No. 15-9554

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LONGHORN SERVICE CO.,

Appellant

v.

THOMAS E. PEREZ, SECRETARY OF LABOR;
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Appellees

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge John H. Schumacher)

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

ANN S. ROSENTHAL
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER PHILLIPS
Counsel for Appellate Litigation

RADHA VISHNUVAJJALA
Attorney
U.S. Department of Labor
200 Constitution Ave. NW Rm. S-4004
Washington, D.C. 20210
(202) 693-5445

JANUARY 13, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Pages**

STATUTES AND REGULATIONS:

MISCELLANEOUS:

STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes his legal arguments are adequately presented in his brief and oral argument is not necessary.

JURISDICTIONAL STATEMENT

The Occupational Safety and Health Review Commission ("the Commission") had jurisdiction over this enforcement proceeding pursuant to section 10(c) of the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. § 659(c). Administrative law judge ("ALJ") John Schumacher issued his Decision and Order on April 30, 2015. Decision and Order ("Dec.") at 635.[1] Longhorn Service Co. ("Longhorn") filed a timely petition for discretionary review with the Commission on May 22, 2015. The Commission declined review and on June 4, 2015, ALJ Schumacher's Decision and Order became a final order of the Commission that disposed of all of the parties' claims. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90; Notice of Docketing at 669; Notice of Final Order at 678. Longhorn filed a timely petition for review with this Court on July 30, 2015. *See*

[1] Citations to the record contain the name of the document and a reference to the page number in the Agency Record that was filed with this Court by the Occupational Safety and Health Review Commission. Citations to Longhorn's opening brief contain the name of the document and the page number at the bottom of the page.

29 U.S.C. § 660(a). This Court has jurisdiction pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly determined that Longhorn violated 29 C.F.R. § 1910.23(a)(8), which requires employers to guard "floor holes" of specified dimensions, where the unguarded hole in Longhorn's rig floor measured approximately twelve by twenty-four inches and presented a tripping and falling hazard but was too small for a person to fall through.
2. Alternatively, whether substantial evidence in the record established that Longhorn violated 29 C.F.R. § 1910.23(a)(7), which requires employers to guard "floor openings" of specified dimensions, where Longhorn neither "constantly attended" nor provided standard railings for the hole in the rig floor.
3. Whether the ALJ correctly found that the hole in the rig floor was not "constantly attended" within the meaning of 29 C.F.R. § 1910.23 where Longhorn did not have an employee specifically designated to monitor the hole.
4. Whether the ALJ properly characterized Longhorn's violations of 29 C.F.R. § 1910.23(a)(8) and § 1910.23(c)(1) as serious where the compliance officer's testimony established that an employee's exposure to an unguarded

hole in a rig floor surrounded by heavy moving machinery could result in death or serious physical harm, including amputation, and exposure to an open-sided unguarded platform more than seven feet above the ground could result in serious physical harm such as broken bones or back injuries requiring medical attention.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Finding that occupational injuries and illnesses "impose a substantial burden" upon interstate commerce, Congress enacted the OSH Act to "assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(a), (b). To effectuate this purpose, the OSH Act authorizes the Secretary of Labor ("Secretary") to promulgate and enforce occupational safety and health standards.[2] *Id.* §§ 654, 655, 658. OSHA enforces these standards by issuing citations requiring cited employers to abate violations and, where appropriate, pay a civil penalty. *Id.* §§ 658-659, 666.

If an employer contests a citation, the contest is adjudicated by the Commission, an independent adjudicatory body not within the Department of

[2] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs the Occupational Safety and Health Administration ("OSHA"). *A/C Elec. Co. v. OSHRC*, 956 F.2d 530, 531 (6th Cir. 1991); Secretary of Labor's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

Labor. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute. *Id.* §§ 659(c), 661(j). The full Commission may review the ALJ's decision. *Id.* § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, the ALJ's decision becomes the final order of the Commission. 29 U.S.C. § 661(j). Any person adversely affected or aggrieved by a final order of the Commission may petition an appropriate court of appeals for review of the order. *Id.* § 660(a).

A violation of an OSHA standard is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The relevant inquiry is not the probability that an accident would occur, but rather, the probability of death or serious bodily injury should an accident occur. *Kent Nowlin Constr. Co. v. Occupational Safety & Health Review Comm'n*, 648 F.2d 1278, 1282 (10th Cir. 1981). This Court has acknowledged that the accident itself need only be possible, not probable. *Id*.

In Part 1910, Subpart D, *Walking-Working Surfaces*, 29 C.F.R. § 1910.23, OSHA has prescribed requirements for "Guarding floor and wall openings and holes."[3] Section 1910.23(a)(8) provides that "[e]very floor hole into which persons can accidentally walk shall be guarded by" a standard railing with standard toeboard, a floor hole cover, or a removable standard railing, or "shall be constantly attended by someone." Similarly, paragraph (a)(7), which governs

[3] Part 1910 contains general industry standards. Parallel standards applicable to floor holes and openings at construction sites are contained in Part 1926.

"floor openings," provides that these "shall have standard railings, or shall be constantly attended by someone."

The definition section for Subpart D defines a floor hole as "[a]n opening measuring less than 12 inches but more than 1 inch in its least dimension . . . through which materials but not persons may fall; such as a belt hole, pipe opening, or slot opening." 29 C.R.R. § 1910.21(a)(1). Floor openings are larger than floor holes: "an opening measuring 12 inches or more in its least dimension . . . through which persons may fall." *Id.* § 1910.21(a)(2). In either case, however, these definitions are fluid if "the context requires otherwise." *Id.* § 1910.21(a).

B. Statement of Facts

1. *The Unguarded Floor Hole and Platform Sides in Longhorn's Oil-Well Servicing Rig, OSHA's Inspection of Longhorn's Oil-Well Servicing Rig, and Issuance of the Citations*

On April 12, 2013, OSHA Compliance and Safety Health Officer ("CSHO") Robert Klostermann[4] inspected Longhorn's oil-well servicing Rig 33 at the Laroque 34-12H well in Alexander, North Dakota. Dec. at 638. Longhorn, an oil-well servicing company, was at the worksite to wash out a drilled well hole to prepare for hydraulic fracturing. Trial Transcript ("Tr.") at 32-33. Longhorn's Rig

[4] CSHO Klostermann had been a CSHO in OSHA's Denver area office for fifteen years and had conducted approximately 1400 OSHA inspections, around thirty of which had been in the oil and gas industry. Tr. at 26-27. He had received extensive safety and health training while employed with OSHA, including taking approximately five classes that included training in the oil and gas industry. Tr. at 27.

33 had been set up at the worksite two days before the inspection. Tr. at 33, 193; Dec. at 639. There was a set of pulleys at the rig, called the traveling blocks, which were controlled by the rig operator. Tr. at 38-39; Dec. at 645. Longhorn employees had put pipe through a floor hole in the rig floor, into the well hole, and pumped water into the well hole to flush it out. Tr. at 32-33; Dec. at 639.

On the day of the inspection, Longhorn employees were in the process of pulling pipe back out of the well, known as "tripping out" pipe, because the washing process had been completed. Tr. at 33; Dec. at 640. When tripping out the pipe, the rig operator lowers the traveling blocks so that the workers on the rig floor can connect the lower part of the traveling blocks (called elevators) to the upper part of the pipe coming up through the floor hole from the well hole below. Tr. at 38-39. The employees on the rig floor then remove the slips, which keep the pipe in place, so that the operator can raise the traveling blocks and pull the pipe up out of the well hole and through the rig floor. Tr. at 39; Dec. at 645.

During his inspection, CSHO Klostermann observed numerous fall hazards. Dec. at 667. Longhorn's rig floor was seven feet, eight inches above the ground. Dec. at 638; Tr. at 45; Ex. C-4 at 273. The rig floor's dimensions were six feet by approximately eight or nine feet. Tr. at 45. CSHO Klostermann observed a hole in the rig floor at the opening where the pipe stem went through the rig floor and into the well hole. Tr. at 37. The hole had been created when employees pulled part of

the rig floor out to support the pipe slide, allowing employees to slowly lower the pipe through the floor hole and into the well hole. Tr. at 36-37; Ex. C-4 at 272. He estimated that the hole was approximately twelve inches by twenty-four inches. Tr. at 44-45. Neither a guardrail nor a hole cover was in place on or around the hole in the rig floor. Tr. at 46. CSHO Klostermann personally witnessed two Longhorn employees working on the rig floor in close proximity to the unguarded floor hole. Tr. at 48, 58-59; 193. There were also tools on the rig floor in the area around the hole. Tr. at 49; Ex. C-4 at 273. CSHO Klostermann also determined that there were no employees assigned to constantly attend the hole in the rig floor and that the employees working on the rig floor were frequently focused on things other than the hole, such as the traveling blocks, pipes, or tools. Tr. at 46-48.

Longhorn's rig floor had three exposed sides with no guardrails. Tr. at 69-72; Ex. C-10 at 294-96. One side, which was six feet across, had two chains rather than a guardrail. Tr. at 69-70, 73-74; Ex. C-10 at 296. The chains were inadequate to serve as a guardrail because both chains were connected on one side at the same point and had no vertical support connecting the chains. Tr. at 73; Ex. C-10 at 296. Thus, if a worker were to lean against the chains, the chains would deflect out and not prevent the person from falling. Tr. at 74. The rig floor had been without guardrails since its initial set up. Tr. at 76.

As a result of the inspection, OSHA issued Longhorn citations for seven serious violations and one repeat violation of OSH Act standards.[5] Dec. at 637. Longhorn contested the citations, Notice of Contest 511, and a hearing was held before an ALJ on November 13, 2014.

2. *The ALJ's Decision*

The ALJ found that Longhorn committed serious violations of 29 C.F.R. § 1910.23(a)(8) (failing to guard a floor hole), and 29 C.F.R. § 1910.23(c)(1) (failing to guard an open-sided platform). The ALJ reasoned that 29 C.F.R. § 1910.23(a)(8) applied to the hole in Longhorn's rig floor. He noted that OSHA defines a "floor hole" as an "opening measuring less than 12 inches but more than 1 inch in its least dimension, in any floor, platform, pavement, or yard, through which materials but not persons may fall; such as a belt hole, pipe opening, or slot opening." Dec. at 642 (*quoting* 29 C.F.R. § 1910.21(a)(1)). He also noted that the preface to the definition section for the cited standard, § 1910.21(a), indicated that the definitions apply unless context requires otherwise. Dec. at 642-43. The ALJ credited the testimony from CSHO Klostermann and David de los Angeles,[6] a Longhorn on-

[5] The only remaining citation items before the Court are Longhorn's serious violations of 29 C.F.R. § 1910.23(a)(8) (failing to guard a floor hole) and 29 C.F.R. § 1910.23(c)(1) (failing to guard an open-sided platform). This brief therefore only addresses these two citation items.

[6] The ALJ decision and trial transcript refer to this on-site supervisor as "David de los Angles." Longhorn's briefs refer to him as "David de los Angeles." Opening Br. at 3.

site supervisor, indicating that the hole was approximately twelve inches by twenty-four inches, and held that even if the least dimension of the hole had been slightly larger, context required finding that the hole in the rig floor was covered by the cited standard because it was not so large that a person was likely to fall through it. Dec. at 642-43.

The ALJ also found that the terms of § 1910.23(a)(8) were violated. Dec. at 643. "There were no standard railings or covers over the hole; in fact, the cover, as it were, had been slid out away from the floor … [and] there was nobody attending the hole while it was uncovered." *Id*. Likewise, the evidence demonstrated that Longhorn violated § 1910.23(c)(1). CSHO Klostermann's photos depicted "an elevated platform with guardrails missing in multiple places, as well as a chain rail that does not comply with the requirements of a 'standard railing.'" Dec. at 649.

The ALJ classified the violations of § 1910.23(a)(8) and § 1910.23(c)(1) as serious. Dec. at 646-47, 650. He credited CSHO Klostermann's testimony that the hole in the rig floor could cause employees to trip and fall and exposed them to amputation hazards from moving machinery. Dec. at 647; Tr. at 44, 60. Employees also could have tripped and fallen off the side of the rig platform, exposing them to falls of over seven feet. Dec. at 647. The ALJ accepted CSHO Klostermann's testimony that a fall from such a height could lead to serious injury, and noted multiple Commission ALJ cases holding the same. Dec. at 647, n.4.

3. *Longhorn's Petition to the Commission for Discretionary Review*

Longhorn petitioned the Commission for discretionary review of the ALJ's decision. 29 C.F.R. § 2200.91(b); Petition for Discretionary Review at 671-76. Longhorn took exception to the portions of the ALJ's decision that found a violation of 29 C.F.R. § 1910.23(a)(8); the "serious" classification of that violation; and the "serious" classification of the violation of 29 C.F.R. § 1910.23(c)(1). Petition for Discretionary Review at 672-73. The Commission declined review, and the ALJ's decision became a final order of the Commission on June 4, 2015. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90; Notice of Final Order at 678.

SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's determination that the hole in Longhorn's rig floor was a "floor hole" covered by 29 C.F.R. § 1910.23(a)(8). The standard defines a floor hole as an opening that is less than twelve inches in its least dimension, through which materials but not persons may fall. The record evidence, including the testimony of CSHO Klostermann and Supervisor de los Angeles, established that the hole in the rig floor was approximately twelve by twenty-four inches, and that materials but not people could fall through the hole.

Moreover, even if the hole in the rig floor was, as Longhorn asserts, a larger "floor opening" covered by § 1910.23(a)(7), substantial evidence in the record

nevertheless establishes that Longhorn violated this provision as well. Just like § 1910.23(a)(8), subparagraph (a)(7) requires employers to guard floor openings by either having an employee "constantly attend" the opening, or by providing guardrails. Longhorn did neither.

The ALJ also correctly determined that Longhorn failed to constantly attend the hole in the rig floor, within the meaning of the standard, to ensure the safety of its employees. Longhorn had fair notice of the meaning of the word attended from the common dictionary definition of the word. That Longhorn employees were generally aware of the hole and worked nearby was not sufficient to show that the hole was constantly attended, and the ALJ therefore properly found that Longhorn violated § 1910.23(a)(8).

Additionally, substantial evidence supports the ALJ's characterization of Longhorn's violations of § 1910.23(a)(8) and § 1910.23(c)(1) as serious. CSHO Klostermann testified that amputation, broken bones, and back injuries were likely injuries that could occur if there had been an accident on the rig floor. Longhorn provided no evidence to refute the CSHO's testimony and only argued that the CSHO was unqualified to testify about potential injuries because he was not an expert witness. Because testimony about potential injuries does not necessarily have to come from an expert witness, the ALJ properly upheld the serious classification of the cited violations.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the ALJ's factual findings under the substantial evidence standard set forth in the OSH Act, which provides that "findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. § 660(a). The Court has further clarified that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 866 (10th Cir. 2005). The Court reviews the ALJ's legal conclusions "to determine if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Universal Constr. Co. v. Occupational Safety & Health Review Comm'n*, 182 F.3d 726, 732 (10th Cir.1999). Review is narrow and highly deferential to the ALJ. *Id.*; *Compass Envtl., Inc. v. Occupational Safety & Health Review Comm'n*, 663 F.3d 1164, 1167 (10th Cir. 2011).

II. THE ALJ CORRECTLY FOUND THAT LONGHORN VIOLATED 29 C.F.R. § 1910.23(a)(8).

To establish a violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the violative condition; and (4) the employer knew, or with the exercise of

reasonable diligence could have known, of the violative condition. *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). Longhorn challenges only the ALJ's findings on the first and second elements, asserting that the ALJ incorrectly determined that 29 C.F.R. § 1910.23(a)(8) applied, and that in any event Longhorn did not violate the terms of the standard because the hole in the rig floor was attended given that Longhorn employees worked in close proximity to the hole. Longhorn's arguments are without merit.

As explained in detail below, the ALJ correctly found that § 1910.23(a)(8) applied to the hole in Longhorn's rig floor. The CSHO testified that the hole measured twelve by twenty-four inches. Additionally, "context," as referenced in the standard's definitional § 1910.21(a), supported the ALJ's finding that the cited standard applied. But even if the hole were instead deemed a "floor opening" covered by § 1910.23(a)(7), substantial evidence in the record established that Longhorn likewise violated that provision. In either case, Longhorn failed to provide guardrails or an employee to constantly attend the hole in the rig floor. And, Longhorn's assertion that it lacked notice of OSHA's interpretation of the word attend does not withstand scrutiny.

A. Substantial Evidence Supports the ALJ's Determination that § 1910.23(a)(8) Applied to a Rig Floor Hole that Measured Approximately Twelve By Twenty-Four Inches and Through Which Materials but not People Could Fall.

OSHA defines a floor hole as an "opening measuring less than 12 inches but more than 1 inch in its least dimension, in any floor, platform, pavement, or yard, through which materials but not persons may fall; such as a belt hole, pipe opening, or slot opening." 29 C.F.R. § 1910.21(a)(1). The standard's definition section further notes that its definitions apply "unless the context requires otherwise." §1910.21(a).

The ALJ found that the hole in Longhorn's rig floor was a floor hole covered by § 1910.23(a)(8) because it was approximately twelve inches in its least dimension and materials but not persons could have fallen through it. Dec. at 642-43. Substantial evidence supports the ALJ's finding. *See* Tr. at 36, 44-45. Although no precise measurements of the hole were taken, Tr. at 44, based on his visit to the worksite CSHO Klostermann estimated that the hole was approximately twelve inches by twenty-four inches. Tr. at 44-45. CSHO Klostermann also testified that the "rig floor hole caused a hazard in that employees could step into it causing them to trip and potentially fall into the hole." Tr. at 44. This testimony established that the hole was not one through which employees could fall all the way through to the ground, but rather, it was a hole into which employees could accidentally step and trip. *Id*. The executive director of an oil well servicing trade association,

Mr. Kenneth Jordan, further concluded from a photograph of Longhorn's worksite that it "would be difficult for [workers] to fall all the way through," and that "in this particular case … you'd almost have to be trying to fall through." Ex. R-1 at 341, 381-82, 389-90; Tr. at 224 (admitting Ex. R-1 into evidence).

Longhorn argues that the Secretary cited the wrong standard and that the hole in Longhorn's rig floor was too large in its least dimension to be a floor hole covered by 29 C.F.R. § 1910.23(a)(8), and that it was instead a "floor opening" under 29 C.F.R. § 1910.23(a)(7).[7] In support of this assertion, Longhorn points to muddled trial testimony in an attempt to establish that the hole in the rig floor was two feet in its least dimension. Opening Br. at 14, 18.

For example, during direct examination of Mr. de los Angeles, Longhorn asked the width of the "side-to-side" dimension, and Mr. de los Angeles stated that it's "probably around 2 foot," then that it's "[a] foot wide" but can slide out to up to three feet. Tr. at 207. At another point during the trial, Longhorn identified the longer dimension of the hole in Exhibit C-4, the photograph of the floor hole, as being at least two feet. Tr. at 151. Longhorn then characterized this as the "least dimension," stating that the "least dimension would have to be from side to side," and then had CSHO Klostermann confirm that the side-to-side dimension was

[7] A "floor opening" is "[a]n opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard through which persons may fall; such as a hatchway, stair or ladder opening, pit, or large manhole." 29 C.F.R. § 1910.21(a)(2).

approximately two feet after interrupting CSHO Klostermann's attempt to clarify the question. Tr. at 151-52. Longhorn now relies on this confused testimony to assert that CSHO Klostermann estimated the hole to be two feet in its least dimension. Opening Br. at. 14, 18. But this assertion clearly contradicts CSHO Klostermann's earlier testimony, Tr. at 44-45, as well as the written citation indicating that he believed the hole was approximately twelve inches in its least dimension and approximately two feet in its other dimension. Ex. C-1 at 241.

Longhorn therefore failed to provide any reliable evidence to refute CSHO Klostermann's testimony that the least dimension of the hole was approximately twelve inches. Tr. at 44-45. Longhorn also failed to address the record evidence establishing that the hole in the rig floor was not large enough for a person to fall all the way through. The ALJ's finding that the hole was a floor hole covered by § 1910.23(a)(8) was therefore supported by substantial evidence in the record and should be affirmed.

B. "Context" Further Established that § 1910.23(a)(8) Applied Because the Hazard Presented by the Hole in Longhorn's Rig Floor Was Consistent with a Floor Hole and not a Floor Opening.

OSHA's definition section for Subpart D notes that the ascribed meanings apply "unless the context requires otherwise." 29 C.F.R. § 1910.21(a). The ALJ accepted "[CSHO] Klostermann's measurements and further [found] that, given the location of the equipment surrounding the hole, it was a hole 'into which

persons may accidently walk" but not one 'through which persons may fall.'" Dec. at 643. Thus, "[i]n this context, [§ 1910.23(a)(8)] applies." *Id*. This interpretation of the standard was reasonable and conformed to the wording and purpose of the standard and must be upheld.

Section 1910.23(a) contains requirements for guarding various types of floor holes and openings. § 1910.23(a) (listing requirements for "every stairway floor opening," "every ladderway floor opening or platform," "every hatchway and chute floor opening," "every skylight floor opening," etc.). The clear intent of the standard is to cover all situations where a floor opening or hole may present a trip or fall hazard to employees.[8] *See id*. If a particular hole presents a hazard addressed

[8] In 2010, OSHA proposed a rule to amend Subparts D and I of 29 C.F.R. Part 1910, including 29 C.F.R. § 1910.21 and § 1910.23, to eliminate any confusion about the application of the standard. *See* 75 FR 28,862, 28,872 (May 24, 2010). The proposal eliminated the distinction between a floor hole and a floor opening. *Id*. The Summary and Explanation of the Preamble explains the proposed new definition:

> Hole. This term means a gap or void 2 inches (5 cm) or more in its least dimension, in a floor, roof, or other walking-working surface. The existing standard defines holes and openings separately; however, the treatment of each is essentially the same. The existing rule defines a floor hole as an opening less than 12 inches (30 cm) but more than 1 inch (3 cm) in its least dimension through which materials may fall, and defines a floor opening as a hole measuring 12 inches (30 cm) or more in its least dimension through which persons may fall. To bring clarity to the terms and consistency with its fall protection rules in construction industry standards, OSHA is proposing to use the term "hole" to describe all voids and gaps

by one definition, but has dimensions addressed by a different definition, § 1910.21(a) instructs OSHA and the public to look at the context to determine which specific subparagraph of the standard applies. *See* 29 C.F.R. § 1910.21(a) ("As used in § 1910.23, unless the context requires otherwise, floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.").

Longhorn asserts that the ALJ failed to explain how context required a finding that the hole in the rig floor was a floor hole despite the lack of precise measurements of the size of the hole. Opening Br. at 15. This is incorrect. The ALJ accepted CSHO Klostermann's testimony on the size of the floor hole, and further stated that "even if the hole were slightly larger than 12 inches in its least dimension (which Complainant does not concede), but was not such that a person was likely to fall through it, context requires a finding that the hole in question was, in fact, a 'floor hole.'" Dec. at 642-43.

Commission precedent is clear that when the size of an opening does not elucidate whether the opening is a "floor hole" or a "floor opening" under § 1910.21(a), the distinguishing factor is the hazard posed to the exposed employees.

> (holes and openings) in floors, roofs, and other walking-working surfaces.

Id. This proposed rule therefore confirms OSHA's intended broad coverage of the current standard.

In *G & R Machinery & Equipment Co., Inc.*, OSHA cited the employer for a violation of the floor hole standard at 29 C.F.R. § 1910.23(a)(8). 14 BNA OSHC 1146, 1147 (No. 88-707, 1989). After a hearing before an ALJ, OSHA moved to amend the citation to cite § 1910.23(a)(7) because the facts established at the hearing were more in line with the "floor opening" subparagraph of § 1910.23(a) than the "floor hole" subparagraph. *Id*. The ALJ granted the motion, noting the critical difference between the two definitions was the hazard addressed and that § 1910.21(a)(7) applied because the hazard was employee exposure to falls of twenty-four feet through an opening. *Id.*

Similarly, the ALJ in *Munro Waterproofings, Inc.* upheld a violation of the construction standard for floor openings instead of the cited construction standard for floor holes. 1976 WL 21642, at *4, *aff'd*, 5 BNA OSHC 1522, 1522 (No. 16264, 1977). The ALJ in *Munro Waterproofings* based his decision on his finding that the hole in question was twelve to fifteen inches in its least dimension *and* that a person could have fallen through the hole. *Id*. In *Milprint, Inc.*, OSHA alleged a violation of § 1910.23(a)(7), which had been amended at trial from § 1910.23(a)(8). 1973 WL 4212, at *8, *aff'd*, 1 BNA OSHC 1383, 1383 (No. 513, 1973). The ALJ vacated that citation, noting that the "testimony was not clear that the temporary floor openings were such that someone would fall in … ." *Id*. at *11. In *Peavey Co.*, the Commission vacated a citation for a floor hole under 29 C.F.R.

§ 1910.23(a)(8) because the evidence showed that no employees were actually exposed to the hazard. 16 BNA OSHC 2022, 2023 (No. 89-2836, 1994). But the Commission expressed no doubt that the floor hole standard applied, even though the hole was twelve by thirty inches. *Peavey Co.*, 16 BNA OSHC at 2022. The ALJ in *Peavey Co*. did not even mention the dimensions of the hole in his decision and determined that the standard applied because the hole was one into which someone could accidentally walk. 1992 WL 683626, at *2-3, *aff'd in part*, 16 BNA OSHC 2022.

In all of these cases, the primary inquiry was the hazard presented by the hole rather than the precise dimensions of the hole because ultimately, context determined the applicable standard. The ALJ therefore correctly determined in the instant case that § 1910.23(a)(8) applied to the hole in Longhorn's rig floor because it was a hole through which materials but not people could fall.

C. Even Assuming 29 C.F.R. § 1910.23(a)(7) Applied, the Record Evidence Likewise Established Longhorn's Violation of that Standard and Fair Notice of the Guarding Requirements for Floor Holes and Openings.

Even if the hole in Longhorn's rig floor were deemed a "floor opening" covered by § 1910.23(a)(7), as the Secretary argued in the alternative before the ALJ, the record evidence likewise established that Longhorn violated that standard. *See* Sec. Post-Hearing Br. at 594. This is because both paragraphs (a)(7) and (a)(8) of § 1910.23 require essentially the same forms of protection, which Longhorn

failed to provide. Longhorn would therefore not be prejudiced by this Court holding that the company violated § 1910.23(a)(7). *See G & R Machinery*, 14 BNA OSHC 1146, 1147 (No. 88-707, 1989) (amending floor hole citation to floor opening citation after hearing and finding no prejudice against employer); *Munro Waterproofings, Inc.*, 1976 WL 21642, at *4, *aff'd*, 5 BNA OSHC 1522, 1522 (No. 16264, 1977) (upholding violation of floor opening standard when OSHA cited employer under floor hole standard).

For these same reasons, Longhorn's assertion, Opening Br. at 13-15, that it lacked fair notice of the application of the cited standard lacks merit. The doctrine of fair notice requires an OSHA standard to give employers a fair and reasonable warning of the conduct it prohibits. *See Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994); *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). Here, Longhorn had fair notice that 29 C.F.R. § 1910.23(a) applied. Longhorn does not dispute that it understood § 1910.23(a), titled "Protection for floor openings," applied to the hole in the rig floor at its worksite. *See* Opening Br. at 13 ("OSHA's regulations impose specific requirements concerning floor holes and floor openings. *See* 29 CFR § 1910.23. At issue here, is the definition of floor hole versus floor opening."). Longhorn argues only that it did not have fair notice

that the Secretary would cite § 1910.23(a)(8), the paragraph for floor holes, instead of § 1910.23(a)(7), the paragraph for floor openings. Opening Br. at 13-15.

Under § 1910.21(a)(1) and (2), a "floor hole" measures less than 12 inches in its least dimension while a "floor opening" measures 12 inches or more in its least dimension. Taken together, paragraphs (a)(1) and (a)(2) were clearly crafted to encompass every hole or opening in a work floor that poses a trip or fall hazard to employees, and § 1910.23(a) contains the requirements for guarding these various types of floor holes and openings. The requirements for guarding a floor hole and a floor opening are nearly identical: § 1910.23(a)(7) requires all temporary floor openings to have standard railings or be constantly attended, while § 1910.23(a)(8) requires all floor holes into which persons can accidentally walk to be guarded by a standard railing with standard toeboard, a floor hole cover, or a person constantly attending the hole if the cover is not in place. So even if Longhorn believed that the hole in the rig floor was a floor opening covered by § 1910.23(a)(7), its obligations to abate the hazard would have been the same. And, the penalties under both subparagraphs are also identical. 29 U.S.C. § 666(b) (prescribing penalty amount for serious violation of any OSHA standard).

Furthermore, OSHA's definition of a floor hole included the examples of "a belt hole, *pipe opening*, or slot opening." 29 C.F.R. § 1910.21(a)(1) (emphasis added). This language expressly informed Longhorn that the standard covered the

hole in the rig floor, and the record evidence confirms this. CSHO Klostermann testified that the cited hole was a "floor hole where the pipe stem was into the well," and a photographic exhibit shows a pipe stem going into the hole. Tr. at 36; Ex. C-4 at 272. The hole was therefore precisely the type of opening referenced in the standard's definition of a floor hole, and the definition itself provided Longhorn with fair notice of the standard's coverage.

D. The ALJ Correctly Found that the Floor Hole Was not Constantly Attended Because Longhorn Did not Have a Designated Employee Monitoring the Hole.

The ALJ correctly found that Longhorn violated the terms of 29 C.F.R. § 1910.23(a)(8) because there were no standard railings or covers for the hole in the rig floor, and, "contrary to [Longhorn's] assertion, there was nobody attending the hole while it was uncovered." Dec. at 643. Longhorn argues it did not violate the standard because it "complied with the only available interpretation of the term 'attended' … ." Opening Br. at 28. Longhorn also asserts that its employees' proximity to, and general awareness of, the hole in the rig floor met the requirements of the standard. As explained below, these claims are baseless.

1. *The Meaning of the Phrase "Constantly Attended" is Plain and Unambiguous.*

Section 1910.23(a)(8) expressly states that if a floor hole does not have standard railings or a hole cover, it must be "constantly attended by someone." *See*

also id. § 1910.23(a)(7) (stating that if floor opening does not have standard railings it must be "constantly attended by someone"). The commonly understood meaning of attended is "to look after," "take charge of," or "watch over the working of." *See* Webster's Third New International Dictionary, Unabridged 140 (3d ed. 1961). And, the word attended in the standard is modified by the word constantly, meaning "without variation, deviation, or change;" "always;" or "with regular occurrence." Webster's Third New International Dictionary, Unabridged 485 (3d ed. 1961). The plain language of the standard therefore notified Longhorn that "constantly attended" meant a person would have to be monitoring the hole at all times to ensure that the hole did not present a hazard.

Longhorn asserts that § 1910.23(a)'s use of the word attended means only that employees were required to be within twenty-five feet of the hole. Opening Br. at 20. In support of this assertion, Longhorn points to a footnote in a 2010 OSHA letter of interpretation discussing an entirely different standard, 29 C.F.R. § 1926.351(d)(1), a construction welding standard. Letter from Bill Parsons, Acting Director, Directorate of Construction, OSHA, "Interpretation of 'unattended' in 29 CFR 1926.351(d)(1) with regard to electrode holders," available at 2010 WL 2865312 (Apr. 30, 2010) ("OSHA Interp. Letter"). Longhorn's reliance on this letter of interpretation is misplaced.

The construction welding standard referenced in the 2010 letter of interpretation states that "[w]hen electrode holders are to be left unattended, the electrodes shall be removed and the holders shall be so placed or protected that they cannot make electrical contact with employees or conducting objects." 29 C.F.R. § 1926.351(d)(1). An electrode holder becomes unattended when it is out of the welder's immediate control because another person could either come into contact with an electrode holder or bring a conductive object too close, resulting in burns or electric shock. OSHA Interp. Letter at 1. The hazard contemplated by § 1926.351(d)(1) and the circumstances at the worksite influence the determination of what it means to be "unattended." *Id.* Thus, in a crowded or loud environment, an electrode holder becomes unattended as soon as the welder steps away from it because the risk is greater that another person may approach the holder and the welder may not be able to verbally warn that person quickly or effectively. *See id.* Similarly, if the welder is working alone in a tightly controlled area, the electrode holder could still be considered to be attended even if the welder moves several feet away. *See id.*

In a footnote to that 2010 letter, OSHA explained that the meaning of the word attended varied by circumstance and by hazard, and contrasted the examples of powered industrial trucks and powder-actuated tools. *Id*. n.1. Those are deemed unattended if the operator is twenty-five or more feet away or can no longer see the

truck or tool because electrical hazards are more immediate than hazards involving powered industrial trucks or powder-actuated tools:

> Whereas an unauthorized employee could be injured immediately upon contact with an electrode holder, powered industrial trucks and powder-actuated tools don't pose such immediate contact hazards; in both of those scenarios, the unauthorized employee would need to do something with or to the equipment before an injury would occur. Welders simply do not have as much time to react to prevent injury to an approaching employee. For this reason, OSHA is adopting a stricter interpretation of "unattended" in the context of 1926.351(d).

OSHA Interp. Letter, n. 1.

The hazards covered by 29 C.F.R. § 1910.23 differ significantly from the hazards posed by powered industrial trucks or powder-actuated tools. The hazard of tripping or falling into a hole is immediate. On a rig floor surrounded by many moving parts, it would be difficult to effectively warn someone approaching the hole. Dec. at 653; Tr. at 44, 60 (describing moving equipment on a rig floor). Unlike with a powered industrial truck or a tool, an employee would not need to do anything with any equipment before an injury could occur. *See* OSHA Interp. Letter, n.1. Importantly, § 1910.23(a) uses the phrase "constantly attended," while the standards discussed in the 2010 letter of interpretation do not qualify the words attended or unattended. *Compare* 29 C.F.R. § 1910.23(a)(7) *and* 29 C.F.R. §1910.23(a)(8) *with* 29 C.F.R. § 1910.178(m)(5) *and* 29 C.F.R. § 1926.302(e)(6).

Longhorn mistakenly relies on *Usery v. Kennecott Copper Corp*., 577 F. 2d 1113 (10th Cir. 1977), to argue that the Secretary's interpretation of the word attended was unconstitutionally vague. Opening Br. at 22. In *Kennecott Copper*, the OSHA standard at issue stated that "ladders shall be provided," and the Secretary interpreted that to mean that employers shall require the use of ladders. 577 F. 2d at 1118. This Court found that the Secretary's interpretation failed to give the employer fair notice because the plain meaning of "provided" only required the employer to make the ladders available, not ensure their use. As the Court noted, "provided" is synonymous with "made available." 577 F. 2d at 1118. The employer in that case did make ladders available to the employees, so the Court affirmed the Commission's order vacating the citation. *See id*.

Longhorn asserts that the Secretary similarly ascribed a meaning to the word attended that was not adequately expressed in the cited standard. But the previously noted dictionary definitions of both attended and constantly squarely rebut this assertion. *See supra* p. 24. Longhorn's fair notice argument therefore fails.

2. *The ALJ Correctly Determined that Longhorn Employees' General Awareness of and Proximity to the Floor Hole Did Not Establish Constant Attendance as Required by the Standard.*

Substantial evidence supports the ALJ's determination that the hole in Longhorn's rig floor was not constantly attended within the meaning of 29 C.F.R.

§ 1910.23(a). *See* Dec. at 644; Tr. at 48. CSHO Klostermann testified that there were no employees monitoring the floor hole. *Id.* The ALJ emphasized that the standard requires an employee to "*constantly* attend" the hole and noted that the CSHO testified that the employees on the rig floor "were focused on the job at hand," rather than monitoring the hole to keep others away from it. Dec. at 643-44; Tr. at 48. The ALJ therefore properly reasoned that "an employee who is otherwise engaged in a work activity cannot constantly attend to the hole under the meaning of the standard." Dec. at 644.

The facts in this case are similar to those in *Chromalloy American Corp*., 1979 WL 8303 (No. 77-2788, 1979) (ALJ). In *Chromalloy*, the Secretary had cited the employer for a violation of § 1910.23(a)(7) for having an unguarded floor opening that was not "constantly attended by someone." 1979 WL 8303, at *1. The employer in *Chromalloy* argued that the floor opening was constantly attended because an operator was always nearby, and the ALJ rejected that argument because "the regulation contemplates an attendant whose function it is to guard the opening." *Id.* The operator was not constantly attending the opening because he would have been focused on his duties and not paying close enough attention to prevent an accident. *Id*. Likewise, the Longhorn employees on the rig floor were similarly focused on their duties, rather than the hole in the rig floor. The ALJ therefore correctly found that the Longhorn employees on the rig floor

were not constantly attending the floor hole and that Longhorn violated 29 C.F.R. § 1910.23(a)(8). Dec. at 644.

Longhorn argues that it complied with § 1910.23 because its employees were aware there was a hole in the rig floor and two employees were only a few feet away. Opening Br. at 20-21. Longhorn also implies that the hole was constantly attended because the duties of the employees on the rig floor included hauling pipe through the floor hole. Opening Br. at 20-21. However, general awareness of the hole is not sufficient when the requirement is *constant* attendance. For example, in *Stearns-Roger, Inc.*, the Commission examined a case involving a citation for the almost identical construction standard where there were holes in supports on which employees walked. 7 BNA OSHC 1919, 1921-22 (No. 76-2326, 1979). The employer claimed that employees could not accidentally walk into the holes because "the relative narrowness of the supports would require an employee to look precisely where he was going, thereby negating the possibility that an employee would place a foot in one of the holes." *Id*. at 1922. The Commission rejected this argument, explaining that "the standard is directed toward accidental situations when employees are not looking precisely where they are walking." *Id*.

Longhorn attempts to distinguish the facts of this case from *Chromalloy*. Longhorn asserts that in *Chromalloy*, the employee's focus on the opening was

secondary to his job function, while Longhorn's employees on the rig floor were focused on the hole the entire time they worked. Opening Br. at 20-21 ("Whereas Chromalloy may restrict the term 'attended' in secondary functions, it cannot be used when the function itself involves that which is attended."). This assertion mischaracterizes the reasoning in *Chromalloy*. 1979 WL 8303, at *1 (No. 77-2788, 1979) (ALJ). The ALJ in that case understood Chromalloy's argument to be that the opening was constantly attended because an operator was always nearby, as it was the operator's job to direct the tilting of the furnaces that created the opening. *Id*. The ALJ rejected that argument because "the regulation contemplates an attendant whose function it is to guard the opening," and the operator would be focused on the task of pouring and not focused on preventing accidents. *Id.* Thus, in *Chromalloy*, as in the instant case, an employee's focus on the floor opening or hole as he performed another job did not mean he was constantly attending the opening or hole within the meaning of § 1910.23.

III. THE ALJ CORRECTLY CHARACTERIZED LONGHORN'S VIOLATIONS OF 29 C.F.R. § 1910.23(a)(8) AND § 1910.23(c)(1) AS SERIOUS.

Substantial evidence in the record supports the ALJ's determination that Longhorn committed serious violations of 29 C.F.R. § 1910.23(a)(8) and §

1910.23(c)(1).[9] A violation is categorized as serious under the OSH Act if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). The relevant inquiry is not the probability that an accident would occur, but rather, the probability of death or serious bodily injury should an accident occur. *Kent Nowlin Constr. Co. v. Occupational Safety & Health Review Comm'n*, 648 F.2d 1278, 1282 (10th Cir. 1981); *Flintco, Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

The potential injury resulting from the violation of § 1910.23(a)(8) was tripping and falling onto the rig floor after stepping into the floor hole. Tr. at 44. This could result in serious bodily injury because of the many moving parts near the rig. Tr. at 44, 60. CSHO Klostermann testified that if a worker walked into the floor hole, tripped, and extended his or her arms for balance to prevent a fall, that worker could experience an amputation if a limb got caught between the traveling blocks and the pipe. Tr. at 39, 44, 60. The potential injuries resulting from a violation of § 1910.23(c)(1), which could lead to a fall of over seven feet from the unguarded rig floor, included broken bones or back injuries requiring medical attention. Tr. at 66.

[9] Longhorn does not dispute that the ALJ correctly affirmed the violation of § 1910.23(c)(1); it asserts only that the ALJ erroneously found the violation to be serious.

CSHO Klostermann based his testimony both on his inspection of the Longhorn worksite and his prior experience. He had spent fifteen years as a CSHO for OSHA, and had inspected approximately 1400 worksites, thirty of which involved the oil and gas industry. He had also taken thirty to thirty-five training classes with OSHA, including five related to the oil and gas industry. Moreover, fall hazards are common in a variety of workplaces, not just in the oil and gas industry. *See, e.g.*, *Beth Israel Med. Ctr.*, 1979 WL 8262, at *1 (No. 79-1658, 1979) (ALJ) (analyzing citation for violation of § 1910.23(a)(8) at hospital); *Pit-Stop, Inc.*, 16 BNA OSHC 1992, 1992 (No. 93-1295, 1994) (ALJ) (analyzing citation for violation of § 1910.23(a)(8) at motor vehicle service pit); *ConAgra Beef Co.*, 20 BNA OSHC 1585, 1586 (No. 03-0179, 2003) (ALJ) (analyzing citation for violation of § 1910.23(c)(1) at beef packing site). CSHO Klostermann was therefore more than qualified to testify as to potential injuries stemming from a fall or trip hazard on the rig floor.

Longhorn contends that the Secretary failed to establish serious violations of § 1910.23(a)(8) and § 1910.23(c)(1) because CSHO Klostermann was not qualified as an expert witness. Opening Br. at 22. Longhorn misunderstands the Secretary's burden of proof. The Secretary was not required to produce an expert witness to establish a serious violation of the cited standards, and ALJs routinely and properly credit compliance officer testimony on the seriousness of a violation. *See, e.g.*,

Sanderson Farms, Inc., 25 BNA OSHC 1304, 1308 (No. 14-0520, 2014) (ALJ) (crediting compliance officer testimony that employee's clothing could get caught and cause amputation of a finger or a broken bone and affirming serious violation); *Commercial Newspaper Serv.*, 19 BNA OSHC 1363, 1364 (No. 00-1150, 2001) (ALJ) (crediting compliance officer testimony about risk of smoke inhalation or burns potentially causing death and affirming serious violation).

Importantly, that a fall from a height of more than seven feet could result in serious injury is not a matter of scientific knowledge. *See* FED. R. EVID. 702(a) (allowing expert testimony only if the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"); *United States v. Garcia*, 635 F.3d 472, 477 (10th Cir. 2011) (noting Rule 702 requires courts to evaluate whether factfinder would be able to understand evidence without specialized knowledge before allowing expert testimony); *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006) (noting that courts generally do not permit expert testimony on matters "within the juror's common knowledge and experience"). Indeed, Commission ALJs have frequently found that a fall of several feet can result in a serious injury. *See, e.g.*, *Teddy Mosley Painting*, 24 BNA OSHC 1706, 1711 (No. 12-2154, 2013) (ALJ) (seven feet, ten inches); *Saul Ramirez*, 23 BNA OSHC 2067, 2072 (No. 11-0412, 2011) (ALJ) (employee seriously injured after fall from eight feet); *North Atlantic*

Fish Co., Inc., 19 BNA OSHC 1608, 1609 (Nos. 98-0848, 98-0849, 2001) (ALJ) (finding fall from six feet could result in serious injuries such as broken bones or death). Similarly, the Commission has consistently held that amputation constitutes serious physical harm. *See, e.g., J.C. Watson, Co.*, 22 BNA OSHC 1235, 1241 (Nos. 05-0175, 05-0176, 2008); *Mayflower Vehicle Systems, Inc.*, 19 BNA OSHC 1538, 1540 (No. 99-1319, 2001); *Brady-Hamilton Stevedore Co.*, 3 BNA OSHC 1925, 1927 (No. 2265, 1976). The record evidence therefore amply supports the ALJ's characterization of the cited violations as serious.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review.

M. PATRICIA SMITH
Solicitor of Labor

ANN S. ROSENTHAL
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

___/s/_____
RADHA VISHNUVAJJALA
Attorney
U.S. Department of Labor
200 Constitution Ave. NW, Suite S-4004
Washington, D.C. 20210
(202) 693-5445
vishnuvajjala.rad@dol.gov

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

CASE NO. 15-9554

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 8319 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, 14 point font.

_/s/_____
RADHA VISHNUVAJJALA
Attorney
U.S. Department of Labor
Occupational Safety and Health Division
Dated: January 13, 2016

CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS CHECK

I hereby certify that all required privacy redactions have been made.

I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.8, was performed on the PDF version of this brief, and no viruses were found.

_/s/_____
RADHA VISHNUVAJJALA
Attorney
U.S. Department of Labor
Occupational Safety and Health Division
Dated: January 13, 2016

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 13th day of January, 2016, I caused the Brief of the Secretary of Labor to be electronically filed via the Court's CM/ECF system. I certify that I served of this Brief electronically on all counsel of record through the Court's electronic filing system.

I certify that paper copies of this Brief submitted to the Court are exact copies of the version submitted electronically.

_/s/_____
Radha Vishnuvajjala
Dated: January 13, 2016