No. 16-4128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRIUMPH CONSTRUCTION CORPORATION,

Petitioner,

v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge William S. Coleman)

PAGE PROOF BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes that the issues in this case can be resolved on the papers and does not request oral argument.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA)[1] enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 659(c).

On September 19, 2016, administrative law judge (ALJ) William S. Coleman affirmed one citation that OSHA issued to Triumph Construction Corporation (Triumph). *See* Vol.7(67)[2] (Dec.). The Commission did not grant discretionary review of the ALJ's decision, and it became a final Commission order on October 20, 2016. *See* Vol.7(72); *see also* 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90. Triumph filed a timely petition for review with this Court on December 9, 2016, and the Court has jurisdiction over this appeal under section 11(a) of the OSH Act. *See* 29 U.S.C. § 660(a).

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[1] The Secretary of Labor (Secretary) has delegated his responsibilities under the Occupational Safety and Health Act to an Assistant Secretary who directs OSHA. Secretary's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

[2] Record documents are cited to the certified list, dated January 13, 2017, that the Commission filed with the Court, following the format "Vol.[#][(Item #)], [page #]," except citations to the Commission hearing transcript, Vol.1-3, are abbreviated "Tr. [page #]." Citations to Triumph's opening brief are abbreviated "Br."

STATEMENT OF THE ISSUES

1. Whether the ALJ properly upheld a violation of 29 C.F.R. § 1926.652(a)(1), which requires that an adequate protective system shield employees in excavations from cave-ins, where record evidence proves that: (1) the cited standard applied to Triumph's excavation because it was greater than five feet deep; (2) Triumph failed to provide a protective system; (3) a Triumph employee was severely injured when the unprotected trench caved in, and (4) Triumph supervisors knew that the trench was unprotected, and where Triumph failed to demonstrate that the exception set forth at 29 C.F.R. § 1926.652(a)(1)(ii), exempting excavations less than five feet deep that a competent person has determined present no indications of a possible cave-in, applied to the cited portion of its excavation.

2. Whether OSHA appropriately designated the violation as a repeat citation where Triumph had violated 29 C.F.R. § 1926.652(a)(1) on two prior occasions, these prior citations had become final orders of the Commission, and the OSH Act places no limitations on the "look back" period for assessing repeat violations.

STATUTORY AND REGULATORY BACKGROUND

The OSH Act authorizes the Secretary to promulgate and enforce workplace safety and health standards. *See* 29 U.S.C. §§ 655, 658. OSHA enforces the OSH Act by inspecting workplaces and issuing citations when it believes that an employer has violated a standard. *See id.* § 658. OSHA's citations require

employers to abate violations, and, where appropriate, pay a civil penalty. *See id.* §§ 658-659, 666. Violations may be categorized as "not serious," "serious," or "willful." *Id.* § 666(a)-(c). A violation may also be designated as "repeated." *Id.* § 666(a). If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body that is not part of the U.S. Department of Labor. *See id.* §§ 659, 661. An ALJ appointed by the Commission adjudicates the dispute, *id.* § 661(j), after which a party that is dissatisfied with the ALJ's decision may petition the Commission for discretionary review. *See id.* § 661(j); 29 C.F.R. § 2200.91(a). If the Commission does not direct review, the ALJ's decision becomes the final order of the Commission. 29 U.S.C. §§ 659(c), 661(j); 29 C.F.R. § 2200.90(d). The Commission's final orders are reviewable in the courts of appeals. 29 U.S.C. § 660(a).

Subpart P of 29 C.F.R. Part 1926, *Excavations*, contains OSHA standards regulating "all open excavations made in the earth's surface," including trenches. 29 C.F.R. § 1926.650(a). Section 652 of subpart P provides requirements for protective systems in excavations: "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with [OSHA requirements]." *Id.* § 1926.652(a)(1). Section 1910.652(a)(1) contains two exceptions to the requirement for protection from cave-ins where the excavation is: 1) "made entirely in stable rock" or 2) less than five feet deep *and* a

competent person's examination "provides no indication of a potential cave-in."[3] *Id.* § 1926.652(a)(1)(i)-(ii).

STATEMENT OF THE CASE

OSHA initiated an enforcement action against Triumph after a trench collapse severely injured a Triumph employee. Following an inspection, on February 13, 2015, OSHA issued two citations to Triumph, each including one item, for its failure to provide adequate trench protection. *See* Vol.5(2).

Triumph contested the citations, *see* Vol.5(3), and ALJ Coleman held a hearing on the merits. On September 19, 2016, the ALJ submitted to the Commission for docketing his decision and order vacating the first citation and affirming the second, a violation of 29 C.F.R. § 1926.652(a)(1), and assessing a penalty of $25,000. Dec. 48. The Commission did not direct the decision for discretionary review, and the ALJ's decision became a final order of the Commission on October 20, 2016. *See* Vol.7(72).

Triumph timely filed its petition for review with this Court on December 9, 2016, *see* 29 U.S.C. § 660(a), appealing the affirmed citation item: a repeat violation of § 1926.652(a)(1) for failure to protect employees from cave-ins through use of an adequate protective system.

[3] A "competent person" is someone "capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b).

STATEMENT OF FACTS

I. OSHA's Citation of an Unprotected Excavation at a Triumph Worksite

Triumph is a New York-based utilities construction company that was contracted by the New York City Department of Design and Construction to replace water mains throughout New York City, including along West 10th Street spanning several blocks from the West Side Highway to Fifth Avenue. Tr. 10:18-25, 89:12-16. The project included excavating a trench along West 10th Street to remove a twenty-inch water main and to replace it with a new water main of the same size. *See* Tr. 11:9-11, 54:20-22. Four feet of cover separated the top of the twenty-inch water main from street level. *See* Tr. 440:21-441:4. Therefore, the depth of the trench was at least five feet, eight inches. *See* Tr. 103:19-104:3, 490:22-491:4.

On Friday, August 22, 2014, both Salvatore Ansaldi, Triumph's site supervisor, and Augustine Formoso, its foreman, were at Triumph's worksite, along with the city inspector for the project, Mohamad Ayoub. *See* Tr. 12:2-10. At approximately 2:30 p.m. on August 22, the trench collapsed and injured Triumph employee Luis Luna. *See* Tr. 11:18-12:1, 12:5-12. Mr. Luna suffered injuries to his arm, back, and abdomen, which required multiple surgeries. *See* Tr. 49:7-18, 58:2-17. Approximately one hour after the accident, Zhao-Hong Huang, an OSHA Compliance Safety and Health Officer ("CSHO"), arrived at the

worksite to conduct an inspection. *See* Tr. 233:18-234:2. During Mr. Huang's inspection, Mr. Ansaldi and Triumph's Health and Safety Officer, Thomas Miller, admitted that there was not appropriate sheeting, shoring, or other cave-in protection in the trench at the time of the accident. *See* Tr. 210:5-17, 211:4-11, 259:8-14, 289:12-15, 320:14-321:9.

Mr. Huang took four measurements at and around the cave-in location, indicating trench depths of 53, 64, 70, and 70 inches.[4] *See* Vol.4(C-1, 7-10, 11, 13); Tr. 257:12-259:20, 265:1-269:14, 270:14-19, 300:1-302:20, 335:5-336:19, 343:12-345:6. Between the time of the accident and Mr. Huang's inspection, the condition of the trench had not changed, except for the area where the cave-in occurred due to rescue efforts. *See* Tr. 312:20-313:11.

OSHA cited Triumph for a repeat violation of 29 C.F.R. § 1926.652(a)(1) for its failure to provide adequate cave-in protection for employees working in a trench that was more than five feet deep. *See* Vol.5(2). Triumph's previous

[4] The ALJ noted that

> [t]he 53-inch measurement was to the top of a slab of pavement that had collapsed into the excavation during the cave-in . . . . It is more probable than not that the total thickness of this slab of pavement and the soil/debris from the cave-in underneath it exceeded seven inches, and thus that the depth of the excavation at that location before the cave-in was greater than 60 inches (five feet).

Dec. 10. (internal citation omitted).

citations for violations of the same standard were from 2009 and 2011, and became final orders of the Commission in those same years. *Id.*; *see also* Vol.4(C-18-22).

II. The ALJ Decision Affirming the Citation

After a three-day hearing on the merits, the ALJ affirmed the repeat violation of 29 C.F.R. § 1926.652(a)(1), and assessed a penalty of $25,000. Dec. 3, 48. The ALJ first determined that § 1926.652(a)(1) applied to Triumph's worksite. *Id.* at 15. The ALJ found that no adequate protective system protected employees from cave-ins, as required by the standard. *Id.* at 26. Both foreman Formoso, and Triumph superintendent Ansaldi knew that to install the new twenty-inch water pipe the excavation had to be at least five feet, eight inches deep. *Id.* at 27. They also knew that no protective system was in place throughout the excavation. *Id.* Mr. Formoso directed his employee to work in an area of the excavation that he knew was more than five feet deep. *Id.* Accordingly, the ALJ concluded that "[a] preponderance of the evidence establishes that Triumph has actual knowledge that its employee was in the excavation that was more than five feet deep and was not protected from cave-ins by an adequate protective system designed in accordance with § 1926.652(b) or (c)." *Id.*

The ALJ further found that, despite Triumph's contrary assertion, the two-prong exception described by § 1926.652(a)(1)(ii) did not apply. *See id.* at 26. In analyzing whether § 1926.652(a)(1)(ii)'s exception applied to Triumph's worksite,

which included an evaluation of Mr. Ansaldi's credibility, the ALJ noted that Triumph did not call foreman Formoso, to testify at the hearing.[5] *Id.* at 25-26.

The ALJ also determined that OSHA appropriately designated the violation as a repeat citation. Triumph had previously violated § 1926.652(a)(1) on two other occasions; these prior citations became final orders of the Commission on May 27, 2009, and November 18, 2011.[6] *Id.* at 30-31, 40; *see also* Vol.4(C-19, 22).

SUMMARY OF THE ARGUMENT

The ALJ correctly found that Triumph violated 29 C.F.R. § 1926.652(a)(1) because Triumph knowingly exposed its employees to a cave-in hazard in the West 10th Street excavation by failing to provide any protective system. Substantial evidence in the record establishes that the standard applied because the trench was greater than five feet deep, Triumph failed to provide protection, a Triumph employee was severely injured when the unprotected trench caved in, and Triumph knew that the trench was unprotected. Furthermore, once the Secretary proved the violation, the ALJ appropriately required Triumph to show that the exception set

[5] Because Triumph "failed to prove the excavation was less than five feet," the ALJ did not address the "competent person" prong of the exception. Dec. 26 n.15.

[6] Triumph incorrectly asserts that "[i]n both instances, Triumph entered into an informal settlement agreement with OSHA that resolved the citations." Br. at 8-9. In reality, the parties resolved the 2009 violation through a stipulated settlement approved by an ALJ. Dec. 12; *see also* Vol.4(C-20-22).

forth at § 1926.652(a)(1)(ii) applied to its worksite. Triumph failed to do so, as record evidence demonstrated that Triumph directed an employee to work in an unprotected trench more than five feet deep. Nor did the ALJ's single, passing reference to Triumph's decision not to call foreman Formoso as a hearing witness amount to a missing witness charge that somehow shifted the Secretary's burden of proof to Triumph. Instead, the ALJ properly found that the Secretary met his burden in proving the violation and noted Triumph's failure to proffer persuasive evidence that the standard's exception applied.

The ALJ also appropriately affirmed the violation's repeat characterization. OSHA has discretion to issue citations as repeated where OSHA has previously cited an employer at least once for a substantially similar violation. Here, it is undisputed that OSHA had cited Triumph for violating § 1926.652(a)(1) on two prior occasions. Triumph's reliance on OSHA's 2011 Field Operations Manual (FOM) to rebut the repeat characterization is misplaced because the FOM serves merely as a guide and creates no substantive rights for employers, and the OSH Act places no limitations on the "look back" period for characterizing repeat violations. In any event, substantial evidence in the record established that when OSHA issued the 2015 citation, OSHA policy provided for a five-year "look back" period that encompassed Triumph's 2011 violation.

STANDARD OF REVIEW

This Court must uphold the Commission's final order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 73 (2d Cir. 2012) (citation and internal quotation marks omitted). Legal conclusions are reviewed *de novo*. *See id.*

The Commission's factual findings must be upheld if they are supported by "substantial evidence on the record considered as a whole."[7] 29 U.S.C. § 660(a); *Loretto-Oswego*, 692 F.3d at 73 (citations omitted). Substantial evidence means "less than a preponderance, but more than a scintilla," and amounts to "such relevant evidence as a reasonable person might accept as adequate to support a conclusion." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000) (citation and internal quotation marks omitted). The Court must also "give great deference to credibility determinations by the ALJ," *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 72 (1st Cir. 2012), as "agency credibility resolutions are essentially nonreviewable unless contradicted by uncontrovertible documentary evidence or physical facts." *Olin Const. Co., Inc. v. OSHRC*, 525 F.2d 464, 467 (2d Cir. 1975) (citation and internal quotation marks omitted).

[7] Where an ALJ's decision becomes a final order after the Commission declines to direct it for discretionary review, the substantial evidence standard "applies with undiminished force" to the ALJ's findings. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 104 n.3, 108 (1st Cir. 1997).

ARGUMENT

I. Substantial Evidence in the Record Establishes Triumph's Violation of 29 C.F.R. § 1926.652(a)(1).

The ALJ properly found that Triumph committed a violation of 29 C.F.R. § 1926.652(a)(1). To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applied; (2) the employer failed to comply with the standard; (3) employees were exposed to the violative condition; and (4) the employer knew or should have known of the violative condition. *See New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996). An employer that seeks the benefit of the exception contained in 29 C.F.R. § 1926.652(a)(1)(ii) has the burden to prove that it qualifies for the exception. *See Sec'y v. A.E.Y. Enters.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *NYU Medical Center v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998) (citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)); *Sec'y v. C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). As discussed below, substantial evidence in the record establishes each of the four elements, Triumph failed to show that the exception in § 1926.652(a)(1)(ii) applied, and Triumph's assertion that the ALJ's

reference to an uncalled witness somehow shifted the burden of proof to Triumph is meritless.[8]

A. Triumph Violated § 1926.652(a)(1) When it Knowingly Failed to Protect Employees from Cave-Ins in the West 10th Street Excavation.

Under 29 C.F.R. § 1926.652(a)(1), "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section . . . ." Triumph, a utilities construction corporation, stipulated that it performed excavation work at its worksite. Tr. 10:18-22, 11:5-8. Accordingly, 29 C.F.R. § 1926.652 applied to Triumph's worksite.

Similarly, it is undisputed that Triumph's West 10th Street excavation lacked any protective system designed to shield Triumph's workers from cave-in hazards, a clear violation of the cited standard's requirements. Triumph's site supervisor and its health and safety officer both admitted there was no shoring at the worksite. *See* Tr. 291:7-22, 320:14-321:9, 547:4-13; *see also* Vol.4(C-3-4). Mr. Luna, the Triumph employee injured in the August 22, 2014 cave-in, told Mr. Huang during OSHA's investigation of the cave-in that there was no shoring installed in the trench and confirmed this assertion through his hearing testimony. *See* Tr. 60:10-

[8] Triumph does not specifically challenge any of the four elements that comprise the Secretary's prima facie case. Instead, the company argues generally that the ALJ's passing reference to an uncalled witness somehow inappropriately shifted the burden of proof to Triumph. Br. 12-15.

61:7, 276:5-8. Photographs taken moments after the accident show no sheeting or shoring, *see* Vol.4(C-1); Tr. 208:17-209:2, the city's Construction Accident Report reads that "[t]he trench area was 6.2' and 6.8' deep and unsheeted," Vol.4(C-2), Mr. Huang did not observe any sheeting during his inspection, Tr. 245:24-255:1, and Triumph conceded that there was no other protective system in place at the time of the accident, Tr. 499:15-23.

The Secretary also demonstrated exposure to an unprotected excavation in multiple areas of the excavation. *See* Dec. 29-30. At the time of the cave-in, Mr. Luna was preparing the excavation floor for installation of new pipe. Tr. 54:1-58:17. He had also cleared dirt by hand from under the crossing utilities because using machines in the area risked damaging them. Tr. 57:7-16, 236:24-238:10, 258:5-259:2; *see also* Vol.4(C-1, 3). In performing these tasks, Mr. Luna was exposed to the hazard and was, in fact, severely injured in the August 22, 2014 cave-in at Triumph's worksite. *See* Tr. 49:7-18, 58:2-17.

Through Triumph supervisors Ansaldi and Formoso, Triumph had actual knowledge of the violative condition. Both knew the worksite lacked, in its entirety, a protective system designed to protect Mr. Luna and other Triumph employees from cave-ins, but foreman Formoso nonetheless directed Mr. Luna to work in the unprotected trench. *See* Tr. 54:1-58:17, 60:10-61:7, 493:12-495:7, 541:7-16, 547:4-13. Messrs. Ansaldi's and Formoso's supervisory knowledge is

imputed to Triumph. Dec. 27, citing *Sec'y v. Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (quoting *Sec'y v. Access Equip. Sys.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006)). The Secretary therefore carried his burden to establish his prima facie case, and substantial evidence in the record supports the ALJ's determination that Triumph violated § 1926.652(a)(1). *New York State Elec. & Gas Corp.*, 88 F.3d 98 at 105.

B. Triumph Failed to Prove the Exception at 29 C.F.R. § 1926.652(a)(1)(ii) Applied to the West 10th Street Excavation.

The exception described in 29 C.F.R. § 1926.652(a)(1)(ii) relieves an employer from the requirement to provide an adequate system to protect employees from cave-ins where it can demonstrate that an excavation is less than five feet deep and a competent person's evaluation yielded no indication of a possible cave-in. The record evidence shows that Triumph's West 10th Street excavation was greater than five feet deep, so the exception does not apply to Triumph's worksite. Since four feet of cover separated the top of the twenty-inch water main from street level, the depth of the trench was at least five feet, eight inches. Tr. 103:19-104:3, 440:21-441:4, 490:22-491:4. Further, measurements taken by OSHA during its investigation of the trench collapse confirm that Triumph's excavation was greater than five feet. Dec. 10-11; *see also* Vol.4(C-1, 7-10, 11, 13); Tr. 257:12-259:20, 265:1-269:14, 270:14-19, 300:1-302:20, 335:5-336:19, 343:12-345:6. Because substantial evidence supports the ALJ's

determination that the West 10th Street excavation was greater than five feet deep, Triumph failed to show that the exception described by section 1926.652(a)(1)(ii) applied to its worksite.[9]

C. The ALJ's Passing Reference to Triumph's Choice of Trial Witnesses Is Immaterial Given the Substantial Record Evidence Establishing that the West 10th Street Excavation Was Greater than Five Feet Deep.

Despite the overwhelming record evidence that the trench was deeper than five feet, Mr. Ansaldi testified to the contrary. Accordingly, in evaluating the evidence about the depth of the trench, the ALJ assessed the credibility of Mr. Ansaldi's testimony. The ALJ noted, among "other factors" he considered in evaluating the veracity of Mr. Ansaldi's hearing testimony, that Triumph did not call foreman Formoso to testify about his observations of the condition of the excavation and what Mr. Luna was doing when the cave-in occurred. *See* Dec. 24-26. The ALJ cited *Sec'y v. Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331 (No.

[9] Nor can Triumph establish the second prong of the exception: that a competent person examined the ground and concluded that there was no indication of a cave-in. Mr. Ansaldi's statement, "[y]ou know what the soil looks like . . . how the machine excavates the soil . . . how it falls . . . how it holds up," is insufficient. Tr. 470:3-6; *see Sec'y v. Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994) (discrediting the foreman's conclusion that "I thought it would be safe . . . based on my experience and everything"); *cf Sec'y v. E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2050-2051 (No. 92-35, 1994) (finding that owner was not a competent person, regardless of experience, because he permitted employees to work in trench exposed to hazards in violation of OSHA standards); *Sec'y v. Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1188-1189 (No. 96-1043, 2003) (rejecting employer's argument that its competent person exercised his judgment based on his training and thirty years of experience).

00-1968, 2003), for the proposition that "when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party." Dec. 25-26, quoting *Capeway Roofing*, 20 BNA OSHC at 1342-1343. The ALJ suggested that foreman Formoso's testimony bore on Triumph's claim that the excavation was less than five feet and therefore the exception at 29 C.F.R. § 1926.652(a)(1)(ii) applied. *See* Dec. 8 (noting that "[m]oments before the cave-in, the foreman had cautioned [Mr. Luna] to be careful"); *see also* Dec. 25.

As the ALJ expressly noted, however, Triumph's decision not to call foreman Formoso as a trial witness was but one of the "factors that render what Ansaldi said on the day of the cave-in about what [Mr. Luna] was doing more reliable than his differing testimony [at the hearing] on that subject." Dec. 24. Triumph has therefore failed to substantiate its insinuation that the ALJ viewed Triumph's failure to call foreman Formoso as determinative, or "fatal," to its defense. Br. 1, 8, 13-15. An ALJ's conclusions are "not . . . rendered clearly erroneous," where, as here, substantial evidence supports those findings, "even if the testimony of the respondent's witnesses was discounted by the inference

arising from respondent's failure to call" a particular witness.[10] *Scott-Paine v. Motortanker V. L. Keegan II*, 339 F.2d 422, 424 (2d Cir. 1964). As the trier of fact, the ALJ "weighs the evidence, determines credibility and draws inferences . . . ." *Mallette v. Scully*, 752 F.2d 26, 31 (2d Cir. 1984). The ALJ appropriately fulfilled this role in issuing his decision in the instant case, and substantial evidence in the record – independent of Triumph's decision not to call foreman Formoso as a trial witness – supports the ALJ's conclusions.

In an effort to distract from the voluminous record evidence establishing that the West 10th Street excavation was greater than five feet deep, *see* Dec. 16-26, Triumph asserts that the ALJ "manufactured a missing witness charge **after the hearing**, without affording Triumph the opportunity to produce Formoso to address JHO Coleman's concerns." Br. 14 (emphasis in original). Triumph further claims that this action by the ALJ "effectively shifted the burden of proof from the Secretary to prove its allegations, to Triumph to prove its defenses." Br. 13. These contentions are meritless.

[10] Indeed, the failure to call foreman Formoso represents at best the "[s]econd" indicator of Mr. Ansaldi's unreliability. Dec. 25. The first factor cited by the ALJ was Mr. Luna's testimony corroborating Mr. Ansaldi's prior statements (and contradicting Mr. Ansaldi's assertions at hearing). Dec. 24-25.

As an initial matter, the ALJ never affirmatively issued a missing witness charge.[11] Nor did he inappropriately shift the burden of proof. Instead, the ALJ properly required Triumph, as the party seeking the benefit of the exception contained in 29 C.F.R. § 1926.652(a)(1)(ii), to show that the exception applied. *See A.E.Y. Enters.*, 21 BNA OSHC at 1659 (remanding a case and instructing the ALJ to place on the employer the burden of proving the exception contained in § 1926.652(a)(1)(ii)) (citation omitted); *see also Morton Salt Co.*, 334 U.S. at 44-45 ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *NYU Medical Center*, 156 F.3d at 413 (citing *Morton Salt Co.*, 334 U.S. at 44-45); *C.J. Hughes Constr., Inc.*, 17 BNA OSHC at 1756 ("A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.") (citations omitted). Triumph did not carry its burden, as it could not rebut the substantial record evidence demonstrating that Triumph's excavation was deeper than five feet.

Even if the ALJ's passing reference (made in the context of evaluating another Triumph witness's credibility) to Triumph's decision not to call foreman

[11] As there was no jury, the ALJ issued no charge. *See Winchester Industries, Inc. v. Sentry Ins.*, 630 F. Supp. 2d 237, 242 (D. Conn. 2009) (One of the "differences between a bench trial and a jury trial . . . consist[s] of the addition of . . . jury charge[s]."). Nonetheless, judges have discretion to draw inferences when parties determine not to call particular witnesses. *See Adelson v. Hananel*, 652 F.3d 75, 87 (1st Cir. 2011).

Formoso amounts to a missing witness charge, such a charge was appropriate. "Whether a missing witness charge should be given lies in the sound discretion of the trial court." *U.S. v. Torres*, 845 F.2d 1165, 1170-1171 (2d Cir. 1988) (citations omitted); *see also U.S. v. Gaskin*, 364 F.3d 438, 463 (W.D.N.Y. 2004) ("[W]e afford district judges considerable discretion in deciding when [missing witness charges] should and should not be given . . . . We will reverse only upon a showing of both abuse of discretion . . . and actual prejudice.") (internal citations omitted). And a judge may give a missing witness instruction without a request from a party. *See U.S. v. Ford*, 771 F.2d 60, 63 (2d Cir. 1985) (citations omitted).

The United States Supreme Court has held – in accord with the *Capeway Roofing* standard quoted by the ALJ – that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. U.S.*, 150 U.S. 118, 121 (1893) (citations omitted). An evaluation of a witness's availability must consider "all the facts and circumstances bearing upon the witness's relation to the parties, rather than merely on physical presence or accessibility." *Torres*, 845 F.2d at 1170 (citations omitted). Where the uncalled witness is likely biased toward one of the parties, such as when the witness is one party's employee like foreman Formoso, that witness is not equally available to both parties. *See U.S. v. Beekman*, 155 F.2d

580, 584 (2d Cir. 1946); *see also U.S. v. Cotter*, 60 F.2d 689, 692 (2d Cir. 1932) ("[I]f it appear that [a witness] would naturally side with one party, it is reasonable to expect that [the party] does not use him for good reason . . . .). Triumph mischaracterizes the "peculiarly available" standard by ignoring the "facts and circumstances" surrounding its failure to call foreman Formoso. As Triumph's employee, he "would naturally side with" Triumph. *Cotter*, 60 F.2d at 692.

Case law relied on by Triumph also supports the conclusion that the ALJ acted within his significant discretion and placed all burdens squarely where they belonged. Triumph cites *People v. Wood*, 271 A.D.2d 705 (2d Dept. 2000), for the proposition that "a defendant is under no duty to call witnesses." Br. 14-15. However, a more comprehensive reading of the non-binding, one-page *Wood* decision reveals that:

> [w]hile a defendant is under no duty to call witnesses . . . if a defendant elects to adduce affirmative proof of his innocence, his failure to call material witnesses under his control in support of his defense may be brought to the attention of the jury and does not constitute an impermissible effort to shift the burden of proof.

271 A.D.2d at 705 (internal citations omitted). Triumph may not have been under a duty to call witnesses, but it introduced evidence at the hearing in an effort to defend its case and take advantage of the exception in 29 C.F.R. § 1926.652(a)(1)(ii), "point[ing] to the testimony of Ansaldi as establishing that the excavation was less than five feet deep at the location of the cave-in." Dec. 18.

However, "[t]his testimony is not corroborated by any reliable evidence and is controverted by the [CSHO]'s objective measurements, [Mr. Luna]'s testimony, and Ayoub's testimony."[12] *Id.* The ALJ, as factfinder, appropriately considered Triumph's failure to call its employee, foreman Formoso, to testify and did not inappropriately shift the burden of proof. *See Wood*, 271 A.D.2d at 705; *see also Mallette*, 752 F.2d at 31.

In sum, after the Secretary successfully carried his burden proving Triumph's violation of 29 C.F.R. § 1926.652(a)(1), as correctly determined by the ALJ and supported by substantial record evidence, Triumph then had to show the exception contained in § 1926.652(a)(1)(ii) applied to the worksite. Triumph had the opportunity of a full hearing to present evidence – including the testimony of foreman Formoso – showing that the exemption at § 1926.652(a)(1)(ii) relieved it of its duty to protect its employees from cave-ins. Triumph's failure to carry its burden (including its affirmative choice not to call foreman Formoso) do not warrant a new hearing. The ALJ's reference to foreman Formoso's missing testimony was within his discretion, was not prejudicial, and was not dispositive of the case. The ALJ properly applied relevant burdens, found the exception at 29 C.F.R. § 1926.652(a)(1)(ii) did not apply to Triumph's excavation, and correctly

[12] Triumph also attempted to rely on Mr. Ayoub's testimony in proving the exception at § 1926.652(a)(1)(ii) applied to its excavation. *See* Dec. 19-20. But "rather than corroborate Ansaldi's testimony . . . , Ayoub's original testimony actually contradicts Ansaldi's . . . ." *Id.* at 20.

upheld the violation of § 1926.652(a)(1) based on substantial evidence in the record.

II. The ALJ Properly Affirmed the Violation of 29 C.F.R. § 1926.652(a)(1) as Repeated.

Triumph had previously received two citations for violating 29 C.F.R. § 1926.652(a)(1).[13] "A violation is repeated under section 17(a) of the [OSH] Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Sec'y v. Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The ALJ therefore correctly found that Triumph had committed a repeat violation because "the violation of 29 C.F.R. § 1926.652(a)(1) proven here is for the same standard as the two previous citations, and thus [] the violation here is substantially similar to those prior violations." Dec. 31.

Triumph asserts that OSHA improperly designated the citation as repeated because it relied on a five-year "look back" period, rather than the three-year period memorialized at the time in OSHA's 2011 Field Operations Manual

[13] The two prior citations became final orders of the Commission on May 27, 2009 and November 18, 2011. *See* Vol.4(C-19, 22). OSHA issued the instant citation on February 13, 2015, approximately three-and-a-half years after the 2011 final order. *See* Vol.5(2). OSHA had designated the 2011 citation as a repeat violation based on the 2009 Commission final order. *See* Vol.4(C-18).

(FOM).[14] *See* Br. 16-24. Triumph's assertion is incorrect because the suggested "look back" period contained in OSHA's FOM is effectively irrelevant to the disposition of this proceeding.

The FOM is "OSHA's enforcement policies and procedures manual that provides [its] field offices a reference document for identifying the responsibilities associated with the majority of their inspection duties." Vol.6(42), Ex. A, Vol.6(43).[15] The FOM "provide[s] instruction regarding some of the internal operations of . . . OSHA . . . . No duties, rights or benefits, substantive or procedural, are created or implied by this manual," and its "contents . . . are not enforceable by any person or entity against the Department of Labor or the United States." Dec. 38; Vol.6(42), Ex. A. In accordance with the explicit disclaimer language in the FOM, "the Commission has consistently held that the FOM is an internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer important procedural or substantive rights or duties on individuals." *Sec'y v. Caterpillar Inc.*, 15 BNA OSHC 2153, 2173 n.24 (No. 87-0922, 1993) (citations omitted). The Commission in

[14] OSHA's current version of the FOM suggests a five-year "look back" period. Dec. 36 n.26.

[15] Vol.6(43) is the ALJ's February 8, 2016 order granting Triumph's motion to take judicial notice of certain documents (Vol.6(42)), including relevant portions of the 2011 FOM. Triumph attached these FOM excerpts to its motion as Exhibit A, and the ALJ entered them into the record with the designation "R-2." Exhibit R-2 is not separately included on the Commission's certified list.

Caterpillar consequently determined that it had "no reason to examine the Secretary's actions in this case to determine whether they conformed to the procedures outlined in the FOM." *Id.*

The 2011 FOM provides a general policy for the issuance of a repeated citation where "[t]he citation is issued within 3 years of the final order date of the previous citation." Vol.6(42), Ex. A. Even if OSHA were bound to unflinchingly follow FOM procedures, which it is not, the FOM's explicit language also "confirms that 'there are no statutory limitations on' the look-back period."[16] Dec. 38; Vol.6(42), Ex. A. The Commission agrees. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) ("[T]he time between violations does not bear on whether a violation is repeated.") (quoting *Sec'y v. Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994)); *Potlatch*, 7 BNA OSHC at 1064 ("[W]e hold

[16] In entering the informal settlement agreement, Triumph "waive[d] its rights to contest the above citation(s) and penalties, as amended . . . ." Vol.4(C-19). The ALJ held that "[t]his waiver . . . made the agreed amended citation a 'Commission final order' within the meaning of *Potlatch*." Dec. 34. No record evidence suggests that Triumph relied on the 2011 FOM's general three-year "look back" policy when agreeing to the informal settlement agreement. Dec. 39. Even assuming such evidence of reliance existed, "such reliance would have been unreasonable, because . . . the 2011 FOM observes that there are 'no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation,'" and includes the explicit disclaimer that the FOM does not create rights for employers. Dec. 38-40; Vol.6(42), Ex. A. For these reasons, Triumph's bald assertion that it relied on the three-year "look back" period in entering the November 18, 2011 informal settlement agreement with OSHA has no support in evidence or law. Dec. 39-40.

that . . . the time lapse between the violations . . . do[es] not bear on whether a particular violation is repeated . . . .").

Further, "the 2011 FOM contains guidance on circumstances when OSHA may consider deviating from [its] three-year policy, including 'cases of multiple prior repeated citations,' as here." Dec. 38; Vol.6(42), Ex. A. OSHA Area Director Kay Gee's testimony confirmed that "there are certain areas where . . . I, as the Area Director, can use my discretion" in characterizing violations as repeated. Tr. 391:10-16. So rather than operating contrary to its internal procedures, OSHA instead evaluated the circumstances of Triumph's August 2014 violation of 29 C.F.R. § 1926.652(a)(1) and – as sanctioned by the 2011 FOM – appropriately designated it as a repeat violation. *See* Dec. 35-40. Therefore, case law relied upon by Triumph suggesting that OSHA failed to provide a reasoned justification for deviating from its policy is inapposite. *See id.* at 38-39.

Other OSHA guidance documents also support Area Director Gee's recollection that in any event, OSHA's policy had changed in the latter half of 2010.[17] OSHA issued a memorandum concerning "Administrative Enhancements

[17] The ALJ concluded that "an employer who was aware only of the 2011 FOM and not any policy changes within OSHA at variance with the 2011 FOM could reasonably conclude that OSHA's general internal policy included the general three-year look-back period described" by the FOM. Dec. 37 n.26. Therefore, despite acknowledging contrary OSHA policy documents, the ALJ viewed Triumph's arguments through the three-year timeframe. *Id.* He nonetheless affirmed the repeat designation. *Id.* at 40.

to OSHA's Penalty Policies" on April 22, 2010 providing that "[t]he time period for repeated violations will . . . be increased from three to five years." *See* Vol.4(J-1). Although Triumph argues that the memorandum "confirmed" the three-year period and "stated that a change *may* occur in the future," Br. at 21-22 (emphasis in original), the use of "will" rather than "may" indicates OSHA's clear intention to expand the relevant timeframe to five years.

Subsequently, OSHA's "Deployment of OSHA's Interim Administrative Penalty Policy," dated September 27, 2010, designated the change's effective date as October 1, 2010.[18] OSHA's March 27, 2012 memorandum, titled "Annual Review and Scheduled Modification to OSHA's Interim Administrative Penalty Policy," likewise indicated that the five-year period went into effect in the fall of 2010.[19] OSHA therefore properly designated the instant citation as a repeat

[18] OSHA's September 27, 2010 policy deployment memorandum is not in the record. However, the ALJ decision in *Sec'y v. Hubbard Constr. Co.*, 24 BNA OSHC 1689 (No. 11-3022, 2013), acknowledges that the three-year "look back" period expanded to five years on October 1, 2010. *See Hubbard*, 24 BNA OSHC at 1698 (citation omitted). OSHA provided a reasonable justification for this change: "to enhance the deterrent effect of penalties." *Id.* (citation omitted). Such policy change was permissible under the statute because "the time between violations does not bear on whether a violation is repeated," and "OSHA materials such as the FOM are only a guide for OSHA personnel to promote efficiency and uniformity, are not binding on OSHA or the Commission, and do not create any substantive rights for employers." *Id.* (citations and internal quotation marks omitted).

[19] Although neither party introduced OSHA's March 27, 2012 memorandum at hearing, the Secretary filed a post-hearing motion to take judicial notice of the

violation of 29 C.F.R. § 1926.652(a)(1), and the Commission's final order affirming that designation should stand.

CONCLUSION

For the foregoing reasons, the Court should dismiss Triumph's petition for review and affirm the Commission's final order.

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memorandum. *See* Vol. 7(62). The ALJ concluded that the Commission could "consider the Memorandum in assessing the parties' legal arguments," but "need not judicially notice it pursuant to Federal Rule of Evidence 201 in order to do so." Vol.7(64), 2. Indeed, "the Commission and the courts regularly consider . . . OSHA interpretive documents for purposes of taking into account their effect (if any) on legal, rather than factual issues; this does not implicate judicial notice." *Sec'y v. The Davey Tree Expert Co.*, 25 BNA OSHC 1933, 1933 n.1 (No. 11-2556, 2016) (citation omitted); *see also* Vol.7(64), 2.

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2017, the following counsel of record for Triumph Construction Corporation, was served with a copy of the foregoing Page Proof Brief for the Secretary of Labor through the Court's CM/ECF filing system:

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