IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor,

Petitioner,

v.

GREDE WISCONSIN SUBSIDIARIES, LLC,

Respondent.

OPINION AND ORDER

13-cv-017-wmc

In this action, petitioners Hilda Solis and the United States Department of Labor ask this court to enforce compliance with an administrative subpoena duces tecum issued by the Occupational Safety and Health Administration ("OSHA") for internal audit documents prepared by respondent Grede Wisconsin Subsidiaries, LLC ("Grede") in connection with an ongoing inspection of one of its foundries. After considering the parties' briefing and oral argument, the court concludes that, having publicly adopted a "Final Policy" advising employers like Grede that OSHA would refrain from using voluntary self-audits "as a means of identifying hazards upon which to focus inspection activity," OSHA has created a reasonable expectation of privacy in those audits such that it cannot subpoena them for general investigatory purposes without violating the Fourth Amendment. ("Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits," Fed Register # 65:46498-46503.) Once OSHA identifies "an independent basis to believe that a specific safety or health hazard warranting investigation exists," however, its broad subpoena powers in the area of health and safety in the workplace and the Fourth

Amendment authorize OSHA to enforce an administrative subpoena for "relevant portions of voluntary self-audit reports relating to the hazard" as expressly set forth in that same policy. (*Id.*)

BACKGROUND

Pursuant to the Primary Metals National Emphasis Program, OSHA initiated an inspection on August 1, 2012, of Grede's metal foundry in Browntown, Wisconsin. On September 25, 2012, OSHA requested access to certain safety and health documents kept by Grede, including internal safety audits for the foundry compiled by the company between 2010 and 2012. When Grede refused to turn over the audits, OSHA served it with a subpoena on October 17, 2012.

Grede continues to resist, maintaining that OSHA is barred from obtaining the audits by (1) an agency rule (which petitioners maintain is an agency "policy") and (2) the Fourth Amendment. OSHA counters that (1) it has no "rule" restricting its access to a company's internal audits; (2) it is in any event acting consistent with its articulated policy in seeking the self-audits *after* initiating an inspection; and (3) in light of Grede's past violations of that Act and violations discovered during its ongoing investigation, its exercise of the administrative subpoena power under the authority of Section 8(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 657(b)) meets the requirements of the Fourth Amendment.

OPINION

I. Scope of OSHA's Subpoena Power Over Self-Audits

Because it leads to "the compulsory production of private papers," a person served with a subpoena duces tecum by a governmental agency is entitled to the Fourth Amendment's protection against unreasonableness. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). According to the Supreme Court, "reasonableness" means that an administrative subpoena duces tecum must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. City of Seattle*, 387 U.S. 541, 544 (1967).

OSHA is authorized by statute to investigate health and safety violations in the workplace, an exceedingly broad mandate. 29 U.S.C. § 657(a). Because a wide variety of documents -- including internal safety audits -- are arguably relevant to the scope of such an investigation, OSHA's general subpoena power is correspondingly broad. Judging scope based solely on the investigatory powers conferred by the OSHA statute, the court might well enforce the instant subpoena because OSHA has met the low burden of showing that (1) these documents would advance its investigation of possible health and safety violations and (2) production would not be "unreasonably burdensome" for the respondent. However, the "relevancy and adequacy or excess in the breadth of the subpoena are *matters variable in relation to* the nature, purposes and scope of the inquiry." *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 203, 209 (1946) (emphasis added).

Here, despite enjoying broad statutory powers, OSHA publically committed to limit the exercise of its own investigatory authority in order to induce businesses to

perform self-audits of their own operations. Specifically, OSHA informed businesses through guidance published in the Federal Register that:

> (a.) OSHA will not routinely request voluntary self-audit reports at the initiation of an inspection. OSHA will not use such reports as a means of identifying hazards upon which to focus inspection activity.
>
> (b.) However, if the Agency has an independent basis to believe that a specific safety or health hazard warranting investigation exists, OSHA may exercise its authority to obtain the relevant portions of voluntary self-audit reports relating to the hazard.

(Fed. Register # 65:46498-46503.)

Despite providing this pulic assurance -- with the obvious goal of encouraging companies to thoroughly investigate and correct health and safety violations, thereby protecting far more workers than OSHA could hope to achieve through its own investigations alone -- OSHA now takes the position that its assurance was never adopted as a rule and, therefore, in no way binds the agency. In the court's view, however, it is irrelevant whether one calls this guidance a "rule" or merely a "final policy," or even whether it is legally binding on the agency for purposes outside of the exercise of its agency subpoena power. What is important is that it creates a reasonable expectation of privacy that businesses rely on in conducting internal safety audits; in turn, this expectation serves OSHA's paramount goal of promoting safety in the workplace.

A reasonable expectation of privacy is a touchstone of the Fourth Amendment and the "reasonableness" of a Fourth Amendment intrusion always requires "balancing the public interest against private security." *Okla. Press Pub. Co.*, 327 U.S. at 203. Even if, prior to the publishing of the agency's so-called "policy," OSHA's investigatory interests

outweighed respondent's privacy interests in its own safety audits, the court finds the balance shifted when OSHA deliberately raised respondent's reasonable privacy expectations.

Perhaps in recognition of this reality, OSHA also argues that its policy goes no further than to assure a company that it will not seek self-audits until an investigation has begun, but after that point OSHA retained an unrestricted right to any and all self-audit documents. But this position would require the court to ignore the remainder of the assurances given companies in the Final Policy as adopted by OSHA. Indeed, the Final Policy states flatly that the agency "will not use [voluntary self-audit reports] as a means of identifying hazards upon which to focus inspection activity" and only "if the Agency has an independent basis to believe that a specific safety or health hazard warranting investigation exists, [may it] exercise its authority to obtain the relevant portions of voluntary self-audit reports relating to the hazard." (Fed. Register # 65:46498-46503.) To find OSHA enjoys unfettered access to such reports without identifying "a specific hazard" warranting investigation would render these assurances (and respondent's resulting reasonable expectations of privacy) meaningless. Accordingly, OSHA must comply with its own, Final Policy when issuing a subpoena duces tecum for self-audits, at least until official repeal or modification of that policy.

II. Next Steps

At Wednesday's hearing, petitioner's counsel was unable or unwilling to disclose the specific hazards identified by its investigation, so at this point the court cannot

enforce the requested subpoena of Grede's self-audits.[1] However, OSHA did indicate that it will shortly be issuing administrative citations, which will necessarily disclose one or more hazards identified during its investigation. Once OSHA does so, respondent will be obligated by OSHA's subpoena to produce promptly any portions of their internal audits relevant to the articulated hazards.

Petitioner continues to maintain that it has the legal right to subpoena and inspect *all* of respondent's self-audit documents in furtherance of its administrative investigation. In light of the fact that OSHA did not have an opportunity to fully brief its position in response to Grede's substantial, recently-filed brief on the subject, the court will allow additional briefing by both sides. Petitioner may respond and respondent reply as set forth in the court's order below.

ORDER

IT IS ORDERED that:

1) petitioners' motion to compel compliance (dkt. #1) is DENIED IN PART AND GRANTED IN PART as set forth above;

2) if and when OSHA discloses independently-identified hazards found at the Browntown facility, respondent must promptly produce any portion of their internal audit documents relevant to any of these articulated hazards;

3) petitioner will have 10 days from the date of this order to file a responsive brief on the scope of its subpoena power over Grede's self-audit documents under the circumstances of this case; and

[1] At one point, petitioners' counsel indicated that the specific hazards were (1) air contamination and (2) racking and shelving units. However, he later clarified that petitioner would not make a definitive statement of the hazards found at the Browntown facility until it issues formal citations against the company.

4) respondent will have an additional seven days to file a reply, if any.

Entered this 1st day of February, 2013.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge