

No. 16-2268

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

THOMAS G. GALLAGHER, INC.,

Petitioner,

v.

**THOMAS E. PEREZ, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,**

Respondent.

**ON PETITION FOR REVIEW OF A FINAL ORDER OF
THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

BRIEF FOR THE SECRETARY OF LABOR

NICK GEALE
ACTING SOLICITOR

ANN ROSENTHAL
ASSOCIATE SOLICITOR FOR
OCCUPATIONAL SAFETY AND HEALTH

HEATHER R. PHILLIPS
COUNSEL FOR APPELLATE LITIGATION

SCOTT GLABMAN
SENIOR APPELLATE ATTORNEY
U.S. DEPARTMENT OF LABOR
200 CONSTITUTION AVE., N.W.
ROOM S-4004
WASHINGTON, D.C. 20210
(202) 693-5493

FEBRUARY 27, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES.....	1
STATUTORY AND REGULATORY BACKGROUND.....	2
STATEMENT OF THE CASE.....	4
A. Procedural History	4
B. Statement of Facts	5
1. <i>Gallagher and the Pipe Assembly Accident.....</i>	<i>5</i>
2. <i>Gallagher's Work Rule on Rigging Loads and Lack of a Work Rule Prohibiting Putting Hands on Suspended Loads</i>	<i>7</i>
C. The ALJ's Decision	10
SUMMARY OF THE ARGUMENT	11
ARGUMENT.....	12
I. STANDARD OF REVIEW	12
II. GALLAGHER HAD CONSTRUCTIVE KNOWLEDGE THAT THE PIPE ASSEMBLY WAS IMPROPERLY RIGGED IN VIOLATION OF 29 C.F.R. § 1910.179(n)(3)(i)	14
III. GALLAGHER HAD CONSTRUCTIVE KNOWLEDGE THAT MR. THIBAUT PUT HIS HAND DIRECTLY ON THE SUSPENDED PIPE ASSEMBLY IN VIOLATION OF 29 C.F.R. § 1910.184(c)(9)	24
CONCLUSION.....	31

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Archer-Western Contractors Ltd.,

15 BNA OSHC 1013 (No. 87-1067, 1991) 28

Brock v. L.E. Myers Co.,

818 F.2d 1270 (6th Cir. 1987) 23, 29-30

Brown & Root, Inc.,

8 BNA OSHC 2140 (No. 76-1296, 1980) 27

Burford's Trees Inc.,

22 OSHC 1948 (No. 07-1899, 2010)..... 15

Consolo v. Federal Maritime Comm'n,

383 U.S. 607 (1966)..... 13

Cuyahoga Valley Ry. Co. v. United Transp. Union,

474 U.S. 3 (1985)..... 3

Enfield's Tree Serv., Inc.,

5 BNA OSHC 1142 (No. 9118, 1977) 27

*Gen. Dynamics Corp. v. Occupational Safety Health Review Commission
(OSHRC),*

599 F.2d 453 (1st Cir. 1979)..... 13

Gen. Tel. of Michigan,

6 BNA OSHC 1555 (No. 14193, 1978) 24

<i>Lake Erie Constr. Co.,</i>	
21 BNA OSHC 1285 (No. 02-0520, 2005)	15, 23, 25
<i>Martin v. OSHRC (CF&I),</i>	
499 U.S. 144 (1991).....	2-3
<i>Martin v. OSHRC (Milliken),</i>	
947 F.2d 1483 (11th Cir. 1991)	12
<i>Martin v. Pac-Saver Mfg. Co.,</i>	
933 F.2d 528 (7th Cir. 1991)	3
<i>Modern Continental Constr. Co. v. OSHRC,</i>	
305 F.3d 43 (1st Cir. 2002).....	12-13
<i>Mosser Constr. Co.,</i>	
15 OSHC 1408 (No. 89-1027, 1991).....	20, 24
<i>P. Gioioso & Sons, Inc. v. OSHRC (Gioioso 1),</i>	
115 F.3d 100 (1st Cir. 1997).....	16, 26
<i>P. Gioioso & Sons, Inc. v. OSHRC (Gioioso 2),</i>	
675 F.3d 66 (1st Cir. 2012).....	13, 14, 18
<i>Par Elec. Contractors, Inc.,</i>	
20 BNA OSHC 1624 (No.99-1520, 2004)	16-17
<i>PSP Monotech Industs.,</i>	
22 BNA OSHC 1303 (No. 06-1201, 2008)	15, 23

Rodriguez Pagan v. Secretary of HHS,

819 F.2d 1 (1st Cir. 1987)..... 13, 18, 29

Universal Camera Corp. v. NLRB,

340 U.S. 474 (1951)..... 13

Whirlpool Corp. v. Marshall,

445 U.S. 1 (1980)..... 2

STATUTES:

Occupational Safety and Health Act of 1970,

29 U.S.C. § 654(a)(1) 2

29 U.S.C. § 654(a)(2) 2

29 U.S.C. §§ 658-659, 666..... 3

29 U.S.C. § 659(a)..... 3

29 U.S.C. § 659(c)..... 1

29 U.S.C. §§ 659(c), 661(j) 3

29 U.S.C. § 660(a)..... 1, 12-13, 26

29 U.S.C. §§ 660(a)-(b)..... 3

29 U.S.C. § 661(j) 5

29 U.S.C. § 666(k)..... 12

REGULATIONS:

Occupational Safety and Health Administration (DOL),

Safety and Health Regulations for Construction,
Cranes and Derricks in Construction,

29 C.F.R., part 1926, subpart CC 10-11, 25

Keeping Clear of the Load,

29 C.F.R. §§ 1926.1425(b)&(c)..... 28

Occupational Safety and Health Standards,

Materials Handling and Storage,

Overhead and Gantry Cranes,

29 C.F.R. § 1910.179(n)(3)(i)..... *passim*

Slings,

29 C.F.R. § 1910.184(b) 6

29 C.F.R. § 1910.184(c)(9)..... *passim*

MISCELLANEOUS:

Federal Register Notices,

Delegation of Authority and Assignment of Responsibility,

Secretary’s Order 1-2012, 77 Fed. Reg. 3,912 (January 25, 2012) 3

JURISDICTIONAL STATEMENT

Petitioner Thomas G. Gallagher, Inc., seeks review of an August 18, 2016 final order of the Occupational Safety and Health Review Commission (Commission), Appendix (App.) 296. The Commission had jurisdiction under section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 659(c). The Commission's final order adjudicated all the claims, rights, and liabilities of the parties. This Court has jurisdiction to review the Commission's final order because Gallagher's petition for review was filed on October 14, 2016, within the statutory sixty-day period from the date of the Commission's final order. 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

(1) Whether Gallagher had constructive knowledge that its pipe assembly was improperly rigged in violation of 29 C.F.R. § 1910.179(n)(3)(i) where (a) the company failed to communicate adequately its work rule that big and heavy pipe assemblies were to be rigged only at foreman Mark DiCristoforo's direction and only under his supervision; (b) pipe fitter Jason Thibault rigged the assembly improperly three times on his own initiative and without such supervision; and (c) co-worker Joe Myles, who helped Mr. Thibault hoist the improperly rigged pipe assembly, did not caution him that he was breaking the rule.

(2) Whether Gallagher had constructive knowledge that Mr. Thibault put his hand directly on the improperly rigged pipe assembly in violation of 29 C.F.R. § 1910.184(c)(9) where the company had no work rule prohibiting an employee from putting a hand directly on a suspended load, and never instructed Mr. Thibault not to do so, and employees usually needed to put their hands on a load to stabilize it.

STATUTORY AND REGULATORY BACKGROUND

The fundamental objective of the OSH Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the OSH Act imposes two duties on an employer: a “general duty” to provide 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); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2).

The OSH Act separates rule-making and enforcement powers from adjudicative powers and assigns these respective functions to two different administrative actors: the Secretary and the Commission. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 147, 151 (1991). The Secretary is charged with promulgating and enforcing workplace health and safety standards, and the

Commission is responsible for carrying out the Act's adjudicatory functions. *CF & I*, 499 U.S. at 147. The Secretary (through the Occupational Safety and Health Administration (OSHA))¹ prosecutes violations of the Act and its standards by issuing citations requiring abatement of violations and assessing monetary penalties. 29 U.S.C. §§ 658-59, 666. The Commission is an independent agency that is a "neutral arbiter" for adjudicating disputes between employers and OSHA that arise from those citations. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam); *CF&I*, 499 U.S. at 147-48, 154-55.

An employer may contest a citation by filing a written notice of contest with OSHA within fifteen working days of receiving the citation. 29 U.S.C. § 659(a); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528 (7th Cir. 1991). A Commission ALJ provides an opportunity for a hearing and issues a decision on the contest. 29 U.S.C. §§ 659(c), 661(j). The Commission may review and modify the ALJ's decision. *Id.* §§ 659(c), 661(j). Either the Secretary or an aggrieved party may seek judicial review in a United States court of appeals of a Commission final order. *Id.* § 660(a)-(b).

This case involves citations issued to Gallagher for allegedly violating

¹ The Secretary of Labor has delegated his responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Dep't of Labor, *Delegation of Authority and Assignment of Responsibility*, Secretary's Order 1-2012, 77 Fed. Reg. 3,912, 3,912 (2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

29 C.F.R. §§ 1910.179(n)(3)(i) and 1910.184(c)(9). Section 1910.179(n)(3)(i) is part of OSHA'S overhead and gantry cranes standard, and requires that a "load shall be well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches." *Id.* Section 1910.184(c)(9) is part of OSHA's slings standard, and provides that "[w]henver any sling is used, . . . [a]ll employees shall be kept clear of loads about to be lifted and of suspended loads." *Id.*

STATEMENT OF THE CASE

A. Procedural History

After two pipes smashed pipe fitter Thibault's fingers while an improperly rigged 5000-pound pipe assembly was being hoisted with an overhead bridge crane, OSHA inspected Gallagher's fabrication shop in Andover, Massachusetts, and issued a two-item serious citation, proposing total penalties of \$11,250. Addendum to Gallagher's Brf. (Gal. Add.) 1-3, 8. Item 1 of the citation alleged a serious violation of the overhead and gantry cranes standard at 29 C.F.R. § 1910.179(n)(3)(i) in that a pipe assembly hoisted by a bridge crane was not well secured or properly balanced. Gal. Add. 2. The citation proposed a penalty of \$7000 for item 1. Gal. Add. 2. Item 2, as amended, alleged a serious violation of the slings standard at 29 C.F.R. § 1910.184(c)(9) in that an employee had put his

hand on a pipe assembly being hoisted by a bridge crane. Gal. Add. 2. The citation proposed a penalty of \$4250 for amended item 2. Gal. Add. 2-3.

Gallagher timely contested the citation and proposed penalties, and an administrative law judge (ALJ) heard the case on the merits, and affirmed the two citation items, assessing total penalties of \$3500. Gal. Add. 3. After the Commission declined to direct this case for review, the ALJ's decision automatically became a Commission final order by operation of law. 29 U.S.C. § 661(j). The petition for review to this Court followed.

B. Statement of Facts

1. Gallagher and the Pipe Assembly Accident

Gallagher makes prefabricated piping systems for installation in major construction projects. Gal. Add. 3-4. In late July 2014, Gallagher finished fabricating a pipe assembly (accurately depicted in Exhibit J-2, attached as Secretary's Addendum (Sec. Add. 1)) for a Novartis construction project. Gal. Add. 4. The pipes in the assembly were going to be used as vents for water chillers on the Novartis construction site. App. 247.

The pipe assembly was about thirty-two-feet long and four feet wide, and consisted of five four-inch diameter pipes, and one eight-inch diameter pipe, all parallel to each other, and about six inches apart. Gal. Add. 4. On one end of the assembly, metal plates were permanently welded to adjacent pipes to keep the

pipes six inches apart. Gal. Add. 4. On the other end, a channel iron had been temporarily welded to the pipes to keep them in place during transportation to the Novartis site. Gal. Add. 4-5. The assembly weighed about 5000 pounds. Gal. Add. 4.

On August 1, 2014, the pipe assembly was lying on two three-foot-high saw horses underneath a permanently installed overhead bridge crane, awaiting transportation by a flatbed trailer to the Novartis site. Gal. Add. 5; Sec. Add. 1. On his own initiative, Gallagher pipe fitter Jason Thibault attempted to use the crane's hoist to lift the pipe assembly off its saw horse supports, move the supports out from underneath the assembly, and then lower the assembly onto two dollies below it so that it could be rolled onto the flatbed trailer. Gal. Add. 6. To prepare for the hoist, Mr. Thibault rigged the assembly using two synthetic web slings. Gal. Add. 6. Mr. Thibault used two choker hitches² to rig the assembly. Gal. Add. 7. One choker hitch connected one of the slings around the eight-inch-diameter pipe near its midpoint; the other choker hitch lashed the other sling around the five four-inch diameter pipes near their midpoints. Gal. Add. 7.

Mr. Thibault's rigging method was improper in two ways. Gal. Add. 7. First, rigging the pipe assembly near its midpoint with only two slings caused the

² A "choker hitch" is "a sling configuration with one end of the sling passing under the load and through an end attachment, handle or eye on the other end of the sling." 29 C.F.R. § 1910.184(b).

load to teeter longitudinally when hoisted. Gal. Add. 7. Second, when the assembly was suspended, the sling choked around the five smaller pipes exerted lateral pressure on the two outermost pipes, causing one of the welds connecting the channel iron to those pipes to break during the lift. Gal. Add. 7.

When Mr. Thibault was ready to move the pipe assembly onto the dollies, he asked co-worker Joe Myles to help him.³ Gal. Add. 8. The pipe assembly rested on the two saw horses at about waist height of the two men. Gal. Add. 8. Mr. Myles operated the hoist to lift the assembly high enough above the saw horses that the two men could move them out from under the assembly. Gal. Add. 8. Then Mr. Myles began to lower the assembly onto the two dollies beneath it. Gal. Add. 8. When the assembly began to teeter, Mr. Thibault put his right hand on it to steady it. Gal. Add. 8. While Mr. Thibault's hand was on the assembly, the weld connecting the channel iron to the outermost small pipe broke, and caused that pipe to slam into the adjacent pipe, smashing Mr. Thibault's fingers. Gal. Add. 8. As a result of the accident, Mr. Thibault lost two fingers, and had to have a permanent titanium plate inserted in a third finger. Gal. Add. 9.

2. *Gallagher's Work Rule on Rigging Loads and Lack of a Work Rule Prohibiting Putting Hands on Suspended Loads*

Neither Gallagher foreman Mark DiCristoforo nor any other Gallagher supervisor witnessed the accident, or had actual knowledge at the time of the

³ The record does not reveal Mr. Myles' job title or trade. Gal. Add. 8 n.4.

accident that Mr. Thibault had rigged the pipe assembly by himself, or that he had placed his hand directly on the suspended pipe assembly. Gal. Add. 9. Gallagher did not communicate any work rules or guidance on how to rig loads. Gal. Add. 10. Mr. Thibault rigged the pipe assembly involved in the accident three different times, including the accident. Gal. Add. 10. Each time he rigged the assembly, he rigged it the same way he did just before the accident, and erroneously believed that he had rigged it properly each time. Gal. Add. 10.

Furthermore, foreman DiCristoforo substantially replicated Mr. Thibault's improper rigging when he tried to weigh the pipe assembly after the OSHA Compliance Officer asked how much it weighed. Gal. Add. 20, 32. After he re-rigged the assembly using only a single sling with two points of attachment and a choker hitch around more than one pipe, foreman DiCristoforo hoisted the assembly with the crane about six inches above the two dollies. Gal. Add. 20-21, 32. The assembly then teetered, and a weld connecting the channel iron to one of the small pipes broke, forcing the foreman to lower the assembly back onto the dollies before getting a definite weight. Gal. Add. 20. Even foreman DiCristoforo admitted that he had re-rigged the assembly in an unsafe way. Gal. Add. 21; App. 273-74.

Foreman DiCristoforo always attempted to be directly involved in rigging and loading pipe assemblies "[b]ecause . . . they're big and heavy, and . . . [rigging

and loading them is] dangerous" Gal. Add. 16; App. 251-52. There is no evidence, however, of whether or when foreman DiCristoforo communicated to any Gallagher employee that assemblies should be rigged only at his express direction and only under his direct supervision. Gal. Add. 17. No such policy was communicated in writing to Gallagher employees. Gal. Add. 17. Moreover, Mr. Thibault did not follow this policy on any of the three occasions that he rigged the Novartis pipe assembly by himself, without instructions or direction from anyone else. Gal. Add. 10. Nor did Mr. Myles, who helped Mr. Thibault hoist the Novartis assembly, caution him that they should not be doing this job without foreman DiCristoforo. Gal. Add. 31.

Gallagher had no work rule prohibiting an employee from putting a hand directly on a suspended load, and Mr. Thibault was never told not to do so.⁴ Gal. Add. 19, 35; App. 153. On the contrary, Gallagher's work rules and training actually endorsed the practice of placing hands directly on suspended loads under certain circumstances. Gal. Add. 19. Mr. Thibault believed that he appropriately put his hand directly on the suspended pipe assembly at the time of the accident,

⁴ Foreman DiCristoforo's April 2014 toolbox talk to five Gallagher employees, including Mr. Thibault, instructed them to keep "hands and fingers from between the load and the chain." Gal. Add. 12 (quoting Respondent's Exhibit (RX) 11). The instruction is inapplicable here because no chain was involved in rigging the pipe assembly. Gal. Add. 12. The toolbox talk did not order employees to keep their hands off rigged loads not involving chains. App. 145-46.

and testified that workers usually needed to do so to stabilize the load. Gal. Add. 19.

C. The ALJ's Decision

The ALJ found that Gallagher had constructive knowledge of both alleged violations: the rigging violation, 29 C.F.R. § 1910.179(n)(3)(i), and the hands-on-the-suspended-pipe-assembly violation, §1910.184(c)(9)⁵. Gal. Add. 2-3. The ALJ determined that Gallagher, through foreman DiCristoforo, had constructive knowledge of the violation of §1910.179(n)(3)(i) because the foreman did not adequately communicate his rule that big and heavy pipe assemblies were to be rigged only at his direction and only under his supervision. Gal. Add. 30-33. The ALJ based this determination on the fact that Mr. Thibault did not follow this rule on any of the three occasions that he rigged the Novartis pipe assembly by himself on his own initiative, and that Mr. Myles, who helped Mr. Thibault hoist the assembly, was apparently unaware of the rule. Gal. Add. 31-32.

The ALJ also found that Gallagher had constructive knowledge of the violation of §1910.184(c)(9) because the company had no work rule prohibiting an employee from putting a hand directly on a suspended load, and Mr. Thibault was never told not to do so. Gal. Add. 35. The ALJ also cited Gallagher's safety manual, which states that all crane and derrick work shall comply with the OSHA

⁵ Only these two ALJ findings will be discussed as Gallagher is challenging only constructive knowledge on review.

cranes and derricks in construction standard, 29 C.F.R., part 1926, subpart CC (not applicable here), which, unlike the general industry standard cited here, allows a worker to put his hands directly on suspended loads under certain circumstances. Gal. Add. 35 & n. 19; App. 98, 233-34. In addition, the ALJ quoted Mr. Thibault's testimony that employees usually needed to do so "to control [the suspended load] so it doesn't swing around or take off . . . [or] roll around." Gal. Add. 35-36; App. 153.

SUMMARY OF THE ARGUMENT

An employer's failure to establish an adequate work rule or communicate it effectively is alone sufficient to give an employer constructive knowledge of a violative condition. Substantial evidence supports the Commission's finding that Gallagher had constructive knowledge that the pipe assembly was improperly rigged because the company failed to communicate adequately its work rule that big and heavy assemblies were to be rigged only at foreman DiCristoforo's direction and only under his supervision. There is no evidence of whether or when Mr. Cristoforo communicated this rule to employees. The injured employee, pipe fitter Jason Thibault, rigged the assembly improperly three times on his own initiative and without such supervision. Co-worker Joe Myles, who helped Mr. Thibault hoist the improperly rigged assembly, did not caution him that he was breaking the rule.

Substantial evidence also supports the Commission's finding that Gallagher had constructive knowledge that Mr. Thibault put his hands directly on the suspended pipe assembly because the company had no work rule prohibiting an employee from putting a hand directly on a suspended load, and never instructed Mr. Thibault not to do so. Mr. Thibault testified that employees usually needed to put their hands on a load to stabilize it. Because Gallagher either did not establish an effective work rule or failed to communicate it adequately, the company had constructive knowledge of the cited violations.

ARGUMENT

I. STANDARD OF REVIEW

The first issue under review is whether the Commission⁶ correctly found that Gallagher had constructive knowledge, i.e., could have known with the exercise of reasonable diligence, 29 U.S.C. § 666(k), that its pipe assembly was improperly rigged. The Commission's findings of reasonable diligence are questions of fact. *Martin v. Occupational Safety & Health Review Comm'n (OSHRC) (Milliken)*, 947 F.2d 1483, 1485 (11th Cir. 1991). The Commission's findings of fact are conclusive as long as they are "supported by substantial evidence on the record

⁶ Since the ALJ's decision automatically became a Commission final order by operation of law when the decision was not directed for review, *see supra* p. 5, the ALJ's findings will be designated here as "the Commission's findings."

considered as a whole." OSH Act, § 11(a), 29 U.S.C. § 660(a); *Modern Continental Constr. Co. v. OSHRC*, 305 F.3d 43, 49 (1st Cir. 2002).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), but “less than the weight of the evidence,” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). This deferential substantial evidence standard applies even when the Commission does not hear the case itself but instead adopts an ALJ's findings of fact. *P. Gioioso & Sons, Inc. v. OSHRC* (*Gioioso 2*), 675 F.3d 66, 72 (1st Cir. 2012). The reviewing court must also accept reasonable factual inferences drawn by the Commission. *Id.* Moreover, where the evidence is conflicting, the reviewing court must accept the Commission’s resolution of the conflict so long as it is supported by substantial evidence. *Rodriguez Pagan v. Secretary of HHS*, 819 F.2d 1, 3 (1st Cir. 1987). Additionally, an ALJ’s credibility determinations are entitled to great deference, and should not be reversed absent an adequate explanation of the reviewing body’s grounds for disagreeing with the ALJ. *Gioioso 2*, 675 F.3d at 72; *Gen. Dynamics Corp. v. OSHRC*, 599 F.2d 453, 463 (1st Cir. 1979).

The second issue under review is whether the Commission correctly found that Gallagher could have known with the exercise of reasonable diligence that Mr. Thibault put his hands directly on a suspended pipe assembly. Like the first issue,

the second issue involves a Commission factual finding of reasonable diligence reviewable under the substantial evidence standard.

II. GALLAGHER HAD CONSTRUCTIVE KNOWLEDGE THAT THE PIPE ASSEMBLY WAS IMPROPERLY RIGGED IN VIOLATION OF 29 C.F.R. § 1910.179(n)(3)(i).

Substantial evidence supports the Commission's finding that Gallagher had constructive knowledge that the pipe assembly was improperly rigged because the company failed to communicate adequately its work rule that big and heavy assemblies were to be rigged only at its foreman's direction and only under his supervision. In other words, Gallagher's failure to communicate this rule adequately constitutes a lack of reasonable diligence. The Commission therefore correctly found that Gallagher violated 29 C.F.R. § 1910.179(n)(3)(i).⁷

In evaluating an employer's constructive knowledge, the Commission considers whether the employer has (1) established work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations

⁷ To establish a violation of a safety or health standard, the Secretary must prove: (1) that the cited standard applies; (2) that the employer failed to comply with the standard; (3) that employees had access to the violative condition; and (4) that the employer had actual or constructive knowledge of the violation. *Gioioso 2*, 675 F.3d at 72. The Commission found that all elements of § 1910.179(n)(3)(i) were established. Gal. Add. 23-24, 33. Here, the only issue Gallagher is raising is knowledge of the violation.

have been discovered.⁸ *Burford's Trees Inc.*, 22 OSHC 1948, 1951-52 (No. 07-1899, 2010). A supervisor's failure to communicate a work rule adequately is alone sufficient to give an employer constructive knowledge of the violative condition. *PSP Monotech Industrs.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) (inconsistently and confusingly communicated work rule gave employer constructive knowledge of its failure to keep employees clear of a suspended load); *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1287 (No. 02-0520, 2005) (failure to establish or effectively communicate a work rule requiring employees to tie off in the basket of a bucket truck established constructive knowledge of employee's failure to do so).

Substantial evidence supports the Commission's finding that Gallagher failed to communicate adequately its work rule that big and heavy assemblies were to be rigged only at foreman DiCristoforo's direction and only under his supervision. Given that Gallagher did not communicate any rules or guidance on how to rig a load, Gal. Add. 10, its rule to do so only under its foreman's supervision was its

⁸ The only one of these factors applicable here, however, is whether Gallagher implemented adequate work rules since the basis of the Commission's ultimate finding that Gallagher had constructive knowledge of the violation is that the company failed to communicate a work rule adequately, Gal. Add. 30-33. Thus, all the other factors of constructive knowledge and the preliminary Commission findings discussed in Gallagher's brief, Gal. Brf. 20-25, are irrelevant, and will not be discussed here, except insofar as Gallagher claims that they preclude the Commission's ultimate finding.

only procedure for rigging loads properly. Yet there is no evidence of whether or when Mr. Cristoforo communicated this rule to employees. Gal. Add. 17. The rule was not communicated in writing. Gal. Add. 17, 31. Gallagher did not take reasonably diligent measures in communicating the rule. Gal. Add. 17. If the rule was communicated through training sessions, or safety meetings, etc., there are no lists of who conducted such sessions, who attended them, and no documentation of what was said about the rule. Absent such documentation, Gallagher, like the employer in *P. Gioioso & Sons, Inc. v. OSHRC (Gioioso I)*, 115 F.3d 100 (1st Cir. 1997), "cannot persuasively argue that it effectively communicated [its rule] to its employees." *Id.* at 110 (lack of documentation of content of training programs and participants demonstrated inadequate communication of work rules).

The fact that pipe fitter Thibault did not follow the rule on any of the three occasions that he rigged the Novartis pipe assembly, Gal. Add. 10, is further substantial evidence that Gallagher did not communicate the rule adequately. Moreover, Mr. Thibault's erroneous belief that he had rigged the assembly properly each time, Gal. Add. 10, further shows that the work rule was not communicated adequately.

Furthermore, foreman DiCristoforo's admission that he had re-rigged the assembly unsafely, App. 273-74, is additional evidence that Gallagher had constructive knowledge of Mr. Thibault's improper rigging. *Par Elec. Contractors*

Inc., 20 BNA OSHC 1624, 1627-28 (No. 99-1520, 2004) (employer's admission that foreman should have ensured that protective gloves were worn evidence of constructive knowledge). Finally, the fact that co-worker Myles, who helped Mr. Thibault hoist the assembly, did not caution him that they should not be doing that job without foreman DiCristoforo, Gal. Add. 31, constitutes further substantial evidence that the rule was not communicated adequately.

On review, Gallagher disputes this evidence of constructive knowledge of improper rigging, citing the Compliance Officer's testimony that he lacked evidence, other than the accident, that Mr. Thibault, or any other employee, had a history of engaging in unsafe rigging. Gal. Brief (Brf.) 24. Gallagher also cites both the Compliance Officer's and foreman DiCristoforo's testimony that the foreman's use of an improper re-rigging method to weigh the pipe assembly was not common or normal. Gal. Brf. 24 n.5. In support of foreman DiCristoforo's testimony, Gallagher points to his assertion that he maintained a near constant presence on the shop floor. Gal. Brf. 24. Gallagher further claims that foreman DiCristoforo's use of an improper rigging method was done only at the Compliance Officer's request. Gal. Brf. 24 n.5. In addition, Gallagher discounts Mr. Myles' failure to remind Mr. Thibault of foreman DiCristoforo's rule not to rig large and heavy loads without his supervision on the ground that there is no evidence that Mr. Myles was a pipe fitter. Gal. Brf. 24 n.6.

The Commission, however, properly resolved the conflict of evidence about the frequency of improper rigging by crediting Mr. Thibault's testimony, not foreman DiCristoforo's, on this issue:

The Foreman was plainly mistaken in believing that up until the time of the accident, no Novartis project pipe assemblies had been rigged without his knowledge, when in actuality, [Mr. Thibault] had rigged the pipe assembly that injured him twice before without the Foreman's knowledge. It is apparent, therefore, that even though the Foreman spent most of the workday on the shop floor supervising work, there was significant activity in the shop of which he had no actual awareness.

Gal. Add. 32 n.16. Therefore, since the Commission's resolution of the conflict is supported by substantial evidence (Mr. Thibault's testimony that he rigged the pipe assembly without foreman DiCristoforo's knowledge three times, including the accident, App. 148, 154-56) and the Commission's credibility determinations, this Court should accept that resolution⁹. *Rodriguez Pagan*, 819 F.2d at 3 (agency's resolution of evidentiary conflicts must be accepted if supported by substantial evidence); *Gioioso 2*, 675 F.3d at 72 (ALJ's credibility determinations entitled to great deference).

⁹ Furthermore, contrary to Gallagher's assertion, the Compliance Officer did not ask foreman DiCristoforo to use a particular method of rigging to weigh the pipe assembly (the Compliance Officer did not know that much about rigging, App. 226), but simply accepted the foreman's offer to weigh the assembly, App. 177, 219-22. Mr. DiCristoforo testified that he used an unsafe method of rigging, but thought that it would be okay for weighing the assembly. App. 273-74, 281.

Furthermore, Gallagher's argument that there is no evidence that Mr. Myles was a pipe fitter, Gal. Brf. 24 n.6, is irrelevant. The record shows that Mr. Myles operated the hoist to lift and lower the large pipe assembly. App.151, 158. Anyone performing that type of work, whether a pipe fitter or not, was subject to foreman DiCristoforo's rule not to rig large and heavy loads without his supervision, and should have been informed of that rule. If Mr. Myles was not qualified for that work, then Gallagher had constructive knowledge that he performed it because the company did not exercise reasonable diligence in keeping him from operating the hoist. The fact that Mr. Myles did operate the hoist, however, and was therefore covered by the rule, but did not tell Mr. Thibault that the task they were about to perform was supposed to be done only with foreman DiCristoforo's authorization and supervision is substantial evidence that Mr. Myles was not informed of the rule.

Gallagher also alleges that the Commission's finding that the company had constructive knowledge that Mr. Thibault would rig the pipe assembly without foreman DiCristoforo's supervision, Gal. Add. 2, had nothing to do with the violative condition that the load was not well secured and properly balanced in the sling. Gal. Brf. 16-17 (citing Citation 1, item 1). Moreover, Gallagher asserts that the Commission made certain findings that precluded its ultimate finding that the company had constructive knowledge of Mr. Thibault's improper rigging of the

assembly, namely that (1) Gallagher's employees, including Mr. Thibault, had received sufficient training on rigging; (2) in light of Boston-area employers' reliance on union training, Gallagher did not fail to exercise reasonable discretion in not providing Mr. Thibault with detailed formal training on rigging; (3) Gallagher did not fail to exercise reasonable discretion by not having a work rule that explicitly specified the method of rigging the type of pipe assembly involved in the accident; and (4) Gallagher did not fail to exercise reasonable discretion in not discovering the violative condition given foreman DiCristoforo's near constant presence on the shop floor and the short duration of the violation. Gal. Brf. 18-22, 24 (citing Gal. Add. 26-28).

These objections are without merit. Contrary to Gallagher's assertion, Gal. Brf. 16-17, the Commission's finding that the company had constructive knowledge that Mr. Thibault would rig the pipe assembly without foreman DiCristoforo's supervision, Gal. Add. 22, *did* apply to the violative condition that the load was not well secured and properly balanced in the sling. Work rules are designed to prevent a violative condition, *Mosser Constr. Co.*, 15 OSHC 1408, 1415 (No. 89-1027, 1991), and may be direct (such as when using a choker hitch to rig a pipe assembly, always choke on a single pipe) or indirect (such as rig big loads only at Foreman DiCristoforo's direction and only under his supervision).

Gallagher used the latter, indirect rule to try to prevent the violative condition of a not well-secured or properly balanced pipe assembly. Gal. Add. 30-31. Thus, Gallagher's rule applied to the violative condition because the rule was designed to prevent that condition. Similarly, contrary to Gallagher's assertion, Gal. Brf. 16-17, the Commission's finding that the rule was not communicated adequately also applied to the violative condition because, as the Commission found, "Gallagher, in the exercise of reasonable diligence, should have known that [Mr. Thibault] would not comply with this [rule] *and that a violative condition would result*,"¹⁰ Gal. Add. 17 (emphasis added).

Gallagher is also mistaken in contending, Gal. Brf. 18-22, 24, that the Commission's preliminary findings that the company exercised reasonable discretion in some respects precluded the Commission's ultimate finding that Gallagher's failure to communicate its work rule adequately proved that the company had constructive knowledge of the violation of § 1910.179(n)(3)(i). The Commission itself pointed out how the work rule finding trumped the other findings: after noting foreman DiCristoforo's belief that Mr. Thibault knew how

¹⁰ For the same reason, Gallagher's objection that OSHA does not require multiple employees to rig a load, Gallagher Brf. 17, is misconceived. OSHA did not cite Gallagher for failing to have multiple employees rig the pipe assembly, and the Commission did not find any such requirement. Instead, the Commission properly found that Gallagher had constructive knowledge that its pipe assembly was not well-secured or properly balanced because the company failed to communicate adequately the work rule, including the requirement that multiple employees rig a big load, it designed to prevent that violative condition.

to rig the pipe assembly properly, based on his union training, experience, and safe conduct (subjects of some of the preliminary findings), the Commission observes "[t]he Foreman's belief, however, does not completely square with his recognition that the Novartis pipe assemblies are 'big and heavy, and . . . dangerous . . . and that's why I pick the right guys and we do it.'" Gal. Add. 31 (quoting App. 251-52).

Again, noting that foreman DiCristoforo recognized that rigging a Novartis assembly alone would be hazardous even for an experienced pipe fitter, the Commission points out that "the Foreman failed in his supervision of even the experienced journeyman pipefitters on the rigging of those pipe assemblies, by failing [to communicate the work rule adequately]." Gal. Add. 32-33. Thus, the Commission properly concluded that its finding that Gallagher inadequately communicated its work rule, and thus failed to provide necessary supervision of even experienced pipe fitters, outweighed its findings on Gallagher's adequate training¹¹ and inspection of its employees in other circumstances, and established

¹¹ Gallagher asserts that even the Compliance Officer acknowledged that Gallagher employees received sufficient training on rigging, and that Mr. Thibault, in particular, was trained on proper rigging. Gal. Brf. 8, 19. As the Commission noted, however, foreman DiCristoforo believed that his work rule was still needed for big and heavy loads in spite of this training because the work was dangerous, and the Commission found that Mr. Thibault rigged pipe assemblies improperly three times, and foreman DiCristoforo re-rigged the assembly improperly while trying to weigh it after the accident. Gal. Add. 20-21, 31-33; App 273-74. Thus, there was still a need for the work rule despite the training, and substantial

constructive knowledge.¹² *PSP Monotech*, 22 BNA OSHC at 1306 (failure to communicate work rule adequately alone sufficient to establish constructive knowledge); *see also Lake Erie*, 21 BNA OSHC at 1287, *infra* n.12.

In addition, foreman DiCristoforo's near constant presence on the shop floor and the short duration of the violation did not preclude Gallagher's constructive knowledge of the violation, as the company claims, Gal. Brf. 20, because Gallagher could have prevented the violation by adequately communicating its work rule. *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987) (hazardous employee conduct considered preventable, even if undetectable when it occurred, if it could have been precluded through feasible precautions); Gal. Add. 31 (had foreman DiCristoforo communicated the work rule adequately, it is likely that Mr. Thibault would have complied with it). Moreover, as the Commission noted, even though foreman DiCristoforo spent most of the work day on the shop floor, he missed significant activity. Gal. Add. 32 n. 16, quoted *supra*, p. 18.

evidence shows that Gallagher exercised a lack of reasonable diligence in not communicating the rule adequately.

¹² The same result would follow if Gallagher lacked an adequate work rule in the first place. *Lake Erie*, 21 BNA OSHC at 1287 (failure to establish an adequate work rule or effectively communicate it sufficient to give employer constructive knowledge of the violative condition); *infra* pp. 24-30 (showing that Gallagher's failure to have an adequate work rule gave the company constructive knowledge of the violation of 29 C.F.R. § 1910.184(c)(9)).

III. GALLAGHER HAD CONSTRUCTIVE KNOWLEDGE THAT MR. THIBAUT PUT HIS HAND DIRECTLY ON THE SUSPENDED PIPE ASSEMBLY IN VIOLATION OF 29 C.F.R. § 1910.184(c)(9)).

Substantial evidence also supports the Commission's finding that Gallagher had constructive knowledge that Mr. Thibault put his hands directly on the suspended pipe assembly in violation of 29 C.F.R. § 1910.184(c)(9),¹³ because the company had no work rule prohibiting an employee from putting a hand directly on a suspended load, and never instructed Mr. Thibault not to do so, and employees usually needed to put their hands on a load to stabilize it. In other words, Gallagher's failure to establish such a work rule constitutes a lack of reasonable diligence. A work rule must be explicit and include specific safety instructions which, if followed, would prevent the cited violation. *Mosser Constr.*, 15 OSHC at 1415; *Gen. Tel. of Michigan*, 6 BNA OSHC 1555, 1557 (No. 14193, 1978).

Substantial evidence supports the Commission's determinations that Gallagher had no work rule prohibiting an employee from putting a hand directly on a suspended load, and never instructed Mr. Thibault not to do so, and that employees usually needed to put their hands on a load to stabilize it. Mr. Thibault

¹³ The cited provision provides that employees shall be kept clear of suspended loads. 29 C.F.R. § 1910.184(c)(9). Gallagher does not dispute that this provision applies, that Mr. Thibault's action of putting his hand on the suspended pipe assembly did not comply with the provision, and that Mr. Thibault had access to the violative condition. The only issue here is whether Gallagher had constructive knowledge of the violation. *See supra* p. 14 n.7

testified that there were no work rules at the Gallagher shop prohibiting an employee from putting a hand on a load when trying to move the load, and that he was never told not to do so. App 153. On the contrary, Gallagher's safety manual states that all crane and derrick work shall comply with the OSHA cranes and derricks in construction standard, 29 C.F.R., part 1926, subpart CC. But that standard, which allows a worker to put his hands directly on suspended loads under certain circumstances, Gal. Add. 35 & n. 19; App. 98, 233-34, is not applicable here because Gallagher was not engaged in construction work, Gal. Add. 13 n. 8. Instead, Gallagher was subject to the cited general industry standard, which prohibits employers from touching suspended loads. Gal. Add. 13 n.8 & 34 n.17. Mr. Thibault also testified that employees usually needed to put their hands on a load to stabilize it. App 153. Thus, Gallagher's failure to establish an adequate work rule is sufficient to give the company constructive knowledge of the violation. *Lake Erie*, 21 BNA OSHC at 1287 (failure to establish an adequate work rule or effectively communicate it sufficient to give employer constructive knowledge of the violative condition).

On review, Gallagher contests the Commission's finding that the company had constructive knowledge that Mr. Thibault put his hands directly on the suspended pipe assembly, raising several objections. First, Gallagher alleges that its work rule that employees should never stand or work under a suspended load

would, if followed, have prevented Mr. Thibault from getting close enough to the pipe assembly to put his hands on it. Gal. Brf. 25. Second, Gallagher asserts that Mr. Thibault broke this work rule by standing close enough to the pipe assembly to put his hands on it. Gal. Brf, 25-26. Third, Gallagher claims that Mr. Thibault was trained not to place his hands on a suspended load. Fourth, Gallagher contends that it could not possibly have discovered that Mr. Thibault put his hand on the load because that action was too fleeting. Gal. Brf. 26. Fifth, Gallagher maintains that there was no indication that an employee would act in such an improper manner because Mr. Thibault had never broken a work rule, and Gallagher had not had any violations of rigging rules and standards. Gal. Brf. 26.

These objections lack merit. As a threshold matter, Gallagher has waived its first two objections, that Mr. Thibault broke a work rule that would have prevented him from getting close enough to put his hands on the pipe assembly, by not raising these objections below. 29 U.S.C. § 660(a) ("No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"); *Gioioso I*, 115 F.3d at 107 ("An aggrieved party desiring to preserve an issue for judicial review must raise it before the ALJ, articulate it clearly in its [petition for discretionary review], and offer a modicum of developed argumentation in support of it"). Gallagher has not mentioned any extraordinary

circumstances that would excuse its failure to urge these objections before the Commission.

If this Court should reach the first two objections, however, it should reject them. To begin with, Gallagher's rule prohibiting standing or working under a suspended load was not specific enough to prevent employees from getting close enough to put their hands on the load. The rule does not mention any ban on placing hands on the load, the distance an employee had to be from the suspended load, or prohibit employees working above or to the side of the load from putting their hands on it. As such, the rule was inadequate to protect employees from the hazard of putting their hands on a suspended load. *See Brown & Root, Inc.*, 8 BNA OSHC 2140, 2143-44 (No. 76-1296, 1980 (work rule not to work under an area where overhead work was proceeding not specific enough to protect against falling objects); *Enfield's Tree Serv., Inc.*, 5 BNA OSHC 1142, 1144 (No. 9118, 1977) (warnings to stay clear of energized lines not specific enough to instruct employees to stay at least ten feet away).

Further, even if followed, the work rule prohibiting standing or working under a suspended load would not have prevented Mr. Thibault from putting his hand on the suspended pipe assembly. There is no evidence that Mr. Thibault was standing or working under the pipe assembly when he put his hand on it. Instead, Mr. Thibault testified that the assembly was resting on a saw horse at about waist

height, when he put his hand on the assembly to lift it so that his co-worker, Mr. Myles, could pull the saw horse out from under the other end of the assembly. App. 157. The accident occurred as Mr. Thibault was lowering the load on to the carts, and a weld broke, and a pipe smashed *laterally*, not *down*, into Mr. Thibault's hand. App. 157-58. Thus, the work rule was inadequate because, even if followed, it would not have prevented Mr. Thibault from putting his hand on the assembly. *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (no. 87-1067, 1991) (instruction not to lift load until the crane was re-rigged insufficient where re-rigged crane would still not have had the capacity to lift the load).

The record considered as a whole does not support Gallagher's third objection, that Mr. Thibault was trained not to put his hands directly on a suspended load, Gal. Brf. 26. Mr. Thibault testified that he was never told at Gallagher not to do so, App. 153, and Gallagher's safety manual authorized such an action under certain circumstances, *see supra*, p. 25. As the Commission found, Gallagher could not have reasonably believed that Mr. Thibault's union training provided such instruction because that training was for construction workers, and, as noted above, placing one's hands directly on a suspended load is permitted under certain circumstances in that trade.¹⁴ Gal. Add. 36.

¹⁴ The cranes and derricks in construction standard at 29 C.F.R. § 1926.1425(b) & (c) permits workers to put their hands on a suspended load to hook, unhook, or guide it under specified circumstances. *Id.* By contrast, the cited provision of the

Gallagher alleges that Compliance Officer Henson testified at his deposition that Mr. Thibault was trained not to place his hands near a suspended assembly. Gal. Brf. 8 (citing App. 210-11). Even if Mr. Henson did so testify, this Court should resolve the conflict between that testimony and the Commission's contrary finding in the Commission's favor because that finding is supported by substantial evidence (Mr. Thibault's testimony, Gallagher's safety manual, and the evidence that Mr. Thibault's union training permitted putting hands on a suspended load under certain circumstances, *supra* pp. 28-29 & n.14¹⁵. *Rodriguez Pagan*, 819 F.2d at 3 (agency's resolution of evidentiary conflicts must be accepted if supported by substantial evidence).

Gallagher's fourth objection, that it could not possibly have discovered that Mr. Thibault put his hand on the load because that action was too fleeting, Gal. Brf. 26, is insufficient because the company could have prevented that action by

general industry slings standard, § 1910.184(c)(9), does not allow workers to put their hands on a suspended load. *Id.* ("employees shall be kept clear of . . . suspended loads"); *see also* App. 233 (Compliance Officer Adam Henson) (construction workers sometimes allowed to place their hands on loads, as opposed to general industry workers who are not permitted to do so).

¹⁵ In any case, it is not clear that Compliance Officer Henson's testimony, considered as a whole, stated that Mr. Thibault was trained not to put his hands on suspended loads. The sentence from Mr. Henson's deposition that Gallagher's counsel quoted at the hearing to support this conclusion ("Q 'Not to place hands on a live load is part of training; correct?' A It is") does not say who received the training or who provided it. The deposition that would provide the context is not in the record. At the hearing, Compliance Officer Henson denied that Mr. Thibault was trained to stay clear of a suspended load. App. 210-11.

establishing and adequately communicating a work rule prohibiting the action. *Myers*, 818 F.2d at 1277 (hazardous employee conduct considered preventable, even if undetectable when it occurred, if it could have been precluded through feasible precautions). The record does not support Gallagher's fifth objection, that the company lacked constructive knowledge of the violative condition because Mr. Thibault had never broken a work rule, and Gallagher had not had any violations of rigging rules and standards, Gal. Brf. 26. In fact, Mr. Thibault testified that Gallagher employees, including himself, usually needed to put their hands on a suspended load to stabilize it, App.153. That substantial evidence of improper conduct establishes that Gallagher had constructive knowledge that Mr. Thibault put his hand directly on the suspended assembly.

CONCLUSION

For the above reasons, the Commission's August 18, 2016 final order should be affirmed.

NICK GEALE
Acting Solicitor

ANN ROSENTHAL
Associate Solicitor For
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

SCOTT GLABMAN
Senior Appellate Attorney
U.S. Department Of Labor
200 Constitution Ave., N.W.
Room S-4004
Washington, D.C. 20210
(202) 693-5493

February 27, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

- this brief contains 7,455 total words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

- this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 with 14 point Times New Roman, *or*
- this brief has been prepared in a monospaced typeface using _____ with _____.

/s/Scott Glabman
SCOTT GLABMAN
Attorney for the Secretary of Labor
Dated: February 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2017, I served a copy of the *Brief for the Secretary of Labor* through the court's CM/ECF system, on the following:

Margaret Carter, Clerk
United States Court of Appeals
for the First Circuit
Attention: Kaitlin Copson

James F. Laboe, Esq.
jlaboe@orr-reno.com

/s/Scott Glabman
SCOTT GLABMAN
Attorney for the Secretary of Labor