

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

SECRETARY OF LABOR,	
Complainant,	:
v.	:
IMPERIAL SUGAR COMPANY,	:
IMPERIAL-SAVANNAH, L.P.,	:
Respondents.	:

OSHRC DOCKET NO. 08-1104

ORDER

This matter comes before the undersigned on Respondents' Motion to Depose OSHA Compliance Officers ("CO's"). Specifically, Respondents seek to depose CO's of OSHA and of Michigan and Maryland OSHA, which are "State plan" states. Respondents contend the depositions are needed (1) to authenticate records of inspections of other facilities, which Respondent obtained pursuant to FOIA requests, and (2) to obtain testimony regarding the actual conditions that existed during the underlying inspections. Respondents claim they intend to use the depositions only to find out what was observed during other inspections as to large dust accumulations and that the deposition testimony of the CO's is relevant to matters of industry practice. The Secretary, in her response, states that she will stipulate to the authenticity of the records obtained by FOIA requests and anticipates the State OSHA agencies will do the same; thus, as the Secretary points out, the depositions are not needed to authenticate the records. The Secretary opposes the Motion, asserting that the information Respondents seek in the depositions is not relevant to the claims or defenses in this matter; in this regard, she notes that none of the prior inspections involved facilities owned or operated by Respondents. In addition to stating their arguments in writing, oral argument was made by the parties before the undersigned telephonically on this date. I have considered all of the parties' arguments, and I conclude that Respondents may depose the CO's, but only as set out below.

As the Secretary points out, in their Notice of Rule 30(b)(6) Deposition, Respondents are seeking the designation of one or more Federal OSHA employees to testify with respect to the following matters as to other, non-Imperial facilities:

1. "the specific physical conditions found and facts gathered at" the inspection

2. the authentication of documents in the inspection files

3. "the identities of all Complainant's employees and agents who have conducted inspections of or otherwise entered the Location [of the inspection] at any time since January 1, 2000, through the date of this Notice of Deposition"

4. "the identities of all of Complainant's employees and agents who participated in, reviewed or approved the decision to issue the citations regarding the Location [of the inspection]"

Number 2 above is no longer an issue, assuming that the Secretary and the State plan agencies will stipulate, as indicated, to the authenticity of the records in the inspection files obtained through FOIA requests. Furthermore, as to Number 4 above, I agree with the Secretary that the information sought in that item is privileged and that Respondents may not have discovery in that regard.

As to Number 1 above, I note that Rule 26(b)(1) states, in relevant part, that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...." I also note that "[r]elevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." Merrill v. Waffle House, Inc., 227 F.R.D. 467 (N.D. Tex. 2005) (citations omitted). On the other hand, upon reviewing the list of depositions Respondents wish to take, as set out on pages 1 and 2 of the Motion, I note that the list includes inspections that do not appear to involve sugar refineries. I conclude that discovery into inspections of facilities that do not conduct sugar refining would have no relevance to this matter with respect to industry custom and practice in sugar refineries. Respondents may thus only conduct the depositions set out in the list that involve inspections of sugar refineries. In addition, those depositions are limited to the information contained in the inspection files, such as the OSHA 1B's and photographs taken by OSHA. Respondents may, however, inquire into the designee's experience with sugar refineries, including OSHA inspections as well as other relevant work experience and education. Respondents may also inquire whether the designee has personal knowledge of any other inspections involving sugar refining facilities that are not already on the list in the Motion.

Finally, as to Number 3 above, I find that the information sought therein does not appear "reasonably calculated to lead to the discovery of admissible evidence," with one exception.

Respondents may ask the Secretary's designee, if that individual is not the CO who inspected the facility, to identify the OSHA CO who conducted the inspection about which the designee is testifying.

SO ORDERED this 31st 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 was electronically served on March 31, 2009, on the following parties:

Charles H. Morgan, Esq. <u>charlie.morgan@alston.com</u> Matthew J. Gilligan, Esq. <u>matt.gilligan@alston.com</u> Ashley D. Brightwell, Esq. <u>ashley.brightwell@alston.com</u> Jeremy D. Tucker, Esq. <u>jeremy.tucker@alston.com</u> KAREN E. MOCK <u>Mock.karen@dol.gov</u> ANGELA F. DONALDSON <u>Donaldson.angela@dol.gov</u>

> <u>/s/Arnita Acty</u> Legal Assistant