ORAL ARGUMENT NOT REQUESTED [*See 10th Cir. R. 34.1(G)*]

No. 04-9541

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS SLINGLUFF

PETITIONER

v.

SECRETARY OF LABOR

RESPONDENT

AND

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOMINAL RESPONDENT PURSUANT TO FED.R.APP.P. 15(a)

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
(HON. SIDNEY J. GOLDSTEIN)

BRIEF FOR THE SECRETARY OF LABOR

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SEPTEMBER 2004

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STATEMENT OF RELATED CASES

There are no prior or related cases. *10th Cir. R. 28.2(C)(1).*

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Thomas Slingluff a/k/a Stuck in the Mud ("Slingluff") seeks review of a final decision of the Occupational Safety and Health Review Commission. The Commission obtained jurisdiction when Mr. Slingluff contested a citation, issued by the U.S. Secretary of Labor, alleging a violation of the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §§ 651-678 (2000 ed. (2001)). *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 because Mr. Slingluff is authorized to file his appeal in this Circuit and because Mr. Slingluff timely filed a petition for review on April 30, 2004, within sixty days of the issuance, on March 1, 2004, of the Commission's final order disposing of all the parties' claims. *29 U.S.C. § 660(a).*

STATEMENT OF THE ISSUES

1. Whether the Commission properly rejected Mr. Slingluff's claim that the OSH Act could not constitutionally be applied to his stuccoing activity.

2. Whether the Commission properly found that Mr. Slingluff was an employer under the OSH Act and properly rejected his other challenges.

STATEMENT OF THE CASE

This appeal involves an enforcement action initiated by the Secretary under the OSH Act. Following OSHA's inspection of Mr. Slingluff's worksite in Alamosa, Colorado, the Secretary issued a citation charging that Slingluff committed numerous violations of fall protection requirements for scaffolds (R3:1). [1] When an employer contests a citation, a hearing is convened by a judge employed by the Commission.[2] *29 U.S.C. §§ 659(c), 661(j)*. In this

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[1] References are to the Commission's Certified List (dated June 18, 2004) of the record in the proceeding below. References are cited by volume number, document number (where applicable) and/or page number of the original record. *See Fed.R.App.P. 28(a)(7); 10th Cir.R. 28.1(B)*.

[2] The Commission has *no* connection with the Secretary, OSHA, or the U.S. Department of Labor, *see Martin v. OSHRC*, 499 U.S. 144, 147 (1991) (OSH Act assigns distinct regulatory tasks to different administrative actors), and is not an active party before this Court. *See OCAW v. OSHRC (American Cyanamid Co.)*, 671 F.2d 643, 651 (D.C. Cir.), *cert. denied*, 459 U.S. 905 (1982) (Commission lacks authority to participate as a party in proceedings to review one of its decisions).

case, Mr. Slingluff timely contested the citation, thereby invoking the jurisdiction of the Commission (R3:2).[3] *29 U.S.C. § 659(c).*

The Commission's Chief Administrative Law Judge wrote to the parties on August 4, 2004, informing them that he had designated the matter to be handled using the Commission's E-Z Trial Procedures and that Hon. Sidney J Goldstein would preside.[4]

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[3] An employer who receives a citation may notify OSHA in writing "that he intends to contest such citation or proposed penalty before the Review Commission." *29 C.F.R. § 1903.17(a).* In response to the citation, Mr. Slingluff wrote to OSHA on June 18, 2003, "to formally advise you of my intent to accept your Citation and Notification of Penalty inspection # 306224106" (R3:2). In his letter, Mr. Slingluff demanded, *inter alia*: that two local OSHA officials each execute what he called a "Public Servant's Questionnaire"; that OSHA explain whether the Federal Government had purchased the worksite and, if so, to provide a copy of "the official deed"; and that OSHA explain whether the worksite had been reserved by the Federal Government upon Colorado's admission as a State (*ibid.*). If OSHA failed to "evidence proper delegation of authority[,] Stuck in the Mud hereby refutes, contest, denies any contract, equitable obligation or any compelled performance of a *de facto* Citation and Notice of Penalty in whole and every part" (*ibid.*). Despite the ambiguity of Mr. Slingluff's letter, the Secretary treated it as a notice of contest and forwarded it to the Commission. *29 C.F.R. §§ 1903.17, 2200.33.* By letter of July 31, 2003, the Commission notified the parties that Mr. Slingluff's case had been docketed on July 30 (R3:3).

[4] The purpose of the E-Z Trial process is to provide simplified procedures for resolving contests under the OSH Act, so that parties before the Commission may reduce the time and expense of litigation while being assured due process and a hearing that meets

He explicitly noted that "[t]he complaint and answer requirements are suspended" (R3:4 & 5). Judge Goldstein conducted a one-day hearing (R1:1-110) and subsequently affirmed the citation (R3:19).

Mr. Slingluff challenged the judge's decision by filing with the Commission a Petition for Discretionary Review (R3:21). When the Commission did not direct review, the decision automatically became a final order of the Commission (R3:22). *29 U.S.C. § 661(j)*. *See Martin v. OSHRC*, 499 U.S. 144, 148 (1991) (judge's ruling becomes Commission's final order unless it grants review).

Thereafter, Mr. Slingluff petitioned this Court to review the Commission's adverse disposition. *29 U.S.C. § 660(a)*.

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the requirements of the Administrative Procedure Act, 5 U.S.C. 554. *29 C.F.R. § 2200.200(a)*. Procedures are simplified in a number of ways: complaints and answers are not required; pleadings generally are not required; discovery is not permitted except as ordered by the Administrative Law Judge; and hearings are less formal -- the Federal Rules of Evidence do not apply. *29 C.F.R. § 2200.200(b)*. Cases selected for E-Z Trial will be those that do not involve complex issues of law or fact and generally include one or more of the following: (1) relatively few citation items; (2) an aggregate proposed penalty of not more than $10,000; (3) no allegation of willfulness or a repeat violation; (4) not involving a fatality; (5) a hearing that is expected to take less than two days; or (6) a small employer, whether appearing *pro se* or represented by counsel. *29 C.F.R. § 2200.202(a)*.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

In 1970, Congress determined "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *29 U.S.C. § 651(a)*.

Accordingly, through the exercise of its powers to regulate commerce and to provide for the general welfare, Congress adopted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources." *29 U.S.C. § 651(b)*. *See Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 729 (10th Cir. 1999) (OSH Act is remedial legislation designed to protect employees from workplace dangers and must be construed liberally); *Usery v. Lacy*, 628 F.2d 1226, 1229 (9th Cir. 1980) ("The coverage of the [OSHA] regulations is consistent with the congressional purpose to reach as broadly as constitutionally permissible in regulating employee safety, since nonuniform coverage would give unsafe employers a competitive advantage."); *Lee Way Motor Freight v. Secretary of*

Labor, 511 F.2d 864, 870 (10th Cir. 1975) ("One purpose of the Act is to prevent the first accident."). *See also Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States . . . ."); Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 Admin.L.Rev. 645, 648 (1997) (Congress established OSHA when market incentives, such as additional compensation for dangerous jobs, and state regulatory systems, primarily workers' compensation, failed to prevent thousands of workplace fatalities and injuries).

The OSH Act defines a covered "employer" as "a person engaged in a business *affecting commerce* who has employees . . . " (emphasis added). *29 U.S.C. § 652(5)*. The statute imposes duties upon such an "employer": "Each employer . . . shall comply with occupational safety and health standards promulgated [under the OSH] Act." *29 U.S.C. § 654(a)(2)*. Employers who violate OSHA regulations are subject to citation and penalties. *29 U.S.C. §§ 659(a), (b)*.

The Secretary has defined "construction work" as "work for construction, alteration, and/or repair, including painting and decorating." *29 C.F.R. § 1926.32(g)*. Falls are the leading cause of worker fatalities in the construction industry. *Fall Protection in Construction*, OSHA Publication 3146 (1998 revised) at p. 1 [http://www.osha.gov/SLTC/fallprotection/recognition.html] ("Each year, on average, between 150 and 200 workers are killed and more than 100,000 are injured as a result of falls at construction sites.").[5]

The Secretary has promulgated safe-scaffolding regulations. *29 C.F.R. 1926, Subpart L -- Scaffolds*. The citation alleged that Slingluff violated the scaffold requirements by failing to provide adequate guardrails, adequate planking, adequate supporting

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[5] Scaffolding hazards continue to rank high on the list of the most frequently cited safety standards in the construction industry. *Scaffold Use in the Construction Industry*, OSHA Publication 3150 (2002 Revised) at p. v [http://www.osha.gov/SLTC/scaffolding/index.html] ("Scaffold-related fatalities account for a significant number of fatalities in the construction workplace."). The workplace hazards that annually cause thousands of injuries are as prevalent in small businesses as in larger firms. *OSHA Handbook for Small Businesses*, OSHA Publication 2202 (1996 revised) at p. iv [http://www.osha.gov/Publications/osha2209.pdf].

baseplates, adequate structural bracing, adequate means of access and competent supervision of the erection of the scaffold (R.3:1).

B. OSHA discovers violations at Mr. Slingluff's worksite

In June 2003, Mr. Slingluff was engaged in applying stucco and foam insulation under contract to the City of Alamosa at a worksite in Alamosa, Colorado (R1:6-9,14-16,35,40; R.2:Ex.C-1). Mr. Slingluff asserted that "the majority of the stuff that I use is clearly a local product" (R1:90). Yet, he acknowledged that he used a 1984 Dodge truck to haul materials and to pull a trailer loaded with scaffolding for use in the course of his work (R1:22-25,49-50; R2:Ex.C-3). He had a liability insurance policy for the truck issued by Allied Insurance Company, an Iowa firm (R1:32).[6]

Mr. Slingluff used a type of insulating foam board called expanded polystyrene (EPS) (R1:17,19,91; R2:Ex.C-2). Insulfoam, the manufacturer of EPS, claims that it is the largest manufacturer of EPS in the U.S. with eleven plants located in ten states including

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[6] Allied's website states that "Allied's headquarters are located in Des Moines, IA. Throughout our operating territory, we are represented by skilled, professional independent insurance agents. These agents are served by regional offices and staff in: Des Moines, IA; Lincoln, NE; Denver, CO; and Sacramento, CA." See http://www.alliedinsurance.com/profile_history.cfm.

Colorado. See http://www.premier-industries.com/insulfoam .cfm?topic=eps. Mr. Slingluff purchased scaffolding from Brand Services, Inc. (Brand) (R1:28-31,36-37; R2:Ex.C-4). Brand's website states that it is the largest scaffolding provider in North America, with locations in 21 states, including Colorado, as well as in Canada and Puerto Rico. See http://www.brandscaffold.com/ index.htm.[7]

An OSHA inspector, Mike McWilliams, observed Mr. Slingluff and another man, Ben Jaramillo, exposed to a fall of more than 18 feet while standing on a scaffold preparing to install some foam board (R1:42,47-48). At McWilliams' request, Mr. Slingluff filled out a form in which he acknowledged that he had one employee (R1:43,49,59; R2:Ex.C-5).[8] Mr. Jaramillo, too, filled out a form for

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[7] Brand's website also states, *inter alia*, that "We are a stand-alone, full-service scaffolding company dedicated to the scaffolding industry construction, rental, and sales. We deliver our services through an extensive field service organization of approximately 5500 reliable and knowledgeable team members, both regular and seasonal."

[8] As executed by Mr. Slingluff, the *Employer Questionnaire* form (R2:Ex.C-5) reports:

> President/owner of company: Thomas Slingluff . . .
> Number of Company Employees on site: 1,

McWilliams, on which he validated Mr. Slingluff's account (R2:Ex.C-6).[9] Mr. Jaramillo was employed by Mr. Slingluff's company, Stuck in the Mud, and was being paid $8.00 an hour for the job (R1:45-46,59,64-65,69-71). He later explained that he had worked for Mr. Slingluff on occasion over the past two years (R1:64-65). Mr. Jaramillo explained (R1:71): "I had only been with Mr. Slingluff an hour and a half that day. I had not *worked for him* in sometime" (emphasis added).

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total number of employees in company: 1.

Slingluff subsequently explained (R1:33-34): "The day [Mr. Jaramillo] was on the scaffolding he was with me. But it's kind of fuzzy whether we would define him as working for me . . . My main association with Mr. Jaramillo is in regard to spiritual jurisdiction." But Slingluff admitted that he was referring to Ben Jaramillo when he filled out the *Employer Questionnaire* form and cited comments that "Ben said on his employee questionnaire" (R1:16,37-39; R2: Ex.C-5). And he characterized Jaramillo as his "associate" (R3:2).

[9] As executed by Mr. Jaramillo, the *Employee Question/ Interview* form (R2:Ex.C-6) reports:

> Company Name: Stuck in the Mud . . .
> Years, Days, Months with Company: 4 months

At the hearing, Mr. Jaramillo claimed that this written acknowledgement of employment status had only been intended as a manifestation of cooperation with the inspection, not as a statement of fact (R1:65). But, as the judge noted (R3:19:3), Mr.

The Secretary thereafter issued a citation alleging violations of OSHA safe-scaffolding requirements at 29 C.F.R. § 1926.451.

C. The Judge's decision

Mr. Slingluff did not deny the existence of the violations or the appropriateness of the proposed penalties (R1:8). In pertinent part, Slingluff argued that the Secretary lacked jurisdiction over him, because: the OSH Act exceeded Congress' power under the Commerce Clause; the Secretary failed to establish that Mr. Slingluff operates a business affecting interstate commerce; and Mr. Slingluff is not an "employer" under the OSH Act.

Judge Goldstein noted that Congress intended to exercise the full extent of the authority granted by the Commerce Clause of the Constitution in enacting the OSH Act, and that an employer will come under the Act if it is engaged in a business affecting commerce (R3:19:4). Judge Goldstein added that the Commission has held that construction is in a class of activity which as a whole affects interstate commerce, and Mr. Slingluff, a stucco contractor, is engaged in construction (R3:19:4). Here, the Secretary showed

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Jaramillo had experience as a practicing attorney (R1:70,73-74). *See People v. Jaramillo*, 35 P.3d 723 (Colo. OPDJ 2001).

that Mr. Slingluff uses a Dodge truck manufactured out of state in the course of his work and adequately established that Mr. Slingluff operates a business affecting interstate commerce (*ibid.*). Thus, the judge concluded that Mr. Slingluff is an "employer" subject to the OSH Act (R3:19:5):

> The city of Alamosa's stuccoing contract was with Mr. Slingluff, who was in the stucco business. Slingluff hired Jaramillo for the duration of the project, or until such time as he no longer needed Jaramillo's services. Jaramillo and Slingluff both understood that Jaramillo worked for Slingluff. Slingluff provided the materials with which Jaramillo worked, including the cited scaffolding. Slingluff was to pay Jaramillo an hourly wage.
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> Because Respondent is a person engaged in a business affecting commerce who has employees, he is an "employer" as defined by Section 3(5) of the Act, and is subject to its provisions.

The judge also rejected Mr. Slingluff's procedural objections: Mr. Slingluff was not prejudiced either by the incorrect dating of the citation or by the Secretary's late filing of the Complaint (R3:19:4); and OSHA's inspector was "unquestionably a duly authorized agent of the agency" (*ibid.*).

Mr. Slingluff's appeal to this Court ensued.

SUMMARY OF THE ARGUMENT

The Secretary established coverage under the OSH Act by demonstrating that Slingluff's business -- commercial stuccoing -- is within a class of activities that, as a whole, substantially affects interstate commerce. Commercial stuccoing substantially affects commerce because the aggregate purchases of materials and equipment by stuccoing firms directly impacts the interstate markets in these commodities, and because allowing employers like Slingluff to violate the OSH Act would competitively disadvantage more safety-conscious firms.

Substantial evidence, in the form of Mr. Slingluff's and Mr. Jaramillo's testimony, supports the Commission's finding that Mr. Slingluff hired Mr. Jaramillo to help him with the work. Accordingly, Mr. Slingluff was an "employer" subject to the Act.

Mr. Slingluff's remaining miscellaneous contentions concerning the OSHA inspector's authority and interviewing technique, and the Secretary's delay in filing the complaint, are entirely unsupported. Accordingly, the Commission's decision must be affirmed.

ARGUMENT

I. THE JUDGE PROPERLY REJECTED MR. SLINGLUFF'S COMMERCE CLAUSE CHALLENGE

A. Standard of Review

Mr. Slingluff's constitutional challenge is reviewed *de novo*. *U.S. v. Janus Indus.*, 48 F.3d 1548, 1555 (10th Cir. 1995).

B. The Secretary may establish OSHA coverage by demonstrating that the employer's business is within a class of activities that, as a whole, substantially affects interstate commerce

Mr. Slingluff argues (Br.6,15-17) that the OSH Act cannot constitutionally be applied to him because his stuccoing activities had no connection with interstate commerce. The OSH Act extends federal OSHA jurisdiction to every "employer," which it defines as "a person engaged in a business affecting commerce who has employees." *29 U.S.C. § 652(5)*. In light of this coverage element in the Act, Mr. Slingluff's claim is best understood as an as-applied challenge to the sufficiency of the Secretary's evidence under Section 652(5). *Cf. U.S. v. Riddle*, 249 F.3d 529, 536-37 (6th Cir. 2001) (construing commerce clause challenge to conviction under

18 U.S.C. § 1962 (RICO)).[10]

The ALJ held that Mr. Slingluff was covered by the OSH Act because his stuccoing business was within a class of activity that, as a whole, affected interstate commerce (R3:19:4). The judge's holding was correct. Two key considerations frame the analysis on the Commerce Clause issue. First, Section 652(5) reflects Congress' intent to exercise jurisdiction to the fullest extent of authority granted by the Commerce Clause. *United States v. Dye Constr. Co.*, 510 F.2d 78, 83 (10th Cir. 1975). *Accord*, *Usery v. Lacy*, 628 F.2d 1226, 1228-29 (9th Cir. 1980); *Brennan v. OSHRC*, 492 F. 2d 1027, 1030 (2d Cir. 1974).

Second, the activity which subjected Mr. Slingluff to coverage under the statute -- Slingluff's stuccoing work -- was commercial in nature. Mr. Slingluff performed the stuccoing pursuant to a $16,820 contract with the city (R.2:Ex. C-1; R.1:6-9,14-16,35,40);

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[10] If construed as a facial Commerce Clause challenge, Slingluff's claim necessarily fails. A statute enacted under the Commerce Clause is constitutional on its face if it contains a coverage element, such as Section 652(5) of the OSH Act, that ensures, through case-by-case inquiry, that the activity in question affects interstate commerce. *See U.S. v. Cunningham*, 161 F.3d 1343, 1345-46 (11th Cir. 1998) (rejecting facial challenge to statute prohibiting person

purchased stuccoing supplies and scaffolding equipment from commercial sources (R.2:Exs.C-1,C-4; R.1:28-31,36-37); and hired Mr. Jaramillo at $8.00 an hour to help with the work (R.1:45-46,59, 64-65,69-71). These were commercial transactions; consequently, the stuccoing work was an economic activity. *U.S. v. Haney*, 264 F.3d 1161, 1168 (10th Cir. 2001) (for Commerce Clause purposes, an activity is economic if it is any sort of economic enterprise). Moreover, commercial stuccoing was Mr. Slingluff's livelihood (R.1:9-10). He had performed similar work under contract with a variety of businesses in Colorado, including a Best Western Hotel, office buildings and stores (R.1:11-12).

The Supreme Court has recently made clear that Congress' authority to regulate matters affecting interstate commerce is broadest where commercial activities are involved. *United States v. Lopez*, 514 U.S. 549 (1995). The commerce power extends not only to the use of the channels of interstate commerce, and to the protection of the instrumentalities of interstate commerce, but also to activities that substantially affect interstate commerce. *Id.* at

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who is subject to domestic violence protective order from "possess[ing] in or affecting commerce . . . any firearm.").

558-59. The last category includes a wide variety of economic activities that occur entirely within a single state but have a substantial effect on interstate commerce. *Id.* at 559 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (intrastate mining); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate credit transactions); *Wickard v. Filburn*, 317 U.S. 111 (1942) (intrastate production and consumption of wheat)).

An intrastate activity may satisfy the "substantial effect" test in two ways. *U.S. v. Ho*, 311 F.3d 589, 598-99 (5th Cir. 2002). First, the activity may be significant enough, by itself, to substantially affect interstate commerce. *Id.* at 598 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Second, purely intrastate *commercial* activity is within the reach of the Commerce Clause if the aggregate impact of the class of similar or related activity substantially affects interstate commerce. *Wickard*, 317 U.S. at 127-29 (rejecting Commerce Clause challenge to federal statute regulating production and consumption of homegrown wheat because wheat farming as a whole substantially affects commerce); *Hodel*, 452 U.S. at 227

("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States."); *Lopez*, 514 U.S at 561 (upholding Commerce Clause challenge where regulated activity was not "connected with a commercial transaction which, viewed in the aggregate, substantially affects interstate commerce").[11] If the class of activity as a whole substantially affects interstate commerce, it is irrelevant whether each individual activity within the class has an insubstantial effect on commerce. *U.S. v. Janus Indus.*, 48 F.3d 1548, 1556 (10th Cir. 1993); *State of Utah v. Marks*, 740 F.2d 799, 803 (10th Cir. 1984); *Dye Constr. Co.*, 510 F.2d at 83. *Accord*, *U.S. v. Olin Corp*. 107 F.3d 1506, 1511 (11th Cir. 1997); *Proyect v. U.S.*, 101 F.3d 11, 13 (2d Cir. 1996).

The Constitution permits federal regulation of purely intrastate commercial activity that has a trivial or *de minimis* effect on commerce considered by itself, but a substantial effect when

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[11] *See also U.S. v. Meienberg*, 263 F.3d 1177, 1182 (10th Cir. 2001) ("In considering Congress' constitutional power to regulate intrastate transactions, the aggregate interstate effect of the regulated intrastate transactions is considered.").

viewed in the aggregate, because the absence of regulation would undercut the goal of fostering stable national markets. *Lopez*, 514 U.S. at 555 (noting expansion of Commerce Clause jurisprudence in recognition of changes in the national economy), *U.S. v. Morrison*, 529 U.S. 598, 610-11 (2000) ("Congress may regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."). This aggregation principle is the central justification for the OSH Act. In enacting the statute, Congress found that injuries and illnesses arising out of work situations substantially burdened interstate commerce because of the combined effect of diminished wages, lost productivity, medical expenses and disability compensation payments. *29 U.S.C. § 651(a)*. Congress plainly viewed the employment relationship as essentially an economic activity, and concluded that regulation of individual intrastate work activities, in all their varied forms, was necessary, under a market theory, to effective federal regulation of interstate commerce.

Applying these principles, this Court and other federal circuit courts of appeals have consistently upheld OSHA coverage based on a finding that the employer was engaged in a class of

business activity that, as a whole, affected interstate commerce. In *Dye Constr. Co.*, this Court held that an employer excavating a trench was subject to OSHA coverage where the record showed that the employer used equipment, supplies and insurance policies that were part of interstate commerce. 510 F.2d at 83. The Court reasoned that the activity was one within Congress's commerce authority and "it is irrelevant then whether Dye itself was engaged in commerce." *Ibid.* Implicit in this holding is the premise that commercial trenching as a class of business activity substantially affects the interstate markets in construction equipment and supplies.

The Ninth and Second Circuits have applied a similar analysis. In *Usery v. Lacy*, 628 F.2d 1226, 1228-29 (9th Cir. 1980), the Ninth Circuit reversed a Commission decision finding that the Secretary had failed to meet her burden of proving that an employer's construction of an apartment building affected commerce. In an opinion by Judge, now Justice, Kennedy, the court held that the OSH Act requires the Secretary to show that the employer's business is within a class of activity that as a whole affects commerce. *Id.* at 1228 (citing *NLRB v. Reliance Fuel Oil*

Corp., 371 U.S. 224 (1963); *Polish Nat. Alliance v. NLRB*, 322 U.S. 643, 647-48 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-39 (1937)). That test was satisfied, the court ruled, because the construction work at issue was within a class of activities that necessarily affected commerce in the aggregate. *Id.* at 1229 (citing *Dye Constr.*).

The Second Circuit applied essentially the same class-of-activities analysis in holding that an employer who performed construction work and supplied services to local businesses which were engaged in interstate commerce, and who used supplies produced out of state but purchased from local suppliers, was "engaged in a business affecting commerce." *Brennan v. OSHRC*, 492 F.2d 1027 (2d Cir. 1974). The court noted simply that the OSH Act, like the National Labor Relations Act which contains essentially the same jurisdictional element, "goes well beyond persons who are themselves engaged in interstate or foreign commerce." *Id.* at 1030.

Mr. Slingluff notes that the Supreme Court in *Lopez* rejected the government's aggregation theory, and suggests that acceptance of it here would permit regulation of virtually any activity (Br.6,15-16). However, Slingluff fails to distinguish between the clearly

differing analyses applicable to economic and non-economic activity. Consideration of the aggregate impact of purely intrastate activity is ordinarily permissible *only* where the regulated activity is economic in nature. *Morrison*, 529 U.S. at 613, 617 (Congress may not regulate non-economic violent criminal conduct based solely on aggregate effect of such conduct on interstate commerce). Where Congress enacts a statute extending federal authority over non-economic activity traditionally subject to state regulation, such as the statute criminalizing possession of a firearm in a school zone at issue in *Lopez*, the government ordinarily must show that the regulated activity by itself substantially affects interstate commerce. However, federal regulation of purely economic activity, such as commercial stuccoing, may be sustained on the basis of the aggregate impact of the class of related activities. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610-11. Restricting the use of an aggregation theory to economic activities like commercial stuccoing preserves the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. For these reasons, the ALJ correctly focussed the Commerce Clause analysis on the aggregate impact of stuccoing as a class of activity.

C. The record shows that commercial stuccoing is a class of business activity that, as a whole, substantially affects interstate commerce

The record contains ample evidence to show that commercial stuccoing is a class of activity that substantially affects interstate commerce in several ways. Commercial stuccoing involves the use of equipment and materials, including scaffolding, trucks and materials, that are directly connected to interstate commerce. The firm that supplied the scaffolding used in this case advertises through the internet that it is part of a national team delivering scaffolding products and services in the United States, Canada and Puerto Rico. See page 9, note 7, *supra*. The truck Mr. Slingluff used to haul materials and scaffolding was made by a recognized national manufacturer, and was insured by a liability policy issued by an out of state company. See page 8 note 6. The company that manufactured the insulating foam used in the project advertises through the internet that it is the largest manufacturer of this product in the U.S., with eleven locations throughout the country. See page 8-9.[12]

[12] It is appropriate for this Court to take judicial notice of the fact that Insulfoam is an interstate manufacturer of EPS board, and

The total purchases of scaffolding, trucks, foam and other stuccoing supplies by the class of businesses performing commercial stuccoing work has a direct and obvious impact on the interstate markets in these commodities. The class of commercial stuccoing businesses includes firms in all states; their transactions with suppliers as a whole not only substantially affect interstate commerce by influencing the prices and availability of stuccoing equipment and materials, they *are* interstate commerce in these items. This same connection between the class of construction activity and the interstate markets in construction equipment and

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that Brand is an interstate supplier of scaffolding products and services. Judicial notice may be taken at any time, including on appeal, of a fact that is not subject to reasonable dispute because it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Insulfoam's and Brand's official websites contain detailed information on these firms' interstate operations, including the State, street address, telephone and FAX numbers and Email address of each plant or office. This information is not subject to reasonable dispute. *See Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of information from National Personnel Records Center's website). It is also generally known that Dodge, the manufacturer of the truck Mr. Slingluff used, is a division of Chrysler Corp., a major national automobile and truck manufacturer. *Cf. Lacy*, 628 F.2d at 1229 (taking judicial notice that Weyerhaeuser and Sears Roebuck are engaged in the production and distribution of goods for commerce).

materials was easily sufficient to support OSHA coverage of trenching in *Dye*, apartment construction in *Lacy*, and commercial painting in *Brennan*. The same result should follow here.

Mr. Slingluff's stuccoing activity also affects interstate commerce in another way. By failing to comply with OSHA requirements, commercial stuccoing firms such as Stuck in the Mud gain an economic advantage over more conscientious firms willing to invest the necessary resources in safety. If large numbers of intrastate stucco contractors choose to avoid the costs of compliance with OSHA, other more safety-conscious firms in the industry will not be able to compete. Congress specifically found that broad coverage was necessary to avoid disadvantaging safety-conscious firms. S. Rep. No. 91-1282, at 4 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* at 144 (1971). This finding is an additional basis for concluding that Slingluff's commercial stuccoing business subjected him to coverage under the Act. *Brennan*, 492 F.2d at 1030.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE'S FINDING THAT MR. SLINGLUFF IS AN EMPLOYER SUBJECT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT

A. Standard of review

The findings of the Commission with respect to questions of fact, if supported by substantial evidence, "shall be conclusive." *29 U.S.C. § 660(a)*; *Tierdael Constr. Co. v. OSHRC,* 340 F.3d 1110, 1114 (10th Cir. 2003).

B. Substantial evidence supports the challenged findings

The judge's finding that Mr. Slingluff had an "employee" -- and, thus, is an "employer" covered by the OSH Act -- is supported by substantial evidence (R3:19:4):

> The city of Alamosa's stuccoing contract was with Mr. Slingluff, who was in the stucco business. Slingluff hired Jaramillo for the duration of the project, or until such time as he no longer needed Jaramillo's services. Jaramillo and Slingluff both understood that Jaramillo worked for Slingluff. Slingluff provided the materials with which Jaramillo worked, including the cited scaffolding. Slingluff was to pay Jaramillo an hourly wage.

Mr. Slingluff contends (Br.17-20) that the Secretary failed to establish that Slingluff had "employees." He concedes (Br.17) that this inquiry is confined by the substantial evidence standard of review, but neglects to show that there is no substantial evidence to

support the judge's conclusion. Mr. Slingluff himself gave evasive testimony concerning whether Mr. Jaramillo was working for him on the day in question (R1:33-34): "[I]t's kind of fuzzy whether we would define him as working for me." But he conceded (R1:37-38) that, at the time of the inspection, "I indicated that I had one employee . . . Ben Jaramillo." The inspector testified that Mr. Jaramillo told him during the inspection that he worked for Stuck in the Mud, Mr. Slingluff's company, and that he was being paid $8 per hour (R1:45-46,59). Although Mr. Jaramillo later professed not to be able to recall, he acknowledged that he could have told OSHA that (R1:70-71). Accordingly, the judge's finding that Mr. Jaramillo was Mr. Slingluff's employee is conclusive. *29 U.S.C. § 660(a)*; *Tierdael Constr. Co. v. OSHRC,* 340 F.3d at 1114.

III. MR. SLINGLUFF'S REMAINING CONTENTIONS ARE MERITLESS

OSHA inspector's authority and interviewing technique. Mr. Slingluff's cursory contention (Br.21) that OSHA's inspector could not use a form questionnaire at the worksite without obtaining prior approval of the Office of Management and Budget is without support in law or logic. The Paperwork Reduction Act does not apply to information collected during the conduct of an administrative investigation of a specific individual or entity. *44 U.S.C. § 3518(c)(1)(B)(ii)*. The inspector presented his credentials upon arrival (R1:42-43), consistent with OSHA regulations. *29 C.F.R. § 1903.7(a)*. The inspector explained that, if Mr. Slingluff and Mr. Jaramillo did not respond to questions at the worksite, he might have to subpoena them to come to OSHA's office to answer the questions at a later time (R1:43-44,96). At the worksite, Mr. Slingluff did not object to the inspector's "home-made" (Br.9) interview form (R1:44,49,59).

Mr. Slingluff complains (Br.21) that OSHA should have responded, before the case was even docketed at the Commission, to his "Public Servant's Questionnaire," see page 3, note 3, *supra*

(R1:96). But the Commission Rules governing E-Z Trial do not provide for such discovery unless specifically authorized by the judge. *29 C.F.R. § 2200.200(b)*. In any event, Mr. Slingluff had full opportunity to explore his concerns when he cross-examined the inspector at the hearing (R1:50-58).

Secretary's delay in filing the complaint. Mr. Slingluff contends at length (Br.21-27) that Judge Goldstein abused his discretion in permitting the Secretary additional time to file a complaint. Mr. Slingluff neglects to mention that a complaint was not required in this case.

The Commission Rules provide, 29 C.F.R. § 2200.205(a):

> Once a case is designated for E-Z Trial, the complaint and answer requirements are suspended. If the Secretary has filed a complaint under §2200.34(a), a response to a petition under §2200.37(d)(5), or a response to an employee contest under §2200.38(a), and if E-Z Trial has been ordered, no response to these documents will be required.

In addition, the Commission gave Mr. Slingluff explicit, written notice that "[t]he complaint and answer requirements are suspended" (R3:5). And Judge Goldstein noted on the record at the outset of the hearing that the case had been designated for trial pursuant to E-Z Trial procedures (R1:4).

The Commission Rules also provide, 29 C.F.R. § 2200.204(b):

> At any time during the proceedings any party may request that the E-Z Trial be discontinued and that the matter continue under conventional procedures.

At no time below did Mr. Slingluff request that the E-Z Trial be discontinued. And Mr. Slingluff provides no support for his charge (Br.26) that the Chief Administrative Law Judge's designation of this matter for disposition pursuant to E-Z Trial was "untimely."

In short, Mr. Slingluff was not entitled to a complaint and he failed to request that the matter proceed under conventional procedures. Finally, Mr. Slingluff has shown no prejudice resulting either from the application of this Commission E-Z Trial Rule or from the Secretary's failure to provide a complaint to Mr. Slingluff by July 23, before any obligation to provide one was suspended 12 days later, on August 4. Mr. Slingluff had ample opportunity to present his evidence at the hearing, but he failed to do so.[13]

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[13] See R1:75 ("Your Honor, I know of a few people that can come and testify, but I did not compel anybody to do anything. I had a witness that was an expert on safety rails, and I left him a message, if he was interested he could come in today.").

CONCLUSION

The Court should affirm the Commission's final order finding that Slingluff is an "employer" subject to the OSH Act.

Respectfully submitted.

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