

No. 17-3748

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANCIS J. PALO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

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

BRIEF FOR THE SECRETARY OF LABOR

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DATE: April 11, 2018

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JURISDICTIONAL STATEMENT

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

On September 8, 2017, administrative law judge (ALJ) Carol A. Baumerich found that Francis J. Palo, Inc. (Palo), violated 29 C.F.R. § 1926.856(a). J.A. 39 (Dec. 24).¹ The Commission did not direct discretionary review of the ALJ's decision (J.A. 1 – Petition for Review), and it became a final order of the Commission on October 25, 2017. *See* 29 U.S.C. § 661(j). Palo filed a petition for review with this Court on December 18, 2017 (J.A. 1), within the sixty-day time period prescribed by the OSH Act. 29 U.S.C. § 660(a). This Court has jurisdiction over this appeal under section 11(a) of the Act, 29 U.S.C. § 660(a).

¹ Record references are to the Joint Appendix (J.A.); the ALJ's Decision (Dec.); the Hearing Transcript (Tr.); and Palo's Brief (Br.).

STATEMENT OF THE ISSUE

Whether substantial evidence supports the ALJ's finding that Palo violated 29 C.F.R. § 1926.856(a), which prohibits the use of mechanical equipment on working surfaces unless the surface is strong enough to support the equipment's weight, where Palo could have known, with the exercise of reasonable diligence, that a partially-demolished concrete bridge could not support the weight of a fifty-ton excavator used to clear rubble from the worksite.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Secretary certifies that this case has not been before this Court previously. The Secretary is not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal.

LEGAL FRAMEWORK

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); *see also* 29 U.S.C. § 651(b) (declaring the OSH Act's purpose: "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."). To achieve this purpose, the OSH Act requires employers to comply

with occupational safety and health standards promulgated by OSHA.² 29 U.S.C. § 654(a)(2).

OSHA enforces the OSH Act by inspecting workplaces and issuing a citation when it believes an employer has violated a standard. *Id.* § 659. In appropriate cases, OSHA also proposes civil penalties against cited employers. *Id.* § 659(a). If the employer timely contests a citation or penalty, the Commission is required to “afford an opportunity for a hearing,” and “thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation or proposed penalty.” *Id.* § 659(a), (c). Hearings are presided over by a Commission ALJ. *Id.* § 661(j).

A party that is dissatisfied with the decision of the ALJ may petition the Commission for discretionary review. *Id.* §§ 659(c), 661(j). If the Commission does not grant review, the ALJ’s decision becomes the final order of the Commission. *Id.* § 661(j); 29 C.F.R. § 2200.90(d). Final decisions of the Commission are reviewable in the courts of appeals. 29 U.S.C. §§ 659(c), 660(a), 660(b).

² The Secretary’s responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. *See Pub. Citizen Health Research Grp. v. U.S. Dep’t of Labor*, 557 F.3d 165, 175 (3d Cir. 2009); Secretary of Labor’s Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (January 25, 2012). The terms “Secretary” and “OSHA” are used interchangeably in this brief.

This case involves a citation OSHA issued Palo alleging a violation of 29 C.F.R. § 1926.856(a) – Removal of walls, floors, and material with equipment. Section 1926.856(a) is part of OSHA’s standards governing demolition work. *See* 29 C.F.R. part 1926, subpart T (29 C.F.R. §§ 1926.850–1926.860). The cited provision precludes the use of “[m]echanical equipment . . . on floors or working surfaces *unless* such floors or surfaces are of sufficient strength to support the imposed load.” 29 C.F.R. § 1926.856(a) (emphasis added). The standard’s use of the word “unless” signals that the standard presumes a hazard. *See Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2152 (No. 08-1656, 2016). Therefore, once the Secretary establishes that an employer used mechanical equipment on a working surface, the burden shifts to the employer to show that the working surface was of sufficient strength to support the load. *Cent. Fla.*, 25 BNA OSHC at 2152; *Bardav, Inc.*, 24 BNA OSHC 2105, 2107-08 (No. 10-1055, 2014) (noting that “party claiming the benefit of an exception bears the burden of proving that its case falls within that exception,” and finding that the employer did not satisfy that burden); *C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (same).

STATEMENT OF THE CASE

I. Proceedings Below

The Pennsylvania Department of Transportation (PennDOT) selected Palo as the general contractor to partially demolish and reconstruct the Pennsy Bridge along State Route 219 in Ridgway, Pennsylvania. J.A. 17 (Dec. 2). On June 18, 2015, four workers suffered injuries when the Pennsy Bridge collapsed. J.A. 16, 19-20 (Dec. 1, 4-5). Following an inspection, OSHA issued Palo a citation alleging a serious violation of 29 C.F.R. § 1926.856(a). J.A. 16 (Dec. 1). Palo timely contested the citation, and a Commission ALJ held a hearing on the merits. J.A. 16 (Dec. 2).

On September 8, 2017, the ALJ issued a decision affirming the citation and assessing a \$4900 penalty. J.A. 39 (Dec. 24). The Commission did not grant discretionary review, and the ALJ's decision became a final order of the Commission by operation of law on October 25, 2017. 29 U.S.C. § 661(j). Palo timely filed a petition for review with this Court on December 18, 2017. 29 U.S.C. § 660(a); J.A. 1-7 (Petition for Review).

II. Statement of Facts

A. The Pennsy Bridge Project

Palo provides bridge demolition and construction services to government entities. J.A. 493 (Joint Exhibit 16 – Stipulated Facts, Stipulation (Stip.) 2). In

early 2015, PennDOT selected Palo to be the general contractor for a project that required the partial demolition and reconstruction of the Pennsy Bridge, a bridge that crossed the Elk Creek along State Route 219 in Ridgway, Pennsylvania. J.A. 16-17 (Dec. 1-2), 411 (Joint Exhibit 2 – Inspection Report). The bridge had a northbound lane, a southbound lane, and sidewalks on each side. J.A. 17 (Dec. 2), 411. The bridge’s support beams were arched, with the center of each beam approximately two to three feet narrower than the ends. J.A. 18 (Dec. 3). The bridge’s strength was at the ends of the beams, near the abutments, not at the center of the span. J.A. 18 (Dec. 3).

Before accepting bids for the Pennsy Bridge project, PennDOT provided bidding contractors, including Palo, a packet containing various drawings, specifications, and notes for the bridge. J.A. 102-105, 130, 164-67, 221 (Tr. 125-28, 169, 235-38, 359), 421-36 (Joint Exhibit 5 – Bid Package); Tr. 124, 234, 356-62. The notes indicated that “existing plans are not available for this structure.” J.A. 433. PennDOT also directly cautioned contractors, “[d]o not consider any of the data on the existing structure supplied [by PennDOT] as positive representations of any of the conditions that you will encounter in the field.” *Id.*

Prior to bidding on the project, Mark Schaffer, Palo’s Executive Vice President of Operations, conducted a single site visit. J.A. 29 (Dec. 14), 493 (Stip. 6). He took photographs and scribbled two pages of notes about the bridge. J.A.

29 (Dec. 14); J.A. 438-39 (Joint Exhibit 6 – Selected Survey Photographs), 442-43 (Joint Exhibit 7 – Survey Notes), 493 (Stip. 9). Palo referred to this site visit as an “engineering survey,” however, Mr. Schaffer is not an engineer and his notes contained only rudimentary measurements and limited information about the bridge. J.A. 29 (Dec. 14). No other Palo employee visited the site before Palo submitted its bid and no engineers reviewed Mr. Schaffer’s survey notes for the purposes of conducting an engineering analysis. J.A. 29 (Dec. 14), 119-20, 130 (Tr. 156-57, 169). Mr. Schaffer’s notes did not reference the mechanical equipment Palo planned to use, nor did they contain any analysis about the bridge’s weight-bearing capacity. J.A. 29 (Dec. 14), 442-43.

After winning the bid, Palo prepared a demolition plan using information obtained during Mr. Schaffer’s site visit. J.A. 456-69 (Joint Exhibit 10 – Demolition Plan). Palo’s demolition plan called for the bridge to be demolished by cutting the concrete away from the supporting abutments on both sides of the bridge. J.A. 18-19 (Dec. 3-4); 495 (Stip. 31). This would be accomplished in two phases. J.A. 18-19 (Dec. 3-4), 457-59. First, workers would make a longitudinal cut down the center of the bridge roadway deck, separating the northbound and southbound lanes. J.A. 19 (Dec. 4), 457. This would enable the southbound lane to remain open to traffic while Palo worked on the demolition and reconstruction of the bridge’s northbound side. J.A. 19 (Dec. 4), 497 (Government Exhibit 3 –

Selected Inspection Photograph). Next, workers would make horizontal and vertical cuts at the concrete abutments on the northbound half of the bridge. J.A. 457. Palo would then knock down the northbound half of the bridge using an excavator-mounted hydraulic hammer. *Id.* To conclude phase one, Palo would rebuild the northbound portion of the bridge according to PennDOT's specifications. *Id.* Palo's demolition plan included the following note: "At no time during the demolition process will men or equipment work on or from the component being demolished." *Id.* PennDOT accepted Palo's demolition plan on April 21, 2015. J.A. 18 (Dec. 3), 411 (Inspection Report), 494 (Stip. 12).

Palo retained various subcontractors, including Allegheny Diamond Services (ADS), to help with the project. J.A. 18 (Dec. 3), 495 (Stip. 31), 470-85 (Joint Exhibit 11 – ADS Subcontract Agreement); Tr. 144-45. ADS provided saw cutting services, cutting away designated components of the bridge. J.A. 477; Tr. 145, 253-54. PennDOT had an employee at the worksite and retained the engineering firm Erdman Anthony to inspect the worksite on its behalf. J.A. 73, 82-88, 206-207 (Tr. 39, 76-84, 329-30), 408-409 (Inspection Report), 495 (Stip. 30). However, as the general contractor, Palo oversaw the project and retained responsibility for worksite safety. J.A. 18 (Dec. 3), 115, 204, 265 (Tr. 146, 325, 445), 494 (Stips. 17-19); Tr. 110-11, 326, 444.

Palo began phase-one demolition on the northbound portion of the bridge on June 15, 2015. J.A. 412 (Inspection Report). After making the initial longitudinal saw cut down the center of the roadway deck, ADS workers began making the horizontal cut through abutment 1 (at the south end of the bridge). J.A. 19 (Dec. 4), 225 (Tr. 389), 487 (Joint Exhibit 15 – Daily Report); Tr. 388. On June 16, 2015, ADS completed the necessary cuts to abutment 1. J.A. 226-27 (Tr. 390-91), 412, 488. ADS then began making the horizontal cut at abutment 2 (at the north end of the bridge). J.A. 226 (Tr. 390), 488. While this work was ongoing, Palo moved a Caterpillar 235C excavator (CAT) on to the bridge. J.A. 226-28 (Tr. 390-92), 494 (Stips. 15, 21-23), 536 (Palo Exhibit 15 – Photograph of CAT). William Ott, Palo’s superintendent for the project, approved parking the CAT on the bridge; the CAT weighed approximately 101,800 pounds.³ J.A. 256 (Tr. 431), 493-94 (Stips. 7-8, 17-18, 23), 517 (Government Exhibit 7 – Caterpillar 235C Excavator Specifications). The following day, ADS completed the horizontal cut at abutment 2 and began the vertical cut at the centerline of the bridge. J.A. 228, 257 (Tr. 392, 432). Meanwhile, Palo used the CAT to remove rubble created by the demolition process from the bridge’s deck. J.A. 19 (Dec. 4), 118, 230 (Tr. 155, 399), 494-95 (Stips. 24-26); Tr. 53.

³ Aside from stating that “[t]he CAT weighed over 90,000 pounds,” the ALJ did not make a specific finding about the exact weight of the CAT. J.A. 19 (Dec. 4).

B. The Bridge Collapse, OSHA Investigation, and Issuance of the Citation.

On June 18, 2015, Palo parked the CAT on the closed northbound traffic lane. J.A. 19 (Dec. 4), 258 (Tr. 433). ADS and Palo workers continued demolition of the northbound side of the bridge. J.A. 19 (Dec. 4), 258-59 (Tr. 433-34). ADS workers had already completed the horizontal cuts to the abutments at each end of the northbound lane and the vertical cuts at abutment 1. J.A. 19 (Dec. 4), 490 (Daily Report), 495 (Stip. 31), 530 (Government Exhibit 15 – Diagram of Longitudinal and Horizontal Cuts); Tr. 395, 529.

Workers were continuing the vertical cuts at abutment 2 when they noticed some unusual cracking in one of the beams. J.A. 229 (Tr. 394), 490. Mr. Ott ordered the ADS workers to stop work and went on to the bridge deck to take measurements. J.A. 229, 260 (Tr. 394, 435), 490. He noticed that the deck on the northbound side had dropped several inches. J.A. 261 (Tr. 436), 490; Tr. 395. An Erdman Anthony inspector joined Mr. Ott on the bridge deck; Mr. Ott told him that they should get off the deck and tried to warn the ADS workers who were underneath the bridge. J.A. 20 (Dec. 5), 261 (Tr. 436), 413 (Inspection Report), 490; Tr. 395. There was insufficient time to evacuate the bridge before the northbound side ruptured at the center of the span. J.A. 20 (Dec. 5), 261-62 (Tr. 436-37), 514 (Video of Collapse); Tr. 395. The two workers on the bridge deck and the fifty-ton CAT slid down the deck as the roadway collapsed into the creek

below. J.A. 20 (Dec. 5), 261-62 (Tr. 436-37), 413, 490, 514. The two ADS workers who were underneath the bridge when it collapsed were injured. J.A. 413, Tr. 38. One suffered multiple injuries, including a broken ankle, and the other suffered severe head, neck, and back trauma. J.A. 20 (Dec. 5), 413; Tr. 38, 396.

The Pennsylvania Emergency Management Agency notified OSHA of the bridge collapse, and compliance officer (CO) Jennifer Harencame inspected the project worksite. J.A. 16, 20 (Dec. 1, 5). As part of her investigation, she took photographs and interviewed several witnesses, including Mr. Ott, individuals associated with PennDOT, and several ADS employees. J.A. 408-409 (Inspection Report), 496-513 (Inspection Photographs); Tr. 42. She also requested documents from Palo regarding engineering surveys and reports; Palo's response was that they did not conduct an engineering analysis because such analysis was not required. J.A. 79-80 (Tr. 73-74).

Based on the investigation, OSHA issued Palo a citation alleging a serious violation of 29 C.F.R. § 1926.856(a).⁴ J.A. 403 (Joint Exhibit 1 – Citation and Notification of Penalty, Citation 1, Item 2). The citation alleged that Palo used a CAT 235C excavator weighing approximately 101,800 pounds on the northbound

⁴ The citation also alleged a violation of 29 C.F.R. § 1926.850(a), but OSHA subsequently withdrew this item, and it is not at issue in this case. J.A. 17 (Dec. 2, n.1), 402 (Citation 1, Item 1).

lane of the bridge without ensuring that the bridge had sufficient strength to support the CAT, as required by 29 C.F.R. § 1926.856(a). *Id.*

C. The Hearing Before the ALJ

Palo contested the citation, and a hearing was held in Pittsburgh, Pennsylvania, before ALJ Carol A. Baumerich. J.A. 16-17 (Dec. 1-2). Palo did not dispute the applicability of 29 C.F.R. § 1926.856(a), nor that the working surface collapsed and employees were exposed to the hazardous conditions. J.A. 21 (Dec. 6), 115, 204, 265 (Tr. 146, 325, 445), 494 (Stips. 18-19); Tr. 444. Palo contended, however, that it lacked knowledge of the violation. J.A. 21, 27-28 (Dec. 6, 12-13).

Mohammad Ayub testified as an expert structural engineer on behalf of the Secretary, without objection from Palo.⁵ J.A. 23 (Dec. 8), 279-80 (Tr. 491-92). According to Mr. Ayub, it was readily apparent that the Pennsy Bridge was a cast-

⁵ Mr. Ayub testified at length about his qualifications. *See* J.A. 268 (Tr. 476); Tr. 477-86. He has a Master's degree in Civil Engineering, with a major in structural engineering, from George Washington University. J.A. 268 (Tr. 476). He also has held professional engineer licenses in Virginia and California, and currently holds a professional engineer license from the state of Maryland. *Id.* Since 1989, Mr. Ayub has served as OSHA's Director of the Office of Engineering in the Directorate of Construction. J.A. 270 (Tr. 481). Prior to joining OSHA, he served as a senior structural engineer for the Department of Veterans Affairs. J.A. 269 (Tr. 480). In his current capacity as the lead engineer for OSHA, Mr. Ayub conducts forensic structural engineering analyses and has investigated at least seven bridge collapses. J.A. 270-71 (Tr. 481-82).

in-place, arched, rigid⁶ frame beam bridge. J.A. 285-87, 323, 330-31 (Tr. 497-99, 567, 579-80). And, it would have been “very obvious” to anyone visually inspecting the bridge that the center of each curved beam was thinner than the beam ends. J.A. 296-97, 323 (Tr. 516-17, 567). Because of this design, Mr. Ayub explained, the bridge was strongest at the ends of the span and was weakest at the center of the span, where the beams were thinner. J.A. 285-87, 295-96, 330-31 (Tr. 497-99, 515-16, 579-80). When a load is imposed on this type of bridge, the load path goes toward the supporting ends. J.A. 285-87, 295-96, 387-89 (Tr. 497-99, 515-16, 665-67).

Mr. Ayub explained that when Palo made the horizontal and vertical cuts at the supporting ends, the bridge’s structural behavior changed from a fixed-end to a simple span bridge. J.A. 295-98, 302, 306-307, 318, 321-22, 335, 345-46, (Tr. 515-18, 523, 534-35, 560, 565-66, 585, 598-99), 529 (Government Exhibit 14 – Cross-Sectional Diagram of the Bridge), 537 (Palo Exhibit 16 – Diagram Comparing Structural Behavior of Fixed-End Bridge and Simple Span Bridge). Thus, once Palo made the cuts to the abutments, the bridge was not strong enough

⁶ Both parties agreed that a “rigid” frame means that the various components of the bridge – *i.e.*, the deck, the abutments, the end diaphragms, and the beams – are interconnected and that such design means that any weight imposed on the bridge is transferred into the abutments. J.A. 142-43, 284-86, 297 (Tr. 185-86, 496-98, 517); Tr. 295.

to support the weight of the CAT. J.A. 295-98, 302, 306-307, 318, 321-22, 335, 345-56 (Tr. 515-18, 523, 534-35, 560, 565-66, 585, 598-99), 529-30, 537.

Mr. Ayub opined that an experienced demolition and construction contractor should have known that cutting the deck away from the abutments would change the structural behavior of the bridge and render it unable to support the weight of the CAT. J.A. 306-307 (Tr. 534-35). A reasonably diligent contractor would not have placed a fifty-ton excavator on a bridge, after making integral cuts to its abutments, without first conducting even a simple analysis to determine whether the bridge could withstand the weight of such heavy equipment. *Id.*

Mr. Schaffer, Palo's Executive Vice President of Operations, conceded that during the course of the bid process, Palo did not request PennDOT's yearly inspection reports or any additional documentary information for the bridge. J.A. 171-72 (Tr. 246, 249). Mr. Schaffer also stated that unless explicitly required by PennDOT, he never includes external engineering consulting in his bid or demolition plan. J.A. 175-76 (Tr. 257-58). And, in this instance, he did not procure an engineering analysis, but merely consulted with Mr. Roman, Palo's President, in preparing a demolition plan. J.A. 179 (Tr. 261). Mr. Roman admitted that Palo did not perform an analysis to determine whether the bridge could withstand the weight of the CAT. J.A. 119-20 (Tr. 156-57).

Palo executives asserted that they reasonably relied on their experience when they assumed that the partially-demolished bridge would support the weight of the CAT. J.A. 119-20, 359, 368 (Tr. 156-57, 614, 634). However, Mr. Schaffer, who was responsible for surveying the bridge and developing the demolition plan, lacked an engineering degree and had only limited experience with arch-shaped bridges (such as the Pennsy Bridge) – ninety percent of his experience involved straight beam bridges. J.A. 161, 174-75 (Tr. 230, 256-57); Tr. 255, 296. Mr. Roman also acknowledged that most of Palo’s experience was with straight beam bridges. J.A. 110-111 (Tr. 136-137).

Mr. Schaffer thought the arched shape of the bridge was merely decorative, not structural. J.A. 174, 353, 355 (Tr. 256, 608, 610). Similarly, Mr. Roman believed cutting the abutments would have no effect on the load-bearing capacity of the bridge because, in his opinion, the beams would continue to distribute weight vertically onto the abutments. J.A. 145 (Tr. 188). As Mr. Ayub explained, however, these assumptions were false. Instead, the curved (arched) shape of the beams was an important structural component of the bridge. J.A. 323-26, 387 (Tr. 567-70, 665).

Palo also claimed that it had reasonably assumed the bridge was reinforced with sufficient rebar, and that only after the collapse did Mr. Schaffer discover that there was less rebar than expected, and that the rebar had hooked ends, something

he had never seen before. J.A. 198, 310, 372-73, 375-76 (Tr. 306, 539, 644-65, 647-48). Mr. Ayub acknowledged that Palo could not have examined the rebar before the collapse and that the bridge's hooked rebar did not conform to current engineering standards. J.A. 300-301, 310-311, 331 (Tr. 521-22, 539-40, 580). However, he explained that hooked rebar was common in 1912 (when the bridge was built) and that rebar from that period was as strong as the rebar used today. J.A. 299 (Tr. 520).

Moreover, Palo's assumption about the rebar was irrelevant because the company failed to ascertain the bridge's ability to support the CAT's weight after cutting the abutments. J.A. 310-311 (Tr. 539-40). And, even if the rebar had conformed to current engineering standards, cutting the abutments would still have compromised the bridge's load-bearing capacity. J.A. 24 (Dec. 9), 301-302, 310-310 (Tr. 522-23, 539-40). Thus, the unusual rebar did not cause the bridge's collapse; instead, the multiple cuts to the abutments and Palo's use of a fifty-ton excavator on the bridge deck caused it to collapse. J.A. 301-302, 323, 384 (Tr. 522-23, 567, 662).

D. The ALJ's Decision

On September 19, 2017, the ALJ issued her decision affirming a serious violation of 29 C.F.R. § 1926.856(a) and assessing a \$4900 penalty. J.A. 16, 39 (Dec. 1, 24). The principal issue before the ALJ was whether Palo had knowledge

that the partially-demolished bridge lacked sufficient strength to support the weight of the fifty-ton CAT. J.A. 21, 27 (Dec. 6, 12). The ALJ found that Palo failed to engage in reasonable diligence to assess the strength of the bridge. J.A. 27 (Dec. 12). The ALJ reasoned that “an experienced demolition and construction contractor should not have placed mechanical equipment like the CAT on the bridge without conducting an engineering analysis to ascertain whether the bridge could take the load after the abutments were cut.” J.A. 36 (Dec. 21). The ALJ found that Palo neglected to obtain “critical information” to ascertain whether the working surface could withstand the weight of the CAT. *Id.* Palo knew that the CAT was a heavy piece of equipment and that its weight was an important factor to consider when deciding whether to place it on the bridge. J.A. 28 (Dec. 13). Palo also conceded that it took no specific action to determine whether the bridge would be able to support the CAT’s weight after multiple cuts through both supporting abutments. *Id.*

The ALJ also rejected Palo’s assertions of reasonable diligence. Simply reviewing and relying on the information provided by PennDOT did not support Palo’s decision to park the CAT on the bridge. J.A. 29, 33 (Dec. 14, 18). PennDOT had not assigned the bridge a specific weight limit and “nothing in PennDOT’s documentation specified that the bridge could withstand a piece of

mechanical equipment, weighing in excess of forty tons, being used or parked on it, particularly after the cutting work began.” *Id.*

Nor was Palo’s pre-bid site survey conducted in a reasonably diligent manner. *Id.* Mr. Schaffer’s survey notes contained very limited information and did not reference the mechanical equipment Palo planned to use or any analysis about the bridge’s weight-bearing capacity. *Id.* Palo also acknowledged that it never obtained any documentation showing an analysis (engineering or otherwise) establishing that the bridge could withstand the CAT’s weight after its supporting abutments were cut. J.A. 29-30 (Dec. 14-15).

Similarly, Palo’s reliance on its demolition plan did not justify its failure to ascertain whether the partially-demolished bridge could withstand the CAT’s weight. J.A. 30, 33 (Dec. 15, 18). Indeed, the demolition plan specified that “[a]t no time during the demolition process will men or equipment work on or from the component being demolished.” J.A. 30 (Dec. 15, n.12). Palo also failed to request additional information on the bridge, such as inspection reports, from PennDOT to ascertain the bridge’s structure and strength. J.A. 30, 33 (Dec. 15, 18).

The ALJ also held that Palo’s reliance on the experience of its employees did not negate the company’s failure to obtain sufficient information about the bridge’s ability to sustain the weight of heavy equipment throughout the project. J.A. 33-34 (Dec. 18-19). Mr. Schaffer and Mr. Ott both lacked experience with

rigid, arch-shaped bridges and neither had the educational background of a professional engineer. J.A. 33 (Dec. 18). The ALJ rejected Palo's claim that it thought there was more rebar supporting the bridge. J.A. 35 (Dec. 20). The ALJ concluded that the bridge's beams were simply not big enough to accommodate a large amount of rebar. *Id.* Instead, "the narrowness of the arches should have alerted a reasonably diligent person that there could not possibly be enough rebar to continue to sustain the same weight after the abutments were cut." *Id.*

In making her determinations, the ALJ accorded "great weight" to Mr. Ayub's expert testimony. J.A. 23 (Dec. 8, n.5). In particular, Mr. Ayub explained that a walk over and under the bridge would have confirmed its structural type as having arched beams. J.A. 34 (Dec. 19). In his expert opinion, the bridge could be easily identified upon visual inspection as an arch-shaped bridge, and an experienced demolition contractor should have known that cutting the abutments would change the bridge's structural behavior and ability to bear weight. J.A. 30-31, 34-35 (Dec. 15-16, 19-20). Mr. Ayub also explained that a visual inspection of the bridge would have revealed the arch's role as a structural component. J.A. 35-36 (Dec. 20-21). Thus, the ALJ found that Palo failed to engage in reasonable diligence to determine whether the bridge would support the weight of the CAT after multiple cuts to the supporting abutments, and therefore had knowledge of the violation of 29 C.F.R. § 1926.856(a). J.A. 36 (Dec. 21).

SUMMARY OF THE ARGUMENT

The ALJ properly affirmed the violation of 29 C.F.R. § 1926.856(a). Substantial evidence in the record supports the ALJ's finding that Palo used a fifty-ton CAT on a partially-demolished bridge without ensuring the bridge could bear its weight. Palo should have known, through the exercise of reasonable diligence, that the bridge lacked sufficient strength to support the weight of the CAT after workers began cutting the supporting abutments. A reasonably diligent contractor would have obtained more information from PennDOT and conducted an engineering analysis to ascertain whether the bridge could support the CAT's weight before moving the excavator onto the bridge. Palo, however, took no action to determine whether the partially-demolished bridge would be able to support the CAT's weight. The ALJ also properly relied on the expert testimony of Mr. Ayub concluding that cutting the arch-shaped bridge changed its weight-bearing capacity and ultimately undermined its ability to bear the fifty-ton weight of the CAT.

Palo's attacks on the pre-trial and trial proceedings are unavailing. The procedural objections related to the ALJ's scheduling order lack merit. And, the ALJ properly excluded CO Haren came's inspection notes because Palo's counsel expressly withdrew his motion to admit that document into evidence. Likewise,

the ALJ properly accorded little weight to uncorroborated and irrelevant aspects of OSHA's inspection report. The Court should therefore dismiss the appeal.

ARGUMENT

I. Standard of Review

The Court reviews the Commission's findings of fact under a substantial evidence standard.⁷ *See* 29 U.S.C. § 660(a); *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 204 (3d Cir. 2005). The Commission's factual findings must be upheld if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 660(a); *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981); *see also Bianchi Trison Corp.*, 409 F.3d at 204.

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Balsavage v. Dir., Office of Workers' Comp. Programs*, 295 F.3d 390, 395 (3d Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If substantial evidence exists, the Court must affirm the ALJ's interpretation of the evidence even though it "might have interpreted the evidence differently in the first instance." *Balsavage*, 295 F.3d at 395 (citation omitted); *see also Am. Iron & Steel*

⁷ This deferential substantial evidence standard likewise applies to unreviewed ALJ decisions, such as this one, that become Commission final orders by operation of law. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 104 n.3 (1st Cir. 1997); *see also Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 204 (3d Cir. 2005) (stating standard of review in case involving unreviewed ALJ decision).

Inst. v. OSHA, 577 F.2d 825, 831 (3d Cir. 1978). Additionally, “the ALJ’s credibility determinations should not be reversed unless inherently incredible or patently unreasonable.” *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2005); *see also Carson Concrete Corp. v. Sec’y of Labor*, No. 05-2160, 2006 WL 460898, *2 (3d Cir. Feb. 27, 2006) (deferring to the ALJ’s resolution of conflicting testimony because “the ALJ had the opportunity to observe the demeanor and hear the testimony of both witnesses”); *U.S. Steel Corp. v. OSHRC*, 537 F.2d 780, 783 (3d Cir. 1976) (noting that the Court “would not be in a position to override the judgment of the trier of fact on a question of credibility”).

The Court reviews questions of law under a similarly deferential standard, only reversing the Commission’s legal conclusions where they are “arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); *Sec’y of Labor v. Trinity Indus.*, 504 F.3d 397, 400 (3d Cir. 2007). Additionally, the Court reviews the ALJ’s decision to admit expert testimony under the abuse of discretion standard. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 81 (3d Cir. 2017).

II. The ALJ Properly Affirmed the Violation of 29 C.F.R. § 1926.856(a).

Under 29 C.F.R. § 1926.856(a), “[m]echanical equipment shall not be used on floors or working surfaces unless such floors or surfaces are of sufficient

strength to support the imposed load.”⁸ The ALJ correctly found that Palo violated § 1926.856(a) when it used a fifty-ton CAT on a partially-demolished bridge without assessing the bridge’s ability to support the weight of the CAT. Palo failed to take any actions to determine the strength of the bridge during the demolition process, and subsequently used the CAT on the bridge to remove rubble. The bridge collapsed, and several workers were seriously injured as a result.

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applied; (2) the employer failed to comply with the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known of the condition with the exercise of reasonable diligence. *Sec’y of Labor v. ConocoPhil. Bayway Refinery*, 654 F.3d 472, 479-80 (3d Cir. 2011). Palo did not dispute the first three elements in its petition for discretionary review to the Commission.⁹ J.A. 1-7

⁸ As previously discussed, the use of the word “unless” indicates that the standard presumes a hazard, and the employer therefore must assess whether the working surface can support the mechanical equipment. *See supra* p. 4.

⁹ Without any supporting discussion, Palo asserts on appeal to this Court that § 1926.856(a) did not apply because it was not “using” the excavator on a “working” surface. Br. 51. Palo also appears to argue that the Secretary did not establish the company’s non-compliance with the standard. *See* Br. 46-47, 51. Palo failed to raise these claims in its petition for discretionary review to the Commission. JA. 1-7. These arguments are therefore waived under section 11(a) of the OSH Act. *See* 29 U.S.C. § 660(a) (“No objection that has not been urged before the Commission shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary

(Petition for Discretionary Review); *see also* Br. 29-50. Palo argued only that it acted with reasonable diligence and therefore lacked knowledge of the violative conditions. J.A. 1-7; *see also* Br. 34-50. As detailed below, substantial evidence supports the ALJ's finding that Palo failed to engage in reasonable diligence to determine whether the bridge was of sufficient strength to support the CAT's weight after ADS began cutting away the supporting abutments. *See* J.A. 26-36 (Dec. 11-21). Palo therefore had constructive knowledge of the violation and the Court should deny the petition for review.

A. Substantial Evidence Supports the ALJ's Finding that Palo Had Knowledge of the Violative Condition Because Palo Failed to Exercise Reasonable Diligence to Determine Whether the Partially-Demolished Bridge Could Withstand the CAT's Weight.

To establish Palo's knowledge of the violation of § 1926.856(a), the Secretary must prove that Palo had either actual or constructive knowledge of the

circumstances.”); *see also D.A. Collins Constr. Co. v. Sec’y of Labor*, 117 F.3d 691, 694 (2d Cir. 1997) (noting that § 11(a) is a jurisdictional limitation); *P. Gioioso & Sons*, 115 F.3d at 107 (“oblique references” are not enough to satisfy the exhaustion doctrine or section 11(a) of the OSH Act); *Keystone Roofing Co. v. OSHRC*, 539 F.2d 960, 963-64 (3d Cir. 1976) (employer waived claim that standard did not apply when it failed to urge that contention before full Commission). In any event, and for the reasons articulated by the ALJ (*see* J.A. 21-26 (Dec. 6-11)), substantial evidence establishes that the cited standard applied and that Palo failed to comply with the standard. *See also infra* pp. 26-27 (discussing Palo's use of the CAT on the bridge and Palo's complete inaction related to assessing the partially-demolished bridge's ability to withstand the fifty-ton weight of the CAT).

violative conditions. *See* 29 U.S.C. § 666(k); *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3d Cir. 1984). To show constructive knowledge, the Secretary must prove that Palo, “with the exercise of reasonable diligence, should have known of the conditions constituting the violation.” *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2155 (No. 08-1656, 2016) (citing *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015)). The knowledge of a supervisor may be imputed to an employer such that “an employer can be charged with constructive knowledge of a safety violation that supervisory employees know or should reasonably know about.” *Thomas G. Gallagher, Inc. v. OSHRC*, 877 F.3d 1, 4 (1st Cir. 2017) (citation omitted); *see also Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 283 (6th Cir. 2016) (“The Secretary of Labor can show constructive knowledge on the part of a supervisor by establishing by a preponderance of the evidence that knowledge of a hazard could have been obtained through the exercise of reasonable diligence.”).

In determining whether an employer has acted with reasonable diligence, the Commission considers several factors, including: an employer’s obligation to adequately supervise employees; to adequately inspect the work area; to anticipate hazards to which employees may be exposed; and to take measures to prevent the occurrence of violations. *See Thomas G. Gallagher*, 877 F.3d at 9, 11; *Mountain States*, 825 F.3d at 285. An employer’s obligation to inspect the workplace for

hazards “requires a careful and critical examination.” *Austin Commercial v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979).

The ALJ correctly found that reasonable diligence required Palo to evaluate the bridge project for hazards before placing the CAT on the bridge deck. *S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1624 (No. 94-3393, 2011) (“It is well-settled that an employer has an obligation to ascertain the hazards to which its employees may be exposed.”); *Hamilton Fixture*, 16 BNA OSHC 1073, 1087 (No. 88-1720, 1993) (“[A]n employer has a general obligation to inspect its workplace for hazards.”). Because Palo could have discovered that the partially-demolished bridge could not support the weight of the CAT had it conducted “a careful and critical examination” of the bridge’s structure, Palo had constructive knowledge of the violative condition. *Austin Commercial*, 610 F.2d at 202.

There is no dispute that Palo knowingly used the CAT on the bridge. *See* J.A. 34 (Dec. 19). Mr. Ott acknowledged that he approved parking the CAT on the bridge on the day of the collapse. J.A. 230, 256 (Tr. 399, 431). Mr. Roman, Palo’s President and in-house civil engineer, admitted that he knew that Palo would use one of its largest excavators on the bridge project. J.A. 147 (Tr. 190). Mr. Schaffer was also keenly aware, via Mr. Ott’s daily task reports, that an excavator was being used on the bridge. J.A. 419 (Joint Exhibit 3 – Citation Worksheet); J.A. 487-91 (Daily Reports). Mr. Schaffer also testified that Palo’s demolition

plan¹⁰ contemplated use of its CAT 235C on the bridge and that, in his estimation, the CAT weighed approximately 93,000 pounds. J.A. 198-200 (Tr. 306-308), 613 (Palo's Post-Hearing Brief, p. 72, n.11).

Palo's top executives, President Roman and Vice President Schaffer, also knew that the demolition process required cutting through both the bridge's abutments, components that support the bridge's beams and deck. J.A. 136, 634 (Tr. 176, 368); Tr. 255, 295. And, as the ALJ correctly noted, both Mr. Ott and Mr. Schaffer knew that the excavator's weight was an important factor to consider when deciding whether to use the excavator on a partially-demolished bridge. J.A. 28 (Dec. 13), 224, 380 (Tr. 374, 658). Despite this collective knowledge, Palo failed to take any action to determine whether the bridge would continue to support the CAT's weight after demolition began on the abutments. J.A. 28 (Dec. 13), 80, 119-20, 178-79, 233 (Tr. 74, 156-57, 260-61, 402).

Contrary to Palo's assertion (Br. 37-43, 46-49), the ALJ also reasonably relied on Mr. Ayub's expert testimony concluding that Palo should have known that the bridge would not support the weight of the CAT after the abutments were cut. *See* J.A. 32 (Dec. 17, n.14). Mr. Ayub explained that a simple walk over and under the bridge would have confirmed its structural design as a cast-in-place,

¹⁰ Mr. Schaffer wrote the language in Palo's demolition plan that required "using an excavator mounted hydraulic hammer" to "knock down [the bridge's] superstructure and substructure" during both phases of the project. J.A. 199-200 (Tr. 307-308), 457-58 (Joint Exhibit 10 – Demolition Plan).

rigid, fixed beam, arch-shaped bridge. J.A. 287, 297, 323, 330-31 (Tr. 499, 517, 567, 579-580). He also opined that it would have been “obvious” to any demolition contractor that cutting the supporting abutments would change the bridge’s structural behavior and render it unable to support an imposed load. J.A. 306, 323, 330-31 (Tr. 534, 567, 579-80). Given the bridge’s readily apparent structural design, Mr. Ayub added, Palo should not have placed the CAT on the bridge without first conducting “some basic engineering analysis” to determine whether it would support heavy equipment after all the cuts were made. J.A. 306-307 (Tr. 534-35).

Palo waived any objection to Mr. Ayub’s qualifications as an expert witness at the hearing (J.A. 280 (Tr. 492)), and now fails to articulate a valid reason to reject Mr. Ayub’s testimony.¹¹ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1214 (D.C. Cir. 2014) (the ALJ is “normally accorded wide latitude in determining whether proffered expert testimony would be helpful” (citation omitted)); *see also St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2005) (“[T]he ALJ’s credibility determinations should not be reversed unless inherently incredible or patently unreasonable.”); *Estate of Bynum v. Magno*, No. 01-16541,

¹¹ Palo makes much of the fact that Mr. Ayub does not hold a license from the state of Pennsylvania. *See* Br. 23. However, Palo does not explain why a state-specific license is necessary in this case or why Mr. Ayub’s engineering license from Maryland does not adequately reflect his qualifications as a structural engineer. As the ALJ aptly explained, “the laws of gravity do not change” when one crosses state lines. *See* J.A. 23 (Dec. 8, n.5).

2003 WL 124171, at *1 (9th Cir. Jan. 14, 2003) (defendants forfeited their right to object to the admission of expert opinion because they failed to make “a contemporaneous objection to its admissibility” or move to strike the opinion). Palo contends that the ALJ improperly relied “exclusively” on the Mr. Ayub’s testimony. Br. 37. To the contrary, the ALJ reasonably found that Palo failed to present any credible evidence contradicting Mr. Ayub’s engineering analysis. *See* J.A. 36-37 (Dec. 21-22). As the ALJ noted, Palo did not call its own engineer (Mr. Roman) to rebut Mr. Ayub’s structural analysis. *See id.* The ALJ also provided good reasons for her decision to discredit Mr. Schaffer and Mr. Roman’s testimony that they acted with reasonable diligence and thought the bridge would continue to support the CAT’s weight. *See* J.A. 28-36 (Dec. 13-21). Although Mr. Schaffer referred to his pre-bid visit of the bridge as an “engineering survey,” he is not a structural engineer. J.A. 169 (Tr. 240). His lack of structural engineering knowledge was evident at the hearing, as he acknowledged that he believed the arched shape of the bridge was decorative, rather than an important structural component.¹² J.A. 353-55 (Tr. 608-610).

¹² Palo claims that the ALJ “improperly diminished” Mr. Schaffer’s testimony and now argues that Mr. Schaffer was qualified as an expert by virtue of his knowledge and experience. *See* Br. 41. Palo had ample time and opportunity to offer Mr. Schaffer (or any other person) as an expert witness, but failed to do so. *See* J.A. 37 (Dec. 22). Additionally, the ALJ accepted Mr. Schaffer’s testimony into evidence and gave it its proper weight; the ALJ’s decision to accord greater weight to Mr. Ayub’s testimony is entitled to deference. *See Dana Container, Inc.*

In addition, the ALJ correctly noted that Mr. Schaffer’s survey notes contained only rudimentary information about the bridge. J.A. 29 (Dec. 14). His survey notes did not reference the mechanical equipment that Palo planned to use nor did they contain any analysis about the bridge’s ability to support any imposed load after the abutments were cut. J.A. 29 (Dec. 14), 442-43 (Joint Exhibit 7 – Survey Notes). Mr. Schaffer also acknowledged that ninety percent of his experience was with straight beam bridges, rather than arched bridges. J.A. 174 (Tr. 256). Based on his limited experience with arch-shaped bridges, Mr. Schaffer was unqualified to adequately assess the bridge’s ability to support a heavy CAT after ADS began cutting away the supporting abutments.¹³

Likewise, Mr. Roman’s conclusory opinion that the Pennsy Bridge was “really strong” and would support the excavator (Br. 46; J.A. 139 (Tr. 181)), did

v. Sec’y of Labor, 847 F.3d 495, 502 (7th Cir. 2017) (“Though Dana vigorously attacks the credibility of the Secretary’s expert witness, we defer to an agency’s credibility determinations in all but extraordinary circumstances.”); *Carson Concrete Corp.*, 2006 WL 460898, at *2 (accepting the ALJ’s resolution of conflicting testimony); *Am. Wrecking Corp. v. Sec’y of Labor*, 351 F.3d 1254, 1262 (D.C. Cir. 2003) (“The ALJ reasonably credited the testimony of these experts over the contradictory testimony of AWC’s witnesses.”).

¹³ Both Mr. Schaffer and Mr. Roman acknowledged that they had limited experience with the type of bridge at issue in this case. J.A. 110-110, 154-55, 174 (Tr. 136-37, 209-210, 256). Their lack of knowledge of arched bridges underscored the need for Palo to obtain an engineering analysis before using a CAT on the partially-demolished bridge. *Cent. Fla.*, 25 BNA OSHC at 2154-55 (finding that employer lacked “critical information” to ascertain whether berm could support load of CAT dump truck).

not represent a thorough analysis as to whether the bridge would support the CAT's weight following multiple cuts to the abutments.¹⁴ Although Mr. Roman is a civil engineer and reviewed Mr. Schaffer's survey notes and photos of the bridge, there is no evidence that he sought to conduct "a careful and critical examination" of the bridge to determine its structure and strength. *See Austin Commercial*, 610 F.2d 200, 202 (5th Cir. 1979); *see also Mountain States*, 825 F.3d at 285 (stating that employers have an obligation to inspect the workplace, to anticipate hazards, and to take measures to prevent the occurrence of violations). Instead, the record suggests that Mr. Roman never thoroughly contemplated the critical question of whether the bridge's load-bearing capacity would be altered after the abutments were cut. J.A. 119-20 (Tr. 156-57), 524-28 (Government Exhibit 9 – Answers to Secretary's First Set of Interrogatories).

Palo argues that it did not consult an engineer because PennDOT did not provide the original drawings for the bridge and Palo would not have been able to provide basic information to the engineer. Br. 29-30; J.A. 125-26, 381 (Tr. 164-65, 659), 433 (Bid Package). However, Mr. Roman conceded that it is very common not to have original drawings in bridge projects – fifty percent of the time, he estimated. J.A. 126 (Tr. 165). The absence of original drawings should

¹⁴ Like Mr. Schaffer, Mr. Roman understood that the rigid, arch-shaped bridge would "accept weight straight down on [to] the abutments." J.A. 142-43 (Tr. 185-86). Still, Mr. Roman erroneously believed that cutting the abutments would have no effect on the load-bearing capacity of the beams. J.A. 143-44 (Tr. 186-87).

have alerted Palo that a more thorough examination of the bridge's structure and strength was warranted, or at a minimum, that additional documentation from PennDOT, such as inspection reports, was needed. Palo's failure to undertake any of these measures shows a lack of reasonable diligence. *See, e.g., Austin Bridge & Road, Inc. v. OSHRC*, No. 03-60642, 2004 WL 838611, *3 (5th Cir. Apr. 20, 2004) (finding that employer did not act with due diligence when it relied solely on the lift plan and made no attempt to find the true weight of the beam prior to the lift). And, a more thorough examination of the Pennsy Bridge was critical here because Palo had only limited experience with arch-shaped bridges like the Pennsy Bridge. J.A. 110-111, 154-55, 174-75 (Tr. 136-37, 209-210, 256-57); *Cent. Fla.*, 25 BNA OSHC at 2154 (finding that foreman "mistakenly relied on Central Florida's experience from previous work on a different berm at the same facility to determine that the berm in question had the capacity to support the CAT").

Palo also argues that it did not have constructive knowledge of the bridge's inability to bear the weight of the CAT because the company thought there was more rebar supporting the bridge, and it could not have known that the bridge's rebar was spliced.¹⁵ *See* Br. 38-41. Palo's argument misses the mark. As the ALJ

¹⁵ Palo's reference to ACI 318 (the American Concrete Institute building code requirements for reinforced concrete) is a red-herring. *See* Br. 39-40. Mr. Ayub thoroughly explained that it was improper for Palo to expect a larger number of rebar in a single beam because the beams were two feet deep and two feet wide at the center and because placing so much rebar in such a narrow beam would violate

correctly noted, Palo is not charged with constructive knowledge of the bridge's unusual rebar configuration. J.A. 35 (Dec. 20, n.21). Instead, the Secretary's "contention is that Palo should have known what was *capable of being visually determined, i.e.*, that cutting a fixed-beam arch bridge through its supporting abutments compromised its ability to [support the CAT's weight]." *Id.* (emphasis added). Mr. Ayub explained that the narrowness of the arches should have alerted Palo that there could not possibly be enough rebar in the bridge to sustain the fifty-ton excavator after the abutments were cut. *Id.*; J.A. 384-85, 391-92 (Tr. 662-63, 669-70). And, as the ALJ correctly found, the bridge's beams were "simply not big enough to accommodate a large amount of rebar."¹⁶ J.A. 35 (Dec. 20).

Mr. Ayub also persuasively explained that the bridge's inability to support the fifty-ton CAT was not a function of the bridge's spliced rebar. Rather, it was

engineering standards. J.A. 384-85 (Tr. 662-63). Additionally, the graphic referencing the "ACI Code" on page 40 of Palo's brief is not part of the record in this case.

¹⁶ Palo asserts that the ALJ should not have relied on Mr. Ayub's analysis because he did not personally inspect the bridge. *See* Br. 23. But Rule 703 expressly authorizes the admission of expert opinion that is based on "facts or data" that themselves are inadmissible, as long as the evidence relied upon is "of a type reasonably relied upon by experts in the particular field in forming opinions." Fed. R. Evid. 703; *see also Monsanto Co. v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008) ("[T]he Federal Rules of Evidence establish that an expert need not have obtained the basis for his opinion from personal perception."). The tests conducted in this case are "the type reasonably relied upon by experts," and the ALJ therefore properly credited Mr. Ayub's testimony.

the cutting away of the arch-shaped bridge's abutments that critically diminished the bridge's ability to support the CAT's weight. J.A. 295-98, 302, 306-307, 323 (Tr. 515-18, 523, 534-35, 567). Mr. Ayub explained that the bridge's strength was located at the fixed ends, *i.e.*, the abutments, not at the center of the span. J.A. 286, 296 (Tr. 498, 516). By cutting the abutments, Palo eliminated the bridge's source of strength. J.A. 295-98, 323, 330-31, 339-40 (Tr. 515-18, 567, 579-80, 589-90).

Mr. Ayub also stated that the strength of the rebar used in 1912 (when the bridge was built) was similar to that of rebar used today. J.A. 299 (Tr. 520). In any event, Mr. Ayub added, "even if you assume that all the [rebar] splices were done properly, as per today's standards, this bridge would have still failed. It would not have taken the weight of the excavator." J.A. 302 (Tr. 523). Mr. Ayub thus concluded that the bridge collapsed because Palo placed the fifty-ton excavator on the bridge after making multiple cuts to its supporting abutment, not because the bridge had unusual rebar.¹⁷ J.A. 298, 302, 306-307, 323 (Tr. 518, 523, 534-35, 567).

¹⁷ Palo claims that "[i]f it was truly the weight of the excavator that caused the collapse then the principal site of the collapse should have been over the 'load' caused by the excavator." Br. 51. This argument reflects Palo's continued misunderstanding of the bridge's structural design and the reason for its collapse, *i.e.*, a combination of the arched shape of the beams and the cuts to the supporting abutments. The collapse occurred at the center of the span because that is where the bridge was weakest after workers began cutting the abutments. J.A. 286-87,

Palo further asserts that the ALJ’s constructive knowledge finding is unsupported because PennDOT had designated the cuts to the abutments and “approved” Palo’s demolition plan. *See* Br. 38, 43-46. But, contrary to Palo’s assertion, the record indicates that Palo’s demolition plan was merely “accepted” by PennDOT. *See* J.A. 30-31 (Dec. 15-16), 494 (Stip. 12). There is no evidence to suggest that anyone from PennDOT or any associated engineer “approved” of how Palo was going to conduct the demolition. J.A. 31 (Dec. 16), 422-36 (Bid Package), 494 (Stip12). Nor did Palo’s demolition plan discuss the use of the CAT on the bridge deck after the abutments were cut, or at any time. J.A. 456-58 (Demolition Plan); Tr. 149.

In addition, as the ALJ correctly found, neither the information from PennDOT nor anything in the demolition plan shows that it was reasonable for Palo to conclude that it could use a fifty-ton excavator on the bridge, much less used on the bridge *after* its supporting abutments were cut. J.A. 30 (Dec. 15), 422-36 (Bid Package), 456-58 (Demolition Plan). A reasonably diligent contractor would have obtained more information about whether the bridge could support the CAT’s fifty-ton weight during demolition before it moved the equipment onto the bridge. *See Cent. Fla.*, 25 BNA OSHC at 2154-55; *see also Carlisle Equip. Co. v. Sec’y of Labor*, 24 F.3d 790, 794 (6th Cir. 1994) (“Reasonable diligence also

296, 298, 319-23 (Tr. 498-99, 516, 518, 563-67), 537 (Diagraph Showing Load-bearing Capacity of Simple Span Bridge).

implies effort, attention, and action, not mere reliance upon the action of another.”). Palo failed to take any action to determine the bridge’s ability to support the CAT, and the ALJ therefore properly found that Palo had constructive knowledge of the violation of 29 C.F.R. § 1926.856(a).

B. Palo’s Remaining Attacks on the ALJ’s Conduct of Pre-Trial and Trial Proceedings Lack Merit.

In its brief Palo raises several miscellaneous attacks on the ALJ’s conduct of pre-trial and trial proceedings. Palo argues that the ALJ erred by “not observing her own [scheduling order]” and in ruling Joint Exhibit 4 (CO Harencame’s notes) inadmissible as hearsay. Br. 30-34. Palo also claims that the ALJ erred in giving little weight to certain hearsay statements contained in Joint Exhibit 2 (OSHA’s inspection report). *See* Br. 31. These assertions are meritless.

Before the hearing, the ALJ issued a scheduling order requiring the parties to submit a joint prehearing statement including “a list of all exhibits to be offered into evidence with *notations of all objections.*” J.A. 10 (ALJ Hearing Notice and Scheduling Order) (emphasis in original). The parties conferred and submitted a joint prehearing statement containing a list of joint exhibits, including the OSHA inspection report (Joint Exhibit 2) and CO Harencame’s notes (Joint Exhibit 4). J.A. 66 (Joint Prehearing Statement).

At the hearing, Palo sought to admit CO Harencame’s inspection notes (Joint Exhibit 4) into evidence. J.A. 96B-96D (Tr. 96-98). The Secretary objected

to this evidence at the hearing on the grounds of hearsay.¹⁸ *Id.* In response, the ALJ explained that her practice was to exclude hearsay evidence unless it qualified for an exception to the exclusionary rule or was offered for another reason, including refreshing a witness’s recollection. *Id.* She also explained that she preferred that the parties state any objections, including hearsay, “at the very beginning of the hearing.” J.A. 96F (Tr. 100). Palo’s counsel then replied: “I’m one of the great proponents of the hearsay rule because I’m going to be using it, also. *So I will withdraw my request to even admit the document.*”¹⁹ *Id.* (emphasis added).

According to Palo, the Secretary “waived” his right to raise a hearsay objection with respect to Joint Exhibit 4 because he failed to specifically list this objection in response to the ALJ’s scheduling order. Br. at 31; J.A. 8-15. But, contrary to Palo’s assertion, the ALJ’s scheduling order did not preclude the parties from raising evidentiary objections at trial. The order did not indicate that the

¹⁸ Palo’s counsel initially sought to admit Joint Exhibit 4 in its entirety. J.A. 96C (Tr. 97). Following the Secretary’s objection, Palo sought to admit only selected pages. *Id.* The Secretary then renewed his hearsay objection as to the selected pages to the extent that they contained third-party statements. J.A. 96D (Tr. 98).

¹⁹ Palo acknowledges this in its opening brief, writing: “Because the ALJ was not observing her own Order, Palo counsel withdrew the motion as to [Joint Exhibit 4].” Br. 31. Palo’s counsel also indicated during the hearing that he was not offering Joint Exhibit 4 as evidence, but simply using the notes to refresh CO Harencome’s recollection. J.A. 96D-96E (Tr. 98).

parties would waive their right to raise objections by failing to note their objections in their pre-hearing statements. *See* J.A. 8-15. Rather, as the ALJ explained at trial, the purpose of her order was to facilitate the presentation of evidence and encourage “a meeting of the minds” between the parties on certain procedural matters. J.A. 96E-96F (Tr. 99-100).

Additionally, Palo fails to demonstrate that it was prejudiced by the Secretary’s failure to object to the admission of Joint Exhibit 4 during the pre-hearing stage of the proceedings. *E.g., Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 212-13 (3d Cir. 2005) (upholding ALJ’s decision to allow certain expert testimony despite party’s failure to comply with the 90-day disclosure requirement contained in the ALJ’s scheduling order because demolition contractor failed to show that it was prejudiced by ALJ’s decision or the testimony itself). And, objections to evidentiary rulings that are not made at trial are not preserved on appeal.²⁰ *See* Fed. R. Evid. 103(a)(1); 29 C.F.R. § 2200.71 (Federal Rules of Evidence applicable to ALJ hearings). *See also Capeway Roofing Sys. v. Chao*, 391 F.3d 56, 62 (1st Cir. 2004) (hearsay objection to statement made to OSHA

²⁰ Palo’s challenge to the ALJ’s exclusion of Joint Exhibit 4 also lacks merit because Palo’s counsel failed to give an adequate offer of proof concerning the content, relevance, and admissibility of the CSHO’s notes. *E.g., See Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1147 (10th Cir. 2009) (district court did not commit plain error in excluding evidence where proponent failed to make an adequate offer of proof concerning the content, relevance, and admissibility of such evidence).

inspector waived on appeal because it was not made at the hearing); *Nova Grp./Tutor-Saliba*, 23 BNA OSHC 1933, 1935-36 (No. 10-0264, 2012) (“[B]y not objecting to the reformulated question, Nova waived the issue.”); cf *United States v. Schartner*, 426 F.2d 470 (3d Cir. 1970) (defense attorney’s withdrawal of original objection to admission of defendant’s prior criminal record constituted waiver precluding counsel from later moving to strike).

Palo cites *All Florida Tree & Landscaping, Inc.*, 25 BNA OSHC 1310 (No. 13-0373, 2015), for the proposition that “when one fails to object to the admission of a document, the hearsay objection has been waived and the document becomes substantive evidence.” Br. 32. As an initial matter, unreviewed ALJ decisions have no precedential value. *Fabi Constr. Co. v. Secretary of Labor*, 370 F.3d 29, 35 n.7 (D.C. Cir. 2004). In any event, the decision in *All Florida* is inapposite and does not support Palo’s position that the Secretary waived his hearsay objection by not objecting *before* the hearing. The employer in *All Florida* waived its right to object on hearsay grounds by failing to object *at trial*. *All Fla.*, 25 BNA OSHC at 1335. The opposite is true in this case: the Secretary properly exercised his right to object on hearsay grounds at trial. J.A. 96B (Tr. 96).

The OSHA inspection report (Joint Exhibit 2) contains summaries of conversations with PennDOT personnel. See J.A. 406-15 (Inspection Report). Palo argues that certain statements in the report show PennDOT agreed with Palo

that “there was not an issue with the excavator on the Bridge” and that Palo was adhering to PennDOT’s requirements and the demolition plan. *See* Br. 33.

According to Palo, the ALJ incorrectly gave little weight to this evidence. *See* Br. 31-34. However, the referenced statements do not say what Palo asserts. As the ALJ noted, none of the statements can be read to support Palo’s position: “one PennDOT employee said he did not think the demolition plan was correct for this job and another acknowledged that he had not read it.” J.A. 30 (Dec. 15, n.11).

The ALJ also found that the PennDOT statements were not corroborated at trial and did not address the issue of whether Palo exercised reasonable diligence. *Id.*

The ALJ therefore did not abuse her discretion in giving little weight to this portion of the inspection report.²¹ *See Williams Enters., Inc.*, 13 BNA OSHC 1249, 1252-53 (No. 85-355, 1987) (upholding ALJ’s exclusion of testimony where the proffered testimony was irrelevant to issue of non-compliance).

²¹ Palo also contends that the ALJ should have considered the full context of these statements. *See* Br. 33. However, the ALJ properly assessed OSHA’s inspection report – including statements indicating that work was proceeding according to PennDOT’s specifications and Palo’s demolition plan – in its entirety. *See* J.A. 30-33 (Dec. 15-18), 74-75 (Tr. 40-41). The ALJ simply found that Palo lacked reasonable diligence *irrespective* of its demolition plan and PennDOT’s acceptance of that plan. *See* J.A. 30-33 (Dec. 15-18). Palo fails to explain how the ALJ’s disposition of this evidence amounts to reversible error. *See* Fed. R. Evid. 103(a) (“A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party. . . .”); *see also Williams Enters., Inc.*, 13 BNA OSHC 1249, 1252-53 (No. 85-355, 1987) (ALJ’s exclusion of testimony was harmless error where the proffered testimony was irrelevant to issue of non-compliance).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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CERTIFICATE OF BAR MEMBERSHIP

In compliance with 3d Cir. L.A.R. 28.3(d) and L.A.R. 46.1(e), I certify that at least one of the attorneys whose names appear in this brief is a member of the bar of this court, or has filed an application for admission pursuant to this rule.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 3d Cir. L.A.R. 31.1(c), I certify the following:

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 11,564 words, as determined by the word count of the word-processing system used to prepare this document.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2018, I electronically filed the foregoing Secretary's Brief in PDF format with the Clerk of the Court for the United States of Appeals for the Third Circuit using the Court's CM/ECF system. Hardcopies of the Secretary's Brief in the number required are being mailed to the Court and Petitioner's counsel. Furthermore, Petitioner's counsel is a Filing User and will be served electronically by the Notice of Docket Activity that is generated by the Court's CM/ECF system.

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