

No. 17-9506

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

F & H COATINGS, LLC,

Petitioner - Appellant,

v.

**R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,**

Respondent – Appellee.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge Brian A. Duncan)
OSHRC Case No. 15-0558

BRIEF FOR THE SECRETARY OF LABOR

NICHOLAS C. GEALE
Acting Solicitor of Labor

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

CHARLES F. JAMES
Counsel for Appellate Litigation

BRIAN A. BROECKER
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5484

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Oral Argument Not Requested (10th Cir. R. 28.2(C)(4))

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 RELATED CASES (10th Cir. R. 28.2(C)(1))

There are no prior or related appeals.

GLOSSARY OF ACRONYMS AND ABBREVIATIONS
(10th Cir. R. 28.2(C)(6))

Administrative law judge (ALJ)

Boardman, LLC (Boardman)

OSHA Compliance Safety and Health Officer (CSHO)

F & H Coatings, LLC (F&H)

Occupational Safety and Health Act of 1970 (OSH Act)

Occupational Safety and Health Administration (OSHA)

Occupational Safety and Health Review Commission (Commission)

Secretary of Labor (Secretary)

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 November 28, 2016, administrative law judge (ALJ) Brian A. Duncan issued a decision affirming a citation that OSHA issued to F & H Coatings, LLC (F&H). Vol.5(38)² (hereafter, “Dec.”). The Commission did not grant discretionary review of the ALJ’s decision, and it became a final Commission order disposing of all parties’ claims on December 30, 2016. *See* Vol.5(41); 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90. F&H filed a timely petition for review with this Court on February 14, 2017, and the Court has jurisdiction over this appeal under section 11(a) of the OSH Act. 29 U.S.C. § 660(a).

¹ At all times relevant to this case, the Secretary of Labor’s (Secretary) responsibilities under the Occupational Safety and Health Act had been delegated to an Assistant Secretary who directed OSHA. Secretary of Labor’s Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms “Secretary” and “OSHA” are used interchangeably in this brief.

² Record documents are cited to the certified list that the Commission filed with the Court on March 16, 2017, following the format “Vol.[#](Item #), [page #],” except citations to the Commission hearing transcript, Vol.1-2, are abbreviated “Tr. [page #].” Citations to F&H’s opening brief are abbreviated “Br. [page #].”

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's finding that a large, lopsided pressure vessel that was placed on F&H's cylindrical pipe racks was a serious safety hazard, where the elevated vessel posed an obvious risk that the vessel could move or fall from the pipe racks and strike an employee working on or near the vessel, F&H's supervisors acknowledged that the vessel could move or fall from the pipe racks if it were unstable or improperly positioned on the pipe racks, and the vessel actually fell from the pipe racks and fatally crushed an F&H employee.
2. Whether substantial evidence supports the ALJ's finding that F&H recognized the potential for the elevated and unsecured vessel to move or fall from the pipe racks and strike an employee, where the potential for the vessel to move or fall was obvious, F&H's supervisors acknowledged that the vessel could unexpectedly move or fall from the pipe racks, and F&H demonstrated its recognition of that risk by assessing the positioning and stability of elevated vessels prior to working on them, and by using physical implements to prevent smaller objects from moving or falling off of the pipe racks.
3. Whether substantial evidence supports the ALJ's finding that F&H could have feasibly abated the hazard, where F&H could have used a roller rack, wood

pilings, or a rack constructed with “I-beams” to elevate the vessel, any of which would have materially reduced the hazard, and the ALJ reasonably admitted, and relied on, testimony from an expert witness regarding the feasible methods for holding such a vessel during the sandblasting and painting process.

4. Whether substantial evidence supports the ALJ’s finding that F&H had knowledge of the presence of the hazard, where such knowledge is established if F&H was aware of the physical conditions that constituted a hazard, and it is undisputed that F&H’s supervisor worked on the elevated and unsecured vessel.

STATEMENT OF THE CASE

I. Procedural History

OSHA initiated this enforcement action against F&H after a 12,000 pound pressure vessel, which had been elevated on cylindrical “pipe racks,” unexpectedly fell from the pipe racks and fatally crushed an F&H employee who was preparing the vessel to be sandblasted and painted. OSHA opened an inspection of the workplace where the accident occurred on September 24, 2014, and ultimately issued a citation to F&H for a violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), which is commonly known as “the general duty clause.”

After F&H contested the citation, Vol.4(3), a Commission ALJ held a two-day hearing on the merits, and on November 28, 2016, issued a decision and order affirming OSHA’s citation. Vol.5(38). F&H filed a petition for discretionary

review on December 19, 2016, Vol.5(40), but the Commission did not direct the decision for review, and the ALJ's decision became a final order of the Commission on December 30, 2016. *See* Vol.5(41). F&H timely filed its petition for review with this Court on February 14, 2017. 29 U.S.C. § 660(a).

II. Statutory Background

The OSH Act's purpose, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," 29 U.S.C. § 651(b), is "neither punitive nor compensatory, but rather forward-looking; *i.e.*, to prevent the first accident." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir. 1987). To effectuate this purpose, Congress obliged employers to comply with both OSHA's occupational safety and health standards, 29 U.S.C. § 654(a)(2), and a "general duty clause," which requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The general duty clause is "intended as a catchall provision to cover dangerous conditions of employment not specifically covered by existing health and safety standards promulgated by the Secretary of Labor under the [OSH] Act." *Pratt & Whitney Aircraft v. Sec'y of Labor*, 649 F.2d 96, 98 (2d Cir. 1981).

The Secretary enforces OSHA's standards and the general duty clause by issuing citations to employers, which require the employer to abate violations and, where appropriate, propose a civil money penalty. 29 U.S.C. §§ 658-659, 666. If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body that is not within the U.S. Department of Labor. *Id.* §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute. *Id.* §§ 659(c), 661(j). A party adversely affected by the ALJ's decision may petition the full Commission to discretionarily review the decision. *Id.* § 661(j); 29 C.F.R. § 2200.91(a). If review is not granted, the ALJ's decision becomes the final order of the Commission thirty days after its issuance. 29 U.S.C. § 661(j). A party adversely affected or aggrieved by the Commission's final order may seek review in the appropriate court of appeals. *Id.* § 660(a), (b).

III. Statement of Facts

A. An F&H Employee is Fatally Crushed When a Pressure Vessel Unexpectedly Falls from F&H's Pipe Racks.

F&H is a commercial and industrial painting and coating contractor. Dec. 3 (Stip. ¶4). F&H contracted with Boardman, LLC (Boardman), a manufacturer of steel pressure vessels, to sandblast and paint six pressure vessels. Dec. 3, 4; Tr. 71, 190, 312; Vol. 3(R-11). F&H performed its work at Boardman's Wichita, Kansas facility. Dec. 3 (Stip. ¶9), 4.

Prior to beginning work on the contract, F&H delivered to Boardman's facility cylindrical pipe racks,³ which were essentially metal sawhorses created by welding together several pieces of eight-inch-diameter piping. Dec. 4; Tr. 53-54, 82, 151, 211, 212, 267, 355. As shown below, each pipe rack consisted of a horizontal crossbeam (approximately twelve feet long), two vertical legs (approximately twenty-seven inches in height), and two additional pipe sections that were perpendicular to the crossbeam and served as the feet (approximately forty-six inches long):

[Imbedded photograph omitted]

³ The "pipe racks" were also referred to as "pipe stands" during the proceeding below, *see, e.g.*, Tr. 78 (explaining that F&H referred to "pipe stands" and "pipe racks" interchangeably during the inspection). This brief uses the term "pipe racks."

Vol.3(R-4); Dec. 4; Tr. 37, 80, 245; *see also* Vol.3(R-5). The pipe racks, which did not have a visibly-marked load rating, Tr. 84, were very light weight and could be picked up by a single man. Tr. 37, 46.

In use, the pipe racks were placed at variable distance apart from each other with their crossbeams parallel, Dec. 4; Tr. 149-50, thus permitting one or more objects to be rested on top of, and across, the crossbeams. At the end of each crossbeam was a metal pin attached to a metal chain, which – when inserted into a hole in the top of the crossbeam – could be used to prevent objects resting on the crossbeams (such as small diameter piping) from rolling off the sides of the crossbeams. Dec. 4; Tr. 174, 252; Vol.3(R-4), (R-5), (R-6). Other than these chains and pins, the pipe racks did not have any physical features that would prevent elevated objects from rolling, sliding, or otherwise falling off of the ends of the crossbeams. Tr. 38-39, 81-82, 213.

F&H did not have safety rules or written procedures regarding the use of pipe racks, Tr. 83-84, 227, 274, nor did F&H train its employees on how to safely use the pipe racks. Tr. 145, 150, 228-29, 258. Boardman did not ask F&H to deliver the pipe racks; rather, F&H independently delivered the pipe racks to Boardman so that Boardman would place its recently-fabricated pressure vessels on the pipe racks for the sandblasting and painting process. Tr. 151, 293-95, 317-

19, 355-56. F&H did not conduct any safety or engineering analyses before using the pipe racks to hold large pressure vessels. Tr. 170, 229; Vol.3(C-10), 2.

Boardman did not use pipe racks to hold the pressure vessel in place when it manufactured the pressure vessels, but instead used a “roller rack” (or “rollers”), in which the vessel is cradled between two sets of wheels or tires. Dec. 4, Tr. 97, 271-72, 291, 342-43, 389; *see* Vol.3(C-11), F6 (depicting roller racks similar to those used at Boardman). A vessel held by a roller rack maintains four points of contact with the rack, and the roller rack’s motorized tires permit the operator to spin and rotate the vessel without breaking contact with the tires. Tr. 271-73. Boardman’s employees received training on how to safely use roller racks, but because Boardman did not use pipe racks in its work, Boardman did not have safety training or procedures regarding the use of pipe racks. Tr. 90, 319, 322, 343. Roller racks could also be used to hold pressure vessels in place for sandblasting and painting, and several sandblasting and painting contractors, including F&H, previously used roller racks to hold Boardman-manufactured vessels during the sandblasting and painting process. Dec. 18-19; Tr. 93, 159, 270, 296, 301-02, 361, 482. Vessels painted on a roller rack tended to require more “touch-up”⁴ work than vessels painted on pipe racks. Tr. 98, 279.

⁴ After a vessel is initially blasted and painted on either pipe racks or a roller rack, the vessel must be rotated and repositioned in order to “touch up” the parts of the vessel that were in contact with the rack. *See* Tr. 269-70, 455.

On September 23, 2014, a Boardman employee, Dustin Johnson, used a crane to place a recently-manufactured vessel on F&H's pipe racks, which Boardman set up on an outdoor concrete surface. Dec. 3 (Stip. ¶¶ 7, 16), 5; Tr. 266, 315. Mr. Johnson placed the vessel on the pipe racks because F&H had given Boardman the pipe racks for that purpose, and because F&H had recently used the pipe racks to support a similarly-sized vessel for sandblasting and painting. Tr. 77-78, 190, 192, 293-95, 317, 324-25.

Weighing approximately 12,000 pounds, the vessel had a twelve-foot-long and three-foot-diameter cylindrical body, and four quadrangular angle iron legs attached to one end of the body, each of which was approximately four feet long. Dec. 5; Tr. 75, 256; Vo.3(C-1), (C-13). The vessel's cylindrical body had several valves and appendages protruding from it, as well as a "manway" through which workers could access the interior of the vessel. The manway protruded approximately eighteen inches from the body of the vessel, had a diameter of approximately twenty-nine inches, and accounted for approximately 2,200 pounds of the vessel's weight. Dec. 5; Tr. 75, 256, 346, 354-55; Vol.3(C-13). The manway made the vessel lopsided, but a counterbalance was not installed. Tr. 355. Both the vessel's manway and angle iron legs can be clearly seen in the following photograph:

[Imbedded photograph omitted]

Vol.3(R-7). When resting on F&H's pipe racks, the vessel had three points of contact with the crossbeams (two legs on one crossbeam, and the curved end of the cylindrical body on the other crossbeam). Tr. 268-69; *see also* Vol.3(C-8) (showing the curved end of the vessel).

F&H's supervisor, Robert Patrick, and his subordinate painter, Tony Losey, arrived at the worksite later that morning. Dec. 3 (Stip. ¶¶ 6, 8); Tr. 104-05, 151, 168, 185. As he always did before working on a vessel elevated on pipe racks, Mr. Patrick assessed whether the vessel was correctly positioned and stable on the pipe racks. Dec. 5-6; Tr. 145, 187-88, 249-50. Mr. Patrick was "not an engineer," Tr. 148, 156, and had not received any specific training or instructions from F&H regarding the use of pipe racks to elevate vessels. Mr. Patrick relied solely on his

“experience” to judge the vessel’s positioning and stability. Dec. 9; Tr. 145, 149, 150, 156, 157, 258, 274-75; *see also* Tr. 83-84 (F&H’s safety and health program had no content related to the use of pipe racks).

Mr. Patrick began by visually inspecting the vessel’s placement on the pipe racks to ascertain whether they were set an appropriate distance apart, and whether the vessel was positioned “dead-center” on the crossbeams. Dec. 5; Tr. 146-49, 156, 187-88, 191. Mr. Patrick then physically pushed the vessel “just to make sure that it wasn’t going to move.” Tr. 171; *see* Tr. 154, 156, 191. A vessel “couldn’t be off-center” or “too far to one end,” or it would “disrupt the racks,” Tr. 146-47, and a vessel that was unstable on the crossbeams would “probably fall.” Tr. 154; *see also* Tr. 213. Although Mr. Patrick claimed that he would “know there was a problem if [he saw] it,” Tr. 157, he had never in his twenty-plus year career found that an elevated vessel was unstable or improperly positioned on pipe racks. Tr. 156-57. However, had he determined that the vessel was unstable or incorrectly positioned on the pipe racks, Mr. Patrick could have asked Boardman to use its crane to reposition the vessel. Tr. 152-53; *see also* Tr. 348 (F&H was expected to ask Boardman to move the vessel with its crane).

Mr. Patrick did not know how much the September 23, 2014 vessel or its manway weighed, but assumed that the vessel’s legs, which were lying flat on one of the pipe racks’ crossbeams, would prevent the manway from causing the vessel

to shift. Tr. 148-49, 214. Mr. Patrick determined from his assessment that the elevated vessel was safe for work, Tr. 145, and he and Mr. Losey thereafter began preparing the vessel to be blasted and painted. In order to hang lights inside the vessel, Mr. Losey crawled partway inside of the vessel's manway. Tr. 85, 161-62. Mr. Patrick, who was standing nearby, then heard a loud noise, and observed the vessel beginning to move on the pipe racks. Tr. 163, 166. Although Mr. Patrick yelled at Mr. Losey and attempted to physically stop the tank from moving, the pipe racks flipped up and the vessel rolled off the pipe stands, which pushed Mr. Patrick backwards and fatally crushed Mr. Losey underneath the manway. Tr. 163-66; *see also* Tr. 86.

B. OSHA Issues a Citation to F&H, and a Commission ALJ Affirms the Citation.

The following day, OSHA Compliance Safety and Health Officer (CSHO) Ryan Hodge initiated an inspection of Boardman's fatality. Dec. 6; *see* Tr. 68-70. CSHO Hodge determined that F&H's pipe racks were not configured to prevent elevated objects from unintentionally moving, and that the potential for the pressure vessel to unintentionally move or fall from the pipe racks created an obvious safety hazard to employees working on or near the vessel. Tr. 95-96; *see also* Tr. 98 ("the pressure vessel could become off-centered and kick-out or fall from the racks" and strike or crush an employee), Tr. 100 (the cited hazard "deals with the inability of the pipe rack to keep the pressure vessel from moving or

becoming off-center, from leaving the work racks”). OSHA ultimately issued a citation to F&H on March 17, 2015, which proposed a civil penalty of \$7000. Dec. 6; Vol.3(C-6), Vol.4(2).

F&H contested the citation, and a two-day hearing was held before a Commission ALJ on March 29 and 30, 2016. Dec. 2. In addition to CSHO Hodge, Tr. 65-126, and Mr. Patrick, Tr. 141-223, the ALJ heard testimony from Sergeant John Ryan of the Wichita Police Department, who investigated the accident for local law enforcement, Tr. 27-64, Michael Moon, who was the Assistant Area Director for OSHA’s Wichita Area Office at the time of the accident, Tr. 127-41, and Michael Emmett, F&H’s safety director. Tr. 226-83, 510-12. The ALJ also heard testimony from three of Boardman’s current and former employees: Jeffrey Mills, who was Boardman’s plant superintendent at the time of the accident, Tr. 284-304, 312-34, Keith Farish, who was a fitter/welder and safety coordinator at the time of the accident, Tr. 335-81, and Max McMillian, who was a quality control inspector at the time of the accident. Tr. 382-411. Additionally, the ALJ heard testimony from Brian Hope, Tr. 412-507, the vice president of a national safety and health consultant company, Tr. 412, who the ALJ qualified to testify as “as an expert in safety procedures used to support tanks and vessels during blasting and painting.” Tr. 457.

On November 28, 2016, the ALJ issued his decision affirming OSHA's citation and assessing a \$7000 civil penalty. Dec. 22. The ALJ first determined that placing the extremely heavy pressure vessel on the pipe racks, "allowing work to be performed on it, and not accounting for the possibility that the object might fall" created a safety hazard. Dec. 8; *see* Dec. 8-11. A safety hazard is "a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur," Dec. 10 (citing *Baroid Div. of NL Indus., Inc.*, 660 F.2d 439, 444 (10th Cir. 1981)), and the ALJ concluded that placing the vessel "on top of round metal pipes, with only visual observation and a shove to ensure stability, certainly increased the risk of serious harm to those employees assigned to perform work on the elevated object." Dec. 10. Given that F&H relied solely on Mr. Patrick's pre-work evaluation – which "was not based on any methodology or calculation," Dec. 9 – to assess the vessel's stability, the ALJ found that it was reasonably likely that such an accident would occur due to a "simple oversight regarding the [vessel's] placement on the racks or an incorrect assumption about the ability of the vessel's legs to counterbalance the weight of the protruding, two-thousand-pound manway." Dec. 11. Considering the size of the vessel, and the consequences of the September 23, 2014 accident, the ALJ determined that death or serious physical harm to an employee would likely result

if the elevated vessel were to move or fall from the pipe racks during F&H's work.

Dec. 16.

The ALJ further determined that F&H recognized the risk of harm that the elevated and unsecured vessel posed to its employees. Dec. 11-15. The ALJ found that it was obvious that "placing an awkwardly shaped, incredibly heavy object on elevated crossbeams creates, or at the very least contributes to, an increased risk of being struck by the vessel should it roll, slip, shift, fall or slide." Dec. 12.

Additionally, the fact that Mr. Patrick assessed the vessel to gauge its positioning and stability on the pipe racks prior to working on it indicated that F&H recognized the potential for the elevated vessel to unintentionally move or fall from the pipe racks. Dec. 12. The ALJ also found that the pipe racks' metal chains and pins, which were designed to prevent smaller objects from falling off the crossbeams, Tr. 174, 252, further demonstrated that F&H recognized the potential for elevated objects to inadvertently fall from the pipe rack crossbeams.

Dec. 13. The ALJ thus concluded that F&H actually recognized the safety hazard.⁵

Id.

⁵ The ALJ also clarified that even if Boardman created the hazard by setting up the vessel on the pipe racks, F&H would still be liable as a "controlling" and/or an "exposing" employer. *See* Dec. 14-15. F&H did not challenge that finding in its opening brief. *Coleman v. B-G Maint. Mgmt. of Colorado, Inc.* 108 F.3d 1199, 1205 (10th Cir. 1997) ("Issues not raised in the opening brief are deemed abandoned or waived.").

The ALJ also determined that there were multiple feasible means to materially reduce the hazard. Dec. 17-21. The ALJ first clarified that F&H had not taken any steps to abate the recognized hazard, as Mr. Patrick's assumption that the vessel would not fall from the pipe racks, which was based on his unscientific pre-work assessment, is "not the same as taking steps to ensure that it will not." Dec. 18. The ALJ went on to find that F&H could have used a roller rack (or "rollers") to hold the vessel during the sandblasting and painting process. Dec. 18. F&H argued that the vessel's attached legs, protruding valves, and manway precluded the use of a roller rack, but the ALJ found that Boardman's roller rack actually held the vessel at the end of the fabrication process, which indicated that the vessel could have likewise been held on a roller rack for sandblasting and painting. Dec. 19. While the legs and protrusions may have made it more difficult to fully rotate the vessel on the tires of the roller rack, the vessel could have been partially rotated and then repositioned with the assistance of a crane. *Id.* In addition to a roller rack, the ALJ found that F&H could have used wood pilings to "chock up" the vessel, as another contractor did when it blasted and painted a similar Boardman-manufactured vessel, Dec. 20, or a rack constructed from I-beams, which were "designed to prevent both the movement of the vessel/tank and to prevent movement of the racks themselves." Dec. 20-21.

Additionally, the ALJ found that F&H had knowledge of the physical conditions that presented a hazard to its employees. Mr. Patrick – whose knowledge, as a supervisor, is imputed to the employer, *Mountain States Telephone and Telegraph Co.*, 623 F.2d 155, 158 (10th Cir. 1980) – “was not only at the worksite, but directly involved in working on the vessel at the time of the accident.” Dec. 17.

SUMMARY OF THE ARGUMENT

The ALJ correctly determined that F&H violated the OSH Act’s general duty clause. Placing the heavy lopsided pressure vessel on F&H’s pipe racks, with only three points of contact between the vessel and the cylindrical crossbeams, created an obvious risk that the vessel could unexpectedly move or fall from the pipe racks and strike an employee. This risk is evident from the September 23, 2014 accident – in which the elevated vessel actually fell from the pipe racks and fatally crushed Mr. Losey – as well as from the testimony from F&H’s supervisors, who acknowledged that the vessel could fall if it were unstable or improperly positioned on the pipe racks. That F&H relied solely on Mr. Patrick’s unscientific pre-work assessment to determine if the elevated vessel was stable and correctly positioned on its pipe racks further indicates that such an accident could occur under plausible circumstances, and both the September 23, 2014 accident and common sense support that an unexpectedly falling vessel would likely cause the

death or serious harm of an employee working on or near the vessel. Substantial evidence thus supports the ALJ's finding that a hazard existed.

Substantial evidence also supports the ALJ's finding that F&H recognized the hazard. Not only was it obvious that the elevated and unsecured vessel was hazardous, but it is clear that F&H was actually aware of the potential danger that the elevated and unsecured vessel posed to its employees; F&H's supervisors' acknowledged the potential for the unsecured vessel to unintentionally move or fall from the pipe racks and harm an employee, and both Mr. Patrick's pre-work assessment, and F&H's use of metal chains and pins to keep other objects from falling off of the pipe racks, also demonstrate that F&H was aware that the vessel could unintentionally move or fall from the pipe racks.

Also supported by substantial evidence is the ALJ's finding that there were multiple feasible means for abating the hazard, as the evidence established that F&H could have used a roller rack, wood pilings, or a rack constructed with "I-beams" to more safely support the vessel. When making this finding, the ALJ did not err by admitting and relying on Mr. Hope's testimony regarding the feasible alternative methods for supporting the vessel for blasting and painting. The ALJ also correctly found that F&H had knowledge of the physical conditions that constituted a hazard because Mr. Patrick indisputably worked on the elevated and

unsecured vessel. The Court should therefore uphold the Commission’s decision and dismiss the petition for review.

STANDARD OF REVIEW

The Court’s review of the Commission’s final order “is narrow and highly deferential to the agency.” *Compass Env’tl, Inc. v. OSHRC*, 663 F.3d 1164, 1167 (10th Cir. 2011). The Commission’s legal conclusions are reviewed “to determine if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” while factual findings must be upheld if they are supported by “substantial evidence on the record considered as a whole.” 29 U.S.C. § 660(a). This deferential standard of review “applies even when the Commission does not receive evidence but instead adopts an ALJ’s findings.” *Tierdael Const. Co. v. OSHRC*, 340 F.3d 1110, 1114 (10th Cir. 2003). An ALJ’s decision should be upheld under substantial evidence review if “a reasonable mind would consider the evidence adequate to support the conclusion reached.” *Compass Env’tl, Inc.*, 663 F.3d at 1167; *see also Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1129 (10th Cir. 2013) (substantial evidence standard “requires more than a scintilla but less than a preponderance of the evidence,” and “does not allow a court to displace 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*”).

ARGUMENT

The ALJ correctly determined that F&H violated the general duty clause when its employees worked on a large, lopsided pressure vessel that had been elevated on cylindrical pipe racks, with only three points of contact between the vessel and the cylindrical crossbeams. To establish a violation of the general duty clause, “the Secretary must show: (1) that a hazard likely to cause death or serious bodily harm existed at a citable workplace; (2) that the hazard was recognized as such either by the cited employer or generally within the industry; and (3) that there was a feasible method by which the cited employer could have abated the ‘recognized hazard.’” *Baroid*, 660 F.2d at 444 (citations omitted). The Secretary must also prove that the cited employer knew, or with the exercise of reasonable diligence, could have known, of the violative condition. *Tampa Shipyards*, 15 BNA OSHC 1533, 1535 (Nos. 360, 86-469, 1992); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976).

F&H challenges the ALJ’s conclusion that the Secretary proved each of these elements, and also argues that the ALJ erred by admitting the Secretary’s expert witness’s testimony, which the ALJ relied on when finding that there were multiple feasible methods for abating the hazard. As discussed below, F&H’s arguments are uniformly meritless, and the Court should dismiss the petition for review.

I. Substantial Evidence Supports the ALJ’s Finding that the Large, Lopsided Pressure Vessel, Which was Elevated on F&H’s Pipe Racks and Had Only Three Points of Contact with the Racks’ Crossbeams, Posed a Serious Safety Hazard to F&H’s Employees.

The general duty clause requires employers to ensure that its workplace is “free from recognized hazards,” 29 U.S.C. § 654(a)(1), and this Court has defined “hazard” as any “condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.” *Baroid*, 660 F.2d at 444. A condition that creates such a risk may be cited under the general duty clause if an accident could “occur under other than a freakish or utterly implausible concurrence of circumstances.” *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052 (No. 89-2804, 1993) (citing *Nat’l Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973)). Here, substantial evidence supports the ALJ’s determination that placing the 12,000 pound pressure vessel on F&H’s pipe racks, which provided the vessel with only three points of contact between the vessel and the pipe racks’ cylindrical crossbeams, created a safety hazard, as it created “an increased risk [that an employee would be] struck by the vessel should it roll, slip, shift, fall or slide” from the pipe racks. Dec. 12.

To begin with, the ALJ reasonably determined that it was obvious that the placement of the pressure vessel on F&H’s cylindrical pipe racks created an increased risk that the vessel could unexpectedly move or fall, striking any employee nearby. *See* Dec. 4, 8, 11. A condition may be determined to be an

obvious safety hazard based solely on the condition's physical characteristics and common sense. *See, e.g., McKie Ford, Inc. v. Sec'y of Labor*, 191 F.3d 853, 856 (8th Cir. 1999) (finding an elevator to be an obvious hazard based on its description, photographs, and a video recording of the elevator in operation); *Litton Sys., Inc.*, 10 BNA OSHC 1179, 1182 (No. 76-900, 1981) (finding a vehicle with a twenty-five-foot blind spot to be an obvious hazard based on "common knowledge"); *Donovan v. Missouri Farmers Ass'n*, 674 F.2d 690, 693 (8th Cir. 1982) (lowering employees into a confined space without a safety belt and a lifeline attachment is an obvious hazard). Here, the elevated vessel was conspicuously lopsided, Dec. 5; Tr. 54, 75, 149, 256, 355, and while two of its angle iron legs rested on one of the pipe rack crossbeams, the vessel's cylindrical body provided the vessel's only point of contact with the other crossbeam. Dec. 8; Tr. 149, 268-69. The pipe racks had no physical features that would prevent the vessel from moving or falling off the crossbeams, nor did F&H add any physical mechanisms to secure the vessel in place on the pipe racks. Dec. 8; Tr. 38-39, 81, 82, 202, 213-14. CSHO Hodge identified that this staging created an obvious risk that the elevated vessel could unexpectedly move or fall from the pipe racks and strike an employee, Tr. 95-96, and given the vessel's overt lopsidedness, and the common understanding that "round objects placed on convex, round surfaces have a tendency to move," Dec. 13, the ALJ sensibly agreed that the risk that the

vessel could unexpectedly move or fall from the pipe racks and strike an employee would be obvious to any employer. Dec. 11, 13-14.

The testimony of F&H's supervisors, Mr. Emmett and Mr. Patrick, also demonstrate that the elevated and unsecured vessel had the potential to unintentionally move or fall from the pipe racks and strike an employee. Mr. Emmett acknowledged that an elevated pressure vessel could move or fall if the vessel was improperly placed, or not properly centered, on the pipe racks, and that a falling vessel would be hazardous to employees working near the vessel. Tr. 258-59. Mr. Patrick explained that such a large vessel needed to be placed "dead center" on the crossbeams to remain stable, and that the vessel would "probably fall" if the vessel was not stable on the pipe racks. Tr. 147, 154; *see also* Tr. 146-47 (a vessel "couldn't be off-center" or "too far to one end" or it would "disrupt the racks"), 213 (an off-center vessel can roll or fall from the pipe racks). Even a slight movement of the vessel from the exact center of the racks would cause a vessel to fall, because, according to Mr. Patrick, "[o]nce [a 12,000 pound vessel] gets to moving, it's gone." Tr. 156. Mr. Patrick confirmed that a potential consequence of such an event would be the death of an employee, Tr. 172, and it was because of this recognized risk that Mr. Patrick assessed the vessel's stability and positioning on the pipe racks before working on it. Tr. 146-47, 154. Mr. Emmett's and Mr. Patrick's mutual recognition of the vessel's potential to

unintentionally move or fall and harm an employee further demonstrates that a safety hazard existed. *See infra* pp. 33-36 (discussing F&H's recognition of the hazard)

Moreover, the occurrence of an accident may serve as convincing evidence that a particular condition presents a hazard. *Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991); *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 & n.5 (No. 90-2148, 1995) (fact that employee fell through cited skylight opening to his death established that a hazard existed), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). Here, the September 23, 2014 accident confirms that the placement of the vessel on the pipe racks created an increased risk that it would unexpectedly move or fall and strike an employee, *see* Dec. 10, as Mr. Patrick actually observed the vessel unexpectedly move, after which the pipe racks abruptly "flip[ped] up," and the vessel "roll[ed] off," crushing Mr. Losey beneath the vessel's manway. Tr. 163-66.

F&H criticizes that the Secretary did not identify what caused the vessel to unexpectedly move on September 23, 2014, *see* Br. 16, 18, but as the ALJ explained, it is not necessary to establish the cause of an accident to establish that a cited condition was hazardous. Dec. 10; *see Williams Enters. Inc.*, 13 BNA OSHC 1249, 1252-53 (No. 85-355, 1987) ("the cause of an accident is not necessarily relevant" as "the circumstances of an accident may provide probative evidence" of

a violation); *Kelly Springfield Tire Co.*, 1982 WL 917447, *4 (No. 78-4555, 1982) (“it is the hazard, not the specific incident that resulted in injury...that is the relevant consideration”). And, irrespective of the precise forces that caused the accident, the fact that the vessel actually fell from the pipe racks and killed an F&H employee plainly demonstrates that the placement of the vessel on the pipe racks created an increased risk of serious harm to F&H’s employees. The risk of harm posed to F&H’s employees was the same regardless of the specific force that spurred the vessel into its unexpected motion on September 23, 2014, and the fatal incident is thus convincing evidence that the condition posed a safety hazard.⁶

The fatal September 23, 2014 accident is also convincing evidence that death or physical serious harm could result if such a large pressure vessel were to become unstable and fall from an elevated position on F&H’s pipe racks. *See* Dec.

⁶ F&H repeatedly cites *Crowley Am. Trans., Inc.*, 18 BNA OSHC 1888, 1999 WL 603912 (No. 97-1231, 1999) (ALJ) to claim that “[t]he fact that an incident occurred is not proof that a hazard existed,” Br. at 11, 14, but F&H’s reliance on *Crowley* is misplaced. Even setting aside that *Crowley* is an unreviewed ALJ decision with no precedential value, *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985), the ALJ in *Crowley* acknowledged “that an accident may convincingly demonstrate that a condition presents a hazard to employees,” *Crowley*, 1999 WL 603912 at *5 (citing *Coleco*, 14 BNA OSHA at 1964), but simply found that the accident at issue in that case (tractor plunging over the side of platform, killing the operator) was “not sufficiently relate[d]” to whether the cited condition (operator’s failure to wear a seatbelt) was hazardous, as there was “no real suggestion that using a seat belt would have prevented [the employee’s] death.” *Id.* In contrast, the accident here (large, heavy vessel falling from pipe racks and killing Mr. Losey) is plainly related to whether the placement of the vessel created an increased risk that it would move or fall and crush a nearby employee.

16; *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1188 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000) (the Secretary must show that “if an accident were to occur, death or serious physical harm would be the likely result”); *see, e.g., Coleco*, 14 BNA OSHC at 1964 (potential for death or serious physical harm established where the hazard actually caused the death of an employee). And, even if the fatal September 23, 2014 accident had not occurred, Mr. Patrick confirmed that a consequence of an unexpectedly moving vessel would be the death of an employee. Tr. 172. Furthermore, the ALJ reasonably relied on common sense to determine that if a 12,000 pound vessel were to unexpectedly move or fall from the pipe racks, it could cause death or serious physical harm to employees working on or near the vessel. Dec. 16; *Nat’l Realty*, 489 F.2d at 1265 n.33 (potential for serious injury indicated by an employee’s actual death “and, of course, by common sense”); *Compressor Co., Div. of Carrier Corp. v. OSHRC*, 683 F.2d 673, 676 (2nd Cir. 1982) (potential for death or serious physical injury established by an accident that actually caused a serious injury, in addition to “the obvious danger” that the condition posed to employees).

F&H contests the finding by repeatedly claiming that the ALJ erroneously assumed “that the entire pressure vessel was cylindrical” and that the vessel “could somehow roll if placed on the pipe racks.” Br. 16; *see also* Br. 14, 21, 24-25. The argument is meritless, as the ALJ made no such assumption: The ALJ described

the vessel as “cylindrical” and “rounded” because the body of the vessel is indisputably cylindrical and rounded. *See* Vol.3(R-7), (C-8); Tr. 453 (the ALJ asks “[A]ren’t we dealing with a cylindrical-shaped thing being placed on an elevated rack and whether or not it can move?” and counsel for F&H Coatings replies “Yes it is, your honor.”); *see also, e.g.*, Tr. 97 (describing the vessel as a “cylindrical shaped object”). The ALJ also clearly factored into his analysis that one end of the vessel had square-shaped legs, two of which were in contact with one of the pipe rack crossbeams. *See* Dec. 8 (mentioning the vessel’s legs); 9 (discussing Mr. Patrick’s belief that the legs would prevent the vessel from rolling), 11 (mentioning Mr. Patrick’s “incorrect assumption” about the stabilizing effect of the legs), 12 (stating that Mr. Patrick checked to ensure that the “flat portions of the angle iron legs were placed on one of the racks”). The ALJ identified, however, that the curved end of the vessel’s cylindrical body provided the vessel’s only point of contact with the other crossbeam, Tr. 268-69, and reasoned that this “quite small” point of contact, Dec. 8, between two rounded objects indicated that the vessel could “shift/move/slide on the pipe racks.” Dec. 14. Additionally, none of the ALJ’s findings rest on an expectation that the vessel could “roll” off the pipe racks; rather, the ALJ determined that the unsecured vessel posed a safety hazard because it was susceptible to all manner of unintentional movement, be it a “roll, slip, shift,

fall, or slide.” Dec. 12; *see also* Dec. 10 (“It is irrelevant whether the vessel rolled, slipped, or slid off the racks.”).

Substantial evidence also supports the ALJ’s finding that it would not require “a freakish or utterly implausible concurrence of circumstances” for the elevated and unsecured pressure vessel to move or fall from F&H’s pipe racks and strike an employee. *See* Dec. 10-11. As explained *supra* pp. 23-24, both Mr. Emmett and Mr. Patrick recognized that an off-center or improperly set vessel could move or fall from the pipe racks and harm an employee, and Mr. Patrick stated that an unstable or improperly set vessel would “probably fall” or “disrupt the racks.” Tr. 146-47, 154. These admissions establish that an accident was sufficiently likely to occur; neither a misplacement of the vessel on pipe racks, nor a misjudgment by Mr. Patrick regarding an elevated vessel’s positioning or stability on the pipe racks, would be a “freakish or utterly implausible convergence of circumstances,” but rather the result of eminently foreseeable human error. *See Gen. Elec. Co.*, 10 BNA OSHC 2034, 2040 (No. 79–504, 1982) (employer’s system for controlling employee access to potential electrocution hazards did not render the workplace free of such hazards where the system “ultimately depend[ed] on visual inspection by the supervisor” and did “not adequately protect against human error”). Given the unscientific nature of Mr. Patrick’s pre-work assessment – eyeballing the vessel, giving it a shove, and then making a judgement based

solely on his “experience,” Tr. 146-49, 154, 156, 171, 259-60 – the ALJ correctly concluded that Mr. Patrick could misjudge an elevated vessel’s positioning and stability on the pipe racks, and thereby allow himself and his subordinates to work on and around an unstable vessel, under other than freakish or utterly implausible circumstances. Dec. 11.

The September 23, 2014 accident supports this conclusion. With no knowledge of the weight of the vessel or its protruding manway, and relying on a groundless assumption regarding the stabilizing effect of the vessel’s legs, Dec. 9; Tr. 148-49, 256, Mr. Patrick determined from his assessment, as he always did, that it was safe to work on the vessel. Tr. 145, 156, 180-81, 194. Nothing “freakish” or out of the ordinary was necessary for Mr. Patrick to make this error, after which the pipe racks “flip[ped] up” and the vessel roll[ed] off” the pipe racks, crushing Mr. Losey underneath the manway. Tr. 163-66.

To claim that the September 23, 2014 accident was “freakish and unforeseeable,” F&H protests that it had never previously experienced an incident in which an elevated vessel moved or fell from its pipe racks. Br. 13, 15, 17; *see also* Br. 22. First, as noted above, the inquiry is not whether the September 23, 2014 accident was freakish or unforeseeable, but whether the *cited hazard* could cause an accident under “other than a freakish or utterly implausible concurrence of circumstances.” *Kelly Springfield*, 1982 WL 917447 at *4. Second, evidence of

prior accidents is not necessary to establish that the condition posed a safety hazard, as “[o]ne purpose of the Act is to prevent the first accident.” *Lee Way Motor Freight, Inc. v. Sec’y of Labor*, 511 F.2d 864, 869-70 (10th Cir. 1975); *see also St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 n.7 (8th Cir. 1981); *Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004) (rejecting the employer’s argument that a reactor’s explosion was a “freakish, unprecedented occurrence” because such reactor failures were “virtually unheard of”); *Gen. Elec.*, 10 BNA OSHC at 2040 (lack of prior accidents did not prove that employer’s safety program was adequate). Indeed, a lack of prior accidents could simply be the result of good fortune, rather than safe work practices. *Stuttgart Mach. Works, Inc.*, 9 BNA OSHC 1366, 1369 (No. 77-3021 1981); *see* Tr. 158 (Mr. Patrick stating that he had never previously encountered an unstable vessel because he had “been lucky”).

Nor is it meaningful that the Boardman employees who saw the vessel elevated on the pipe racks prior to the accident on September 23, 2014, did not warn F&H that the staging was imminently hazardous. *See* Br. 9-10, 15, 16, 23. To begin with, it is F&H’s responsibility to comply with the general duty clause, and F&H may not shift to its employees (or to third-parties like Boardman) the responsibility to identify and address unsafe working conditions. *Armstrong Cork Co.*, 8 BNA OSHC 1070, (No. 76-2777, 1980) (employer “could not fulfill its duty

to render its workplace free of the hazard by relying on its employees to report” a hazardous condition). Additionally, Boardman’s employees’ lack of alarm at the vessel’s staging is unimpressive given their limited experience with pipe racks, and their lack of involvement in the blasting and painting process. Boardman’s employees did not use pipe racks, nor were they trained in their use, Tr. 268, 291, 319, 342-43, 389, and Boardman’s other contractors had not used pipe racks to elevate their vessels for blasting and painting. Tr. 301-02, 362; *see also* Tr. 370 (Mr. Farish had mostly seen vessels painted on rollers, but had “seen pictures of [vessels] on pipe racks”). And, other than operating the crane to place and reposition the vessel on the pipe racks, Boardman’s employees were not involved in the blasting and painting of the vessel. *See* Tr. 77-78; 190, 192, 293-95, 317, 324-25, 327, 348. It was F&H’s supervisor, Mr. Patrick, who assumed the responsibility to assess whether vessels elevated on F&H’s pipe racks were properly positioned. Dec. 15; Tr. 142-43, 146-47, 152, 156, 187-88; *see also* Tr. 332 (Mr. Mills saw the vessel on the pipe racks, but did not inspect it). Accordingly, Boardman’s employees’ lack of alarm at the vessel’s staging carries little relevance.

F&H further protests that the ALJ should have given more weight to Mr. Patrick’s determination that it was “safe to work” on the elevated vessel on September 23, 2014, Tr. 145, alleging that “[t]he fact that [Mr.] Patrick did not

recognize a hazard is strong evidence that there was none.” Br. 18; *see* Br. 16-18.

This argument largely misses the point. Mr. Patrick was plainly aware that the pressure vessel could unexpectedly move and kill an employee if it was not stable and perfectly centered on and between the pipe rack’s crossbeams. Tr. 146-47, 156, 172, 213; *see supra* pp. 23-24. As the ALJ found, Mr. Patrick did not take any meaningful steps to abate this hazard – that is, to render the vessel “safe to work.” Dec. 18. Rather, Mr. Patrick relied upon assumptions about the stability of the pipe racks themselves, the centeredness of the vessel on the racks, and the ability of the angle iron legs to counteract any tendency for the vessel to shift, roll, or slide. *Id.* Accordingly, Mr. Patrick recognized that the placement of the vessel on the pipe racks created “an increased risk that an event causing death or serious bodily harm to employees [could] occur.”⁷ *Baroid*, 660 F.2d at 444. The Court should uphold the ALJ’s substantially supported finding that the cited hazard existed.

⁷ To the extent that F&H argues that Mr. Patrick’s pre-work assessment was adequate to protect employees from the hazard posed by the elevated and unsecured vessel, that argument is germane to whether the workplace was “free” of the hazard, *see infra* pp. 37-38 n.10, but “it is not determinative of whether a hazard exists in the first instance.” *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1245 (Nos. 76–4807, 76–4808, 1981); *see also Arcadian*, 20 BNA OSHC at 2007 (“The adequacy of the employer’s work practices to reduce the risk of, or prevent the occurrence of, the hazard is a separate issue from the question of how the recognized hazard is defined.”) (citations omitted).

II. Substantial Evidence Supports the ALJ’s Finding that F&H Recognized the Potential for the Elevated Pressure Vessel to Unintentionally Move or Fall from the Pipe Racks and Strike an Employee.

The general duty clause requires employers to provide a workplace “free from *recognized* hazards,” 29 U.S.C. § 654(a)(1) (emphasis added), and a hazard is “recognized” when “the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry.” *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (No. 89-265, 1997) (citing *St. Joe Minerals*, 647 F.2d at 845). Recognition thus refers to knowledge of cited condition’s hazardousness, as “it is *the dangerous potential* of the condition or activity being scrutinized that must be known specifically by the employer or known generally in the industry.” *Beverly*, 19 BNA OSHC at 1185 n.56 (emphasis in original). An employer’s actual recognition of the condition’s dangerous potential may be directly established by the evidence, *see, e.g., Coleco*, 14 BNA OSHC at 1964-65, or it may also “be inferred from the obvious nature of the hazard.” *Litton*, 10 BNA OSHC at 1182; *see also Kelly Springfield v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) (a hazard may be considered recognized where it is “obvious and glaring”). Here, the ALJ determined from substantial evidence that the dangerous potential of the cited condition was obvious, and that F&H actually recognized the risk of

serious harm that the elevated and unsecured vessel posed to its employees.⁸ *See* Dec. 11-15.

As discussed *supra* pp. 21-23, the ALJ reasonably determined that the potential for the elevated vessel to move or fall from the pipe racks and strike an employee would be obvious to any employer. Dec. 11. CSHO Hodge found the hazard to be obvious, Tr. 96, and the ALJ's analysis of the vessel and the pipe racks led him to likewise conclude that simply resting the large, lopsided vessel on F&H's cylindrical pipe racks created an overt risk that the vessel could move or fall from the pipe racks and strike an employee.

The ALJ also correctly determined that Mr. Patrick's pre-work assessment demonstrates that F&H recognized the potential for the elevated and unsecured vessel to unintentionally move or fall from the pipe racks. *See* Dec. 11-12. Mr.

⁸ The Secretary also argued below that the industry generally recognized the hazard. *See* Vol.5(33), 20-24. "[T]he test for determining industry recognition of a hazard is the knowledge or understanding of safety experts familiar with the workplace conditions or the hazard in question," *Beverly*, 19 BNA OSHC at 1187 (citations omitted), and here, the ALJ qualified Mr. Hope as an expert in the "safety procedures used to support tanks and vessels during blasting and painting." Tr. 457; *see infra* pp. 45-47. Mr. Hope testified that the industry would recognize the elevated vessel as hazardous because F&H's pipe racks are not engineered or designed to prevent the unintentional movement of a large load elevated on the crossbeams. Tr. 480-81; *see also* Tr. 471 (elevating the vessel on pipe racks posed a hazard), 479 (F&H's pipe racks could safely support lightweight objects, but blasting and painting companies would not use them to support a 12,000 pound load). The ALJ did not rule on this argument, but the Secretary maintains that Mr. Hope's testimony establishes that the cited hazard is generally recognized by the blasting and painting industry. *Marshall v. C. F. & I. Steel Corp.*, 576 F.2d 809, 812 (10th Cir. 1978) (this Court reviews "the record as a whole").

Patrick routinely assessed elevated vessels to determine if the vessels were correctly positioned and stable on the pipe racks prior to beginning work, Tr. 145-47, 154, 187-88, and, as CSHO Hodge explained, the fact that F&H needed to perform such an assessment indicates that F&H had “a reasonable anticipation that the pipe [racks] could be displaced or that the pressure vessel could move.” Tr. 125; *See* Dec. 9 (“the fact that [Mr.] Patrick was insistent that the vessel needed to be ‘dead center’ and that he purported to ensure that the vessel would not move by pushing on it certainly seems to indicate that [F&H] perceived [a hazard]”).

Not only does the pre-work assessment evince F&H’s recognition of the hazard, but both Mr. Patrick and Mr. Emmett acknowledged that an elevated vessel could unintentionally move or fall and harm an employee if the vessel was unstable or imprecisely positioned on the pipe racks. Tr. 146-47, 154, 156, 172, 213.

F&H’s supervisors thus indicated that they recognized the dangerous potential of the elevated and unsecured vessel, and their recognition is imputed to F&H.

Georgia Elec. Co. v. Marshall, 595 F.2d 309, 321 (5th Cir. 1979). *See Gen. Elec.*, 10 BNA OSHC at 2039-40 (employer’s attempts to control employee movement in and around high voltage test equipment evinced the employer’s recognition of the hazard (potential shock or electrocution due to accidental contact with such equipment), as did employer’s admission that “unless properly handled and controlled serious injury or death can result from high voltage electricity”).

Also probative of F&H's recognition of the hazard are the metal chains and pins that were attached to F&H's pipe racks, Dec. 13; Vol.3(R-4), (R-5), (R-6), which were used to keep smaller objects (such smaller-gauge piping) from falling off the ends of the crossbeams. Tr. 174, 252. Even if the chains and pins would not have prevented a large pressure vessel from falling off the crossbeams, the chains and pins indicate that F&H recognized that objects elevated on the pipe racks could unintentionally move or fall off the crossbeams. Dec. 13. This is true regardless of whether the elevated vessel could have "rolled" off the crossbeams in the same way that small-gauge piping could, *see* Br. 21, as the risk that F&H used the chains and pins to address (elevated objects unintentionally moving or falling off the pipe racks) is the same risk that was presented by the elevated unsecured vessel. When combined with F&H's pre-work assessment, Mr. Patrick's and Mr. Emmett's acknowledgment of the vessel's dangerous potential, and the obviousness of the hazard, the evidence supporting the ALJ's finding that F&H recognized the hazard is more than substantial.⁹

⁹ Because F&H's pre-work assessment is considered in conjunction with other evidence, F&H's argument that safety precautions like the pre-work assessment "in and of themselves, do not establish that the employer recognized a hazard," Br. 19, is irrelevant. *See* Dec. 12; *Beverly*, 19 BNA OSHC at 1186 (safety "precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence"). Also irrelevant is F&H's statement that it is insufficient for the Secretary to establish that F&H knew that "something could go wrong," Br. 19 (citing *Kinsley Constr., Inc.*, 21 BNA OSHC 1372, 2005 WL 2697284, *4 (No. 04-1654, 2005) (ALJ)), as the Secretary has proven that F&H recognized the specific

III. Substantial Evidence Supports the ALJ’s Finding that There Were Feasible Methods by Which F&H Could Have Abated the Hazard, and the ALJ Did Not Err by Admitting, or Relying On, Mr. Hope’s Testimony Regarding Those Methods.

A. Substantial Evidence Supports the ALJ’s Finding that There Were Multiple Feasible Means of Abating the Hazard.

The general duty clause’s mandate that employers keep their workplaces “free of recognized hazards” requires that “[a]ll preventable forms and instances of hazardous conduct ... be entirely excluded,” *Nat’l Realty*, 489 F.2d at 1266-67, and to demonstrate that a cited hazard is preventable, the Secretary must “specify the particular steps a cited employer should have taken to avoid citation, and demonstrate the feasibility and likely utility of those measures.” *Id.* at 1268. A proposed measure is “feasible” if it is “economically and technologically capable of being done.” *Baroid*, 660 F.2d at 447; *see also Beverly*, 19 BNA OSHC at 1191 (evidence must show that the proposed method was both “capable of being put into effect and ... would be effective in materially reducing the incidence of the hazard”). Here, the ALJ’s finding that there were “multiple feasible means of abatement with respect to this particular hazard” is supported by substantial evidence.¹⁰ Dec. 18.

danger that the vessel posed to its employees (that the vessel could unintentionally move or fall from the pipe racks).

¹⁰ Where an employer has taken measures to abate a recognized hazard, the Secretary must show that the employer’s measures were inadequate, *Cerro Metal*

First, the ALJ correctly determined that F&H could have used a roller rack (or “rollers”) to hold the vessel for sandblasting and painting, which would have provided four points of contact with the vessel, and “[d]ue to the cradle orientation of the tires,” provided “no opportunity for lateral movement of the vessel.” Dec. 18 (citing Ex. C-11 at F6); *see also* Tr. 97, 271-73. Boardman routinely used roller racks to hold vessels during the manufacturing process, Tr. 90, 342-43, 389, and Boardman held the vessel involved in the September 23, 2014 accident in a roller rack for the entirety of the manufacturing process. Tr. 389-95. Vessels could also be sandblasted and painted on roller racks, and multiple Boardman contractors, including F&H, had used roller racks in the past to hold large pressure vessels during the sandblasting and painting process. Tr. 93, 159, 270, 296, 301-02, 361, 482. A roller rack was available for use at Boardman on September 23, 2014, Tr. 90, but Boardman placed the vessel on F&H’s pipe racks because F&H brought the

Prods. Div., Marmon Grp., Inc., 12 BNA OSHC 1821, 1822 (No. 78–5159, 1986), but the ALJ determined that F&H had not taken *any* steps to abate the hazard. Dec. 17-18. F&H did not contest this finding in its opening brief, and it is thereby waived, *Coleman*, 108 F.3d at 1205, but even if Mr. Patrick’s unguided assessment of the vessel were viewed as an effort to abate the hazard, it is clearly inadequate; Mr. Patrick’s assessment was pure guesswork, and by exclusively relying on his unscientific judgment, F&H did not account for the possibility that Mr. Patrick could misjudge whether an elevated vessel was correctly positioned and stable on the pipe racks. As the ALJ put it, “eyeballing and shoving are not adequate means of preventing unintentional movement of a 12,000-pound cylindrical vessel.” Dec. 18.

pipe racks to Boardman's worksite for that specific purpose. Tr. 77-78; 190, 192, 295, 317, 324, 327.

F&H claims that the September 23, 2014 vessel's protruding legs, manway, and other appendages would not have permitted the use of a roller rack, *see* Br. 26-28, but the ALJ properly disposed of this argument below. *See* Dec. 18-20. After acknowledging Mr. Patrick's belief that a roller rack could not have been used because "rollers sat too low to the ground to accommodate the protruding valves and manway," Dec. 18 (citing Tr. 160); *see also* Tr. 98, the ALJ credited the testimony from Mr. McMillian, *see* Dec. 18-19, who built the vessel from scratch, Tr. 389-90, and explained that Boardman's roller rack held the vessel during the entirety of the fabrication process, including when the angle iron legs were attached at the very end of the process. Tr. 393-94. Mr. McMillian thus confirmed that Boardman's roller rack actually held the vessel despite its protruding appendages, manway, and legs, none of which interfered with the vessel's ability to rest on the roller rack's tires. Tr. 395 (the roller rack's tires sat "in front of the legs ... on the round part of the shell"). Mr. McMillian also explained that while the vessel's protrusions may have prevented the vessel from being rotated a full 360 degrees on the roller rack's tires, the vessel could have been partially rotated

on the tires and then repositioned with the assistance of a crane.¹¹ Tr. 394-96, 402. The ALJ’s decision to credit Mr. McMillian’s testimony is entitled to great deference. *Slingluff v. OSHRC*, 425 F.3d 861, 868 (10th Cir. 2005) (“We refuse to substitute our judgment on the credibility of witnesses for that of the ALJ, absent extraordinary circumstances. We do not sit as a super trial examiner, and do not weigh the credibility of one witness against another, nor do we search for contradictory inferences.”)

Although the ALJ did not expressly rely on it, additional evidence supports Mr. McMillian’s testimony that the vessel could have been held in a roller rack for blasting and painting. Both CSHO Hodge and Mr. Hope testified that rollers could have been used to hold the vessel for sandblasting and painting, Tr. 96-98, 482, and Mr. Emmett stated that, even despite the vessel’s legs and protrusions, F&H

¹¹ F&H misrepresents Mr. McMillian testimony by claiming that he indicated that “rollers could no longer be used” once the legs were attached to the pressure vessel. Br. 27 (citing Tr. 403-04), *see also* Br. 5-6, 26. While Mr. McMillian stated that Boardman “lost [the] ability” to roll the vessel a full 360 degrees “as the build continued” and appendages were added, Tr. 401-02, he explained that the vessel could have been partially rolled on the tires, and then repositioned with a crane if a protrusion impeded further rotation of the vessel. Tr. 396, 402. F&H also complains that Mr. McMillian did not explicitly state that the rollers could have held and rotated the vessel for the purpose of *sandblasting and painting* it, *see* Br. 26 (“manufacturing the pressure vessel is different than painting it”), but this nitpicking is unpersuasive; rollers hold vessels the same way regardless of whether a vessel is being manufactured or is being sandblasted and painted, *see* Tr. 271-72, 436-37, and multiple witnesses confirmed that contractors, including F&H, had used rollers to hold vessels in place for blasting and painting. Tr. 93, 159, 270, 296, 301-02, 361, 482.

“might have been able to rotate [the vessel a] very short distance” on a roller rack.¹² Tr. 273. Additionally, Mr. Farish, who participated in the manufacturing of the vessel, Tr. 344, 373-74, corroborated that Boardman’s rollers were able to hold the vessel even after the legs were attached. Tr. 345; *see also* Tr. 360 (the legs protruded beyond the end of the rollers and did not interfere with the operation of the rollers in any way).

Even if it is assumed that the vessel’s protrusions would have prevented fully rotating the vessel on the roller rack’s tires, the inability to rotate the vessel 360 degrees on the tires does not render the roller rack an infeasible option. To the contrary, repositioning the vessel with the assistance of a crane or forklift would be necessary “regardless of what type of rack system is used,” Dec. 19; Tr. 270, 274, 303, and while F&H employees were not permitted to personally operate Boardman’s crane, they could have asked Boardman to reposition the vessel with its crane as needed. Tr. 152-52, 348. The ALJ thus correctly concluded that the only consequence of using a roller rack instead of pipe racks on September 23, 2014 would have been the number of times that the vessel needed to be repositioned, Dec. 19, and while these extra steps may have posed a minor

¹² Both Mr. Mills and Mr. Farish also mentioned that other blasting and painting contractors had placed “cribbing” or “railroad ties” underneath Boardman’s roller rack “[t]o get the height of the vessel up to where they could roll it 360 degrees” despite a vessel’s protrusions. Tr. 329-30, 332-33, 357-58; *see* Dec. 19 n.9.

inconvenience to F&H, that inconvenience does not negate that holding the vessel in a roller rack was “capable of being done.”¹³ *Baroid*, 660 F.2d at 446-47.

F&H protests that the ALJ should have given more weight to the testimony of Mr. Mills, who claimed that, once the legs were attached to the vessel, there would not have been “any place to put the rollers.” Tr. 299. Even assuming that Mr. Mills believed that a roller rack could not have been used at all,¹⁴ the ALJ reasonably afforded more probative weight to Mr. McMillian’s testimony that the vessel could be (and was) held by Boardman’s rollers even after its legs were attached. Mr. McMillian built the vessel from scratch, Tr. 389-90, personally attached the legs to vessel, Tr. 393, and explained that the roller rack’s tires sat “in front of the legs ... on the round part of the shell.” Tr. 395. Mr. McMillian’s

¹³ Nor do these extra steps render the option economically infeasible. *Nat’l Realty*, 489 F.2d at 1266 n.37 (“a precaution does not become infeasible” unless it “would clearly threaten the economic viability of the employer”).

¹⁴ While it is clear that Mr. Mills believed that the vessel could not have sat flush on the roller rack’s tires, *see* Tr. 300 (“once we put the legs on ... there’s no place to put the rollers”); 333 (they “wouldn’t have had the clearance between the nozzles that were in the shell to be able to set those rollers”), which would have prohibited F&H from *rolling* the vessel on the tires, *see* Tr. 299 (once the legs were attached “[i]t got to a point to where [the vessel] couldn’t *roll* on the rollers”) (emphasis added); 333 (“The issue was there was no good place to put the rollers where they could *roll* the manway to where they could get inside it to work.”) (emphasis added), it is not clear whether Mr. Mills also believed that the roller rack would have been unable to hold the vessel in a static position. Mr. Mills acknowledged that sandblasting and painting vessels in a static position was a common approach that other Boardman contractors had employed. Tr. 302 (explaining that another contractor “choked [a vessel] up with wood,” which precluded “rotat[ing] it at all”).

account was corroborated by Mr. Farish, who also personally observed the vessel being held in Boardman's rollers at the end of the fabrication process, with the vessel's legs protruding beyond the end of the rollers. Tr. 345, 359-60. Mr. Mills, on the other hand, offered an opinion regarding whether rollers could have been used, but did not testify that he personally participated in the fabrication of the vessel. The Court should defer to the ALJ's reasonable weighing of this evidence. *Slingluff*, 425 F.3d at 868; *Lockheed Martin*, 717 F.3d at 1129.

In addition to rollers, the ALJ determined that F&H could have used wood pilings to "chock" up the vessel, which another sandblasting and painting contractor (Brewer Restoration) did when it painted Boardman's pressure vessels after the September 23, 2014 incident. Dec. 20; Tr. 301-03, 482. Chocking up a vessel on wood pilings allows the vessel to be sandblasted and painted in a "static position until it need[s] to be moved," which Mr. Mills characterized as a "pretty common" approach for supporting vessels for sandblasting and painting. Tr. 303. F&H argues that the vessels that Brewer Restoration chocked up with wood may have been dissimilar to the vessel involved in the September 23, 2014 accident, but Mr. Mills confirmed that the September 23, 2014 vessel could have been chocked up on wood pilings. Tr. 304.

Substantial evidence also supports the ALJ's finding that a rack constructed with "I-beams" could have been used to elevate the vessel for blasting and

painting. *See* Dec. 20-21. Mr. Hope testified that I-beam racks have vertical members that prevent objects from rolling or falling off at the ends of the crossbeams, and have footings that give the racks greater stability. Tr. 437-38, Tr. 461-62. And, because I-beam racks are “designed to handle the load off-center,” it is not necessary to center the load on an I-beam rack to ensure that the elevated object is secure. Tr. 463-64. Mr. Hope explained that he worked with “thousands” of tanks that were “very similar” to pressure vessels while serving as the corporate safety director at a steel tank manufacturer (Caldwell Tanks), Tr. 416, 432-33, 465, and Caldwell Tanks routinely elevated its tanks on I-beam racks when it blasted and painted them. Tr. 433, 435, 437, 461-63. Mr. Hope further indicated that he was aware of several other companies in the industry that used I-beam racks to support tanks and vessels for blasting and painting.¹⁵ Tr. 457, 466, 470, 482; *see also* Tr. 291-92 (Mr. Mills stating that Boardman had used I-beam racks to elevate material). The ALJ thus reasonably determined that because the I-beam racks are “designed to prevent both movement of the vessel/tank and to prevent movement of the racks themselves,” using an I-beam rack was a feasible means of elevating a vessel that would have materially reduced the hazard. Dec. 20-21.

¹⁵ In contrast, Mr. Hope stated that he had never seen an employer use cylindrical pipe racks like those owned by F&H to elevate large objects for blasting and painting. Tr. 466; *see also* Tr. 297, 301-02 (Mr. Mills stating that using pipe racks “wasn’t a very common thing,” and that Boardman’s other blasting and painting contractors had not used pipe racks to hold vessels).

B. The ALJ Did Not Abuse His Discretion by Admitting Mr. Hope's Testimony, Nor Did the ALJ Err by Relying on Mr. Hope's Testimony Regarding the Feasible Methods Available to Abate the Hazard.

The ALJ relied on Mr. Hope's testimony regarding the multiple alternative means that F&H could have used to support the September 23, 2014 vessel for painting and coating, including I-beam racks, Dec. 20-21 (citing Tr. 437, 461-62), but F&H protests that the ALJ should not have permitted Mr. Hope to testify at all. *See* Br. 28-32. Expert testimony may be admitted under Fed. R. Evid. 702 if the judge determines that the testimony is sufficiently reliable and relevant to the task at hand. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Where, as here, an expert testifies based on his experience, the determination of whether the expert's testimony is "reliable" turns on "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148-50 (1999). Affording great discretion to the judge, this Court reviews a judge's decision to admit expert testimony for abuse of discretion, *Kumho Tire*, 526 U.S. at 152; *Bitler v. A. O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2004) (recognizing the judge's "the wide latitude" to admit or exclude expert testimony), and such abuse is found where a judge's ruling is "arbitrary, capricious, whimsical or manifestly unreasonable ... or when [the judge] made a clear error of judgment or exceeded the bounds of permissible

choice in the circumstances.” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003).

Here, Mr. Hope testified regarding his extensive education and experience as a safety expert in the industry, including serving as the safety director at Caldwell Tanks for more than 15 years, during which he oversaw the blasting and painting of “thousands” of steel tanks that were “very similar” to the pressure vessels that Boardman produced. Tr. 432-37, 465; *see also* Tr. 441-42, 443-45. Mr. Hope further testified that he observed many other employers’ blasting and painting operations through his work as a safety consultant and his service on various safety committees. Tr. 428-29, 430-31, 448, 455-57; *see also* Vol.3(C-4) (Mr. Hope’s resume), thus providing him with extensive knowledge regarding the use of “material stands” to support tanks and vessels during the blasting and painting process. Tr. 454-55. The ALJ therefore qualified Mr. Hope to provide opinion testimony “as an expert in safety procedures used to support tanks and vessels during blasting and painting,” due to his “combination of education and experience and participation in professional organizations [and] professional committee[s].” Tr. 457-58. This decision clearly was not “arbitrary, capricious, whimsical or manifestly unreasonable.” *Cotter Corp.*, 328 F.3d at 1223.

F&H complains that Mr. Hope’s education and experience was insufficient for him to testify regarding the specific pressure vessel at issue in this case,

claiming, for example, that the steel tanks that Mr. Hope worked with at Caldwell Tanks were “designed and built much differently than pressure vessels.” Br. 31. To begin with, this argument goes to the weight, not the admissibility, of Mr. Hope’s testimony. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1045 (2d Cir. 1995) (“Disputes as to the strength of [the expert’s] credentials ... go to the weight, not the admissibility, of his testimony.”) (citing *Daubert*, 509 U.S. at 595); *see also In re Zyprexa Prods. Liab. Litig.*, 489 F.Supp.2d 230, 282 (E.D.N.Y. 2007) (“If the expert has educational and experiential qualifications in a general field closely related to the subject matter in question, the court will not exclude the testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent.”).

Furthermore, because Mr. Hope was as a safety expert who was “familiar with the general workplace condition or practice” at issue, the ALJ reasonably relied on his testimony regarding the feasible methods available for supporting tanks and vessels on “material stands” during the blasting and painting process, even if Mr. Hope never worked with the exact type of pressure vessel that was elevated on F&H’s pipe racks on September 23, 2014. *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1310-11 (No. 93-128, 1995) (explaining that the Commission relies on “safety experts [who are] familiar with the general workplace condition or practice” being challenged, and finding that an crane expert

was sufficiently familiar to opine on the industry’s recognition of a hazard posed by a similar, crane-like machine); Tr. 441-42, 443-45, 465 (the tanks that Caldwell Tanks elevated on material stands for blasting and painting were “very similar” to pressure vessels). The Court should defer to the ALJ’s reasonable decision to credit Mr. Hope’s testimony, *Slingluff*, 425 F.3d at 868; *Lockheed Martin*, 717 F.3d at 1129, and uphold the ALJ’s substantially supported feasibility finding.¹⁶

IV. F&H Had Knowledge of the Physical Conditions that Posed a Hazard to its Employees.

The Secretary must also prove that F&H knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition at the worksite. *Tampa Shipyards*, 15 BNA OSHC at 1535; *Getty Oil*, 530 F.2d at 1145. Employer knowledge is established when it is shown that the employer was aware of the physical conditions constituting the violation, *Phoenix Roofing*, 17 BNA OSHC at 1079; *see also Vanco Constr. Co.*, 11 BNA OSHC 1059, 1060-61 n.3 (No. 79-4945), *aff’d*, 723 F.2d 410 (5th Cir. 1982), and here, the ALJ correctly determined that F&H was aware of the physical conditions that constituted a safety hazard (the elevated and unsecured vessel on the pipe racks). Dec. 17. As the ALJ correctly found, Mr. Patrick – whose knowledge, as a supervisor, is imputed to the employer, *Mountain States*, 623 F.2d at 158 – “was not only at the worksite, but

¹⁶ Even if the ALJ ignored Mr. Hope’s testimony entirely, substantial evidence would still support the ALJ’s findings that F&H could have feasibly used rollers or wood pilings to support the September 23, 2014 vessel. *See supra* pp. 38-43.

directly involved in working the vessel at the time of the accident.” *Id.*; Tr. 163-66 (Mr. Patrick’s first-hand account of the accident).

F&H confuses this “employer knowledge” element with the separate requirement that the Secretary show that the hazard cited under the general duty clause was “recognized.” *See* Br. 22-24. As discussed *supra* p. 33, the Secretary may, as it has here, establish that a hazard was “recognized” because the employer was actually aware of “the dangerous potential of the condition.” *Beverly*, 19 BNA OSHC at 1185 n.56. The employer knowledge element, on the other hand, stems from section 17(k) of the OSH Act, which prohibits characterizing a violation as “serious” if “the employer did not, and could not with the exercise of reasonable diligence, know of the *presence* of the violation.” 29 U.S.C. § 666(k) (emphasis added); *Getty Oil*, 530 F.2d at 1145. To prove that F&H knew of the presence of the violation, the Secretary need not show that F&H “understood or acknowledged that the physical conditions were actually hazardous,” but rather that F&H had actual or constructive knowledge of “the physical conditions constituting the violation.”¹⁷ *Phoenix Roofing, Inc.*, 17 BNA at 1079. Mr. Patrick was clearly

¹⁷ F&H’s confusion is evident from its reliance on *Martin v. Gen. Dynamics Land Sys., Inc.*, 985 F.2d 560, 1993 WL 15067 (Table) (6th Cir. 1993) (unpublished), which did not discuss the employer knowledge element at all, but rather analyzed whether the substantial evidence supported an ALJ’s finding that the employer actually *recognized* that the cited condition was hazardous. *See* Br. 22; *Gen. Dynamics*, 1993 WL 15067 at *3-4.

aware of the physical conditions at issue, and the Court should therefore uphold the finding.

CONCLUSION

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

NICHOLAS C. GEALE
Acting Solicitor of Labor

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

CHARLES F. JAMES
Counsel for Appellate Litigation

/s/ Brian A. Broecker
BRIAN A. BROECKER
Attorney
U.S. Department of Labor
Office of the Solicitor, Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5484

June 23, 2017

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

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/s/ Brian A. Broecker
BRIAN A. BROECKER
Attorney
U.S. Department of Labor
Office of the Solicitor, Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
(202) 693-5484

JUNE 23, 2017

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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/s/ Brian A. Broecker

BRIAN A. BROECKER

Attorney

U.S. Department of Labor

Office of the Solicitor, Room S-4004

200 Constitution Avenue, N.W.

Washington, D.C. 20210-0001

(202) 693-5484

JUNE 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2017, the following counsel of record for F & H Coatings, LLC, was served with a copy of the foregoing Brief for the Secretary of Labor through the Court's online filing system:

Gary W. Auman
Douglas S. Jenks
Auman, Mahan & Ferry
110 N. Main St. 45402
Tel: (937) 223-6003
Fax: (937) 223-8550

/s/ Brian A. Broecker
BRIAN A. BROECKER
Attorney
U.S. Department of Labor
Office of the Solicitor, Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
(202) 693-5484