No. 16-13417-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SOUTHERN PAN SERVICES COMPANY,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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NOVEMBER 18, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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In addition to the interested persons listed in Petitioner's brief, the following individuals, corporations, and counsel have an interest in the appeal:

Attwood, Cynthia L., Chairman, Occupational Safety and Health Review Commission

Gottlieb, Ronald, Counsel for Respondent

MacDougall, Heather L., Commissioner, Occupational Safety and Health Review Commission

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Perez, Thomas E., Secretary of Labor, Respondent

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STATEMENT REGARDING ORAL ARGUMENT

Due to the complexity of the facts and legal issues presented, the Secretary of Labor requests oral argument to assist in the decision-making process.

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STATEMENT OF JURISDICTION

The Occupational Safety and Health Review Commission (Commission) had jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 659(c). This Court has jurisdiction under section 11(a) of the OSH Act because Southern Pan Services Company (Southern Pan) filed a petition for review on June 10, 2016, within sixty days of the Commission's May 19, 2016 final order. *Id.* § 660(a); Volume (Vol.) 19, Item 122, Apx. Tab 6.[1] The Commission's order is final because it resolves all claims in the proceeding. Venue is appropriate in this Circuit because the OSH Act violations affirmed by the Commission's final order occurred in Florida. *See* 29 U.S.C. § 660(a).

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[1] Volume and item numbers are to the volume and item designations of the Commission's Certified List. *See* 11th Cir. R. 28-5 (requiring references to the record to "be to volume number (if available), document number, and page number"). The first citation to a record document will include a reference to the tab number of the appendix where the document can be found, "Apx. Tab [number]" for the Petitioner's Appendix or "Supp. Apx. Tab [number]" for the Secretary's Supplemental Appendix.

STATEMENT OF ISSUES

1. Whether the Commission correctly found that 29 C.F.R. § 1926.701(a), which requires employers to determine based on information from a person qualified in structural design that a building under construction can support a wet concrete load, applied to Southern Pan where Southern Pan employees were exposed to a garage collapse after Southern Pan failed to obtain the necessary load-bearing calculations.

2. Whether substantial evidence supports the Commission's finding that Southern Pan willfully violated § 1926.701(a) where Southern Pan failed to take reasonable measures to ensure employee safety and knew or was plainly indifferent to the fact that no qualified determination had been made that a garage's support columns could withstand the wet concrete load placed on them.

3. Whether the Commission properly found that Southern Pan willfully violated 29 C.F.R. § 1926.703(a)(2), which mandates that "all revisions" of shoring plans be "available at the jobsite," where Southern Pan deviated from the garage's original shoring

plans for over six weeks, knew that it had to obtain revised plans, and knew or was plainly indifferent to the fact that it had not obtained revised plans.

STATUTORY AND REGULATORY BACKGROUND

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(b). Under the OSH Act, OSHA promulgates mandatory occupational safety and health standards for employers requiring "conditions, or the adoption or use of one more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[2] *Id.* §§ 652(8), 654(a)(2), 655.

OSHA enforces its standards by inspecting worksites and issuing citations when it determines that a violation has occurred.

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[2] The Secretary has delegated most of his duties under the OSH Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). Secretary's Order 1-2012 (Jan. 18, 2012) 77 Fed. Reg. 3912 (2012). This brief uses the terms Secretary and OSHA interchangeably.

Id. §§ 657-658; *see also* 29 U.S.C. § 666(a)-(c) (categorizing violations as willful, repeat, serious, and other-than-serious). An employer may challenge a citation by filing a notice of contest seeking review by the Commission, an adjudicative agency independent of the United States Department of Labor. *Id.* §§ 651(b)(3), 659(a), 661. After providing an opportunity for a hearing, a Commission administrative law judge (ALJ) issues a decision affirming, modifying, or vacating the citation. *Id.* §§ 659(c), 661(j). The Commission may review an ALJ's decision; if the Commission does not grant review within thirty days of the ALJ's decision, the decision becomes the final order of the Commission. *Id.* § 661(j); 29 C.F.R. § 2200.90(d). Upon completion of Commission proceedings, an aggrieved employer may seek judicial review in an appropriate court of appeals. 29 U.S.C. § 660(a).

Under OSHA's multi-employer citation policy, an employer is liable for non-compliance with a standard (and OSHA issues the employer a citation) if the employer either created or controlled the hazardous condition, or if the employer's employees are

exposed to the hazardous condition and it failed to take reasonable measures to protect those employees.[3] OSHA Instruction on Multi-Employer Citation Policy, CPL 2-0.124, *publicly available from OSHA's website at www.osha.gov*; *Anning-Johnson Co.*, 4 BNA OSHC at 1197-99. Thus, an exposing employer at a multi-employer worksite must "make a reasonable effort to detect" violations, and when it detects a violation, "exert reasonable efforts to have [it] abated or take such other steps as the circumstances may dictate to protect its employees." *Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185, 1189 (No. 12775, 1976).

OSHA's multi-employer citation policy is regularly implicated at construction worksites, as these worksites typically

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[3] OSHA's multi-employer citation policy applies when two or more employers are working at the same jobsite. In assessing employer responsibility and liability for hazardous conditions at a worksite, OSHA first determines whether an employer is a creating, exposing, correcting, or controlling employer. OSHA Instruction on Multi-Employer Citation Policy, CPL 2-0.124 ¶ X.A.1. (Dec. 10, 1999). If the employer falls within one or more of those categories, OSHA then determines whether the employer met its obligations under the applicable OSHA standard. *Id.* ¶ A.2.; *id.* X.B, C, D, E, F (explaining various obligations of each type of employer and that employer can fall within multiple categories of employer); *see Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197-99 (Nos. 3694 & 4409, 1976) (discussing obligations of exposing, creating, and controlling employers).

have multiple employers (and their employees) working side-by-side but charged with distinct tasks on complex and interrelated construction projects. Reasonable measures an exposing employer at a construction worksite may take to protect its employees include "attempt[ing] to have the general contractor correct the condition," attempt[ing] to persuade the employer responsible for the condition to correct it, instruct[ing] its employees to avoid the area where the hazard exists if this alternative is practical, or . . . provid[ing] an alternative means of protection against the hazard." *Id.*

Subpart Q of 29 C.F.R. Part 1926 contains OSHA's standards for concrete and masonry construction work. Section 1926.701(a) prohibits the imposition of a construction load "on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the load." When constructing a building, "shores" are used to support partially cured concrete and construction loads. Vol. 17, Item 90 at 2 n.3,

Apx. Tab 3; § 1926.700(b)(7). Under § 1926.703(a)(2) all shoring "drawings or plans, including all revisions" must be "available at the jobsite."

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is an enforcement action under the OSH Act. Vol. 17, Item 90 at 1, Apx. Tab 3. OSHA issued Southern Pan a two-item citation alleging willful violations of 29 C.F.R. §§ 1926.701(a) and 1926.703(a)(2) after a parking garage under construction collapsed and killed a Southern Pan employee and seriously injured another Southern Pan employee.[4] Vol. 14, Item 1 at 5-6, Supp. Apx. Tab 1; Vol. 17, Item 90 at 1.

Southern Pan contested the citation, and after a hearing, a Commission ALJ issued a decision vacating the violation of § 1926.701(a) and affirming the violation of § 1926.703(a)(2). Vol. 15, Item 55, at 1-2, 24, Apx. Tab 2. The Commission reviewed the ALJ's decision and affirmed in part, reversed in part, and

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[4] OSHA also issued Southern Pan an additional two-item serious citation, but it was vacated and is not before the Court. Vol. 17, Item 90 at 1-2.

remanded for additional proceedings. Vol. 17, Item 90 at 1-17. On remand, an ALJ issued a decision affirming both violations as willful. Vol. 19, Item 119, Apx. Tab 5. The Commission did not review the ALJ's decision on remand, and it therefore became the Commission's final order by operation of law on May 19, 2016. Vol. 19, Item 122; 29 U.S.C. § 661(j).

B. Statement of Facts

1. *Southern Pan Is Hired to Install Shoring and Formwork for the Berkman Plaza II Project*

On December 6, 2007, a Southern Pan employee was killed and more than twenty other construction worksite employees were seriously injured when approximately 70% of a partially-constructed garage collapsed to the ground while concrete was being poured into supporting formwork installed by Southern Pan. Vol. 17, Item 90 at 1, 3; Vol. 15, Item 55 at 4. The project was known as the Berkman Plaza II project, which involved building a six-story garage and adjacent condominium tower in Jacksonville, Florida. Vol. 17, Item 90 at 1-2.

Choate Construction Company (Choate), the general contractor for the project, had hired Southern Pan to install the

shoring and formwork. Vol. 17, Item 90 at 2. Choate also contracted with a concrete finishing company, A.A. Pittman & Sons (Pittman), to pour the concrete for the horizontal elements of the project, including the slab that was being poured at the time of the collapse. Vol. 17, Item 90 at 2.

Southern Pan's contract with Choate required Southern Pan to provide the project's shoring drawings, and furnish, install, and maintain the formwork. Vol. 17, Item 90 at 2; Vol. 13, Joint Exhibit ("Ex. J")-9 at 02616, Supp. Apx. Tab 16. Southern Pan hired Patent Construction Company (Patent) to have a shoring engineer develop the shoring drawings, and Universal Engineering Services (Universal) to provide pre-pour inspections. Vol. 17, Item 90 at 3.

Patent's shoring drawings required shores or reshores to extend from the level being poured to the ground level.[5] Vol. 17, Item 90 at 3; Vol. 13, Judge's Exhibit J-A (Ex. J-A) ¶ 16, Supp. Apx. Tab 19. Under this method of shoring, a wet concrete load is

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[5] A "shore" is a "supporting member that resists a compressive force imposed by a load." 29 C.F.R. § 1926.700(b)(7). A "reshore" replaces a shore after concrete has at least partially cured. *See id.* § 1926.700(b)(6).

transferred through the posts of the shoring and reshoring to ground level; except where the load passes through the slabs from one level of shoring to the next, the load does not pass to the structural elements of the garage. Vol. 2, Transcript (Tr.) 123-26, Supp. Apx. Tab 2. Therefore, the shoring and the ground, rather than the structure itself, carries the weight of the wet concrete. Vol. 19, Item 119 at 7. Importantly, if reshoring is removed, the structure must bear the weight of the wet concrete. *Id.*

In October 2007, beginning with shoring installation for the fifth level of the garage, Southern Pan decided to deviate from the Patent plans and switch to a shoring method referred to as "one-over-two." Vol. 17, Item 90 at 3; Vol 15, Item 55 at 4. Under this method, only the level being poured and the two levels directly underneath it are shored; shores and reshores below those levels are removed. Vol. 17, Item 90 at 3. As a result, the wet concrete load is borne by the structure, rather than the ground. *E.g.,* Vol. 19, item 119 at 7; Vol. 2, Tr. 122-125, 133.

When it switched to the one-over-two shoring method, Southern Pan should have had a shoring engineer develop revised

shoring plans that accounted for the distribution of loads to the garage structure, in addition to the loads imposed on the formwork and shoring. Vol. 3, Tr. 201-06, Supp. Apx. 3; Vol. 4, Tr. 506-07, 549-50, Supp. Apx. 4; Vol. 7, Tr. 1124-26, Supp. Apx. 7. Indeed, when Southern Pan switched shoring methods for the project's condominium tower, Southern Pan obtained revised plans. Vol. 15, Item 55 at 18. In contrast, Southern Pan never ordered or developed revised shoring plans for the garage. Vol. 17, Item 90 at 3. Consequently, no shoring engineer ever made the determination that the garage could withstand wet concrete loads distributed to the structure, rather than to the ground (the redistribution of wet concrete loads that occurred as a result of Southern Pan's switch to the one-over-two shoring method). Vol. 17, Item 90 at 3; Vol. 19, Item 119 at 6-15, 20.

2. *Florida's Threshold Inspection Law*

Projects such as the Berkman Plaza II project must comply with provisions of Florida's building code known as the Threshold Inspection Law. *See* Fla. Stat. § 553.79, *reproduced in* Vol. 13, Ex. J-18, Supp. Apx. Tab 18. This law provides for inspections at

various stages of the project by inspectors known as "threshold" or "special" inspectors. *Id.* § 553.79(5)(a). The owner of the Berkman Plaza II project hired Synergy Structural Engineering (Synergy) as the threshold inspector. Vol. 17, Item 90 at 3.

The threshold inspector's responsibility is to ensure that construction of the building's structural components complies with the plans and specifications for the building. Fla. Stat. § 553.79(5)(a). For formwork, the threshold inspector must "determine that a professional engineer who specializes in shoring design has inspected the shoring and reshoring for conformance with the shoring and reshoring plans." *Id.* Universal was the designated professional engineer for the Berkman Plaza II project. Vol. 4, Tr. 513-20, 545, 553; Vol. 7, Tr. 1115-19, 1129-31.

In compliance with the Threshold Inspection Law, Soheil Rouhi, the structural engineer for the architectural firm, Pucciano & English, that designed the Berkman Plaza II project, prepared a threshold inspection plan. Fla. Stat. § 553.79(5); Vol. 2, Tr. 35-36; Vol. 13, Ex. J-5, Supp. Apx. 12. Both the Threshold Inspection Law and Mr. Rouhi's threshold inspection plan note that the

threshold inspector's actions do not relieve contractors of their contractual or statutory obligations. Fla. Stat. § 553.79(5)(a); Ex. J-5 at 3.

3. *The Garage Collapse During Concrete Pour 6A*

In late August 2007, Choate realized that reinforcing steel (rebar) had been inadvertently left out of a slab for the ramp between the garage's second and third levels. Vol. 13, Ex. J-8, Supp. Apx. Tab 15. Choate proposed to resolve the problem "post construction," and Mr. Rouhi informed Choate that he did "not have any problem continuing the project" under Choate's proposal, so long as shoring was left in place to support that slab until the repair was performed. Vol. 13, Ex. J-7, Supp. Apx. Tab 14; Ex. J-8.

The missing rebar problem and proposed solution were addressed both at the jobsite and in emails. Vol. 5, Tr. 722, Supp. Apx. Tab 5; Vol. 13, Ex. J-7. Tim Frazier of Synergy, the threshold inspector, was copied on the emails documenting Choate's proposed solution and Mr. Rouhi's acceptance of that proposal; Eric Cannon, Mr. Frazier's representative on the jobsite,

was present when the problem was discussed at the garage. Vol. 5, Tr. 722; Vol. 13. Ex. J-7. Based on the discussion with Mr. Rouhi that occurred at the jobsite, Mr. Cannon believed that shoring was supposed to go to the ground for the entire garage.[6] Vol. 5, Tr. 722.

In October 2007, Southern Pan began removing reshoring from the garage's ground level to implement its switch to the one-over-two shoring method. Vol. 17, Item 90 at 3. On October 30, 2007, Mr. Cannon conducted an inspection and saw Southern Pan removing reshoring from the lower levels of the garage. Vol. 5, Tr. 722-23; Vol. 19, Item 119 at 11. Southern Pan's two jobsite superintendents, James Smith and Tim Marlow, told Mr. Cannon that they had switched to the one-over-two method.[7] Vol. 5, Tr. 722-25, 735-36.

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[6] Indeed, the Patent plans required reshoring to go to the ground. Vol. 2, Tr. 118. Mr. Cannon, however, never saw the reshoring plans. Vol. 5, Tr. 714, 755.

[7] Mr. Marlow was the project superintendent for the tower, and Mr. Smith was the project superintendent for the garage. Vol. 15, Item 55 at 12 n.3, 21.

Because this switch was inconsistent with his understanding that the shoring had to go to the ground, Mr. Cannon called Mr. Frazier for guidance. Vol. 5, Tr. 722-23, 735-36.

Mr. Frazier then emailed Mr. Rouhi:

> They are beginning to remove shoring at the garage. Per your email below[8] I just wanted to clarify that the areas you are requesting to stay shored all the way to the ground are only the bays where the repair is required, not the entire garage correct?

Vol 13, Ex. J-7. Mr. Rouhi responded: "Correct." *Id.* After receiving Mr. Rouhi's response, Mr. Frazier called Mr. Cannon and told him that Mr. Rouhi had said that only the area underneath the ramp where the rebar was missing needed to be reshored to the ground. Vol. 5, Tr. 724. Based on his conversations with Mr. Frazier and Southern Pan's superintendents, Mr. Cannon accepted the use of the one-over-two shoring method, and conducted his inspections accordingly. *See* Vol. 5, Tr. 722-25, 735-39, 741, 761.

Mr. Rouhi later explained that when he replied "correct" in response to Mr. Frazier's email, he was referring only to the

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8 The "email below" refers to the August emails in which Choate and Mr. Rouhi addressed the problem of the missing rebar.

shoring under the faulty slab that he had required to be left in place until post-construction, when repairs to the slab would be made. Vol. 11, Secretary's Exhibit (Ex. C-) C-5a at 29-33, 37-38, Supp. Apx. Tab 10. Indeed, Southern Pan agreed that "Mr. Rouhi expected the Threshold Inspector to verify that what he was inspecting complied with the approved plans and drawings including Patent's shoring and reshoring plans." Vol. 13, Ex. J-A ¶ 12; *see also* Vol. 11, Ex. C-5a at 15-16, 23, 28-33, 37-38 (Mr. Rouhi explaining his limited role regarding shoring).

In the following six weeks during which Southern Pan used the one-over-two method, Southern Pan's superintendent Smith did not follow up on the revised shoring plans he thought had been ordered. Vol. 3, Tr. 390-91. Additionally, Timothy Postma, Southern Pan's senior project manager, who visited the site approximately once a week, Vol. 4, Tr. 599-600, directed superintendent Marlow to remove shoring from lower floors of the garage in response to Choate's demand that shoring be removed to make room for equipment. Vol. 19, Item 119 at 21; Vol. 3, Tr. 249-51. In early December, a day or two before the garage collapsed,

Southern Pan general superintendent Charles Mathis accompanied superintendents Smith and Marlow on a pre-pour inspection for concrete pour 6A to verify that the formwork complied with the plans. Vol. 19, Item 119 at 18.

On December 4, 2007, Universal inspector Greg Holtz inspected the formwork for pour 6A. Vol. 13, Ex. J-3, at 01179, Supp. Apx. Tab 11. Mr. Holtz had seen only partial plans Southern Pan provided to him during the inspections, and these were only the shoring plans for a particular floor, rather than the entire garage. Vol. 3, Tr. 405-11; Vol. 4, Tr. 453-60. Mr. Holtz limited his inspections to the specific items Southern Pan instructed him to inspect, and he accepted Southern Pan's verbal assurance that the one-over-two method was appropriate. Vol. 3, Tr. 405-11; Vol. 4, Tr. 453-60, Vol. 19, Item 119 at 9-11. His written report concluded that the "observed conditions appeared to meet project specifications as shown on project approved plans."[9] Vol. 13, Ex. J-3.

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[9] Southern Pan's expert, Stanley Lindsey, testified at trial that he would construe this report as not passing the formwork for the pour, because the report stated only that formwork "appeared"

On December 5, 2007, Mr. Cannon performed the Florida threshold inspection for pour 6A. Vol. 2, Tr. 67-72; Vol. 5, Tr. 745; Vol. 13, Ex. J-6 at 00730-31, Supp. Apx. Tab 13. Mr. Cannon's report notes that he had observed shoring and reshoring for the garage and that deficiencies that he had detected were corrected, but it does not state that the shoring and reshoring conformed to Patent's shoring plans or contain any other engineering information determining that the garage could support the wet concrete load. Vol. 13, Ex. J-6 at 00730-31.

The day after Mr. Cannon's inspection, on December 6, 2007, Pittman, supervised by Choate, began concrete pour 6A on the sixth floor of the garage. Vol. 15, Item 55 at 4, 15-16; Vol. 2, Tr. 83. During the pour, Southern Pan employees Willie Edwards and Roland Hawkins were on the fifth level so they could observe the formwork during the pour and clean off any concrete that fell through the formwork. Vol. 3, Tr. 258-60. After most of the

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to be in compliance, and not that it was actually in compliance. Vol. 8, Tr. 1442-43, Supp. Apx. Tab 8. Mr. Holtz acknowledged that the report's statement that the formwork met the plans was not true, but also asserted that the report pertained only to what he observed. Vol. 3, Tr. 414-23.

concrete had been poured, approximately two-thirds of the garage "pancaked" to the ground. Vol. 15, Item 55 at 4; Vol. 3, Tr. 261-65. Mr. Edwards was killed and more than twenty other employees, including Mr. Hawkins, were seriously injured. Vol. 15, Item 55 at 1, 4.

4. *OSHA's Investigation and Issuance of the Willful Citation*

Following the collapse of the garage, OSHA conducted an investigation of the Berkman Plaza II worksite. Vol. 17, Item 90 at 1. OSHA learned that none of the project contractors, including Southern Pan, had determined, based on information received from a person qualified in structural design, that the partially-constructed garage could support the poured concrete using the one-over-two shoring method. Vol. 5, Tr. 878. Southern Pan superintendent Smith admitted to OSHA investigators that he knew no employer had determined that the garage could withstand the wet concrete load of pour 6A. Vol. 5, Tr. 878. Both superintendent Smith and project manager Postma knew that OSHA required a determination that the garage could carry the

wet concrete before the concrete was poured. Vol. 3, Tr. 200-01; Vol. 4, Tr 550.

Mr. Smith and Mr. Postma also knew that OSHA required shoring plans to be available on the jobsite, and that if Southern Pan switched shoring methods it needed to have revised plans onsite before proceeding. Vol 3, Tr. 241-46; Vol. 4, Tr. 552, 565, 577; *see also* Vol. 7, Tr. 1112-13 (testimony of Southern Pan's president regarding the importance of complying with onsite plans). However, Mr. Postma, who had worked with Patent to obtain the original shoring plans, did not order new plans because he never intended to switch to the one-over-two method for the garage. Vol. 4, Tr. 507, 546-47.

Based on its investigation OSHA issued a two-item citation alleging that Southern Pan willfully violated 29 C.F.R. §§ 1926.701(a) and 1926.703(a)(2) for failing to determine based on information from a person qualified in structural design that the garage could support concrete pour 6a, and for failing to have

revised plans at the jobsite for the one-over-two shoring method.[10] Vol. 14, Item 1 at 5-6; Vol. 15, Item 55 at 14.

5. *ALJ Ken Welsch's March 8, 2010 Decision*

Southern Pan contested the two-item willful citation, and an eight-day hearing was held in May and July, 2009. Vol. 15, Item 55 at 2. Following a trial on the merits, on March 8, 2010, ALJ Ken Welsch vacated the alleged violation of 29 C.F.R. § 1926.701(a) on the ground that the standard did not apply to Southern Pan. Vol. 15, Item 55 at 16. The ALJ affirmed as willful Southern Pan's violation of 29 C.F.R. § 1926.703(a)(2). Vol. 15, Item 15 at 17-24.

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[10] Choate was also cited for failing to determine if the garage structure could support pour 6a as required by § 1926.701(a), and pursuant to a settlement agreement, the citation was affirmed after Choate withdrew its notice of contest. Vol. 6, Tr. 982, Supp. Apx. Tab 6; *Choate Constr. Co.*, OSHRC No. 08-0924 (ALJ order approving settlement, April 22, 2009). OSHA did not issue a citation to Pittman for its role in placing the wet concrete load, apparently because OSHA determined that Pittman lacked knowledge of the violative condition. Vol. 6, Tr. 982, 990.

6. *The Commission's December 18, 2014 Decision and Remand*

The Commission reviewed the ALJ's March 8, 2010 decision, and reversed in part, affirmed in part, and because ALJ Welsch had retired, remanded the matter to another ALJ for additional proceedings. Vol 17, Item 90. The Commission first determined that the ALJ erred in vacating the alleged violation of 29 C.F.R. § 1926.701(a). "Under Commission precedent," the Commission explained, "the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer. Since the Berkman project involved the placement of a load on the garage's concrete structure, § 1926.701(a) clearly applies to the cited conditions." Vol. 17, Item 90 at 6-7 (citations omitted).

Because Southern Pan's employees were exposed to the violative condition, "the issue for consideration [was] whether, under applicable precedent, Southern Pan made reasonable efforts to protect [its exposed] employees."[11] Vol. 17, Item 90 at 10. The

[11] The Commission noted that OSHA had identified reasonable measures Southern Pan could have taken to protect its employees:

Commission remanded the matter for the ALJ to determine this issue, as well as whether "Southern Pan knew or should have known of the conditions giving rise to the violation." Vol. 17, Item 90 at 11.

The Commission then found that Southern Pan failed to comply with 29 C.F.R. § 1926.703(a)(2) when it changed to the one-over-two method and its formwork was no longer consistent with Patent's on-site plans. Vol. 17, Item 90 at 11-17. The Commission rejected Southern Pan's argument that § 1926.703(e), which addresses the removal of formwork, preempted Southern Pan's obligation to have revised plans onsite. Vol. 17, Item 90 at 12-13. Instead, the Commission agreed with the Secretary that §§ 1926.703(a)(2) and 1926.703(e) "impose different, concurrent requirements to address different conditions." Vol. 17, Item 90 at 12-13.

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(1) obtain the necessary information from a shoring engineer and provide it to Choate and Pittman, and (2) verify before the pour that Pittman or Choate had determined that the structure could support the wet concrete load, on the basis of information from Southern Pan's shoring engineer or from another qualified source if Southern Pan was unable or unwilling to meet its contractual obligation to provide Choate with the necessary information from its shoring engineer. Vol. 17, Item 90 at 10 n.8.

The Commission also rejected Southern Pan's contention that it complied with the standard because Mr. Rouhi's email in response to Mr. Frazier's inquiry concerning the removal of shoring constituted a compliant revision of the shoring plans. Vol. 17, Item 90 at 15-16. The Commission found that Mr. Rouhi's response "did not result in a revision of Patent's on-site drawings." Vol. 17, Item 90 at 16 n.11. With respect to Southern Pan's knowledge of the violation, the Commission remanded the case to the ALJ to determine whether this Court's intervening decision in *ComTran Group, Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304 (11th Cir. 2013), affected the imputation of supervisory knowledge to Southern Pan. Vol. 17, Doc. 90 at 16.

7. *The ALJ's Decision and Order on Remand*

On April 1, 2016, ALJ Heather Joys issued her decision and order on remand affirming Southern Pan's willful violation of 29 C.F.R. §§ 1926.701(a) and 1926.703(a)(2) and assessing a combined penalty of $125,000. With respect to the violation of § 1926.701(a), Southern Pan had not taken reasonable measures to protect its employees from the hazardous concrete pour. Vol. 19,

Item 119 at 6-15. Specifically, the ALJ found, it was unreasonable for Southern Pan to rely on inspections indicating its use of the one-over-two shoring method complied with the on-site shoring plans, because Southern Pan knew that this method did not comply with the garage's plans. Vol. 19, Item 119 at 8-15.

Southern Pan's assertion that Choate had made the determination required by the standard that the garage could withstand the concrete pour based on Mr. Rouhi's one-word response to an ambiguous email chain lacked merit; indeed, there was "no evidence that Southern Pan even knew of" Mr. Rouhi's response prior to the collapse. Vol. 19, Item 119 at 14. And, Southern Pan had knowledge of the violative condition because at the time of the collapse four of its supervisors knew that Southern Pan had not obtained a determination by a qualified engineer that the inadequately shored structure could support the weight of pour 6A. Vol. 19, Item 119 at 15-19.

The ALJ also held that Southern Pan's violation of § 1926.701(a) was willful. Vol. 19, Item 119 at 19-22. Superintendent Smith knew that § 1926.701(a) required a

determination that the garage could withstand the concrete pour and that a failure to make that determination endangered the lives of Southern Pan's employees. Vol. 19, Item 119 at 19-20. In addition, superintendent Smith and project manager Postma knew that their shoring engineer had provided the necessary load-bearing calculations for the original shoring plans, and that the removal of reshoring from the garage's ground level required Southern Pan to obtain new load-bearing calculations. Vol. 19, Item 119 at 20. Even so, both men directed the removal of reshoring. Vol. 19, Item 119 at 20-21. The ALJ found that this conduct showed a "conscious disregard or plain indifference to safety." Vol. 19, Item 119 at 21.

Turning to Southern Pan's failure to have revised shoring plans at the worksite as required by 29 C.F.R. § 1926.703(a)(2), the ALJ found that Southern Pan had knowledge of the violation through its supervisors Smith, Marlow, Postma, and Mathis. Vol. 19, Item 119 at 22-24. Project manager "Postma knew Southern Pan was not supposed to remove the reshoring from the first three levels of the garage," and superintendent Smith's "failure to

secure revised drawings before removing shoring and reshoring continued for 46 days." Vol 19, Item 119 at 23, 24. During this period, Mr. Postma visited the site weekly, and superintendents Smith, Marlow, and Mathis inspected the shoring and reshoring the day before pour 6A. Vol. 19, Item 119 at 24. All four supervisors therefore knew that Southern Pan did not have revised plans for the one-over-two shoring method it was using on December 6, 2007. Vol. 19, Item 119 at 24.

The ALJ further found that Southern Pan's violation of § 1926.703(a)(2) was willful. Mssrs. Postma, Mathis, Marlow, and Smith "uniformly and consistently testified" that they were not allowed to deviate from shoring plans. Vol. 19, Item 119 at 25-26. Yet Mr. Smith did deviate from the original plans, and Mssrs. Smith, Marlow, Mathis, and Postma knew that revised plans were not on site. Vol. 19, Item 119 at 23-26. The ALJ also rejected Mr. Smith's testimony that he had assumed that revised plans had been ordered and were in the mail, and determined that even if Mr. Smith had made that assumption, his reliance on it did "not

show good faith" because he knew he was not allowed to work without revised plans. Vol. 19, Item 119 at 24-25.

The Commission did not review the ALJ's decision and order on remand, and the decision therefore became the Commission's final order by operation of law on May 19, 2016. Vol. 19, Item 122; 29 U.S.C. § 661(j).

C. Standard of Review

The Court reviews the Commission's findings of fact under the substantial evidence standard.[12] 29 U.S.C. § 660(a); *Quinlan v. Secretary, U.S. Dep't of Labor*, 812 F.3d 832, 836, 837 (11th Cir. 2016). Under this standard, the Court affirms a finding if a

[12] The Court applies the same standard of review to an ALJ decision that has become a Commission final order by operation of law as it does to decisions issued directly by the Commission. *See Quinlan v. Secretary, U.S. Dep't of Labor*, 812 F.3d 832, 836, 837 (11th Cir. 2016) (stating standard of review in case involving unreviewed ALJ decision); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997) (for ALJ decisions not reviewed by the Commission, substantial evidence standard "applies with undiminished force" to ALJ's findings). The Commission determinations under review in this case include both the December 18, 2015 Commission Decision and Remand and the subsequent ALJ Decision and Order on Remand which became a final order of the Commission on May 19, 2016. All findings below will be referred to in this brief as "Commission" findings.

reasonable mind could accept the evidence as adequate to support the finding. *Id.* at 837.

The Court reviews the Commission's legal determinations to determine whether they are arbitrary and capricious or contrary to law. *Id.* In applying this standard, the Court defers to the Secretary's reasonable interpretation of his occupational safety and health standards. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-57 (1991); *Brock v. Williams Enters. of Ga.*, 832 F.2d 567, 569-70 (11th Cir. 1987). An interpretation is reasonable if it sensibly conforms to the purpose and wording of the standard. *CF&I*, 499 U.S. at 150-51.

SUMMARY OF ARGUMENT

The Court should affirm the Commission's final order holding that Southern Pan willfully violated 29 C.F.R. §§ 1926.701(a) and 1926.703(a)(2). Southern Pan exposed its employees to the hazard of a garage collapse when it failed to determine (or ensure that some other employer had determined), based on information received from a person who was qualified in structural design, that the garage could withstand the load

imposed by concrete pour 6A. Moreover, Southern Pan's reliance on outside inspectors' approvals of the pour was unreasonable because it knew that these inspectors had based their approvals in part on shoring plans that did not reflect Southern Pan's decision to switch to the one-over-two shoring method. Southern Pan's violation of § 1926.701(a) was willful because multiple Southern Pan supervisors knew that the requisite load-bearing calculations had not been obtained, but nevertheless demonstrated a conscious disregard or plain indifference to employee safety by exposing Southern Pan employees to the hazards of pour 6A.

The Commission also correctly found that Southern Pan willfully violated § 1926.703(a)(2) by failing to maintain revised shoring plans at the Berkman Plaza II worksite. Southern Pan's supervisors knew that the standard required Southern Pan to obtain revised plans when the company decided to deviate from the original plans. The supervisors also knew that Southern Pan did not possess revised plans reflecting the switch to the one-over-two shoring method. Nevertheless, Southern Pan worked for more than six weeks without having revised plans available at the

worksite. Furthermore, the imputation of four Southern Pan supervisors' knowledge of the violation to Southern Pan is proper because, in contrast with the supervisor in *ComTran,* the supervisors in this case were not working alone and exposing only themselves to the violative condition. Instead, the supervisors' actions exposed multiple employees to the hazardous concrete pour, resulting in the death of one Southern Pan employee and serious injury to twenty additional workers.

ARGUMENT

A. Southern Pan Willfully Violated 29 C.F.R. § 1926.701(a) by Knowingly Exposing its Employees to an Inadequately Shored Garage that No Employer Had Determined Could Support the Wet Concrete Load Imposed by Pour 6A.

To establish a violation of a standard OSHA must demonstrate that: (1) the standard applied; (2) the standard was violated; (3) an employee was exposed to the hazard that was created; and (4) the employer knew or with the exercise of reasonable diligence could have known of the violative condition. *Quinlan*, 812 F.3d at 836; *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). A violation is characterized as willful where an employer acts with intentional disregard of, or

with plain indifference to, the requirements of a standard. *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1239 (11th Cir. 2002).

Southern Pan challenges only the Commission's determinations that 29 C.F.R. § 1926.701(a) applied and that Southern Pan violated the standard.[13] Southern Pan also asserts that any violation was not willful. Southern Pan's arguments lack merit. The Commission correctly held that § 1926.701(a) applied to the cited conditions at the construction site. And, Southern Pan exposed its employees to a hazardous concrete pour in the inadequately shored garage and failed to take reasonable measures to protect them. Further, Southern Pan's actions were willful; the company removed shoring and reshoring despite failing to obtain revised shoring plans and knew that its switch to

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[13] Southern Pan does not contest that it exposed employees to the cited hazardous conditions. Additionally, the section of Southern Pan's brief challenging the Commission's finding of knowledge refers only to the alleged violation of 29 C.F.R. § 1926.703(a)(2). SP Br. 37-41. In any event, and as the Commission correctly found, Southern Pan had knowledge of the violation of § 1926.701(a) where multiple "supervisors had actual knowledge their employees removed shoring and reshoring without first obtaining information from a shoring engineer that the structure could support the weight of Pour 6A." Vol. 19, Item 119 at 19; *see also infra* pp. 58-63 (discussing imputation of supervisors' knowledge of violation of § 1926.703(a)(2)).

the one-over-two method required new load-bearing calculations that it failed to obtain.

1. *29 C.F.R. § 1926.701(a) Applied to the Placement of a Construction Load on the Garage's Concrete Structure and to Southern Pan's Work on Pour 6A.*

Concrete pour 6A involved the placement of a wet concrete load on the garage's structure, triggering 29 C.F.R. § 1926.701(a)'s requirement that "[n]o construction load . . . be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the loads." The Commission therefore correctly held that § 1926.701(a), "clearly applied to the cited conditions . . . [and therefore] that element of the Secretary's burden [the applicability of the cited standard] has been established." Vol. 17, Item 90 at 7.

The Commission also correctly held that as an exposing employer Southern Pan had compliance obligations under the cited standard. Vol. 17, Item 90 at 7. The plain language of the Secretary's construction standards and forty-years of OSH Act

precedent establish that such standards apply to all construction employers on a construction site whose employees are exposed to hazardous conditions addressed by those standards. 29 C.F.R. § 1910.12(a) (construction standards "apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work"); *Id.* § 1926.700(a) (this "subpart sets forth requirements to protect all construction employees from the hazards associated with concrete . . . construction operations performed in workplaces covered under 29 CFR part 1926"); *Anning-Johnson Co.*, 4 BNA OSHC 1193. And, "even if a construction subcontractor neither created nor controlled a hazardous situation, the exposure of its employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or 'control' it retains over *its own* employees, gives rise to a duty under section 5(a)(2) of the Act." *Anning-Johnson*, 4 BNA OSHC at 1198-99 (emphasis in original); *supra* pp. 4-6 (discussing OSHA's multi-employer policy and guidance provided in OSHA Instruction on Multi-Employer Citation Policy, CPL 2-0.124).

Southern Pan contends that it had no obligations under § 1926.701(a) because the standard "specifically allocates the duty to ensure the structure could bear the load to Choate, the general contractor." SP Br. 24-26. As support for this proposition, Southern Pan cites to the standard's preamble which notes that § 1926.701(a) "places responsibility for employee safety with the person directly responsible for the concrete operations." 53 Fed. Reg. at 22617. But as the Commission correctly found, neither the preamble nor the cited excerpt "state[s] that the concrete operator's responsibility for employee safety belonged to it alone, nor did the Secretary relieve an exposing employer of its obligation to protect its own employees." Vol. 17, Doc. 90 at 10.

Indeed, the relevant case law holding that exposing employers must protect their employees from hazardous conditions expressly accounts for situations where other employers at a construction site may be nominally responsible for compliance with OSHA's construction standards. *Anning-Johnson Co.*, 4 BNA OSHC at 1198-99; Mark A. Rothstein, *Occupational Safety and Health Law* § 168 & n.10 (4th ed. West Group 1998)

(collecting cases). In short, "even if a construction subcontractor neither created nor controlled the hazardous situation, the exposure of its employees to a condition that the employer knows or should have known to be hazardous, in light of the authority or 'control' it retains over *its own* employees, gives rise to a duty under section 5(a)(2) of the Act." *Anning-Johnson Co.*, 4 BNA OSHC at 1198-99.

Southern Pan also argues that a provision from another subpart of OSHA's construction standards, 29 C.F.R. § 1926.16(c)[14] -- which covers interpretations of section 107 of the Contract Work Hours and Safety Standards Act -- somehow establishes that § 1926.701(a) did not apply to Southern Pan. SP Br. 26. According to Southern Pan, because its responsibility under its contract was limited to formwork, Southern Pan was "only responsible for complying with" formwork standards and not with § 1926.701(a), the standard covering the imposition of loads on structures. SP Br. 26.

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[14] Section 1926.16(c) states in part that "if a subcontractor . . . agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part" of the contract. § 1926.16(c).

Southern Pan is mistaken. Section 1926.16(c) has no bearing on this case because it is expressly limited to section 107 of the Contract Work Hours and Safety Standards Act. 29 C.F.R. §§ 1910.12(c), 1926.10 (explaining purpose and scope of subpart B of part 1926, which contains § 1926.16.) And even if not so limited, § 1926.16(c) is entirely consistent with the Commission's decision because the Contract Work Hours and Safety Standards Act also "makes exposure to conditions which violated promulgated regulations a violation for both general and subcontractors alike." *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1086-87 (7th Cir. 1975). And, § 1926.16(c) says nothing that can be construed as relieving a subcontractor of its other legal obligations, i.e., the overarching duty to protect employees from hazards created by other employers. *Anning-Johnson Co.*, 4 BNA OSHC at 1198-99; OSHA Instruction on Multi-Employer Citation Policy, CPL 2-0.124.

Southern Pan's reliance on § 1926.16(c) also ignores the critical fact that Southern Pan's scope of work contract required Southern Pan to obtain the load bearing engineering information

that Choate needed to determine that the garage could support pour 6a. Vol. 13, Ex. J-9 at 02616 (requiring Southern Pan to "[f]urnish shoring and reshoring drawings, sealed by engineer"); Vol. 17, Item 90 at 2-3; Vol. 19, Item 119 at 8, 20. As such, even if it were applicable, § 1926.16(c) would only confirm that Southern Pan "assume[d] responsibility for complying with" § 1926.701(a) "with respect to [its] part" of the contract for the Berkman Plaza II project. § 1926.16(c); *see also* § 1926.16(a) (noting that subcontractors have legal responsibility for violations even if contract relieved them of "actual" responsibility for compliance); *id.* § 1926.10 (containing statutory language that the court in *Anning-Johnson*, 516 F.2d at 1086-87, relied on to determine that Contract Work Hours and Safety Standards Act "clearly makes exposure to conditions which violated promulgated regulations a violation for both general and subcontractors alike").

2. *Southern Pan Violated § 1926.701(a) When It Failed to Take Reasonable Measures to Prevent Employee Exposure to the Hazards of Pour 6a.*

As the Commission correctly found, "the evidence unequivocally establishes that Southern Pan was an exposing

employer. Two Southern Pan employees were on the fifth floor of the garage during the 6A pour observing the formwork to ensure it was compliant and stable." Vol. 17, Item 90 at 7. As an exposing employer, Southern Pan was required to take reasonable measures "to protect its employees from the hazard to which a particular standard is addressed, even though literal compliance with the standard may [have been] unrealistic." *Anning-Johnson Co.,* 4 BNA OSHC at 1199.

OSHA identified reasonable measures Southern Pan could have taken to protect its employees:

> (1) obtain the necessary information from a shoring engineer and provide it to Choate and Pittman, and (2) verify before the pour that Pittman or Choate had determined that the structure could support the wet concrete load, on the basis of information from Southern Pan's shoring engineer or from another qualified source if Southern Pan was unable or unwilling to meet its contractual obligation to provide these contractors with the necessary information from its shoring engineer.[15]

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[15] Although Southern Pan criticizes the use of the term "shoring engineer," SP Br. 34, the term was used throughout the proceedings, even by Southern Pan, and its meaning is clear: the person who performs the engineering calculations to ensure that formwork will safely distribute the loads imposed on it. *E.g.*, Vol. 3, Tr. 201-03, Vol 4, Tr. 547-50.

Vol. 17, Item 90 at 10 n.8. Southern Pan did neither; instead, it completely abdicated its responsibilities under § 1926.701(a).

Southern Pan asserts that Choate made the load bearing determination required by § 1926.701(a) and that in any event it took reasonable measures to protect its exposed employees. SP Br. 27-34. Both assertions are based on the same flawed premise: that it was reasonable for Choate and Southern Pan to rely on pre-pour inspections by Universal (the inspector Southern Pan hired) and Synergy (the Florida threshold inspector) that allowed Choate to proceed with the pour. As the Commission correctly found, however, any such reliance was unreasonable because:

> Southern Pan deviated from the shoring and reshoring drawings, failed to obtain revised drawings from a qualified shoring engineer who had calculated whether the structure could support the construction load with three levels of the shoring and reshoring removed, and provided Universal and Synergy inspectors with inaccurate shoring and reshoring plans.

Vol. 19, Item 119 at 14-15.

With respect to its claim that Choate made the necessary pre-pour determination (and Southern Pan reasonably relied on

Choate's determination), Southern Pan asserts that the "standard plainly and unambiguously requires [only] inspections [by a person qualified in structural design], and it is undisputed that inspections were duly conducted." SP Br. 30. Relatedly, Southern Pan argues that it is unreasonable to expect Southern Pan to contradict the determinations of persons qualified in structural design, i.e., the Universal and Synergy inspectors who allegedly approved pour 6A. SP Br. 31-32. Neither argument has merit.

Neither the text nor the purpose of § 1926.701(a) supports the view that an employer's compliance obligations are fulfilled by having a person qualified in structural engineering simply inspect the formwork prior to the imposition of a load. Importantly, the employer cannot abdicate responsibility and rely on an inspector when the employer knows or should know that the information received from the inspector does not reflect engineering judgment that the structure can support the load. *See Fabi Constr. Inc.*, 21 BNA OSHC 1595, 1599, 1601 (No. 04-0776, 2006) (ALJ) (employer who knew or should have known that compliance with drawings

was hazardous had duty to take corrective action), *aff'd in relevant part*, 508 F.3d 1077 (D.C. Cir. 2007).

This is precisely the case here. The purpose of the Universal and Synergy inspections was to confirm that the formwork support conformed to the shoring plans, and the inspectors' reports contain no separate information addressing the load-bearing capability of the garage. *See* Fla. Stat. § 553.79(5)(a); Vol. 13, Exs. J-3 at 01179, J-6 at 00730-31. Instead, the reports refer only to the aspects of the shoring that the inspectors examined. Exs. J-3 at 01179, J-6 at 00730-31.

The shoring plans provided by Southern Pan contained the only engineering judgment concerning the load-bearing capability of the garage. Vol. 17, Item 90 at 3; Vol. 19, Item 119 at 20-21; Vol. 3, Tr. 201-06; Vol. 4, Tr. 549-50; Vol. 7, Tr. 1125-26. Choate, however, knew or should have known that the inspected formwork did not conform to the plans (and Southern Pan certainly knew this because Southern Pan provided the shoring plans that it deviated from when it began using the one-over-two shoring method). The only plans on site showed that the shoring was

supposed to go to the ground, and Choate (and Southern Pan) knew that the shoring did not go to the ground. Vol. 17, Item 90 at 3; Vol. 19, Item 119 at 20-21. As a result, Choate knew or should have known that the inspectors' reports (and implicit approval of the pour) did not reflect any separate load-bearing determination that the formwork would safely distribute the load to the structure, and it was unreasonable for Southern Pan to rely on Choate's decision to initiate pour 6A.[16] Vol. 17, Item 90 at 3, 7, 8, 9, 10.

For the same reasons, Southern Pan's asserted reliance on the inspections by Universal (the inspector Southern Pan hired) and Synergy (the Florida threshold inspector) does not constitute a reasonable measure to protect its employees from the hazards of a garage collapse. *See Capform Inc.*, 13 BNA OSHC 2219, 2222-23 (No. 84-0556, 1989) (exposing employer had to ask controlling

[16] Southern Pan misstates the record when it asserts that Mr. Rouhi approved the removal of shoring and of the one-over-two method. SP Br. 31-32. Mr. Rouhi gave no such approvals. Instead, he was only asked about, and only referred to, shoring he required to stay in place as a condition of allowing work to proceed even though steel rebar had been left out of the ramp between the second and third levels. *Supra* pp. 13-16.

employer if it had taken required action and proceed accordingly), *aff'd without opinion*, 901 F.2d 1112 (5th Cir. 1990). Southern Pan bore responsibility for installing the shoring and formwork in accordance with Patent's plans, and knew that the one-over-two method did not conform to those plans. It therefore also knew that any inspection report purporting to find that the observed one-over two shoring conformed to the plans provided by Southern Pan was erroneous and did not reflect a load-bearing calculation that the garage could withstand pour 6A.[17]

In addition, the reasonable measures suggested by OSHA did not impose duties on Southern Pan that exceeded an exposing employer's duties under OSHA's multi-employer citation policy. SP Br. 32-33. The Commission did not impose the same

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[17] The inspectors from Universal and Synergy testified that "Southern Pan's superintendents did not let them handle the drawings, did not have a complete set of drawings with them during the inspection, directed them to only inspect certain areas of the shoring and reshoring, and told them the inspections were not necessary." Vol. 19, Item 119 at 9. Consequently, and contrary to Southern Pan's contention, SP Br. 31, Southern Pan's supervisors did not need engineering expertise to correct the inspectors' reliance on Southern Pan's misrepresentations that the one-over-two shoring method had been authorized and approved. Vol. 19, Item 119 at 6-15, 26.

obligations on Southern Pan as on Choate. Instead, Choate had the duty to make the determination required by § 1926.701(a), while Southern Pan had the duty to provide Choate with the information (accurate shoring plans with corresponding load-bearing calculations) that Choate needed to make that determination.

Presumably referring to 29 C.F.R. § 1926.703(e), Southern Pan also asserts that "OSHA's regulation allows the removal of reshores without a plan so long as the concrete was fully cured, as it was on these floors." SP Br. 33. But even if the removal of reshoring is authorized by § 1926.703(e), an employer must still comply with § 1926.701(a) if it subsequently imposes a construction load on a structure.[18] And, it was Southern Pan's job

[18] The record does not support Southern Pan's statement, SP Br. 34, that removing the reshores on the first and second levels was "standard practice in the industry." *See* Vol. 4, Tr. 507-10 (Mr. Postma testifying that the appropriate shoring method depended on the particular circumstances of the building under construction). Nor does the record support Southern Pan's assertions, SP Br. 34, that Synergy "knew that the plans showed reshoring all the way to the ground," and that this knowledge is why Synergy discussed the removal with Mr. Rouhi. Vol. 5, Tr. 722-25,735-39, 741, 761 (Mr. Cannon from Synergy explaining why Synergy initiated contact with Mr. Rouhi and why Mr.

to provide accurate shoring plans that made the necessary load-bearing calculations for such additional concrete loads. Vol. 13, Ex. J-9 at 02616; Vol. 17, Item 90 at 2-3; Vol. 19, Item 119 at 20.

Relatedly, Southern Pan asserts, SP Br. 33, that the Commission confused "contractual and regulatory requirements" in finding that Southern Pan failed to take reasonable measures to protect its employees, and that § 1926.701(a) does not require the creation of revised plans. But this contention fails to acknowledge that Southern Pan knew it had not provided Choate with the information (accurate shoring plans containing a load-bearing engineering calculation that the garage could bear pour 6A) Choate needed to make the required determination required by § 1926.701(a), despite Southern Pan's contractual obligation to do so, and Southern Pan was therefore obligated to ascertain whether Choate had instead obtained the required information from another source. *See Capform*, 13 BNA at 2222-23; *Fabi*

Cannon accepted Southern Pan's assertions that it was authorized to use the one-over-two shoring method). In any event, *why* the threshold inspector failed to catch the deviation between the plans and the formwork is irrelevant; the deviation existed, and Southern Pan knew the formwork for pour 6A did not conform to the onsite shoring plans.

Constr. Inc., 21 BNA OSHC at 1599, 1601; *Grossman Steel & Alum. Co.* 4 BNA OSHC at 1189 (subcontractors must exercise reasonable diligence to discover violative conditions that endanger their employees even if they are created by other employers); *see also Carlisle Equip. Co. v. U.S. Sec'y of Labor*, 24 F.3d 790, 794 (6th Cir. 1994) ("Reasonable diligence implies effort, attention and action[,] not mere reliance upon the action of another.").

Contrary to Southern Pan's argument, SP Br. 34, the Commission's decision does not mean that all subcontractors at the jobsite had to take the same steps as Southern Pan to protect employees from Choate's failure to comply with § 1926.701(a). Southern Pan, but not other subcontractors, had the duty to obtain revised drawings that made a new load-bearing calculation, and Southern Pan knew that the determination required by the standard depended on the engineering calculations contained in the onsite shoring plans. Vol. 3, Tr. 201-06; Vol. 4, Tr. 550.

Accordingly, the Commission correctly determined that Southern Pan failed to take reasonable measures to prevent its

employees' exposure to the garage collapse and violated § 1926.701(a).[19] *See Fluor Daniel*, 295 F.3d at 1240-41.

3. *Substantial Evidence Supports the Willful Characterization of Southern Pan's Violation of 29 C.F.R. § 1926.701(a).*

A supervisor's willful state of mind is imputable to the employer. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). A violation is not willful, however, if an employer

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[19] Southern Pan refers to expert testimony that engineering calculations showed that the garage could have supported the load with the one-over-two method. SP Br. 29. But these calculations were performed after the accident, and the standard required the calculations to be performed before pour 6A so that Choate could make a reasoned determination that the building could withstand the load. Vol. 6, Tr. 920-21. Moreover, the Secretary's expert explained that the calculations revealed that the margin of safety would have been below industry standards. Vol. 9, Tr. 1567-70, Supp. Apx. Tab. 9.

Similarly irrelevant is Southern Pan's assertion that Mr. Rouhi's defective design of the garage caused the collapse, as the issue in this case is Southern Pan's non-compliance with the cited standard rather than the precise cause of the accident. SP Br. 29. Moreover, Southern Pan misstates the parties' stipulation when it asserts that "[i]t was stipulated that nothing Southern Pan did or failed to do caused the collapse." SP Br. 29. The relevant stipulation was that the "Secretary does not allege that any of the alleged violative conditions in this case caused the collapse of the garage." Vol. 13, Ex. J-A at ¶ 24. The Secretary did not make such an allegation because the cause of the accident was not part of the Secretary's case in proving a violation. In any event, the record establishes that the collapse would not have occurred had Southern Pan followed Patent's drawings. Vol. 19, Item 119 at 28.

can establish that it had an objectively reasonable good faith belief that it was in compliance with OSHA requirements. *Mel Jarvis Constr. Co.*, 10 BNA OSHC 1052, 1053 (No. 77-2100, 1981). Substantial evidence in the record supports the Commission's determination that Southern Pan willfully violated 29 C.F.R. § 1926.701(a). *See Fluor Daniel*, 295 F.3d at 1240 (willfulness a question of fact).

The testimony of Southern Pan superintendent Smith and project manager Postma establishes that they knew § 1926.701(a) required an employer to determine that the garage structure could withstand the wet concrete load imposed by pour 6A. Vol. 3, Tr. 200-01, Vol. 4, Tr. 550. Mr. Smith also acknowledged that the lives of Southern Pan employees depended on the determination being made. Vol. 3, Tr. 201. Mr. Smith's and Mr. Postma's testimony also shows that they knew that, once Southern Pan switched to the one-over-two shoring method, Southern Pan's shoring engineer had to perform new calculations to enable the required load-bearing determination to be made. Vol. 3, Tr. 201-06, Vol. 4, Tr. 546-50, 552, 555.

Mr. Postma, however, knew the new load-bearing calculations had not been obtained, because it was his responsibility to order the new plans and he purposefully did not do so. Vol. 4, Tr. 546-47. Prior to the collapse, he knew that Southern Pan had removed reshoring from the lower floors and had even directed Mr. Marlow to have his crew remove reshoring. Vol. 19, Item 119 at 21. Similarly, Mr. Smith's testimony shows that he knew or was plainly indifferent to the fact that Southern Pan had not obtained new load-bearing calculations from its shoring engineer, because he worked forty-six days without revised plans despite knowing he was prohibited from working without plans authorizing the shoring method used. Vol. 3, Tr. 242-43, 390-91. Southern Pan, through its supervisors, therefore knew or was plainly indifferent to the fact that employees were exposed to the hazards inherent in pour 6A where no employer had made the determination required by § 1926.701(a). Vol. 19, Item 119 at 19-22; *see Fluor Daniel*, 295 F.3d at 1240-41.

Southern Pan contends that the willfulness finding depends on the "conclusion that Southern Pan knew that reshoring was

being removed without specific drawings, but as set forth above, that did not even violate the pertinent standard, let alone show conscious disregard for employee safety." SP Br. 42. But the finding of willfulness was not based on the mere removal of reshores; instead, the removal "triggered the need for a new determination" by a shoring engineer that the revised shoring method would safely distribute loads subsequently placed on the garage. Vol. 19, Item 119 at 20. And, despite knowing this, Southern Pan did not obtain the new load-bearing calculation required for compliance with § 1926.701(a). Vol. 19, Item 119 at 20-21.

Southern Pan's other conclusory assertions challenging willfulness fare no better. It asserts that the violation was not willful because the standard required Choate and not Southern Pan to obtain the required load-bearing engineering information. SP Br. 43. But Southern Pan knew that Choate had *not* obtained the required information because Southern Pan knew it had not provided Choate with accurate load-bearing calculations for the

garage's shoring despite Southern Pan's contractual obligation to do so. Vol. 19, Item 119 at 6-15, 20-21.

Southern Pan also asserts that "the engineering calculations showed that the building would withstand the load with the '1-over-2' method." SP Br. 43. But the referenced engineering calculations were performed after the collapse, and therefore Southern Pan could not have relied on them to excuse the failure of any employer making the determination that the garage could support pour 6A. Vol. 6, Tr. 920-21. And Southern Pan misstates the record in asserting that the "project manual [had] already approved the '1-over-2' method." SP Br. 43. Instead, the project manual required Southern Pan to have "at least" three levels of reshoring and "[i]f necessary [to] extend reshores beyond minimum requirements to ensure proper distribution of loads throughout the structure." Vol. 13, Ex. J-14 at p. 03100—8 (§ 3.2F.3.a., d.), Supp. Apx. Tab 16.

B. Southern Pan Willfully Violated 29 C.F.R. § 1926.703(a)(2) When It Switched to the One-Over-Two Shoring Method but Failed to Maintain Revised Shoring Plans at the Worksite.

The Commission also correctly affirmed a willful violation of 29 C.F.R. § 1926.703(a)(2), which requires employers to have "all revisions" to their shoring plans at the worksite. Southern Pan claims that it did not violate the terms of the cited standard, that it lacked knowledge of the violation, and that any violation was not willful. All of Southern Pan's assertions lack merit, and the Court should deny Southern Pan's appeal.

1. *Southern Pan Violated the Terms of § 1926.703(a) Because it Failed to Have Written Revised Shoring Plans Reflecting the One-Over-Two Method Available at the Jobsite.*

Under 29 C.F.R. § 1926.703(a)(2), an employer must have "[d]rawings or plans, including all revisions, for [its] formwork (including shoring equipment) . . . available at the jobsite." *Id.* As the Commission correctly found, the text, structure, and purpose of the standard required Southern Pan to have written plans available at the worksite that set forth the shoring method actually used by Southern Pan. Vol. 17, Doc. 90 at 14.

The express language in § 1926.703(a)(2) requiring drawings or plans to be "available at the jobsite" indicates that plans (or drawings) must be reduced to writing; this reading conforms to the requirement that the plans be "available," while an interpretation that allows plans to be in someone's head does not. And, having written plans at the worksite advances the protective purpose of the standard by increasing the employer's ability to perform the work safely in accordance with the plans. Vol. 17, Doc. 90 at 14; 53 Fed. Reg. at 22626 ("Without the drawings or plans immediately accessible at the job site, questions regarding the design and integrity of the forms or shoring layout cannot be properly addressed."). Additionally, a related provision requiring the employer to inspect shoring equipment "to determine that the equipment meets the requirements specified in the formwork drawings," further supports the Commission's determination that revised plans must be in writing. § 1926.703(b)(1).

Therefore, when Southern Pan deviated from the original Patent plans and began using the one-over-two shoring method, § 1926.703(a)(2) required Southern Pan to obtain and maintain

onsite revised written shoring plans. *Id.* Indeed, this is how Southern Pan understood the standard's requirements. *See, e.g.,* Vol. 3, Tr. 242-46, Vol. 4, Tr. 507, 546-47, 552, 555, 565, Vol. 7, Tr. 1112-13, Vol. 19, Item 119 at 25. Because Southern Pan did not obtain revised plans, it violated § 1926.703(a)(2)'s requirement that the revised plans be available at the jobsite. Vol. 17, Item 90 at 15-16.

Southern Pan raises two arguments in its attempt to counter this straightforward application of the standard. First, Southern Pan asserts that it complied with the "letter of the standard" because "all the plans that existed were available at the job site," and it had no obligation under the standard to create new drawings. SP Br. 35. This conclusory argument fails to show that the Commission erred in upholding the Secretary's contrary and plainly reasonable interpretation of § 1926.703(a)(2). *See Williams Enters. of Ga.*, 832 F.2d at 569-70.

Southern Pan additionally argues that § 1926.703(a)(2) did not require the creation of revised shoring plans because Southern Pan instead complied with of § 1926.703(e), a provision governing

the removal of formwork and shores. SP Br. 35-37. This argument is also without merit.

Section 1926.703(e)(1) prohibits the removal of "forms and shores . . . until the employer determines that the concrete has gained sufficient strength to support its weight and superimposed loads." Subsection 1926.703(e)(2) similarly prohibits the removal of "[r]eshoring . . . until the concrete being supported has attained adequate strength to support its weight and all loads in place upon it." Paragraph (e)(1) requires employers to determine that the concrete has attained the requisite strength by either following the relevant specifications in the plans or using an appropriate testing methodology.[20] § 1926.703(e)(1)(i), (ii). In Southern Pan's view, interpreting § 1926.703(a)(2) "to require the creation of a plan for the removal of reshores" impermissibly eliminates the option employers have under § 1926.703(e)(1)(ii) to use an appropriate test methodology for determining when to remove reshores. SP Br. 36-37.

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[20] Paragraph (e)(2) is silent on the methodology for determining that the requisite strength has been attained for the removal of reshores; presumably employers can use either of the alternatives prescribed in paragraph (e)(1).

Southern Pan is plainly wrong. In promulgating § 1926.703(e)(2), OSHA explained that the requirement to ascertain the concrete's ability to support loads placed on it was limited to ascertaining the concrete's ability to support the loads on it at the time the reshores were removed. 53 Fed. Reg. at 22636. The provision does "not address loads that would be imposed subsequent to the removal of reshoring." *Id.* Instead, the employer still has to comply with § 1926.701(a) to address the hazard created by the addition of loads after reshoring is removed. *Id.*

Thus, and as the Commission correctly held, §§ 1926.703(a)(2) and 1926.703(e) complement each other and impose different obligations to address different conditions. Vol. 17, Item 90 at 12-13. And under the Secretary's interpretation and the Commission's decision, an employer remains free to use appropriate testing methods (rather than a plan) for determining if the requisite strength of concrete has been attained before reshores are removed. The employer cannot, however, change shoring methods for distributing subsequently placed construction

loads without having a revised written plan for the new shoring method available at the jobsite.[21]

2. *Southern Pan Knew that Revised Shoring Plans Were not Available at the Worksite.*

Generally, a supervisor's actual knowledge of a violative condition may be imputed to the employer to establish the employer's knowledge of the violation. *ComTran*, 722 F.3d at 1307-08, 1311, 1317. In *ComTran*, this Court adopted a narrow exception to the general imputation rule where a supervisor working alone at a worksite creates the violative condition (and therefore knows or should know of the condition) in a manner that could be viewed as an "isolated incident of unforeseeable or

[21] There is no support for Southern Pan's suggestion that it did not have to create revised shoring plans because it did not intend to switch to the one-over-two method. SP Br. 37. The ALJ's statement that "Southern Pan did not have the required revisions on site because no revision actually had been intended" refers to project manager Postma's explanation that he did not request new plans because he intended for superintendent Smith to follow Patent's original plans. Mr. Smith, however, deliberately switched to the one-over-two method, triggering the requirement for revised shoring plans reflecting that method. Moreover, Mr. Postma's explanation does not excuse his failure to request revised plans after learning that Mr. Smith had switched shoring methods, and after directing superintendent Marlow to have his crew remove shoring to accommodate Choate's request for space to store equipment. Vol. 19, Item 119 at 21.

idiosyncratic behavior." *Id.* at 1316-18. In such a situation, the Secretary must present additional evidence, such as deficiencies in the employer's safety program, to establish the employer's constructive knowledge of the violative condition. *Id.* at 1318.

The Commission correctly found in this case that Southern Pan had both actual and constructive knowledge of the violation of § 1926.703(a)(2). Vol. 19, Item 119 at 15-19 (finding actual knowledge); Vol. 18, Item 99 at 7-9, Apx. Tab 4 (finding constructive knowledge based on the duration and readily observable nature of the violative condition). The violative condition, i.e., the lack of revised shoring plans at the worksite, existed for forty-six days, and four Southern Pan supervisors (Mssrs. Smith, Marlow, Postma, and Mathis) knew that Southern Pan did not have revised drawings for the one-over-two shoring method used during this period. Vol. 19, Item 119 at 22-24. The imputation of these supervisors' knowledge to Southern Pan was also fully consistent with this Court's decision in *ComTran*. Vol. 19, Item 119, at 23-24.

Southern Pan concedes that Mr. Smith had knowledge of the violation. SP Br. 37-41. It claims, however, that the Commission erred in finding that the other three supervisors had knowledge of the violative condition, and that this Court's *ComTran* decision therefore precludes imputing Mr. Smith's knowledge to Southern Pan. Southern Pan is wrong on both counts.

Southern Pan acknowledges that Messrs. Marlow, Mathis, and Postma knew that reshoring did not go to the ground. SP Br. 33-34, 40. It contends, however, that such knowledge does not establish their knowledge of the violative condition because the lack of revised plans "was not 'readily observable' by [these] supervisors." SP Br. 40. But this argument fails to account for the substantial evidence in the record that these supervisors knew—and in any event plainly could have known with the exercise of reasonable diligence—that Southern Pan did not have revised drawings for the shoring method it used in the six weeks before the garage collapse. Vol. 19, Item 119 at 23-24; Vol. 18, Item 99 at 7-9.

The testimony of Messrs. Marlow and Postma shows that they and Mr. Mathis knew Southern Pan did not have revised drawings for the one-over-two method. Mr. Postma acknowledged that removing shoring was a mistake because it contravened Patent's drawings. Vol. 4, Tr. 552. In addition, Mr. Postma testified that he was the one responsible for ordering new plans if Southern Pan deviated from the original plans, and that he had not ordered new plans. Vol. 4, Tr. 507, 546-47.

The evidence similarly shows that Mr. Marlow and Mr. Mathis also knew that Southern Pan had deviated from Patent's original plans but had not obtained revised shoring plans. They both testified as to the importance of adhering to the onsite plans. Vol. 19, Item 119 at 25 (citing deposition testimony reproduced in Supp. Apx. Tabs 20 & 21). And, Mr. Marlow testified that a day or two before the pour on December 6, 2007, he, Mr. Smith, and Mr. Mathis checked the shoring and reshoring to verify that the shoring and reshoring conformed to the plans. Vol. 19, Item 119 at 18 (citing deposition testimony reproduced in Supp. Apx. Tab 20).

In any event, and as the Commission found, the facts presented in *ComTran* are distinguishable. In *ComTran*, the supervisor at the jobsite, who was working alone, inadvertently created a trench that violated OSHA's cave-in protection standard. 722 F.3d at 1309, 1311. The *ComTran* court determined that the employer in such a situation was without the "eyes and ears" of a supervisor, and that therefore it was an unusual case requiring the Secretary to present more evidence of knowledge than just the supervisor's knowledge of his own misconduct. *Id.* at 1316-18.

Here, superintendent Smith "neglected to obtain . . . revised drawings," but nevertheless directed his crew to deviate from Patent's plans for forty-six days prior to the violation that occurred on December 6, 2007. Vol. 19, Item 119 at 17, 23. Mr. Smith was not working alone in a non-supervisory capacity. As a result, Southern Pan was not without the "eyes and ears" of a supervisor, and this case falls within the general rule that a supervisor's knowledge is imputed to the employer. *See Quinlan*, 812 F.3d at 841-42 (supervisor's knowledge of his and

subordinate's violative conduct imputed under general imputation rule).

3. *The Commission Correctly Found that Southern Pan Willfully Violated § 1926.703(a)(2).*

Substantial evidence in the record establishes that Southern Pan's violation of § 1926.703(a)(2) was willful. *See Fluor Daniel*, 295 F.3d at 1239 (willful violation is one committed with intentional disregard of or plain indifference to requirements of a standard). Superintendent Smith admitted that he knew he was not permitted to continue work if he did not have revised shoring plans on site, and he also admitted he never saw any revised plans and was never told that they had been ordered; yet for over six weeks he repeatedly used the one-over-two method until the inadequately shored garage collapsed. Vol. 3, Tr. 246-47. Mr. Smith therefore "knowingly disregarded the requirements of the standard." Vol. 19, Item 119 at 24. Mr. Smith's assertion that he believed that the "plans were in the mail" was found not credible. Vol. 19, Item 119 at 24-25. And, even if Mr. Smith had assumed that the plans were in the mail his conduct was nevertheless

willful because he "should not have removed the reshoring until the revised plans were on site." Vol. 19, Item 119 at 24-25.

Mr. Postma, Mr. Marlow, and Mr. Mathis also had willful states of mind. Vol. 19, Item 119 at 25-26. Project manager Postma testified regarding the importance of following written shoring plans, and he *knew* that Southern Pan had *not* ordered plans authorizing the use of the one-over-two method because he was the person responsible for ordering revised plans and he consciously decided not to order such plans. Vol. 4, Tr. 507, 546-47, 565. He also visited the site on multiple occasions after the removal of the reshores, and he directed Mr. Marlow to have his crew remove reshores. Vol. 19, Item 119 at 21, Vol. 4, Tr. 599-600. Mr. Postma's actions therefore also demonstrated plain indifference to the requirements of § 1926.703(a)(2). Superintendents Marlow and Mathis likewise exhibited plain indifference when, a day or two before pour 6A occurred, they inspected the formwork for conformity to the plans but failed to halt the pour despite the obvious deviation between the plans and the formwork. Vol. 19, Item 119 at 24, 25-26.

Southern Pan's attempts to rebut willfulness are unavailing. Southern Pan's claim that its reliance on § 1926.703(e)(1) explains its failure to obtain revised drawings lacks evidentiary support. *Supra* p. 55. And the Commission was entitled to reject Mr. Smith's testimony that he believed that revised plans had been ordered. Vol. 19, Item 119 at 24-25; *Kelliher v. Veneman*, 313 F.3d 1270, 1277 (11th Cir. 2002) (under substantial evidence standard, court does "not re-weigh or re-examine the credibility choices made by the fact-finder"). Moreover, even if Mr. Smith truly believed the revised plans were in the mail, that belief did not establish Southern Pan's good faith attempt to comply with the standard, since Mr. Smith worked for forty-six days without revised plans he knew were required to be onsite. *Fluor Daniel*, 295 F.3d at 1240-41.

CONCLUSION

For the foregoing reasons, the Court should deny Southern Pan's petition for review.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eleventh Circuit Rules 28-1(m) and 32-4, I certify that the foregoing brief complies with the type-volume limitation prescribed in Federal Rule of Appellate Procedure 32(a)(7)(B). It uses Century 14-point typeface and contains 12,517 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2016, I served a copy of the foregoing Brief of the Secretary of Labor on counsel for Petitioner by using the Court's electronic case filing system.

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