No. 04-4017

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR,

Petitioner,

v.

GUINITE CORP.

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respondents

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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Brief for the Secretary of Labor

Jurisdictional Statement

This Court has jurisdiction under 29 U.S.C. § 660(b) to review the final order of the Occupational Safety and Health Review Commission because the conduct at issue occurred within this circuit. The Commission obtained jurisdiction when Gunite Corp. timely contested citations the Secretary had issued under the Occupational Safety and Health Act of

1970, 29 U.S.C. §§ 651-678 (OSH Act or Act). *See* 29 U.S.C. §§ 658, 659. The Commission's order is final because it disposes of all claims involved in the proceedings.

The petition is timely because the Commission issued the order on September 30, 2004, and the Secretary filed the petition sixty days later, on November 29, 2004. *See* § 660(a), (b).

Statement of Issues

1. Whether the Commission erred in concluding that the Secretary failed to present expert evidence that engineering or administrative controls were feasible for reducing silica exposures at two workstations, even though the Secretary designated two of her witnesses as experts in pretrial documents, Gunite agreed they could testify as experts, and they testified about feasible abatement methods.

2. Whether undisputed evidence, including Gunite's agreement that specific controls would be both feasible and effective, was sufficient to establish that the controls were feasible and effective.

Statement of Case

1. Nature of case, course of proceedings, and disposition below

This is an enforcement action under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Following an inspection of Gunite's foundry, the Secretary issued citations alleging numerous violations of the Act and Gunite contested the citations. A Commission administrative law judge (ALJ) affirmed the four citation items at issue here, but the Commission subsequently vacated them. The Secretary then filed this petition for review.

2. Statutory and regulatory background

Finding that occupational injuries and illnesses "impose a substantial burden" upon interstate commerce, Congress enacted the OSH Act "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(a), (b). To advance the Act's preventive purpose, the Secretary promulgates occupational safety and health standards which she enforces by inspecting worksites and, where appropriate, issuing citations that

require the employer to abate the violation and pay a penalty. §§ 654(a)(2), 655, 657-659, 666(a)-(c); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444-46 (1977).[1]

If an employer timely contests a citation, the Occupational Safety and Health Review Commission (Commission) obtains jurisdiction to adjudicate the contest. 29 U.S.C. §§ 659, 661. The Commission is independent of the United States Department of Labor, and its "function is to act as a neutral arbiter" in contest proceedings. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam); *see also Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 147-56 (1991).

After affording an opportunity for a hearing, a Commission ALJ issues a decision affirming, modifying, or vacating the citation. 29 U.S.C. §§ 659(c), 661(j). The three-member Commission may review the ALJ's decision. § 661(j);

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[1] The Secretary has delegated most of her authority under the OSH Act to the Assistant Secretary who heads the Occupational Safety and Health Administration (OSHA). *Secretary's Order 5-2002*, 67 Fed. Reg. 65008 (Oct. 22, 2002). Accordingly, this brief uses the terms "the Secretary" and "OSHA" interchangeably.

29 C.F.R. § 2200.90(b), (d). Upon completion of the Commission proceedings, either the Secretary or any aggrieved party may seek judicial review in an appropriate court of appeals. 29 U.S.C. § 660.

The Secretary has prescribed occupational safety and health standards for protecting employees against overexposure to respirable silica, a toxic substance that poses serious health hazards. *See Ohio Cast Prods., Inc. v. OSHRC*, 246 F.3d 791, 794 (6th Cir. 2001).[2] Employers may not expose any employee to silica in quantities exceeding the permissible exposure limit (PEL), and must "achieve compliance" with the PEL by using administrative or engineering controls "whenever feasible." § 1910.1000(c), (e). The standard further requires employers to use respirators or other personal protective equipment to limit exposures to below the PEL when feasible engineering and administrative controls are not capable of achieving full compliance. *Ibid.*

[2] The relevant standards are reproduced in the regulatory addendum to this brief.

Engineering controls, including product substitution, process or equipment redesign and enclosure, exhaust or dilution ventilation, and employee isolation, remove the contaminant from the workers' environment. *Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 947 n.2 (6th Cir. 1990) (citing 43 Fed Reg. 52989-52990 (Nov. 14, 1978)). Administrative controls, such as employee rotation, reconfigure the work "to reduce the daily exposure of each individual worker." *Ibid.*

This "Hierarchy of Controls" prefers engineering and administrative controls to respirators because these controls "make respiratory protection automatic, while respirators are dependent on use and constant attention and are subject to human error." *See American Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1267-69 (11th Cir. 1999).

Statement of Facts

1. Gunite, silica, and the citation

Gunite operates a foundry in Rockford, Illinois, that manufactures steel castings (App. 1-2). This case involves four of its foundry workers, three "mold station" workers — a metal pourer, a coreset/blowoff operator, and a mold line

technician — and a fourth worker, the sprue pull-off operator, at a different location (App. 6-7).

To manufacture the castings, Gunite fills sand-based molds with molten iron (App. 2). After the iron hardens, Gunite removes the molds and transports the castings to the sprue pull-off operator, who removes any excess metal and sends the castings to a station that prepares them for the finishing department (App. 2, 39, 448-49). The transportation process to and from the sprue pull-off station occurs on vibrating conveyors (App. 2, 39). The vibrating conveyors cool the castings during transport, but the vibration also causes silica to be released from the sand remaining on the castings and conveyors (App. 2, 39, 455-56).

On four occasions between June 1996 and March 1998, Gunite documented overexposures to respirable silica at one or both of the locations at issue here (App. 4, 542, 597-98, 622-23, 651).[3] Each time, Gunite's consultants recommended

[3] On two of these occasions, the exposures were described as exceeding the limit set by the American Conference of Governmental Industrial Hygienists (App. 542, 651; *see also* App. 237-42).

that Gunite adopt engineering or administrative controls to reduce silica exposure to below the permissible exposure limit (PEL) (App. 544, 604, 626, 655).[4]

OSHA inspected the facility from April to October 1998 (App. 1). OSHA's inspection revealed that the mold station employees and the sprue pull-off operator were exposed to approximately 1.6 times the PEL for respirable silica (App. 227, 286-87). Gunite told OSHA that it intended to install a new dust collection and ventilation system for the cited work areas, and that it expected these controls to eliminate the overexposures (App. 120-30). In the interim, it encouraged – but did not require – its workers to use respirators in these areas (App. 12).

OSHA's Health Response Team (HRT), which provides technical expertise in evaluating health hazards and engineering controls, visited the plant to assess Gunite's claim

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[4] Gunite also recorded three cases of silicosis on its injury and illness log during 1996 and 1997 (App. 4). Moreover, Gunite had documented silica overexposures well before 1996; in fact, it asserted that in the early 1990s it developed a long-range plan for controlling the exposures (App. 3, 471-81, 728-39).

that its planned ventilation improvements would reduce the silica exposures at issue to below the PEL (App. 4-5, Tr. 289, 694-702). Based on the HRT's evaluation, OSHA concluded that Gunite's planned improvements would reduce exposures to below the PEL at the molding station but that workers at the sprue pull-off station would still be overexposed (App. 287-90, 331-32).

The HRT prepared a report recommending a number of specific ventilation controls that could be used at the sprue pull-off location (App. 699-700). The recommendation most relevant to this proceeding was to install a "clean air island" (App. 699). A clean air island is an engineering control involving an air diffuser located immediately above a worker's head that blows clean air down to enclose the worker in an "island" of uncontaminated air (Tr. 395). The report noted that all of its recommendations were "based on general principles of ventilation and industrial hygiene which have been shown to be effective in reducing contaminant levels in a variety of industries" (App. 697).

Following the inspection and HRT evaluation, OSHA issued citations charging Gunite with a number of violations of OSHA standards, including willful violations of both the PEL for silica and the requirement to implement engineering and administrative controls to achieve the PEL at the sprue pull-off station, and "serious" violations of the same standards at the molding station, where Gunite's planned controls would abate the violation (App. 30-33, 287-90, 331-32).[5]

2. The litigation

During pre-trial proceedings, the Secretary designated two members of the Health Response Team as expert witnesses: industrial hygienist Keith Motley and mechanical engineer Lee Hathon (App. 65-68). She provided Gunite with information about their qualifications, a summary of their proposed testimony, and the HRT report (App. 67-70). In response, Gunite's pre-hearing statement challenged Motley's

[5] The Commission affirmed several additional violations related to silica overexposures. These violations, which are no longer at issue, include Gunite's failure to conduct frequent inspections to ensure the use of respirators and two additional willful violations of the PEL and engineering controls requirements at a different location (App. 10-17).

and Hathon's ability to testify about the PEL violations, which were documented before the HRT assessment, but acknowledged that their opinions were "probative relative to the question of engineering controls for some of the cited work areas" (App. 100, 102, 107-08). The Secretary's designation of her expert witnesses and Gunite's pre-hearing statement were filed with the Commission (App. 27 (items 42 & 48); *see also* Tr. 328 (ALJ ruling that documents filed with Commission need not be introduced into evidence because they were part of the record).

At the hearing, the parties stipulated to the admission of the HRT report, and agreed that Motley and Hathon would be subject to cross-examination on it (App. 333).[6] Motley and Hathon then testified about their qualifications and expertise

[6] The Secretary initially attempted to introduce a copy of the HRT Report or a draft of that report through Compliance Officer Julia Evans to show why some of the violations had been classified as willful. The HRT report was dated after the citations had been issued, however, and the earlier, but virtually identical, draft had not been provided to Gunite during discovery. For these reasons, the ALJ sustained Gunite's initial objections to admitting the report; but as just noted, Gunite subsequently stipulated to the report's admission.

and about how the HRT report was prepared (Tr. 363-96, 498-521).

Motley also explained how the "clean air islands" recommended in the report would eliminate overexposure at the sprue pull-off station (App. 395). Leroy Cator, the Gunite facilities engineer who was responsible for the ventilation system, agreed that, "Clean air islands are probably [an] effective" way to comply; "I don't question that" (App. 491). Cator also acknowledged that Gunite had installed clean air islands elsewhere in the facility (App. 484).

OSHA Compliance Officer Julia Evans explained how, even without ventilation changes, administrative controls could abate the sprue pull-off violation. In response to Gunite's questioning, she testified that employee rotation was a permissible administrative control, and that rotating employees through the sprue pull-off position should reduce exposure to below the PEL (App. 316-19). She also agreed that Gunite's planned improvements were likely to reduce exposures at the molding station to below the PEL (App. 287-90, 331-32).

Gunite argued that the citations should be vacated for two reasons. First, it contended that respirators both eliminated any overexposure and qualified as administrative controls within the meaning of Section 1910.1000(e) (App. 117-20, 125, 129). Second, it claimed that the citation was unwarranted because the new ventilation system it planned to install would abate all of the violations (App. 120-30).

With respect to the feasibility of engineering and administrative controls, Gunite asserted only that it would be infeasible to use local exhaust ventilation to remove all respirable silica from the foundry (App. 179). As for clean air islands specifically, however, Gunite's objections rested on Cator's testimony that the air had to be tempered in hot and cold weather so that the operator would be comfortable, and that the equipment had to be maintained, (App. 128 (citing App. 483-85, 490-91)), as well as on Motley's testimony that, although he had experience with clean air islands in a number of different settings, he had never seen one in a foundry similar to the Gunite facility (App. 127 (citing App. 396)).

3. The ALJ decision

The ALJ affirmed all four citation items at issue here. She rejected Gunite's reliance on respirator use as either an administrative control or as a defense to the overexposure allegations (App. 37-38, 40). In affirming the engineering controls violations, she relied in part on Gunite's failure to challenge the feasibility or effectiveness of most of the HRT's "specific recommendations for bringing each of the overexposed positions below the PEL" (App. 40). She also determined that the sprue pull-off violations were willful, based on Gunite's long-standing knowledge of the problem; its failure to maintain or repair its existing ventilation system adequately; and the fact that even its planned ventilation improvements would not reduce exposures to below the PEL (App. 41).

Decision Below

The Commission agreed with the ALJ that the protection provided by respirators could not be considered in determining the level of the employees' exposure to silica, and therefore found "that the Secretary established that employee exposure

to respirable silica exceeded the PEL" (App. 7-8). A two-member majority nevertheless vacated the four citation items at issue here, two for exceeding the PEL and two for not implementing engineering or administrative controls to reduce exposures, because, in its view, the Secretary had failed to prove that the proposed engineering and administrative controls would produce a "significant reduction" in respirable silica at the foundry (App. 9).

The majority relied primarily on its view that none of the Secretary's witnesses "were presented . . . as expert[s]," and held that therefore the evidence failed to show that the proposed controls were technologically feasible (App. 9). According to the majority, the Secretary's obligation to present expert testimony to establish the feasibility of proposed controls was not affected by Gunite's failure to challenge the feasibility of these controls because the obligation "was clearly established at the time of the hearing" (App. 9-10 n.6). The majority also ruled that the Secretary "failed to quantify" the expected level of reduction in respirable silica (App. 9-10).

Commissioner Rogers dissented. She noted that the HRT report had stated that "'[p]rograms such as housekeeping and employee hygiene . . . *will have a significant effect* if used in conjunction with other administrative and engineering controls,'" and that, for the most part, Gunite did not challenge the feasibility of these recommendations (App. 21) (emphasis supplied). Whether or not the HRT members had been presented as experts, she continued, did not affect "the probative value of their testimony" (*ibid.*). In her view, their credentials made their "testimony sufficiently reliable" (*ibid.*).

Summary of Argument

The Commission majority ignored pertinent parts of the record and misapplied its case law to vacate the citations. First, the record establishes beyond doubt that Motley and Hathon were, in fact, presented as experts. The Secretary explicitly designated Motley and Hathon as her relevant experts during pre-trial proceedings, Gunite acknowledged the probative value of their expert opinions and stipulated to the admission of their report, and their qualifications and opinions were properly admitted into evidence at trial. The fact that the

designation was not repeated at the hearing is no basis for refusing to recognize the evidence for what it was — expert testimony. Therefore the Commission erred as a matter of law in refusing to accord any weight to the Secretary's expert evidence.

Second, the Commission erred in holding that the Secretary must present expert testimony to carry her burden with respect to undisputed facts. The undisputed evidence established that at least three engineering and administrative controls would have achieved compliance at the cited work stations. For the molding station employees, the parties *agreed* that Gunite's planned improvements would likely reduce the overexposures to below the PEL. Gunite also did not dispute that compliance could be achieved at the sprue pull-off station either by employee rotation or through the installation of a clean air island. Having established that feasible controls for achieving compliance would have eliminated the overexposures, the Secretary had no obligation to precisely quantify the expected level of reduction.

Finally, while the Court need not reach the issue to reverse the Commission below, neither basic evidentiary principles nor the Commission's case law supports the majority's statement that the Secretary must present expert testimony to carry her burden. Not only is such a requirement unfounded and unexplained, it is wasteful and contrary to both precedent and common sense.

Argument

GUNITE VIOLATED 1910.1000(c) AND (e) BY FAILING TO IMPLEMENT FEASIBLE ENGINEERING OR ADMINISTRATIVE CONTROLS TO PROTECT ITS WORKERS FROM RESPIRABLE SILICA

A. Standard of review

Whether the Secretary established that the proposed engineering and administrative controls were feasible and effective means of reducing silica exposures at Gunite's foundry is a mixed question of law and fact. The factual components of the Commission's determination must be reversed if they are not supported by substantial evidence on the record as a whole. 29 U.S.C. § 660(a); *Sierra Resources, Inc. v. Herman*, 213 F.3d 989, 992 (7th Cir. 2000).

The Commission's legal conclusions are reviewed to determine if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Caterpillar, Inc. v. Reich*, 111 F.3d 61, 62 (7th Cir. 1997). This standard applies to the Commission's determination that the Secretary's proof was insufficient because she failed to present expert testimony to prove technological feasibility.

The Secretary's interpretations of her standards and the Act are controlling if they are reasonable, i.e., if they "sensibly conform to the wording and purpose" of the relevant provisons. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-151 (1991); *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 369-70 n.3, 372 (7th Cir. 1997).

B. The Commission majority plainly erred in concluding that the Secretary had not presented expert testimony

1. *Introduction*

The Commission's decision must be vacated because the Commission erred when it failed to recognize that Motley and Hathon had been presented as expert witnesses. This error alone requires reversal because it was the basis for the

majority's conclusion that the Secretary failed to prove that the proposed controls were technologically feasible. Specifically, the Commission majority found that the "record as a whole is insufficient to prove that the controls suggested by the Secretary would produce a significant reduction in airborne respirable silica in the foundry" and "lacks sufficient evidence to establish that the proposed controls were technologically feasible" solely because "neither Compliance Officer Evans nor any of the HRT members were presented by the Secretary as expert witnesses" (App. 9; *see also id.* 9 n.5). *See J.C. Penney Co. v. NLRB*, 123 F.3d 988, 995 (7th Cir. 1997) ("We cannot uphold a decision by an administrative agency . . . if . . . the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result").

As we show below, however, not only must the Commission's decision be vacated, the citations must also be affirmed because the record compels the conclusion that Gunite violated the cited standards.

2. *Motley and Hathon were presented as experts on the feasibility of engineering controls*

a. The pre-hearing proceedings established that Motley and Hathon were to testify as experts.

The majority erred in concluding that Motley and Hathon had not been presented as experts. In pre-trial documents filed with the Commission, the Secretary designated Motley and Hathon as experts for the purpose of establishing the feasibility and effectiveness of technological controls, and Gunite accepted them as experts for this purpose (App. 27 (items 42 & 48), 65-70, 108). The Administrative Procedure Act expressly mandates that these documents are part of the "record for decision." 5 U.S.C. § 556(e); *see also* App. 323 (ALJ ruling that documents filed during pre-hearing proceedings need not be introduced into evidence because they were already part of the record). It does not appear that the Commission ever examined these documents, presumably because the issue of expert testimony was raised sua sponte by the Commission and, as the dissent noted, "ha[d] not previously been briefed." (App. 21). The Commission's

disregard for these pertinent parts of the record was arbitrary and capricious.

The Commission's assertion that Motley and Hathon did not testify as experts appears to be based solely on the fact that their designation as experts did not occur at the hearing. But nothing in the Federal Rules of Evidence, the Federal Rules of Civil Procedure, or the Commission's Rules of Procedure requires that a formal designation of an expert occur at the hearing. *See* Charles Alan Wright, Victor James Gold, *29 Federal Prac. & Proc. (Evid.)* § 6265 at pp. 260-62 (West 1997) (no mandated procedures for designating and qualifying experts); 29 C.F.R. Part 2200 (Commission's Rules of Procedure); *supra* pp. 22 n.6, 23-24 (citing cases that evaluate testimony of witnesses not designated as experts under expert witness standards).

Indeed, as occurred here, the status of experts is frequently resolved in pretrial proceedings. *See* Fed. R. Civ. P. 16(c)(4), 26(a)(2) (respectively, limitation or restriction on use of expert testimony is an appropriate subject of pretrial conference, and imposing special discovery obligations for

proposed expert testimony); *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001) ("The truth-seeking function of litigation is best served by an orderly progression, and because *Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' junction, [our precedent] permits a district court to reject as untimely *Daubert* motions raised late in the trial process"); 29 C.F.R. § 2200.51(b) (Commission rule for pre-hearing conferences incorporating Rule 16 of Federal Rules of Civil Procedure). The majority improperly rejected the pretrial resolution of Motley's and Hathon's expert status that occurred here.[7]

b. Motley and Hathon testified as experts.

Even if the pre-hearing record did not establish Motley's and Hathon's expert status, the Commission still would not

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[7] *See also United States v. Leo*, 941 F.2d 181, 192 (3d Cir. 1991) ("so long as the defendant is on notice that the witness would testify as an expert, the defendant cannot later be heard to argue that the government failed formally to ask that its witness's opinion be admitted as those of an expert"). In fact, Gunite moved before trial to exclude another of the Secetary's expert witnesses, a medical expert, on the grounds that his proposed testimony was not probative of the disputed issues (App. 27 (item 46), 102). The Secretary did not call this witness.

have been justified in determining that they did not testify as experts because it is the nature of a witness's testimony, not a witness's formal designation at trial, that determines whether the witness has testified as an expert. As this Court has noted, the "difference between an expert witness and an ordinary witness is that the former is allowed to offer an opinion, while the latter is confined to testifying from personal knowledge." *United States v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996). The test is whether the witness has "specialized knowledge that the lay person cannot be expected to possess," and reasonably applies the principles of that specialized knowledge to the relevant facts. *United States v. Conn*, 297 F.3d 548, 554-55 (7th Cir. 2002) (applying Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

Here, the relevant testimony of Motley and Hathon and the relevant portions of the Health Response Team report consisted of their opinions about the feasibility and effectiveness of engineering controls. These opinions were based on their knowledge of industrial hygiene and ventilation engineering, and formed after inspecting Gunite's foundry

(App. 363-96, 498-521, 694-702). At the hearing, Gunite stipulated to the admission of their report and examined them on the methodology they used to prepare it, their qualifications for providing opinion testimony, and their opinions on the feasibility of controls Gunite could have used to control exposures (App. 333, 363-96, 498-521). This examination easily establishes Motley's, Hathon's, and the HRT's specialized knowledge and the admissibility of their opinions, and the Commission never suggested otherwise. *See* App. 5 n.3 (HRT "serves as a central technical resource for OSHA's program activities"); *id.* at 21 (Rogers, C., dissenting) (explaining why Motley's and Hathon's testimony was sufficiently reliable and that the need for them to be designated as "experts" had not been briefed)).

Under these circumstances, the Commission was required to evaluate this evidence as the expert evidence it was, regardless of whether a formal expert designation was made. *See United States v. Pree*, 384 F.3d 378, 391-93 (7th Cir. 2004) (testimony of witness who was not proffered as expert evaluated as expert testimony); *Conn*, 297 F.3d at 553-

57 (7th Cir. 2002) (same); *United States v. Bartley*, 855 F.2d 547, 551-52 (8th Cir. 1988) (court not required to specifically find that witness was expert before allowing witness to testify as expert). Accordingly, the Commission's refusal to treat Motley and Hathon as experts was arbitrary, capricious, and contrary to law.

C. The Secretary need not offer expert testimony to carry her burden with respect to undisputed facts

The Commission held that the Secretary had to present expert evidence to establish the feasibility and effectiveness of engineering controls, even though Gunite did not dispute the utility of the recommended controls. But there is no rule, and there is no reason for a rule, requiring the Secretary to present expert evidence on undisputed facts. The Commission's imposition of such a requirement is unwarranted and illogical.

1. *Three methods of abatement were shown to be feasible and effective*

a. The parties did not dispute that the ventilation improvements Gunite planned would eliminate overexposures at the molding station, or that employee rotation would do so at the sprue pull-off station

In this case, the parties *agreed* that Gunite's planned dust-collection and ventilation systems would abate the molding station violations (App. 120-30, 287-90, 331-32).[8] Gunite argued that these improvements constituted "all of the steps . . . required as abatement," and the Secretary did not dispute that the new system would abate the molding station violations (App. 129; *see also* App. 125-27, 231-32). Similarly, Compliance Officer Evans testified without dispute that employee rotation should reduce exposure at the sprue pull-off station to below the PEL (App. 316-19). Thus, for both locations at issue, undisputed evidence establishes that

[8] Gunite's contention below that its plan to install a new ventilation system in the future also absolved it of liability for existing violations was frivolous. *See A.J. McNulty & Co. v. Secretary of Labor*, 283 F.3d 328, 335 (D.C. Cir. 2002) (employer must comply *before* exposing employees to forbidden risk).

Gunite failed to implement an engineering or administrative control that would have achieved compliance with the PEL.

No valid reason exists for requiring the Secretary to present any additional evidence, much less expert testimony, to prove either the feasibility or the effectiveness of these measures. The parties' agreement on the feasibility and effectiveness of Gunite's planned ventilation controls at the molding station obviated any need for the Secretary to prove that the system would do what Gunite said it would.

Futhermore, Evans's undisputed testimony is sufficient to establish that Gunite could have implemented an employee rotation system to achieve compliance at the sprue pull-off station. Employee rotation means, as its name suggests, rotating different employees through a position located in a contaminated atmosphere so that each employee spends less time in the contaminated atmosphere (App. 316). The sprue pull-off operator's exposure was approximately 1.6 times the PEL, and simple logic — unchallenged by Gunite — establishes that having two or more operators divide the eight-

hour shift among them should lower each individual employee's to below the PEL (App. 319).[9]

The Secretary carried her burden with respect to both of these measures when Gunite either admitted or failed to contest them. The whole point of an evidentiary hearing is to resolve *disputed* issues of fact. *See Fontes v. Porter*, 156 F.2d 956, 957 (9th Cir. 1946) (neither proof nor findings required for uncontested issues); F.R. Civ. P. 56. The Commission's insistence on expert — or any additional — testimony to establish undisputed facts can only increase the expense and complexity of litigation before it. [10]

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[9] Gunite argued below that respirator use is also an "administrative control" within the meaning of the standard. But the standard's requirement to implement engineering and administrative controls to the extent feasible and to use respirators only when engineering or administrative controls are not capable of achieving full compliance would make no sense under Gunite's interpretation. *See* § 1910.1000(e). *See generally American Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1267-71 (11th Cir. 1999) (OSHA reasonably retained its "Hierarchy of Controls Policy").

[10] *Cf. Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (Commission's "function is to act as neutral arbiter").

b. Gunite did not dispute the technological feasibility of clean air islands.

Because employee rotation is a feasible method of abating the sprue pull-off station violations, the citations may be affirmed on that basis alone. Nevertheless, the evidence presented by both parties established that a clean air island would be another feasible and effective method of eliminating overexposures there (App. 395, 491). Motley explained that a clean air island would engulf the operator in *clean* air, i.e., air free of respirable silica, and the HRT report stated that a clean air island was a control that has "been shown to be effective in reducing contaminant levels" in other industrial settings (App. 395, 697). The only Gunite witness to testify about this control method admitted both that a clean air island would "probably [be] effective" and that it was capable of being adapted to Gunite's operations (App. 484, 491).

Gunite witness Leroy Cator, the plant engineer, testified that Gunite objected to clean air islands because the operator would be exposed to air from outside the plant and could be uncomfortable in hot or cold weather, and because the

equipment would have to be maintained (App. 484-85, 491). Cater acknowledged, however, that the air could be tempered to make the operator more comfortable, and he never suggested that it would be infeasible to maintain the equipment (*ibid*). Indeed, he admitted that Gunite had installed clean air islands in another part of the foundry (App. 484).[11]

Thus, neither of Gunite's objections to clean air islands implicates either technological feasibility or effectiveness; instead, they merely explain why Gunite decided it would be inconvenient to install a clean air island at the sprue pull-off station. Inconvenience is not infeasibility, however, and is not a defense to failing to implement a control "whenever feasible." § 1910.1000(e).[12]

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[11] In light of these admissions, Gunite's criticism that Motley had not seen a clean air island used at a foundry similar to Gunite's is without merit. Motley was familiar with Gunite's foundry and had the expertise to conclude that a control he knew had been used successfully in a variety of industries could also be used there.

[12] Although Gunite also claimed that it was infeasible to locally exhaust all of the sand it used at the plant, the Secretary never suggested that Gunite do that, and this infeasibility

The undisputed record here compels the conclusions that it was technologically feasible to implement the engineering and administrative controls that OSHA recommended for Gunite's foundry, and that these controls would have eliminated the overexposures. Therefore the citations must be affirmed. *See Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1388 (D.C. Cir. 1985) (court can reinstate citation if only one conclusion is supportable on the record).

D. Once it was established that a recommended control would abate the violations, there was no need for the Secretary to quantify the precise level of reduction the control would achieve

The undisputed evidence showed that Gunite had not implemented engineering or administrative controls that it knew were both feasible and likely to achieve compliance with the PEL, The majority was therefore wrong in suggesting (App. 10) that the Secretary had to "quantify" further the precise level of exposure reduction the controls would achieve.

The Commission's contrary suggestion appears to be based on its misreading of case law stating that the Secretary

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claim is irrelevant to the recommendation to use a clean air island to bring fresh air to a single location.

establishes a violation by showing that engineering or administrative controls are "capable of producing a significant reduction in employee exposure." *G & C Foundry Co.*, 17 O.S.H. Cas. (BNA) 2137, 2140 (Rev. Comm'n 1997). The "significant reduction" criterion is included because, even if using all feasible controls will *not* achieve full compliance with the PEL, employers must still implement them to the extent feasible. *Ibid.* Here, the evidence established that the controls *would* achieve compliance, and that is all the Secretary must show.

The HRT report also provided evidence that other controls it recommended would be effective as well. It stated expressly that its recommendations were "based on general principles of ventilation and industrial hygiene which have been *shown to be effective in reducing contaminant levels in a variety of industries*." App. 697 (emphasis added); *see also* App. 21 (quoting other part of report) (Rogers, J., dissenting). Nothing in this record, and certainly nothing that Gunite argued below, suggests that these "general principles of ventilation and industrial hygiene" would be less effective at

Gunite's foundry than they have shown themselves to be elsewhere.

The value of this evidence is not undermined by the fact that the report also noted Gunite's obligation to choose the appropriate control or combination of controls required to achieve compliance (App. 10, 698). This part of the report merely restates the requirement of the standard and the teaching of the Commission itself: "We emphasize that the [employer] is required to determine and implement feasible controls of any type and in whatever combination is necessary to achieve compliance." *Seaboard Foundry, Inc.*, 11 O.S.H. Cas. 1398, 1402 n.5 (Rev. Comm'n 1983); *see* § 1910.1000(e).

In sum, the parties agreed that three feasible and effective engineering or administrative controls could have been implemented to achieve compliance with the PEL, and the evidence establishes this agreement. Thus, the record compels the conclusion that Gunite violated the cited standards, and therefore the citations must be affirmed. *See Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1388 (D.C. Cir.

1985) (court can reinstate citation only if one conclusion is supportable on the record).

E. The Court should reject the majority's attempt to impose a per se expert witness requirement for proving technological feasibility

As noted above, the majority's statement that the Secretary failed to present expert testimony is incorrect. Accordingly, its claim (App. 9-10 n.6) that such testimony is necessary to establish technological feasibility is irrelevant. Nevertheless, this statement cannot go unchallenged: it is wrong and if uncorrected will unnecessarily increase the complexity and expense of Commission litigation. Accordingly, we urge the Court to reject the majority's per se requirement or at least to note explicitly that it is not assuming the correctness of the majority's statement.

It is significant that the sole authority the majority cited for its assertion that there was a "clearly established" expert witness requirement at the time of the hearing, *G & C Foundry Co.*, 17 O.S.H. Cas. 2137, does *not* hold that expert testimony is *required* to prove feasibility; that case merely noted that the expert testimony presented there established the feasibility of

disputed controls. Indeed, the Commission itself has previously determined that administrative or engineering controls were feasible *without* relying on expert testimony. *Seaboard Foundry, Inc.*, 11 O.S.H. Cas. (BNA) 1398, 1401 & n.4 (Rev. Comm'n 1983).

Furthermore, the general framework established by Commission precedent for proving feasibility focuses on "realism and common sense" – a focus that eschews any per se requirement to present expert testimony. *See The Sherwin-Williams Co.*, 11 O.S.H. Cas. (BNA) 2105, 2110 (Rev. Comm'n 1984) (applying test set forth in *Donovan v. Castle & Cook Foods, a Division of Castle & Cook, Inc.*, 692 F.2d 641, 650 (9th Cir. 1982)). Neither precedent nor logic supports the Commission's statement here (App. 9-10 n.6) that this framework only applied to questions of economic feasibility. *See Sherwin Williams*, 11 O.S.H. Cas. at 2110. There is no apparent reason — and the Commission did not even purport to provide one — to throw "realism and common sense" out the window when technological rather than economic feasibility is at issue.

As shown above, it is counterproductive to require expert testimony to establish undisputed and admitted facts. But even for issues in dispute, a per se expert evidence rule is not justified. The nature of the evidence required in each case will depend on the basis of the employer's contest in that case.

For example, where an employer uses identical processes in two locations but uses effective controls in only one of them, expert testimony would not be necessary to prove that the employer could implement the same controls in the other locations. Similarly, where an employer has historically controlled exposures but then stops maintaining its equipment resulting in exposures in excess of the PEL, the employer's past success would obviate the need to present expert testimony to prove the violation. *Seaboard Foundry*, 11 O.S.H. Cas. at 1401-02 n.4. The point is that, as the Commission itself has recognized in the past, these decisions must be made on a case-by-case basis, and a blanket rule serves no purpose other than the unnecessary complication of Commission litigation.

Conclusion

The Commission's decision should be reversed, and the citation items affirmed.

Respectfully submitted.

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