.R. § 2200.52(b) (emphasis added). Indeed, the Commission frequently considers evidence of industry practice submitted by both the Secretary and employers alike, further demonstrating that the use of the testimony in question should not be narrowly limited as the Secretary urges. *See, e.g.*, *Sec'y of Labor v. Brooks Well Servicing*, 20 O.S.H. Cas. (BNA) 1286, 2002 O.S.H.D. (CCH) ¶ 32,675 (OSHRC 2003) (considering testimony of industry practice relating to exit routes from both the Secretary and the employer, and ultimately agreeing with the employer's position on industry practice).

Second, the Secretary takes issue with the fact that Imperial seeks to depose individual compliance officers "concerning the conditions at diverse inspection sites," stating that this "does not necessarily result in Complainant producing persons with particular industry knowledge or experience." (Complainant's Br. at 8-9). The Secretary's contention that the compliance officers *might* not have sufficient experience to testify regarding industry practice as a whole is, at best, an argument regarding ultimate admissibility of the testimony and does not provide a basis for denying discovery.[3] *See* 29 C.F.R. § 2200.52(b). Testimony of individual compliance officers regarding the conditions perceived at individual inspection sites, even if not

[3] Complainant's attempt to preclude Imperial from discovering facts by proffering arguments regarding the ultimate admissibility of the evidence is improper. See 29 C.F.R. 2200.52(b) ("It is not ground for objection that the information or response sought will be inadmissible at the hearing…"). Rather, 29 CFR 2200.52(b) allows for the discovery of "any matter that is not privileged and that is relevant to the subject matter involved in the pending case." Moreover, it is notable that Complainant did not argue in her response that any of the appropriate reasons for limiting discovery -- duplicativeness, burdensomeness, or ample opportunity to obtain the information elsewhere -- exist in this case. *See* 29 C.F.R. 2200.52(c)

admissible as offensive evidence of broad-based industry recognition, would certainly be admissible to rebut contradictory evidence of industry custom that will undoubtedly be presented by the Secretary. Further, Imperial must secure this testimony by deposition because most of the witnesses are outside Commission's subpoena power for a hearing.

2. Complainant's Attempt to Recast this Stated Reason for the Depositions is Without Merit.

The Secretary's only other argument for precluding Imperial from obtaining discovery on industry practice is her unsubstantiated allegation that Imperial has misrepresented its true purpose for wanting the requested discovery.[4] (Complainant's Br. at 3). Imperial made clear in its opening Memorandum that "through these depositions, Imperial seeks information relating to industry practice." (Imperial Br. at 1). Indeed, Imperial attached its Rule 30(b)(6) Notice that lists its specific areas of inquiry. Imperial's plan to inquire regarding the identities of the employees who conducted inspections and participated in the issuance of citations is clearly relevant given the Secretary's emphasis on the importance of a compliance officer's "hands on involvement" with industry conditions when determining ultimate admissibility of testimony on industry practice. (Complainant's Br. at 8). Nonetheless, having recast Imperial's discovery plan as a covert effort to seek only information regarding OSHA's enforcement of standards (Complainant's Br. at 3), the Secretary then attempts to persuade the Commission that

[4] The Secretary's offer to stipulate authenticity of the files is inadequate. (Complainant's Br. at 2, 5-6). First, the Secretary cannot authenticate the files of the non-party, state-plan agencies. *See* Fed. R. Evid. 901. Moreover, absent clarifying testimony relating to the facts observed, the files may not be admissible even if authenticated, or even if admissible may not be reliable. *See, e.g., Sec'y of Labor v. Brooks Well Servicing*, *Inc*., 2000 OSHD (CCH) ¶ 32,164 (OSHRC ALJ 2000), *rev'd on other grounds*, 20 O.S.H. Cas. (BNA) 1286 (OSHRC 2003) (out of court statements contained in OSHA 1-B form rejected because they did not fall into the hearsay exception); *Sec'y of Labor v. MJP Constr. Co.*, 1999 O.S.H.D. (CCH) ¶ 32018, n.20 (OSHRC ALJ 2000) *aff'd* 19 O.S.H. Cas. (BNA) 1638 (OSHRC 2001) ("The CO testified that his OSHA 1B, which showed only one ironworker, was in error, and that there were about 20 ironworkers on the deck"); *Sec'y of Labor v. J.E. Amorello, Inc.*, OSHRC 06-0834, 2007 WL 4618449 (OSHRC Aug. 30, 2007) (noting that "[p]hotographs provided by the compliance officer [were] inconclusive" because they "show[ed] the backhoe spanning the trench, but does not clearly depict whether it was located in a manner which rendered the ramp inaccessible" and thus relying on witness testimony). Further, absent extraordinary circumstances, a party "is entitled to prove its case free from any [party's] option to stipulate the evidence away." *Cf. Old Chief v. United States*, 519 U.S. 172, 189 (1997).

enforcement evidence does not bear upon the issue of industry practice and is not otherwise relevant (Complainant's Br. at 4-5)

Imperial does not concede that OSHA's pattern of enforcement is unrelated to either the issue of industry custom or the ultimate viability of the citations and violation classifications in this action. *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir. 1982). Even assuming *arguendo* that evidence regarding OSHA's enforcement of the standards is not relevant, the goal of the depositions at issue here is to elicit testimony regarding the actual condition of the various inspection sites, as observed by the compliance officers. As such, the cases cited by Complainant in Section I of her brief regarding the admissibility of OSHA's enforcement track record at a single employer site are entirely inapplicable. (Complainant's Br. at 4-5).

Accordingly, Imperial respectfully requests that the Commission grant its Motion to Depose OSHA Compliance Officers.

Respectfully submitted this 26th 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 in this action may be served and filed electronically. I further certify that a copy of REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DEPOSE OSHA COMPLIANCE OFFICERS was electronically served on March 26, 2009 on the following counsel for Complainant:

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