No. 16-17309-EE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**EMPIRE ROOFING
COMPANY SOUTHEAST, LLC,**

Petitioner,

v.

**SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,**

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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JUNE 1, 2017

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the applicability of the Occupational Safety and Health Administration's aerial lift standard, 29 C.F.R. § 1926.453(b)(2)(v), and the application of this Court's decisions in *Quinlan Enterprises v. Secretary of Labor*, 812 F.3d 832 (11th Cir. 2016), and *ComTran Group, Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013). Given the straightforward nature of the issues presented, oral argument would not materially aid the decision-making process.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA) 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). This Court has jurisdiction under section 11(a) of the OSH Act because Empire Roofing Company Southeast, LLC (Empire Roofing) filed a petition for review on November 28, 2016, within sixty days of the Commission's September 29, 2016 final order. *Id.* § 659(a) (petition for review must be filed within sixty days of Commission final order); Petition for Review.[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 violation affirmed by the Commission's final order occurred in Florida. *See* 29 U.S.C. § 660(a).

[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. Empire Roofing's opening brief will be cited as "Empire Roofing Br. [page number]." Empire Roofing's petition for review to the United States Court of Appeals for the Eleventh Circuit will be cited as "Petition for Review."

STATEMENT OF THE ISSUES

1. Whether the Commission correctly found that OSHA's aerial lift standard, 29 C.F.R. § 1926.453(b)(2)(v), applied to Empire Roofing employees using an aerial lift to transport themselves and materials while installing metal sheeting on the roof of a commercial building.

2. Whether the Commission properly imputed to Empire Roofing its foreman's knowledge of the violation of § 1926.453(b)(2)(v) where the foreman knew his crew members failed to wear safety harnesses while using the aerial lift to access the rooftop worksite.

STATUTORY 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.

[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 OSHA. Secretary's Order 1-2012 (Jan. 18, 2012) 77 Fed. Reg. 3912 (2012). This brief uses the terms Secretary and OSHA interchangeably.

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

STATEMENT OF THE CASE

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

Following an inspection of an Empire Roofing worksite in Fort Lauderdale, Florida, OSHA issued Empire Roofing a citation alleging a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) for failing to use fall protection in an aerial lift. Volume 3, Item 2 at 6-7. Empire Roofing contested the citation and a hearing was held before a Commission ALJ. Volume 3, Item 3. The ALJ affirmed the citation

on February 28, 2014, and Empire Roofing filed a petition for discretionary review with the Commission. Volume 3, Item 25. The Commission directed review and issued its final order affirming the citation (and associated penalty of $4900) on September 29, 2016. Volume 4, Item 32, Apx. Tab 32. Empire Roofing timely filed its petition for review with this Court on November 30, 2016. Petition for Review.

B. Statement of Facts

1. OSHA's Inspection of Empire Roofing's Worksite and Issuance of the Citation

On April 9, 2013, an Empire Roofing crew was installing metal sheeting on the roof of a commercial building in Fort Lauderdale, Florida. Volume 4, Item 32 at 2. When an OSHA compliance safety and health officer (CSHO) arrived at the worksite to conduct an inspection, Empire Roofing's foreman was standing in the basket of an aerial lift, elevated between sixteen and twenty feet above the ground. Volume 4, Item 32 at 2. The foreman was not wearing a safety harness and was not tied off to the basket. Volume 4, Item 32 at 2. Two other Empire Roofing employees were on the roof of the building. Volume 4, Item 32 at 2.

The foreman told the CSHO that he had previously used the aerial lift twice that morning to transport himself and the two other Empire Roofing employees up to work on the roof. Volume 4, Item 32 at 2. The aerial lift was the means they used to transport the materials, equipment, and themselves to the roof and back.

Volume 4, Item 32 at 2. Empire Roofing had a work rule requiring employees to tie off when in an aerial lift basket. Volume 3, Item 23 at 7, Apx. Tab 23. While safety harnesses were available at the worksite, neither the foreman nor the other Empire Roofing employees used them while in the lift. Volume 4, Item 32 at 2. In a signed statement, the foreman explained that he "did not have a harness on because he was in a hurry and that he was not going to use the aerial lift very long and he said it was his fault." Volume 4, Item 32 at 2.

Based on the inspection, OSHA issued Empire Roofing a serious citation for failing to use fall protection in violation of 29 C.F.R. § 1926(b)(2)(v). That provision mandates that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." Volume 3, Item 2 at 6.

2. The ALJ'S February 28, 2014 Decision

Empire Roofing contested the citation, and ALJ Sharon Calhoun held a hearing on the matter on December 4, 2013. Volume 3, Item 23 at 1. The ALJ found that the Secretary had established Empire Roofing's violation of 29 C.F.R. § 1926.453(b)(2)(v), and she affirmed the citation and assessed a $4900 penalty. Volume 3, Item 23 at 3-8. The standard applied, the ALJ found, because "'working' within the meaning of [§ 1926.453(b)(2)(v)] 'includes the act of being transported in an aerial lift to or from a work level.'" Volume 3, Item 23 at 4. (applying Commission decision in *Salah & Pecci Construction Company, Inc.*, 6

BNA OSHC 1688 (Rev. Comm. 1978)). The ALJ also held that Empire Roofing had knowledge of the violation through its foreman, who knew that his crew members had failed to use fall protection when using the aerial lift to access the rooftop work area. Volume 3, Item 23 at 7.

The ALJ rejected Empire Roofing's assertion that the Eleventh Circuit's decision in *ComTran Group, Inc. v. DOL*, 722 F.3d 1304, 1318 (11th Cir. 2013), precluded her from imputing the foreman's knowledge of the violation to Empire Roofing. Volume 3, Item 23 at 7. The ALJ found that *ComTran* did not "disturb" longstanding Commission precedent holding that "where a violation is caused by the actions of a subordinate employee and the supervisor knew or should have known of the violation, the supervisor's actual or constructive knowledge is imputed to the employer." Volume 3, Item 23 at 7.

3. The Commission's September 29, 2016 Final Order

Empire Roofing filed a petition for discretionary review with the Commission challenging the ALJ's findings on the applicability of 29 C.F.R. § 1926.453(b)(2)(v) and the imputation of the foreman's knowledge to the company. Volume 3, Item 25 at 2. The Commission directed review on the knowledge issue,[3]

[3] The Commission erroneously noted in footnote 2 of its decision that "Empire concedes that the remaining elements of the Secretary's burden of proving a violation have been established." Volume 4, Item 32 at 2 n.2. In any event, because the Commission did not direct review on the issue of applicability, the ALJ's determination that 29 C.F.R. § 1926.453(b)(2)(v) applied to Empire Roofing's use

and on September 29, 2016, issued its decision affirming the violation of § 1926.453(b)(2)(v). Volume 4, Item 32 at 2. The Commission held that "the foreman's knowledge of his subordinates' misconduct is imputed to Empire" and "that Eleventh Circuit precedent—including the court's recent decision in *Quinlan v. Sec'y of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) . . . does not require a different outcome on this issue." Volume 4, Item 32 at 3.

C. Standard of Review

The Court reviews the Commission's findings of fact under the substantial evidence standard.[4] 29 U.S.C. § 660(a); *Quinlan Enterprises v. Secretary of Labor*, 812 F.3d 836, 837 (11th Cir. 2016). Under this standard, the Court affirms a finding if a reasonable mind could accept the evidence as adequate to support the finding. *Quinlan, 812 F.3d* at 837.

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of the aerial lift became a final Commission finding when the Commission did not direct the issue for review. *See* 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(d).

[4] 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*, 812 F.3d at 836, 837 (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 ALJ's holding on the applicability of 29 C.F.R. § 1926.453(b)(2)(v), and the Commission's affirmance of the imputation of the foreman's knowledge of the violation to Empire Roofing. All findings below will be referred to in this brief as "Commission" findings.

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)*, 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 Commission correctly found that 29 C.F.R. § 1926.453(b)(2)(v) applied to unprotected Empire Roofing employees using an aerial lift to transport themselves and materials to a rooftop worksite. Such activity constituted "working from an aerial lift" within the meaning of the cited standard. This reasonable interpretation of "working" conforms with the purpose and wording of § 1926.453(b)(2)(v) and the OSH Act, while a narrow reading would hinder the standard's purpose of protecting employees from the hazard of a fall from an aerial lift.

Likewise, the Commission properly determined that Empire Roofing had knowledge of its employees' failure to use fall protection while in the aerial lift. Empire Roofing's foreman had actual knowledge that his crew members were not wearing safety harnesses while using the aerial lift to access the rooftop worksite.

Unlike the supervisor in *ComTran,* who was working alone when he violated an OSHA standard, the Empire Roofing foreman was simultaneously involved in the violation of § 1926.453(b)(2)(v) and aware of his subordinates' violations. This Court's decision in *Quinlan* therefore squarely controls, and the Commission correctly imputed the foreman's knowledge of his subordinates' violative conduct to Empire Roofing.

ARGUMENT

Empire Roofing violated 29 C.F.R. § 1926.453(b)(2)(v) when its employees failed to use fall protection while using an aerial lift to transport themselves and materials to install metal sheeting on the roof of a building.[5] As explained below, the standard applied to Empire Roofing because its employees were "working" within the meaning of the cited standard when they used the aerial lift to complete their assigned roofing work. To the extent the language of the standard is ambiguous, the Court should defer to the Secretary's reasonable interpretation of the phrase "working from an aerial lift" as used in § 1926.453(b)(2)(v), as it conforms to the wording and purpose of the cited standard and the OSH Act. And, under this Court's guidance in *Quinlan,* the Commission properly imputed the

[5] To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the standard applied; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer knowingly disregarded the OSH Act's requirements. *Quinlan*, 812 F.3d at 836. Empire Roofing challenges only the Commission's findings on applicability and knowledge. Petition for Review.

foreman's knowledge of his crew members' failure to use fall protection to Empire Roofing, and the company's arguments to the contrary are meritless.

A. 29 C.F.R. § 1926.453(b)(2)(v) Applied to Empire Roofing Employees Using the Aerial Lift to Transport Themselves and Materials Between the Ground and the Rooftop Worksite.

Under 29 C.F.R. § 1926.453(b)(2)(v), "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." Empire Roofing used an aerial lift to transport employees and materials between the ground and the roof so that employees could install metal sheeting on the roof of a commercial building. Volume 4, Item 32 at 2. The aerial lift constituted the sole means of access to the rooftop worksite. Volume 1 at 70-71. The Commission therefore correctly found that Empire Roofing employees were "working from an aerial lift" and covered by § 1926.453(b)(2)(v) when the company used the aerial lift to complete the roofing installation activities. Volume 3, Item 23 at 5.

To the extent the meaning of the phrase "working from an aerial lift" is ambiguous, the Court should defer to the Secretary's reasonable interpretation of § 1926.453(b)(2)(v). *CF&I*, 499 U.S. at 150-51 (where the meaning of regulatory language is "not free from doubt," the Secretary's interpretation of an OSHA standard is entitled to deference if it "sensibly conforms to the purpose and wording of the regulation."); *see also Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994) (citing *AFL–CIO v.*

OSHA, 965 F.2d 962, 970 (11th Cir.1992)) (stating that the Court "should 'uphold the agency's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*'"). Here, as the Commission found, "working" within the meaning of the cited standard reasonably "includes the act of being transported in an aerial lift to or from a work level." Volume 3, Item 23 at 4 (quoting *Salah & Pecci Construction Company, Inc.,* 6 BNA OSHC 1688, at *1 (No. 15769, 1978)); *see also Gelco Builders, Inc.,* 5 BNA OSHC 1104 (No. 14505, 1977) ("work" necessarily includes the activity of gaining access to the work station).[6]

The Empire Roofing employees were on the clock when using the aerial lift. Volume 1 at 70. They were required to use the lift to reach the rooftop worksite and did so as an integral and necessary part of accomplishing the tasks assigned to them. Volume 1 at 70-71. "Because riding the lift was a part of their job responsibilities, the employees riding the lift were 'working' at the time of the [] violation." *C&C Erecting, Inc.*, 2001 WL 1263325, at *7 (OSHRC ALJ October 18, 2000). The sixteen to twenty foot fall hazard was the same, whether the employees were working or merely riding in the lift. Thus, the Secretary's

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[6] Empire Roofing takes issue with the Commission's reliance on *Salah* (and *Gelco*), Empire Roofing Br. 7-9, but as the ALJ noted, "[t]he fact that [it] is an older case does not negate or diminish its precedential value." Volume 3, Item 23 at 5. Indeed, the sole issue in *Salah* was whether an employee was "working from" an aerial lift basket when being transported in the basket. 6 BNA OSHC at *1.

interpretation of "working" is well-reasoned and furthers the purpose of the cited standard and the OSH Act to "assure . . . safe and healthful working conditions." 29 U.S.C. § 651(b).

Empire Roofing asserts that for the standard to apply, "actual physical work [must] be performed from the aerial lift," and therefore the standard does not apply to "merely riding in the lift." Empire Roofing Br. 5. Neither the text nor the purpose of § 1926.453(b)(2)(v) supports this view. As the Commission noted in *Salah*, "the standard's purpose of protecting employees from the hazard of a fall from an aerial lift would be hindered by a narrow reading of the standard." 6 BNA OSHC at 1690; *see also* Letter to Mr. Michael P. Kurtgis, CEO from Russell B. Swanson, Directorate of Construction (Feb. 2, 2004), 2004 WL 3320220, (noting that purpose of §1926.453(b)(2)(v) "is to protect employees from being bounced out of the aerial lift or placing themselves in a position from which they could be exposed to a fall by leaning over the basket"); *cf.* Safety Standards for Scaffolds Used in the Construction Industry, 61 FR 46026-01 ("In order to facilitate the efforts of construction employers to *safeguard employees who use elevating and rotating work platforms*, the Agency has decided to move the requirements of §1926.556 to a new §1926.453, Aerial lifts, in subpart L.") (emphasis added).

Empire Roofing's attempt to manufacture inconsistencies with other provisions of OSHA's aerial lift standard is equally unpersuasive. OSHA's related

prohibition against "[b]elting off to an adjacent pole, structure, or equipment while working from an aerial lift," § 1926.453(b)(2)(iii), does not create an "absurd result," Empire Roofing Br. 13, when read in conjunction with the cited standard. Instead, paragraph (b)(2)(v) confirms that fall protection must be "attached to the boom or basket," § 1926.453(b)(2)(v), rather than to an adjacent structure because aerial lifts are not designed to be permanent stationary work platforms. Nor does the omission of the word "always" from paragraph (b)(2)(v) undermine the Secretary's interpretation of the standard. *See* Empire Roofing Br. 14.[7] Rather, the wording of the standard indicates precisely when fall protection must be used: "a body belt *shall be worn* [i.e., every time] . . . *when working from an aerial lift*." § 1926.453(b)(2)(v) (emphasis added). Inclusion of the word "always" was therefore unnecessary and would have been redundant to OSHA's intended scope of the standard.

Empire Roofing additionally claims that "construing terms in a standard broadly in order to bring about the Act's remedial purposes is improper," citing to *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). Empire Roofing Br. 8. The *Darden* case is wholly inapposite. The Supreme Court in

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[7] Empire Roofing references 29 C.F.R. § 1926.453(b)(2)(iv), which states, "Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position."

Darden rejected an appellate court's broad interpretation of the term "employee," relying instead on Supreme Court precedent and traditional agency common law principles to construe the term as used in the Employee Retirement Income Security Act of 1974. In contrast there is no common-law definition of "working" that runs counter to the Secretary's interpretation of that term as used in § 1926.453(b)(2)(v).[8]

In sum, and as explained in an OSHA letter of interpretation issued in 2000, using an aerial lift to move from one work location to another is work-related activity:

> With respect to fall protection, §1926.453(b)(2)(v) requires that fall protection be used "when working." It is well established that employees are considered to be working any time they are performing work or work-related activities. Moving from one work location to another is considered a work-related activity. Employees in the bucket must wear fall protection at all times, including when in transit from one work location to another.

Memorandum for Richard Soltan, Acting Regional Administrator, from Russell B. Swanson, Directorate of Construction (Jan. 6, 2000), *publicly available* from OSHA's website at www.osha.gov (Standard Interpretations); *see also* Letter to

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[8] Indeed, available definitions support the Secretary's interpretation. For example, the Merriam-Webster dictionary defines working as "engaged in work especially for wages or a salary," "assumed or adopted to permit or facilitate further work or activity" or "spent at work." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/working (last visited May 31, 2017). Here, Empire Roofing employees were engaged in work for pay while riding in the aerial lift. Volume 1 at 70. The aerial lift "facilitate[d] further work" on the rooftop. Volume 1 at 68.

Andrew Wilson, P.E. from James G. Maddux, Directorate of Construction (Apr. 20, 2012), 2012 WL 2366250 (confirming that "[a]erial lifts may be used to transport personnel so long as the requirements in §1926.453(b)(2)(v) . . . are met. [That provision] requires that employees working from aerial lifts be tied-off."). The Secretary's longstanding interpretation of § 1926.453(b)(2)(v) conforms to the purpose and wording of the standard, is reasonable, and the Court must therefore accord it deference. *CF&I,* 499 U.S. at 157 ("A reviewing court may certainly consult [informal interpretations like interpretive rules and enforcement guidelines] to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position.").

B. The Commission Correctly Imputed to Empire Roofing Its Foreman's Knowledge of His Crew Members' Failure to Use Fall Protection in Violation of 29 C.F.R. § 1926.453(b)(2)(v).

The Commission correctly found that Empire Roofing had knowledge of the violation of 29 C.F.R. § 1926.453(b)(2)(v) through its foreman. Volume 4, Item 32 at 3. The foreman had actual knowledge of the violative conduct of his two crew members. Each unprotected crew member rode up in the basket of the aerial lift with him during two separate trips from the parking lot to the roof. Volume 3, Item 23 at 7. Empire Roofing had a work rule requiring employees to tie off when in an aerial lift basket. Volume 3, Item 23 at 7. The foreman was aware of the rule and

admitted violating it. Volume 3, Item 23 at 7. The foreman also admitted to the CSHO and at the hearing that he had actual knowledge of his crew's failure to use fall protection. Volume 3, Item 23 at 7. Therefore, the Commission properly imputed the foreman's knowledge to Empire Roofing. *See Quinlan,* 812 F.3d at 842.

Contrary to Empire Roofing's assertions, Empire Roofing Br. 18-21, this Court's decision in *Quinlan*, and not *ComTran*, controls this case. As the Court held in *Quinlan*, it is "appropriate to impute a supervisor's knowledge of a subordinate employee's violative condition to his employer under the Act when the supervisor himself is simultaneously involved in violative conduct." 812 F.3d at 835. This is precisely what occurred here: Empire Roofing's foreman "transported himself, along with some materials, and each of the two Empire employees up to the roof" and "[w]hile safety harnesses were available at the worksite, neither the foreman nor the two other Empire employees used safety harnesses during transport in the lift." Volume 4, Item 32 at 2.

Empire Roofing unsuccessfully attempts to analogize the present case to *ComTran*, even while recognizing that "[t]his appears to be similar to the fact pattern in *Quinlan*." Empire Roofing Br. 19. According to Empire Roofing the foreman here "actually created the violative condition." Empire Roofing Br. 16. But it is undisputed that neither of the two Empire Roofing employees in the

foreman's crew used safety harnesses during the transport in the lift. Volume 4, Item 32 at 2. This failure constituted the violative condition, rather than "the foreman's manner of operation of the lift." Empire Roofing Br. 19.

In short, and as the Court held in *Quinlan,* there is "little or no difference between the classic situation in which the supervisor sees the violation by the subordinate and disregards the safety rule [] and the instant situation in which the supervisor sees the violation and pitches in and works beside the subordinate to expedite the job." 812 F.3d at 841. Nor does this case present the "improper and unfair" problem that this Court noted in *ComTran*, where "[t]he mere fact of the violation itself (element 2) would satisfy the knowledge prong (element 4)." *Comtran*, 722 F.3d at 1306, 1317; *see Quinlan*, 812 F.3d at 841. Here, the Secretary proved the second element—the subordinates' failure to use fall protection—separately from proving that Empire Roofing had knowledge of the violative condition. *Quinlan* therefore controls; Empire Roofing had knowledge of its employees failure to use fall protection in the aerial lift; and the Court should affirm the violation of § 1926.453(b)(2)(v).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and affirm the final order of the Commission.

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CERTIFICATE OF COMPLIANCE

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 Times New Roman 14-point typeface and contains 5,141 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2017, 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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