

**BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2005-4552  
OSHA INSPECTION NO. 308782267  
CSHO ID NO. Y8949

v.

FAY BLOCK MATERIALS, INC.

**ORDER ON MOTIONS**

RESPONDENT.

THIS MATTER was before the undersigned on the motions of Respondent, Fay Block Materials, Inc. and Its Successors, hereafter Fay Block, 1) For An Order Scheduling the Hearing in this Matter During the Last Part of July or Afterwards; 2) For An Order Compelling Production of Inspection File; 3) For An Order Granting Permission to Propound Interrogatories, Document Requests or Notice for Depositions; 4) For Permission to Require Answers to Interrogatories; and 5) on the Motion of Complainant, Commissioner of Labor of the State of North Carolina, For An Order Denying Respondent's Request for Discovery. With the parties having had a full and adequate opportunity to argue all the above matters, the undersigned issues the following decisions regarding the Respondent's first two motions as listed above:

- 1) A hearing in this matter cannot practically be scheduled sooner than the date requested by the Respondent as a result of the need to determine the pending motions herein, hence, the Motion to Schedule the Hearing in this Matter During the Last Part of July or Afterwards is GRANTED, and the Commission shall schedule the hearing at the earliest practicable date after September 30, 2006.
- 2) The Inspection File having been produced to Respondent on or about April 14, 2006, makes the determination of Respondent's second motion MOOT, thus no further consideration of the Motion to Compel Production of the Inspection File is required.

The Third, Fourth and Fifth motions as stated above all concern the same issue; hence they will be decided as one motion.

**ISSUE PRESENTED**

Has the Respondent shown good cause for allowing its motion for discovery?

**STATUTES, RULES OR REGULATIONS AT ISSUE**

**N.C.G.S. 95-136(e) and (e1)**

(e) The Commissioner is authorized to compile, analyze, and publish, in summary or detailed form, all reports or information obtained under this section. Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 1326 while such investigations and proceedings are pending, except that, subject to the provisions of subsection (e1) of this section, an employer cited under the provisions of this Article is entitled to receive a copy of the official inspection report which is the basis for citations received by the employer following the issuance of citations.

(e1) Upon the written request of and at the expense of the requesting party, official inspection reports of inspections conducted pursuant to this Article shall be available for release in accordance with the provisions contained in this subsection and subsection (e) of this section. The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party and shall be redacted from any copy of the official inspection report provided to the employer or third party. Witness statements that are in the handwriting of the witness or complainant shall, upon the request of and at the expense of the requesting party, be transcribed so that information that would not name or otherwise identify the witness may be released. A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. Nothing in this section shall be construed to prohibit the use of the name or statement of a witness or complainant by the Commissioner in enforcement proceedings or hearings held pursuant to this Article. The Commissioner shall make available to the employer 10 days prior to a scheduled enforcement hearing unredacted copies of: (i) the witness statements the Commissioner intends to use at the enforcement hearing, (ii) the statements of witnesses the Commissioner intends to call to testify, or (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer; provided a written request for the statement or statements is received by the Commissioner no later than 12 days prior to the enforcement hearing. If the request for an unredacted copy of the witness statement or statements is received less than 12 days before a hearing, the statement or statements shall be made available as soon as practicable. The Commissioner may permit the use of names and statements of witnesses and complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties.

**Rules of Procedure, North Carolina Occupational Safety and Health Review Board, Revised 2-3-92.**

**Rule .0404 entitled, "Discovery Depositions and Interrogatories,"** which states as follows:

- (a) Except by order of the Board or the hearing examiner, discovery depositions of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, and interrogatories, and requests for document and things, directed to parties or intervenors shall not be allowed.
- (b) In the event the Board or the hearing examiner grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.
- (c) The hearing examiner or Board may limit the extent of discovery, taking into account such considerations as: burdensome expense, prior opportunity of a party to acquire the information, the complexity of issues in the case, and other relevant factors.

**Rule .0709 of the Rules of Procedure entitled, "Construction,"** which states as follows:

These rules shall be construed to secure an expeditious, just, and inexpensive determination of every case.

**Rules of Procedure, United States Occupational Safety and Health Review Commission (Updated as of 080105)**

**§2200.53 Production of documents and things.**

(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:

- (1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served;
- (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 thereon.

(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 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 with the Judge and shall annex thereto his request, together with the response and objections, if any.

**29 CFR 2200.55(a)**

"General." 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 interrogatories upon any other party. The number of interrogatories shall not exceed 25 questions, including subparts, without an order of the Commission or Judge. The party seeking to serve more than 25 questions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of interrogatories.

**2200.55(b)**

"Answers." All answers shall be made in good faith and as completely as the answering party's information will permit. The answering party is required to make reasonable inquiry and ascertain readily obtainable information. An answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer, unless he states that he has made reasonable inquiry and that information known or readily obtainable by him is insufficient to enable him to answer the substance of the interrogatory.

**2200.55(c)**

"Procedure." Each interrogatory shall be answered separately and fully under oath or affirmation. If the interrogatory is objected to, the objection shall be stated in lieu of the answer. The answers are to be signed by the person making them and the objections shall be signed by the party or his counsel. The party on whom the interrogatories have been served shall serve a copy of his answers or objections upon the propounding party within 30 days after the service of the interrogatories. The Judge may allow a shorter or longer time. The burden shall be on the party submitting the interrogatories to move for an order with respect to any objection or other failure to answer an interrogatory.

**DISCUSSION**

The determination of what discovery should be granted, if any, in a case before the North Carolina Safety and Health Review Commission must be evaluated using the Rules of Procedure for the Commission and the applicable case law. The rules of the federal Occupational Safety and Health Administration are helpful but are not mandatory.

The North Carolina rules provide that discovery beyond the serving of Requests for Admission is not to be allowed without an order from the hearing examiner or the Board (now, Commission). Few cases have addressed this particular question in North Carolina, but the case of *Brooks v. Zachry*, 2 NCOSH 341, 346 (1982) is instructive. In this case, the Board was asked to rule whether the Commissioner should be allowed to conduct discovery. The Board in *Zachry* determined that, in the absence of rules of procedure that addressed the topic--and at that time, there were apparently no specific rules that addressed the issue of discovery--the Rules of Civil Procedure should govern but that a "showing of good cause is required." Since the *Zachry* decision, the Commission has adopted Rules of Procedure that prohibit depositions, requests for production and interrogatories except when specifically allowed (NCOSHC, Rules of Procedure, .0404). Hence, the motion of Respondent herein was made to require responses to its interrogatories and requests for production.

In *Brooks v. Weeks Construction Company*, 3 OSHANC 976, 90-1767a, the Board Chairman denied discovery, finding that it "would not serve any gainful purpose, but would only delay the case." (Review denied as invalid at 3 OSHANC 977.) Further, in a case where the Board refused to intervene as an appellate authority in a decision of the Chairman who had allowed discovery, the Board noted that the discovery which had been allowed had been "narrowly tailored" and that discovery that allowed the parties "to refine issues and facilitate the factfinder" had been appropriate when it was "restricted to enforcement proceedings and to a limited number of persons. . ." *Commissioner of Labor v. Sumter Builders, Inc.*, OSHANC, 93-2820 (Review denied.)

This Order is made after considering the submissions of the parties, the last of which was filed on June 7, 2006. Consistent with the decision in *Zachry*, each request of the Respondent has been analyzed to determine whether Respondent established good cause, or necessity, for the information to be provided. The controlling law in these motions is founded on North Carolina rules and cases as cited above; however, it is noted, specifically, that the federal rules allow interrogatories, up to 25 in number, to be served routinely without special permission. The law in North Carolina as stated in the decisions and Rules of Procedure adopted to regulate proceedings before this Commission are more narrowly conceived. This Order relies on North Carolina law.

Accordingly, the discovery that is allowed below is limited and restricted to that which has been justified by Respondent in its submissions. The few specific matters upon which discovery is allowed are designated below. Interrogatories 10 and 20 were not addressed by Respondent and are waived and thus NOT ALLOWED.

Complainant is hereby ORDERED, wherever an Interrogatory is ALLOWED, to produce its responses within fifteen (15) days of the date of this order, including responsive documents. Further, the individual Interrogatories are addressed as follows:

1. The fact that Interrogatory 1 may be a "standard" interrogatory does not establish that it is necessary. Whatever responses are allowed by this order will constitute statements of the Commissioner of Labor that Respondent may use at the hearing regardless of who provided the information. Interrogatory 1 is NOT ALLOWED.
2. Respondent does not, by only explaining the content of Interrogatory 2, establish the necessity of obtaining the information sought. The fact that a workplace fatality occurred is reason enough to justify the Commissioner's investigation. Inquiring further into the reasons for the investigation and how the investigation was commenced is not necessary to Respondent's defense. Respondent does not justify its inquiry. Interrogatory 2 is NOT ALLOWED.
3. Interrogatory 3's request for who attended the opening conference and the substance of what was learned in the opening conference, including the description of any documents revealed or disclosed in that conference is relevant; however, Respondent was present through its agents/employees and has since received the official inspection report. Respondent does not establish that the information is necessary to its defense, thus Interrogatory 3 is NOT ALLOWED.
4. Respondent fails to state an adequate basis for Interrogatories 4 and 5 by asserting only that they seek relevant facts that "might" be involved. This supposition fails to establish necessity. Interrogatories 4 and 5 are NOT ALLOWED.
5. Interrogatory 6 asks for measurements taken by the Compliance Officer and is information that relates directly to the determination of whether a serious violation occurred. If this information has not been provided in the official inspection report, then a request for this information is necessary to the Respondent's defense. Interrogatory 6 is ALLOWED.
6. Interrogatories 7 and 16 ask that the Commissioner tell the Respondent what Respondent or its agents said or produced to the CO. This information should have been produced already in the official inspection report, but if it has not been produced already, Respondent has the right to expect, upon requests made pursuant to G.S. 95-136 (e1) any statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer. The existence of this statutory provision and the production of the official inspection report reduces, if not eliminates, Respondent's need for the information requested. Further, Complainant is entitled to object to an interrogatory requesting its work product. To ask Complainant to "pin down" any claimed admissions inquires into Complainant's thought processes in preparation for the hearing--in contradiction to its work product rights. Interrogatories 7 and 16 are NOT ALLOWED.
7. Respondent's assertion in Interrogatory 8 that whether all photographs have been given to Respondent is "significant" does not establish necessity; however, any photograph that Complainant intends to use in the presentation of its case would be important to the Respondent and therefore necessary to the preparation of its defense. Interrogatory 8 is ALLOWED.
8. Respondent's request in Interrogatory 9 solicits information relating to an autopsy of the decedent, as well as the decedent's medical history or condition and the names of persons with such knowledge. Respondent fails to show how such information is necessary to its defense. If Complainant has obtained witness statements relating to these aspects of the case, then upon proper request by Respondent, such statements can and should be produced if required by the provisions of G.S. 95-136(e1). Interrogatory 9 is NOT ALLOWED.
9. In Interrogatory 11, Respondent appears to ask for the basis of any expert opinions regarding "forklifts or trailers" (sic). Respondent is entitled to find such resources as it would like to support the opinions of its witnesses or to attempt to discredit the opinions of Complainant's witnesses, but the identification of resources concerning the operation of forklifts is not necessary to the determination of whether a citation was properly issued in this matter. In addition, this interrogatory appears to request information that would be subject to objection for the work product doctrine. Interrogatory 11 is NOT ALLOWED.
10. Interrogatory 12 solicits information concerning who was present for the Compliance Officer's inspection "so that we find out for certain who was present . . ." While this information is relevant, Respondent has received a copy of the official inspection report and will be entitled to the protections of G.S. 95-136(e1). Further, to show relevance alone is not the same as showing necessity; thus, Interrogatory 12 is NOT ALLOWED.
11. Interrogatory 13 requests further information about the "walk-around." Again, showing relevance alone does not establish necessity, and the protections provided by G.S. 95-136(e) and (e1) are sufficient. Interrogatory 13 is NOT ALLOWED.
12. Interrogatories 14 and 22 are asking for information relating to the decedent, his whereabouts prior to the fatality, the extent to which he was exposed to a hazard prior to the fatality, the conditions which should have been known by Respondent and, more particularly, anything known about the decedent that relates to his health or his consumption of alcohol or drugs. With the exception of its request concerning the decedent's exposure to hazard, Respondent's request is of limited, if any, relevance to the issues of an OSHA matter. Whatever exposure to hazard the decedent suffered should be detailed in the official inspection report. If not part of the inspection report, then Respondent will be entitled, subject to proper request, to the information as detailed in G.S. 95-136(e1). Thus, Interrogatories 14 and 22 are NOT ALLOWED.
13. Interrogatory 15 asks what Complainant has said to Respondent or its agents to indicate how it could change its practices to avoid a repetition of the accident that occurred. If Complainant said nothing on this point and Respondent is just looking for something that might help its defense, then the Respondent has not established that this inquiry is necessary. If the Respondent wants Complainant to repeat something that Respondent thinks was previously stated and not preserved that would help it defend itself, it has failed to establish the necessity of using interrogatories for this purpose. If Respondent's concern is for prevention, then this is not the forum for that topic. The purpose of this proceeding is to determine whether grounds exist to find that a violation of G.S. 95-126, et seq. occurred. Respondent has the right to submit additional Requests for Admissions as the Rules of Procedure do not limit the number of Requests for Admission that can be presented to an opposing party. Respondent will also have the opportunity to cross-examine Complainant's witnesses at the hearing. Respondent's Interrogatory 15 is NOT ALLOWED.
14. Interrogatory 17 concerns the Abatement Note on the Citation. Respondent states no basis for an answer being necessary and for that reason, Interrogatory 17 is NOT ALLOWED.
15. Interrogatory 18 seeks information relating to whether the forklift operator was negligent and, if so, how might he have avoided the hazard. Respondent states that details in regard to negligence and avoidance of the hazard are "critical," but it does not explain why discovery on this point will assist Respondent. Negligence is not an issue in an OSHA proceeding and is not a necessary inquiry (Commissioner of Labor v. Piedmont Electric Membership Corporation, OSHANC 2002-4192 "Negligence is not one of the essential elements [of the Complainant's burden of proof]". As Complainant's burden of proof in a hearing includes proof that abatement was feasible (See Commissioner of Labor v. Metric Constructors, OSHANC 96-3407), an interrogatory asking how the forklift operator might have "avoided the hazard" is a relevant request; however, the hearing is directed toward Respondent and its actions, as opposed to the employee's actions, except in so far as affirmative defenses make the individual employee's conduct relevant. Complainant has already cited one means of reducing the hazard, and this is sufficient. Respondent has not established that the inquiry is necessary to proceed with the hearing. Interrogatory 18 is NOT ALLOWED.
16. Interrogatory 19 asks the Complainant to say whether it looked into Respondent's training of its employees, specifically regarding access of employees to the loading area, and then inquires as to what the Complainant learned from its investigation. As in other interrogatories, if Complainant learned something from a witness that might support an affirmative defense or otherwise exonerate the Respondent, then such information must be produced upon proper request by Respondent. If, on the other hand, Complainant learned something that it intends to elicit from a witness to prove its citation that was not memorialized in a statement produced as a part of the official inspection report, then in that case, the necessity of a response is established. While the allowance of this request would seem to invade the Complainant's work product protected area, it would allow the Complainant to use surprise at the hearing in a manner not consistent with the disclosure provisions of the statutes and Rules of Procedure. Interrogatory 19 is ALLOWED.
17. Interrogatory 21 asks the Respondent for the facts relied upon, who performed tests or measurements, and the documents that were prepared "in that regard." Since Respondent asked that Complainant file pleadings, the facts relied upon have been stated, including measurements as to the lines of sight, and as well, the official inspection report gives the Respondent a review of the facts relied upon. Respondent does not argue the necessity of any aspect of the information requested in this paragraph; thus, there is no justification stated to require a response. Interrogatory 21 is NOT ALLOWED.
18. The second Interrogatory 22 (sic 23?) identified in Respondent's June 2, 2006 filing asks only about "impediments to the view of the forklift operator." Respondent does not argue that there is any necessity to produce this information; thus, Respondent fails to justify this request. Interrogatory 22 is NOT ALLOWED.
19. As in Interrogatory 6, Interrogatory 24 asks for measurements taken by the Compliance Officer. If this information exists and has not been included in the official inspection report, then it should be necessary to Respondent's defense. Interrogatory 24 is ALLOWED.
20. Respondent's Interrogatory 25 asks for information about expert witnesses without explaining why, in these proceedings, there should be disclosure of experts in advance. Failing to justify the necessity for this, Respondent's Interrogatory 25 is NOT ALLOWED.
21. Respondent does not explain the content or purpose of Interrogatory 26. The assertion that the interrogatory is requesting information "usually required" does not establish that a response is necessary. Interrogatory 26 is NOT ALLOWED.

This the 22nd day of August, 2006.