No. 06-16172-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELAINE CHAO, SECRETARY OF LABOR,

Petitioner,

v.

CAGLE'S, INC.,
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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Chao V. Cagle's, Inc., No. 06-16172-JJ

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, I certify that the following persons and organizations have an interest in the outcome of this appeal:

Cagle's, Inc.

Elaine L. Chao, U.S. Secretary of Labor

Edwin G. Foulke, Jr., Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor

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/s/_____
SCOTT GLABMAN
Attorney for the Secretary of Labor
Date:

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor believes that oral argument would help the court decide this case by clarifying the permit space standard at issue and allowing the parties to explain their competing interpretations of the definition of "confined space." Oral argument would also be beneficial because it would permit the court to question the parties about the consequences of their positions. Accordingly, the Secretary requests that oral argument be held.

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STATEMENT OF JURISDICTION

This petition for review concerns a final order of the Occupational Safety and Health Review Commission ("OSHRC" or "the Commission") under the Occupational Safety and Health Act of 1970 ("OSH Act" or "the Act"), 29 U.S.C. §§ 651-678. On March 2, 1998, after two employees were killed in worksite accidents, Petitioner Elaine Chao, the Secretary of Labor ("the Secretary"), inspected Respondent Cagle's, Inc.'s chicken processing plant in Collinsville, Alabama and issued three citations.[1] Record ("Rec.") Volume ("Vol.") 12, Document ("Doc.") 1.[2] The Commission acquired subject matter jurisdiction over this matter on March 23, 1998, when Cagle's timely contested these citations. *See* Rec. Vol. 12, Doc. 2; OSH Act, § 10(a) & (c), 29 U.S.C. § 659(a) & (c).

A Commission administrative law judge ("ALJ") conducted a hearing pursuant to section 12(j) of the OSH Act,

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[1] The Secretary has delegated her responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. The terms "Secretary" and "OSHA" are used interchangeably here.

[2] Record references are to the Commission's January 5, 2007 certified list of relevant docket entries in the proceeding below.

29 U.S.C. § 661(j), and thereafter issued a decision affirming some citation items, but vacating the citation item in question here, which alleged a violation of OSHA's permit-required confined space ("permit space") standard. Rec. Vol. 14, Doc. 42. The full Commission directed review and affirmed the vacation of this item, and disposed of all the parties' other claims, on September 29, 2006. Rec. Vol. 16, Doc. 69. On November 28, 2006, the Secretary filed a petition for review, contesting only the vacation of the disputed item. This court has jurisdiction over this appeal pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a), because the petition was filed within sixty days of the date of the Commission's final order.

STATEMENT OF THE ISSUES

To be covered under OSHA's permit space standard, a space must, among other things, be "large enough and so configured that an employee can bodily enter and perform assigned work." 29 C.F.R. § 1910.146(b) (definition of "confined space"). The Commission held that a trailer 40 feet long by 7 ½ feet wide by 7 ½ feet tall did not meet the definition because employees could not perform any currently

assigned work inside the trailer. Rec. Vol. 16, Doc. 69 at 2, 4-6. The issues are:

(1) Whether the Commission erred in rejecting the Secretary's interpretation that the definition encompasses any space large enough and so configured that *some* work, *if* assigned, can be performed there.

(2) Alternatively, whether the Commission erred in rejecting the Secretary's interpretation that "assigned work" includes reasonably foreseeable actions the employee could take in the performance of the work.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

This case is an enforcement action under section 10 of the OSH Act, 29 U.S.C. § 659. After two employees at Cagle's Collinsville, Alabama, plant were asphyxiated by carbon dioxide while dumping waste breading into a trailer, OSHA inspected the worksite and issued three citations. Rec. Vol. 12, Doc. 1. The citations alleged various repeated, serious and

other violations, and proposed total penalties of $185,000. *Ibid*.

Cagle's contested the citations, and the ALJ vacated 11 of the cited violations, affirmed three, and assessed a total penalty of $15,000. Rec. Vol. 14, Doc. 42. Four of the vacated items were appealed to the Commission, which affirmed the ALJ's vacation of two of these items, and affirmed in part and vacated in part the other two items as serious violations, assessing a combined penalty of $5,000. Rec. Vol. 16, Doc. 69.

This appeal concerns only the Commission's vacation of the alleged serious violation of the permit space standard at 29 C.F.R. § 1910.146(c)(2). That item alleged that Cagle's violated the cited provision by not informing employees that the waste breading trailer was a permit space, and proposed a penalty of $5,000. Rec. Vol. 12, Doc. 1 at 5.[3] In a 2-1 decision, the

[3] The Commission also vacated alleged violations of 29 C.F.R. § 1910.1200(h)(1) and (2) for failure to inform employees working at the waste breading trailer of the carbon dioxide hazard. Rec. Vol. 16, Doc. 69 at 9-12. Moreover, the Commission affirmed the alleged violations of § 1910.1200(f)5)(i) and (ii) for failure to post carbon dioxide

Commission found that the standard did not apply because the Secretary failed to show that it was possible under the circumstances for an employee to perform some currently assigned work while inside the trailer. Rec. Vol. 16, Doc. 69 at 3-6.

B. Statutory and Regulatory Background

1. The OSH Act

The goal of the OSH Act is "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." OSH Act, § 2(b), 29 U.S.C. § 651(b). To achieve this goal, the Act separates rule-making and enforcement powers from adjudicative powers and assigns these respective functions to two different administrative actors: the Secretary and the Commission. *Martin v. OSHRC ("CF&I ")*, 499 U.S. 144, 147, 151, 111 S. Ct. 1171, 1174, 1176 (1991).

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hazard warnings in the waste breading trailer area, but vacated these items with regard to the totes and boxes containing waste breading. *Id.* at 6-8. Further, the Commission reduced the characterization of the partial violation of § 1910.1200(f)(5)(i) from repeated to serious. *Id.* at 12-13.

The Secretary is charged with promulgating and enforcing workplace health and safety standards; and the Commission is responsible for carrying out the Act's adjudicatory functions. *CF & I*, 499 U.S. at 147, 111 S. Ct. at 1174. The Secretary prosecutes violations of the Act and its standards by issuing citations requiring abatement of violations and assessing monetary penalties. *See* OSH Act, §§ 9-10, 17, 29 U.S.C. §§ 658-59, 666. The Commission is an independent agency that is a "neutral arbiter" for adjudicating disputes between employers and the Secretary that arise from those citations. *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7, 106 S. Ct. 286, 288 (1985) (per curiam); *CF&I*, 499 U.S. at 147-48, 154-55, 111 S. Ct. at 1174, 1177-78.

The employer may contest a citation by filing a written notice of contest with the Secretary within fifteen working days of receiving the citation. OSH Act, § 10(a), 29 U.S.C. § 659(a); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528 (7th Cir. 1991).[4] If

[4] Only seven percent of the citations issued in fiscal year 2006 were contested. *Targeted Enforcement Activity Making OSHA*

an employer contests the citation, a Commission ALJ provides an opportunity for a hearing and issues a decision on the contest. OSH Act, §§ 10(c), 12(j), 29 U.S.C. §§ 659(c), 661(j). The Commission may review and modify the ALJ's decision. OSH Act, §§ 10(c), 12(j), §§ 659(c), 661(j). Either the Secretary or an aggrieved party may seek judicial review of a Commission final order. OSH Act, § 11(a)-(b), § 660(a)-(b).

2. The Permit Space Standard

The permit space standard protects employees from the hazards of entry into permit spaces, i.e., confined spaces that could contain a serious safety or health hazard, including a hazardous atmosphere, an engulfing material, or an internal configuration that could trap or asphyxiate an entrant. 29 C.F.R. § 1910.146(b) (definition of "permit space"). The standard defines "confined space" as a space that (1) is large enough and so configured that an employee can bodily enter and perform assigned work; (2) has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage

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More Efficient, Official Tells Advisory Panel, Daily Labor Report (BNA), Dec. 5, 2006, at A-3 (citing Richard Fairfax, director of OSHA's enforcement programs).

bins, hoppers, vaults and pits); and (3) is not designed for continuous employee occupancy. *Ibid.* (definition of "confined space").

The standard is designed both to protect employees who are assigned to enter a permit space and to prevent accidental or unauthorized entry into permit spaces, whether entry into the space is permitted or not. *See* OSHA, Preamble to the Permit Space Standard Final Rule ("Preamble to the Final Rule"), 58 Fed. Reg. 4462, 4462, 4472, 4483-84 (1993). To this end, the standard requires an employer to conduct an initial survey to determine whether the workplace has any permit spaces, and to inform employees of the location of any such spaces and the danger they pose. 29 C.F.R. § 1910.146(c)(1)-(2); Preamble to the Final Rule, 58 Fed. Reg. at 4481.

If the employer decides not to allow employees to enter permit spaces, it must take effective measures to prevent unauthorized entry. 29 C.F.R. § 1910.146(c)(3). If, however, the employer decides to allow employees to enter permit spaces, the employer must develop and implement a written

permit space program, including measures to prevent unauthorized persons from entering and to remove any who do. § 1910.146(c)(4), (d)(1), (i)(8), (j)(5). OSHA specifically intended the standard to protect employees from falling into, or otherwise inadvertently entering, a permit space, and revised the proposed definition of "entry" to include unintentional as well as intentional entry. Preamble to the Final Rule, 58 Fed. Reg. at 4472; Preamble to the Proposed Rule, 54 Fed. Reg. 24,080, 24,102 (1989).

C. Statement of Facts

1. Cagle's is a chicken processor with five plants in Georgia and Alabama. Rec. Vol. 2 at 239-40. Cagle's cited Collinsville, Alabama, plant has about 900 employees. Rec. Vol. 4 at 647. At the Collinsville plant, chickens move on conveyors through a process in which they are coated with marinated breading, frozen by carbon dioxide and packaged. Rec. Vol. 1 at 199, 214-15; Rec. Vol. 2 at 245-46, 248-50, 261-62, 264.

As the chickens move on the conveyor, some of the breading falls off and is collected in plastic totes, 40 inches

square and 36 inches deep, or cardboard boxes, 24 inches square and 16 inches deep. Rec. Vol. 1 at 40, 193, 215; Rec. Vol. 2 at 250-54, 262-67; Rec. Vol. 4 at 788; Rec. Vol. 6 at 1224; Rec. Vol. 10, Secretary's Exhibit C-12 ("Ex. C-12") (showing plastic tote), C-14 (showing cardboard box). The cardboard boxes can hold up to 70 pounds of breading. Rec. Vol. 1 at 40, 108. As the waste breading thaws, the frozen carbon dioxide is turned into gas. Rec. Vol 1 at 182. As a gas, carbon dioxide takes oxygen out of the air, and can cause shortness of breath, headaches, vomiting, comas and death. Rec. Vol 1 at 172, 182; Rec. Vol.10, C-16 at 2-3.

2. When the totes or boxes are full, Cagle's employees dump them into a waste breading trailer, measuring 40 feet long, 7½ feet wide, and 7½ feet high from floor to roof. Rec. Vol. 4 at 732, 790-91. For several years, employees brought the full boxes into the trailer through the rear doors and dumped the waste breading inside with the doors open. Rec. Vol. 1 at 40-42; Rec. Vol. 4 at 801; Rec. Vol. 9 at 1815. Even with the doors open, it was hard to breathe in the trailer. Rec. Vol. 3 at 550-51.

A few months before the inspection, Cagle's changed the dumping procedure by pinning the trailer rear doors shut from the outside and requiring employees to use a forklift to dump the full totes through one of three five-foot-square openings in the roof. Rec. Vol. 1 at 43-45, 48; Rec. Vol. 4 at 727, 729-30, 759-60; Rec. Vol. 10, Ex. C-3 (showing forklift dumping breading but with the trailer doors open). These openings lacked any grilles or grating, and there were no guardrails on top of the trailer. Rec. Vol. 2 at 335; Rec. Vol. 4 at 716; Rec. Vol. 10, Ex. C-5 (showing two of the three roof openings).

On an average day, employees would dump 15 to 22 totes (also called "vats") of waste breading into the trailer. Rec. Vol 4 at 772, 787-88. This dumping produced large white clouds containing high levels of carbon dioxide. Rec. Vol. 4 at 731-32; Rec. Vol. 10, Ex. C-3. Cagle's was aware that the waste breading still contained carbon dioxide even after being dumped into the trailer. Rec. Vol. 1 at 126, 180-81; Rec. Vol. 14, Doc. 42 at 7.

Employees also commonly climbed up a ladder to the roof and manually dumped the waste breading by cutting out a

side of a box with a knife and emptying the box through one of the roof openings. Rec. Vol. 1 at 46, 48-50, 119-20; Rec. Vol. 14, Doc. 42 at 6, 8. Two employees (Leonard Camp and Joey Ross) told the inspecting OSHA compliance officer that they had dumped breading from the trailer roof in this manner. Rec. Vol. 4 at 819, 821. Through employee interviews, the compliance officer was also able to identify three other employees (James Williams, Jeremy Higginbotham, Joey Poe) who manually dumped, or helped dump, breading from the trailer roof. Rec. Vol. 4 at 744-45, 814, 819, 821; Rec. Vol. 9 at 1820-21. Williams was assigned the task of dumping breading into the trailer, and Higginbotham sometimes helped him. Rec. Vol. 1 at 32-33.

In the year before the inspection, a Cagle's waste water superintendent (Michael Mattox) and a former company maintenance manager (Wade Hankinson) observed employees dumping breading from the trailer roof. Rec. Vol. 1 at 26-27, 49-50, 68, 92; Rec. Vol. 2 at 236, 294-96.

3. On September 13, 1997, Williams and Higginbotham were found dead inside the trailer, along with part of a

cardboard box used to carry the waste breading. Rec. Vol 1 at 82; Rec. Vol. 4 at 716; Rec. Vol 10, Ex. C-5. The trailer doors were locked from the outside and could not be opened from the inside. Rec. Vol. 2 at 293; Rec. Vol. 6 at 1093. A ladder was leaning against the side of the trailer, two of the three roof openings were uncovered, and a mound of breading reached up to approximately four feet from the ceiling. Rec. Vol. 1 at 105; Rec. Vol 10, Ex. C-5. Both employees died from carbon dioxide asphyxiation. Rec. Vol. 1 at 5.

OSHA cited Cagle's for various violations, including a serious violation of paragraph (c)(2) of the permit space standard, 29 C.F.R. § 1910.146(c)(2), for failing to warn employees that the waste breading trailer was a permit space. Rec. Vol. 12, Doc. 1 at 5. The cited paragraph requires employers to warn employees "of the existence and location of and the danger posed by permit spaces." § 1910.146(c)(2). OSHA proposed a penalty of $5,000 for the cited violation. Rec. Vol. 12, Doc. 1 at 5.[5]

[5] Cagles was also cited for a serious violation of 29 C.F.R. § 1910.22(c), and fined $5,000, for failure to guard the three

4. It is undisputed that Cagle's did not post danger signs informing employees of the existence, location and danger of the waste breading trailer as a permit space. Rec. Vol. 14, Doc. 42 at 8. The three five-foot square roof openings were large enough that an employee could bodily enter the trailer through them. Rec. Vol. 4 at 831-32. The only means of entering the trailer was through the roof openings or by the difficult process of manipulating the pin locks on the outside of the back doors. Rec. Vol. 6 at 1093, 1096-97; Rec. Vol. 10, Ex. C-37. Since the trailer doors were locked from the outside, Rec. Vol. 2 at 293, the only way to exit the trailer was through the roof openings. It is also undisputed that the unventilated trailer was not designed for continuous employee occupancy, and that the trailer contained an oxygen-deficient atmosphere, hazardous enough to kill two employees. Rec. Vol. 1 at 5; Rec. Vol. 4 at 716; Rec. Vol. 14, Doc. 42 at 8.

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openings in the roof of the trailer. Rec. Vol. 12, Doc. 1 at 5. The ALJ affirmed this violation and the accompanying penalty, Rec. Vol. 14, Doc. 42 at 6-8, 29, and Cagle's did not seek review before the Commission.

D. The ALJ's Decision

In light of the common practice of dumping waste breading from the trailer roof, the ALJ found that it was reasonably foreseeable that employees would be exposed to the unprotected roof openings and the carbon dioxide hazard in the trailer. Rec. Vol. 14, Doc. 42 at 7-8. Nevertheless, the ALJ held that the cited provision, 29 C.F.R. § 1910.146(c)(2), did not apply because the waste breading trailer was not a confined space. Rec. Vol. 14, Doc. 42 at 9. The ALJ explained that the first part of the standard's definition of "confined space" required a space to be so configured that an employee can enter and perform some assigned work. *Ibid.* Citing the lack of evidence that employees were assigned work inside the trailer, the ALJ found that dumping was performed by forklift or by standing on the roof, and that employees were not required to enter the trailer to perform any work. *Ibid.*

Although the ALJ acknowledged that employees could physically fall through the trailer roof openings while dumping, he held that that the openings were not designed for entering or exiting the trailer. Rec. Vol. 14, Doc. 42 at 9.

Accordingly, the ALJ concluded that, since employees were not required to enter the trailer to perform assigned work, the standard did not apply, and he vacated the alleged violation. *Ibid*.

E. The Commission's Decision

1. *The Majority Opinion*

In a split, two-to-one decision, the Commission affirmed the ALJ's vacation of the cited confined space provision, but on different grounds. Rec. Vol. 16, Doc. 69. The Commission majority held that the trailer did not meet the first part of the standard's definition of "confined space," not because no work *had been* assigned inside the trailer, as the ALJ found, but because it was not *possible* under the circumstances for an employee both to enter the trailer *and* perform currently assigned work. *Id*. at 4-6.[6]

The majority maintained that once Cagle's changed the method of dumping breading from entering the trailer through

[6] The Commission did not find that it was impossible for an employee to enter the trailer, but only that, once inside the trailer, the employee could not perform any currently assigned work. Rec. Vol. 16, Doc. 69 at 4-5.

the rear doors and dumping on the floor to dumping through openings in the trailer roof, it was not possible for an employee to dump breading while *inside* the trailer. Rec. Vol. 16, Doc. 69 at 4-5.[7] The majority reasoned that under the new method, dumping was possible only by using a forklift or by climbing up to the roof and manually dropping the contents of the waste breading boxes through the roof openings. *Id.* at 5. It was not possible, in the majority's view, for an employee to jump or lower himself seven-and-a-half feet from the roof openings to the floor, holding a full box of waste breading, dump the box, and then ascend to the roof with the empty box in hand. *Ibid.*

The majority further concluded that if an employee dropped his knife through a roof opening while slitting and dumping the breading boxes, the employee's entry into the trailer to retrieve the knife could not be considered part of the assigned work. Rec. Vol. 16, Doc. 69 at 5 n. 3 ("such a detour

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[7] Both the Commission and the ALJ, however, found that Williams and Higginbotham were performing currently assigned dumping activities *on top of* the trailer on the day of the accident. Rec. Vol. 16, Doc. 69 at 3; Rec. Vol. 14, Doc. 42 at 5, 7.

from the work assigned . . . is not encompassed within the plain meaning of 'assigned work'").

The majority also distinguished *Secretary of Labor v. Mobil Premix Concrete Inc.*, 18 O.S.H. Cas. (BNA) 1010 (Rev. Comm'n 1997), which the Secretary had cited as a contrary Commission precedent. Rec. Vol. 16, Doc. 69 at 6 n.5; Rec. Vol. 15, Doc. 48 at 21. The majority claimed that *Mobil Premix* was inapplicable because it concerned an engulfment hazard that was relevant to whether the work space was a *permit* space, and not, as here, a *confined* space. Rec. Vol. 16, Doc. 69 at 6 n.5; *see supra*, pp. 7-8 (distinguishing these two types of spaces).

2. *The Dissent*

The dissent (Commissioner Rogers) argued that the majority misconstrued the language, structure and purpose of the standard. Rec. Vol. 16, Doc. 69 (Rogers).[8] The dissent observed that the plain meaning of the standard focuses on

[8] Commissioner Rogers actually concurred with the majority on its other three findings, but because only the confined space finding is at issue here, her opinion is designated as the dissent.

whether the *physical configuration* of the confined space permits *any* assigned work to be performed there, and not, as the majority suggested, on whether a *particular* assigned task could be performed there. *Id.* at 5-6. The dissent also noted that the majority ignored the standard's provision that, after an employer decides that no one will enter a permit space, the space remains a confined space even though *no* assigned work can be performed there. *Id.* at 6-7 n.11 (citing 29 C.F.R. § 1910.146(c)(3)).

Disputing the majority's contention that no assigned work could be performed in the trailer after its rear doors were locked, the dissent maintained that it was reasonably foreseeable that an employee dumping breading from the roof could pass through the openings to dump breading or to retrieve a dropped tool. Rec. Vol. 16, Doc. 69 (Rogers) at 6-7. In the dissenting commissioner's view, the fact that such an employee might be overcome by carbon dioxide and be unable to finish his task would not show that the standard is inapplicable, especially given its intent to prevent accidental and unauthorized entry into confined spaces. *Ibid.*

The dissent also disagreed with the majority's interpretation of *Mobil Premix*. The dissent contended that *Mobil Premix* suggested that a space can be a confined space even if employees do not enter the space or perform assigned work there as long as they had access to the hazardous condition. Rec. Vol. 16, Doc. 69 (Rogers) at 2 n.3.

Finally, the dissenting commissioner rejected the ALJ's finding that the trailer roof openings had to be designed for entry or exit to meet the second part of the definition of "confined space." Rec. Vol. 16, Doc. 69 (Rogers) at 8 n.13. Since it was undisputed that the trailer was not designed for continuous occupancy and that a carbon dioxide hazard was present there, Commissioner Rogers would have found that the trailer was both a confined space and a permit space. *Id.* at 8. The dissent also noted that Cagle's conceded that it did not post danger signs informing employees that the trailer was a permit space, and that the record did not show that the company provided this information through any other equally effective means. *Ibid.* Accordingly, the dissent would have affirmed the disputed violation. *Ibid.*

F. Standard of Review

This case involves two issues concerning the meaning of a provision of the Secretary's permit space standard. The first issue concerns the Secretary's interpretation of the standard's definition of a "confined space" as, in part, a space that is large enough and so configured that an employee can bodily enter and perform assigned work. This court must defer to the Secretary's interpretation of her own standard so long as the interpretation is reasonable, that is, so long as it sensibly conforms to the standard's wording and purpose. *Martin v. Occupational Safety & Health Review Comm'n* ("*CF & I* "), 499 U.S. 144, 150-51, 111 S. Ct. 1171, 1176 (1991); *Sierra Club v. Johnson*, 436 F.3d 1269, 1274 (11th Cir. 2006). The court must also consider the design of the regulations as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1818 (1988).[9]

[9] The cited passage of the *K Mart* case concerns statutory, not regulatory, construction, but, as a leading treatise on statutory construction notes, the rules of such construction also govern the interpretation of regulations, 1A Norman J. Singer, Statutes and Statutory Construction § 31:6 (6th ed. 2002).

The alternative issue presented concerns the Commission's holding that the ill-fated employees' entry into the trailer was not related to their assigned work. That holding is a mixed legal and factual determination. The Commission's legal conclusions are subject to the Administrative Procedure Act's ("APA") standard of review and must be overturned if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA, 5 U.S.C. § 706(2)(A); *Fluor Daniel v. Occupational Safety & Health Review Comm'n*, 295 F.3d 1232, 1236 (11th Cir. 2002). The Commission's factual findings are conclusive if supported by substantial evidence. OSH Act, § 11(a), 29 U.S.C. § 660(a).

SUMMARY OF THE ARGUMENT

The split-enforcement scheme of the OSH Act assigns rule-making and enforcement powers to the Secretary and adjudicative powers to the Commission. Because the Secretary is charged with promulgating and enforcing the statute's workplace health and safety standards, her interpretation of her own standard must be upheld by the Commission and the courts so long as the interpretation is

reasonable, i.e., sensibly conforms to the wording and purpose of the standard.

Here, the Commission erred as a matter of law by rejecting the Secretary's reasonable interpretation of language in her permit space standard defining "confined space" as a space that, among other things, "is large enough and so configured that an employee can bodily enter and perform assigned work." The Secretary interprets the definition to include any space large enough and so configured that an employee can enter and perform some work*, if* assigned ("the work-if-assigned interpretation"). The Commission majority, by contrast, construed the definition as applying only when employees have currently assigned work that can be performed in the space ("the work-currently-assigned interpretation").

The Secretary's work-if-assigned interpretation conforms to the definition's literal requirement that the size and shape of the work space determine whether it is a confined space. The Secretary's interpretation also conforms to the standard's design and protective purpose because the interpretation

recognizes that a space's physical dimensions may permit an employee to enter and be exposed to the space's hazards, even if no current assignment can be done there. This interpretation also reflects the standard's explicit provisions recognizing that even spaces where entry is prohibited and physically prevented, and therefore where no current assignment could be done, remain permit spaces. The Secretary's interpretation also reflects the standard's precautions against accidental or unauthorized entry into permit spaces generally.

By contrast, the Commission's work-currently-assigned interpretation is incompatible with the standard's wording, structure and purpose. The Commission's interpretation is inconsistent with the disputed definition's focus on the physical dimensions of the work space. The Commission's reading is also incompatible with the standard's provision for "no entry" permit spaces. The interpretation negates the standard's specific protections from accidental or unauthorized entry into permit spaces. The Commission's interpretation further conflicts with the standard's

requirement that an employer determine that a space is a permit space before deciding whether work will be performed there. Thus, the work-currently-assigned interpretation thwarts the standard's protective purpose by allowing employers to ignore hazardous spaces unless and until work is assigned that could be performed there.

The Commission majority also erred in a second fundamental way because even under the Commission's work-currently-assigned interpretation, employees could have performed assigned work in the trailer. The Secretary maintains that "assigned work" in this context must include reasonably foreseeable actions the employees could take in performing the work. There are a variety of ways in which employees could have entered the trailer in performing the task of dumping breading, whether in the course of the actual dumping or in directly related duties such as retrieving a dropped tool or rescuing an endangered colleague. The Commission's refusal to acknowledge that such activities were reasonably foreseeable or that they would qualify as "assigned work" is inconsistent with the Secretary's reasonable

interpretation of this term, the protective purpose of the standard, prior Commission precedent, and comparable coverage principles in other areas of employment law. Accordingly, this court should reverse the Commission's holding that the permit standard did not apply.

ARGUMENT

D. The Secretary's Interpretation of the Standard's Definition of "Confined Space" Is Reasonable and Should be Upheld.

1. The provision of the standard at issue here defines a confined space as a space that is, among other things, "(1) large enough and so configured that an employee can bodily enter and perform assigned work." 29 C.F.R. § 1910.146(b).[10] This clause, read in isolation, is ambiguous because it is not clear from the text alone whether "assigned work" means any work that could possibly be assigned, or refers only to current work assignments. Even though this portion of the definition

[10] The Commission did not address whether the trailer met parts (2) and (3) of the standard's definition of "confined space" or the additional requirements of a "permit space," 29 C.F.R. § 1910.146(b), but the record demonstrates that all of these other elements were met, *see infra*, pp. 49-51 (citing applicable record passages).

is ambiguous, however, the standard's overall text, structure and purpose, as will be shown below, preclude the Commission's interpretation.[11]

The Secretary interprets the definition to include any space large enough and so configured that an employee can enter and perform *some* work, *if* assigned ("the work-if-assigned interpretation").[12] The Commission, by contrast, construes the definition as applying only when employees have currently assigned work that can be performed in the space

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[11] Even if the Secretary's interpretation is not the best of the competing interpretations, the Secretary's interpretation must still be upheld unless it is plainly erroneous or inconsistent with the standard. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994); *Interstate Brands Corp. v. Local 441*, 39 F.3d 1159, 1163 (11th Cir. 1994).

[12] Consistent with this interpretation, the Secretary argued before the ALJ that the definition does not require that work be assigned inside a confined space but mandates only that the space be large enough that an employee could enter and perform assigned work as *may* be directed. Rec. Vol. 14, Doc. 38 at 11. On review by the Commission, the Secretary took the same position, maintaining that the definition's reference to assigned work was merely conditional and pointing out that the standard applies to unauthorized and accidental entries into confined spaces as well as to work assignments there. Rec. Vol. 15, Doc. 48 at 19-20 (citing the standard, the preamble to the final rule and a compliance directive). Thus, the Secretary's interpretation in this brief reflects her position below and OSHA's considered judgment.

("the work-currently-assigned" interpretation"). Rec. Vol. 16, Doc. 69 at 4-6 & n.5.

As shown below, the Secretary's work-if-assigned interpretation sensibly conforms to the wording, structure and purpose of the standard. A central feature of the standard's workplace evaluation scheme is that even spaces where entry is prohibited and accidental entry prevented, and therefore no work can be done, are classified as permit spaces. 29 C.F.R. § 1910.146(c)(3). The Commission's work-currently-assigned interpretation is incompatible with these "no entry" permit spaces. The Commission's interpretation also negates the standard's specific protections against accidental or unauthorized entry into permit spaces.

Finally, the Commission's interpretation is irreconcilable with the standard's requirement that the employer determine that a space is a permit space *before* deciding whether work will be performed there. The Commission's interpretation reverses the order of these workplace evaluations, thereby thwarting the standard's protective purpose by allowing

employers to ignore hazardous spaces unless and until work is assigned that could be performed there.

2. The Secretary's interpretation conforms sensibly to the wording defining a confined space as a space "large enough and so configured that an employee can bodily enter and perform assigned work." 29 C.F.R. § 1910.146(b). This language is concerned with whether the physical dimensions of the space permit work to be performed there. Therefore, if the size and shape of the space would enable an employee to enter and perform some work if assigned, this portion of the definition is satisfied.

The Commission's interpretation, by contrast, is inconsistent with the definition's focus on the physical dimensions of the space. Under the Commission's reading, the determination whether a work space is a confined space turns, not on the space's size and shape, but on the nature of the employer's current work assignments and whether it is possible for the employee who enters the space to do any of those assignments there. The Commission's work-currently-assigned test gives the space a protean character that changes

as the tasks are assigned, defeating the protective purpose of the standard.

3. The Secretary's work-if-assigned interpretation, unlike the Commission's interpretation, also sensibly conforms to the standard's other provisions and to its overall structure and protective purpose. The cited provision of the standard, 29 C.F.R. § 1910.146(c)(2), requires an employer to inform exposed employees of the location and hazards of permit spaces once the employer determines that its workplace has such spaces and without regard to whether employees will be permitted to enter them.[13]

In addition, section 1910.146(c)(3) requires that if the employer determines that employees will *not* enter permit spaces, the employer must take effective measures to prevent employees from entering the spaces. These measures include guarding, barricading and permanently closing the space to prevent accidental or unauthorized entry. Preamble to the

[13] As discussed earlier, *see supra*, p. 7, a permit space is a confined space which contains atmospheric or other hazards. 29 C.F.R. §1910.146 (b).

Final Rule, 58 Fed. Reg. 4462, 4472, 4484 (1993). Thus, the standard presupposes that a space may be a permit space, even if employees will *never* perform any assigned work there. These spaces remain dangerous because of the prospect of accidental or unauthorized entry, and the standard therefore requires employers to protect employees from such entry.

The Secretary's work-if-assigned interpretation is compatible with the standard's provision for no-entry permit spaces and precautions against entering such spaces. That interpretation is compatible with these provisions because it recognizes that a work space's size and shape may permit an employee to enter and perform some work, if assigned, even if no currently assigned work can be performed there, or entry is prohibited.

The Commission's work-currently-assigned interpretation, by contrast, cannot be reconciled with these provisions for no-entry permit spaces and precautions against entering them. The whole point of these sections is to require protective measures for spaces where entry and work are possible but not permitted and thus no work is currently

assigned. The Commission's interpretation is simply incompatible with the existence of "no entry" permit spaces, which constitute the norm in most industries where permit spaces exist. 29 C.F.R. § 1910.146 App. E (entry into permit space to perform assigned work "is a rare and exceptional event" in jobs other than sewer work).[14]

Accordingly, the Secretary's interpretation that a space is a confined space if employees can enter and perform some work, if assigned, is the only reading consistent with section 1910.146(c)(3).

The Secretary's reading is also consistent with the standard's structure. The standard requires different kinds of protective measures depending upon whether employees will, or will not, enter permit spaces. To implement this dual

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[14] In a prior decision, *Secretary of Labor v. Mobil Premix Concrete Inc.*, 18 O.S.H. Cas. (BNA) 1010 (Rev. Comm'n 1997), *see infra*, pp.47-48 n.20, the Commission held that workplace spaces that employees were not allowed to enter were confined spaces, although this decision did not expressly consider the meaning of the language at issue here. In *Mobil Premix*, the Commission held that sand and gravel hoppers were confined spaces when the hopper gates were open even though employees had no assigned duties in the hoppers then but had assigned work nearby, and thus had access to the hoppers. *Mobil Premix*, 18 O.S.H. Cas. (BNA) at 1012 & n.4.

protective scheme effectively, the employer must be able to determine which spaces are permit spaces before determining whether work will be performed in them.

The employer must conduct an initial evaluation of its workplace to determine which spaces are permit spaces. 29 C.F.R. § 1910.146(c). To evaluate its spaces properly, the employer must first determine which of them are "confined spaces" under the standard's definition, and then determine which of the confined spaces contain potential hazards that would make them "permit spaces." *Ibid*; §§1910.146(a) (definitions of "confined space" and "permit space"), 1910.146(c)(1)-(2); Preamble to the Final Rule, 58 Fed, Reg. 4462, 4476, 4481 (1993). If there are permit spaces in the employer's workplace, employees must be informed of their location and hazards even if the employees will not be allowed to enter. §1910.146(c)(2).

If the employer decides to allow employees to enter permit spaces, the employer must develop and implement a written permit space program, including measures to prevent unauthorized persons from entering and to remove any who

do. 29 C.F.R. § 1910.146(c)(4), (d)(1), (i)(8), (j)(5). If, however, the employer decides not to allow employees to enter permit spaces, it must take effective measures to prevent unauthorized entry. § 1910.146(c)(3). Such a space remains a permit space, even though entry is prohibited and no currently assigned work can be performed there.

The Commission's interpretation short-circuits the standard's workplace evaluation scheme by making the employees' ability to perform currently assigned work in a work space a requirement of a confined space. Thus, the Commission's interpretation improperly moves to step one of the evaluation process (the determination whether a space is a confined space), a decision that the standard assigns to step three (i.e., whether currently assigned work will be performed in a permit space).[15]

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[15] By contrast, the Secretary's interpretation is fully consistent with the standard's workplace evaluation scheme because the interpretation allows the classification of a confined space to be fixed in step one, based on whether the space's size and shape permit some work, if assigned, to be performed there. Furthermore, unlike the Commission's work-currently-assigned interpretation, the Secretary's interpretation also conforms to the scheme's provision that the determination

In so doing, the Commission's reading directly conflicts with one of the central purposes of the standard because the reading allows employers to ignore unquestionably hazardous spaces, such as Cagle's' breading trailer, unless and until the employer actually assigns some work that could be performed in the space. The standard, however, is designed to protect not only employees actually working in permit spaces but also to prevent employees from accidental or unauthorized entry into such spaces. Thus, paragraphs (c)(4), (d)(1), (i)(8) and (j)(5) of the standard specifically require employers to take measures, such as guarding and barricading, to prevent unauthorized entry into restricted-entry permit spaces and remove any unauthorized entrants. 29 C.F.R. § 1910.146(c)(4), (d)(1), (i)(8) & (j)(5).[16]

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that currently assigned work *will* be performed in the space cannot be made until step three, i.e., after the space has been classified as a permit space.

[16] OSHA specifically intended the standard to prevent accidental or unauthorized entry into a permit space, and revised the proposed definition of "entry" to include unintentional as well as intentional entry. Preamble to the Final Rule, 58 Fed. Reg. at 4462, 4472, 4483-84; Preamble to the Proposed Rule, 54 Fed. Reg. at 24,102. The regulatory

The standard's precautions against accidental or unauthorized entry are equally applicable when no work is to be performed in the space, but an employee could unintentionally or unwittingly enter and be trapped or overcome by a hazardous atmosphere. 29 C.F.R. § 1910.146(c)(3); Preamble to the Final Rule, 58 Fed. Reg. at 4462, 4472, 4483. The Commission's interpretation, however, would deny these protections to employees working on or near intrinsically hazardous spaces so long as the employees could not perform any currently assigned work inside the space. Therefore, the Commission's interpretation is incompatible with the standard's specific requirement to prevent accidental or unauthorized entry into permit spaces where no work is to

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history expresses OSHA's intent to prevent such accidents, where fatalities resulted not from performing assigned work in a confined space but from having access to it: "there have been cases where employees who were working in water towers and bulk material hoppers slipped or fell into narrow, tapering, discharge pipes and died of asphyxiation due to compression of the torso." Preamble to the Final Rule, 58 Fed. Reg. at 4462.

be performed. 29 C.F.R. § 1910.146(c)(3) (requiring employers to take effective measures to prevent such entry).[17]

In summary, the Commission's interpretation is untenable for three reasons. First, it is incompatible with the standard's provision for "no entry" permit spaces. Second, the Commission's interpretation negates the standard's specific protections from accidental or unauthorized entry into permit spaces. Third, contrary to the standard's workplace evaluation scheme, the interpretation considers whether current assignments can be performed in a space *before* determining whether the space contains a serious hazard.

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[17] The Commission's interpretation is also inconsistent with the standard's workplace evaluation scheme because the interpretation allows a work space's status as a permit space to fluctuate with the new assigned tasks that could be performed there. Thus, under the Commission's analysis, Cagle's' trailers do not meet the first element of the confined space definition for the assigned task of dumping waste breading, but *would* meet the definition (and the definition of a permit space) if employees had to enter to retrieve a dropped breading box or to perform maintenance or repair work on the trailer, or to perform any other assigned job task. The standard, however, does not provide for such fluid reclassification of confined spaces, and restricts changes in the status of permit/non-permit spaces to elimination of hazards in the former, 29 C.F.R. § 1910.146(c)(7), and changes in the use or configuration of the latter that might increase the hazards, § 1910.146(c)(6).

Thus, the interpretation thwarts the standard's protective purpose by allowing employers to ignore hazardous spaces unless and until work is assigned that could be performed there.

The Secretary reasonably construed the first element of the definition of "confined space" to mean that a space must be large enough and so configured that an employee can enter and perform some work, if assigned. Cagels's' waste breading trailer, which measured 40 feet long, by 7 1/2 feet wide, by 7 1/2 feet high, clearly met this criterion. The Commission erroneously interpreted the standard to require proof that currently assigned work could be performed inside the space. Accordingly, the Commission's holding that the permit space standard did not apply to Cagle's' breading trailers must be reversed.

E. Alternatively, The Commission Erred in Holding That The Assigned Work Of Dumping Breading Could Not Be Performed in the Trailer.

Alternatively, the Court should reverse the Commission because its holding that the assigned work of dumping the breading could not be performed in the trailer conflicts with

the Secretary's reasonable interpretation that "assigned work" includes the employees' reasonably foreseeable actions in performing the work, and because the Commission did not focus on the primary meaning of the word "can" in the definition.

1. As shown below, the employees at issue here could have entered the trailer to perform the actual dumping of the breading boxes or to perform directly related tasks such as retrieving a dropped tool or rescuing an endangered colleague. The Commission's refusal to acknowledge that such activities were reasonably foreseeable or that they would qualify as "assigned work" is inconsistent with the Secretary's reasonable interpretation of the term, the protective purpose of the standard, prior Commission precedent and comparable coverage principles in other areas of employment law.

Contrary to the Commission's finding, there are many ways in which employees could have entered the trailer in the performance of their assigned work. First, employees dumping waste breading from the roof of the trailer could have put their hands in one of the roof openings while manually dumping the

breading. Both the Commission and the ALJ found that Williams and Higginbotham, the two employees who were found dead inside the trailer, were performing assigned dumping activities *on top of* the trailer on the day of the accident. Rec. Vol. 16, Doc. 69 at 3; Rec. Vol. 14, Doc. 42 at 5, 7. Moreover, the method of roof-top dumping was to cut out the side of a box with a knife and empty the box manually through one of the roof openings, Rec. Vol. 1 at 48-49; Rec. Vol. 14, Doc. 42 at 6. Since the standard defines "entry" as occurring "as soon as any part of the entrant's body breaks the plane of an opening into the space," 29 C.F.R. § 1910.146(b), it is possible that one or both of the employees entered the trailer—i.e., put his hands in the roof opening—and performed the assigned work of dumping breading.

Second, in the primary sense of the word "can," meaning "physically or mentally able to," Webster's Third New International Dictionary 323 (1986), Williams and Higginbotham could have jumped into the trailer through a

roof opening and manually dumped breading.[18] The two employees could have entered through the five-foot-square opening with a two-foot-square cardboard box full of breading and emptied the box. Indeed, the fact that the bodies of the two employees and part of such a box were found in the trailer on the day of the accident, Rec. Vol. 1 at 82; Rec. Vol. 4 at 716; Rec. Vol 10, Ex. C-5, shows that the employees who were performing the assigned duty of dumping breading did enter the trailer. The Commission's contrary finding that the employees could not have performed assigned work inside the trailer is speculative, and focuses on the *improbability*, not the *physical impossibility*, of entering the trailer to dump breading. *See* Rec. Vol. 16, Doc. 69 at 5.

Moreover, as the dissent pointed out, the Commission's finding relies on a selective use of the definition of "can," Rec. Vol. 16, Doc. 69 (Rogers) at 4 & n.7. Specifically, the Commission partially quotes a secondary meaning of "can," i.e., "made possible or probable by circumstances," leaving out

[18] To illustrate the use of the "physically able" meaning of "can," Webster's gives the example "he can lift 200 pounds." Webster's Third New International 323.

the words "or probable." Rec. Vol 16, Doc. 69 at 4; Webster's Third New International 323. The Secretary's use of the primary meaning of "can" (concerning physical ability) in interpreting the standard, however, is reasonable, and the Commission erred in not focusing on that meaning.[19]

Third, it was reasonably foreseeable that the employees could have entered the trailer through a roof opening in the direct performance of their assigned dumping activities on the roof top. For example, as both the Secretary and the Commission dissent pointed out, it was reasonably foreseeable that an employee dumping breading into the trailer by using a knife to cut open the end of the breading box might accidentally drop his knife through the roof opening and

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[19] The Commission alternatively claims that Williams and Higginbotham were physically unable to enter the trailer and perform assigned work. Rec. Vol. 16, Doc. 69 at 5 n.4. The Commission's principal argument for this conclusion is that it would have been extremely difficult for the two employees to *leave* the trailer after jumping in or lowering themselves to the floor. *Id.* at 5 & n.4. The difficulty of leaving the trailer, however, does not show that it was impossible to *enter* and perform assigned work, but instead tends to prove that the trailer met the requirement of the second part of the definition, that a confined space have a limited or restricted means of exit. 29 C.F.R. § 1910.146(b).

attempt to retrieve it. Rec. Vol. 15, Doc. 48 at 20; Rec. Vol. 16, Doc. 69 (Rogers) at 7.

Fourth, it was also reasonably foreseeable that if one employee jumped or fell into the trailer, the other employee would try to rescue his endangered colleague. The record suggests that such a scenario might have happened here because, as noted, part of a waste breading box and two dead workers were found in the trailer.

It was, therefore, possible for employees to enter the trailer to perform functions directly related to their assigned task of dumping waste breading. Indeed, both the Commission and OSHA have observed that employee rescue attempts in confined spaces are readily foreseeable and, all too often, result in the death or injury of untrained rescuers as well as of their endangered co-workers. *Secretary of Labor v. Pride Oil Well Serv.*, 15 O.S.H. Cas. (BNA) 1809, 1810, 1816 (Rev. Comm'n 1992); *Secretary v. Aro, Inc.*, 1 O.S.H. Cas. (BNA) 1453, 1455-56 (Rev. Comm'n 1973) (Van Namee, C., concurring); *see* OSHA, Preamble to the Final Rule, 58 Fed. Reg. at 4465-67 (listing examples of unsuccessful rescue

attempts and noting that "rescuers" accounted for over 60 percent of confined space fatalities).

The Commission denied that an attempt to retrieve a dropped tool from the trailer could constitute "assigned work, or that the record indicated that any assigned work could have been performed in the trailer. Rec. Vol. 16, Doc. 69 at 4-6. The Commission dismissed recovery of tools as a mere "detour from the work assigned, . . . not encompassed within the plain meaning of 'assigned work.'" *Id.* at 5 n.3.

The Commission also did not consider whether a fall through the unguarded opening while performing assigned dumping duties on the roof could be regarded as assigned work. Nor did the Commission address whether any spontaneous attempt to rescue a co-worker in the trailer could count as an assigned task. In short, the majority considered only whether an employee would be physically able to carry a breading box down a ladder, dump it, and return. Rec. Vol. 16, Doc. 69 at 5.

The Commission erred in failing to consider tasks directly related to the dumping that could foreseeably result in

employee entry. The standard is intended to prevent employees from accidental or unauthorized entry into permit spaces. *See supra*, pp. 35-37. The Commission's exclusion of employees who fall into confined spaces while performing assigned work in adjacent work areas frustrates the standard's specific intent to prevent precisely that type of accident. *See supra*, pp. 35-36 n.16 (quoting the preamble to the final rule).

Another related task, the attempted rescue of a co-worker, is discussed in the regulatory history and in the Commission's own cases, and accounts for the bulk of confined space fatalities. *See supra*, pp. 43-44. The Commission's failure to regard a spontaneous rescue attempt inside a confined space as assigned work clashes with the standard's explicit intent to cover this activity. The regulatory history discusses examples of unsuccessful spontaneous rescue attempts in confined spaces to illustrate how "death and injury would have been prevented if the procedures and safeguards required in this rule had been used." Preamble to the Final Rule, 58 Fed. Reg. at 4466-67; Preamble to the

Proposed Rule at 24,083-85. The preamble to the final rule specifically notes that the standard protects untrained or poorly trained confined space rescuers. Preamble to the Final Rule, 58 Fed. Reg. at 4465.

2. The Commission's restrictive view of "assigned work" is also inconsistent with comparable coverage principles in other areas of employment law. The Commission's finding that retrieval of a dropped tool from the inside of the trailer is merely a "detour" from, and not part of, an employee's "assigned work" is contrary to the comparable principle of the "scope of employment" in the law of agency. An employer is liable for the actions of its employees when they act within the scope of employment, i.e., perform assigned work or engage in a course of conduct subject to the employer's control and intended to serve the employer's purposes. *Restatement (Third) of Agency*, § 7.07(1)-(2) (2006).

Thus, contrary to the Commission's contention, the retrieval of a dropped tool is directly related to the employee's performance of his assigned work. An attempted retrieval flows from the worker's dumping activities on the trailer roof,

is intended to save a tool used to perform assigned work, and is readily foreseeable. Furthermore, since Cagle's, through its supervisors, knew that employees were dumping breading from the trailer roof, Rec. Vol. 1 at 26-27, 49-50, 68, 92; Rec. Vol. 2 at 236, 294-96, that activity, and its foreseeable consequences, were within Cagle's control.

The Commission's failure to consider a fall through the roof opening while performing assigned dumping duties "assigned work," or to regard a spontaneous rescue attempt in the trailer as such work, conflicts with the related principle of "course of employment" in workers' compensation law. The leading treatise on that subject notes that the course of employment extends to any injury which occurred at a point where the employee was within the range of dangers associated with the employment. 1 Larson & Larson, *Workers' Compensation Law* 13-1 (2006).[20] Similarly, any emergency or

[20] This principle is in harmony with prior Commission precedent, which the Commission disregarded here, that the permit space standard applies where employees perform assigned duties within the "zone of danger" of a permit space, i.e., in proximity to a hazardous condition in such a space, even where there are no assigned duties there. *See Secretary*

rescue activity is within the course of employment if the employer has an interest in the rescue. Id. at 28-1. The course of employment is implicitly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest. *Id.*, § 28.01[1].

Both the Commission and the ALJ found that Williams and Higginbotham were performing assigned dumping activities on top of the trailer on the day of the accident. Rec. Vol. 16, Doc. 69 at 3; Rec. Vol. 14, Doc. 42 at 5, 7. Since the ALJ also found that this work exposed the two employees to the unprotected roof openings and the carbon dioxide hazard in the trailer, Rec. Vol. 14, Doc. 42 at 7-8, any fall into the trailer that may have occurred would have arisen from the employees' assigned work on top of the trailer. Moreover, an attempt to retrieve a dropped tool, or rescue a co-worker, from the trailer would serve Cagle's interest in saving tools and employees. Thus, contrary to the Commission's findings,

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of Labor v. Mobil Premix Concrete, Inc., 18 O.S.H. Cas. (BNA) 1010, 1012 & n.4 (Rev. Comm'n 1997).

Williams and Higginbotham could easily have entered the trailer in the direct performance of their assigned work of dumping the breading.

C. Cagle's Committed the Disputed Serious Violation of the Permit Space Standard.

To establish a serious violation of an OSHA standard, the Secretary must show, by a preponderance of the evidence, that (1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) the employees had access to the violative condition; and (4) the employer had actual or constructive knowledge of the violative condition. See OSH Act, § 17(k), 29 U.S.C. § 666(k); *Secretary of Labor v. Fluor Daniel*, 19 O.S.H. Cas. (BNA) 1529, 1530 (Rev. Comm'n 2001), *aff'd.*, 295 F.3d 1232 (11th Cir. 2002).

The Commission disposed of the disputed serious violation of the permit space standard at 29 C.F.R. § 1910.146(c)(2) by holding that the standard did not apply because the trailer did not meet the first part of the standard's definition of "confined space." Rec. Vol 16, Doc. 69 at 3-6; § 1910.146(b). If this court reverses the Commission's holding

on the first part of the definition, the court should affirm the disputed serious violation because the record establishes that the trailer met the other parts of that definition and the definition of "permit space." The record also shows that all the other elements of a serious violation were present. A court may review a factual issue where, as here, the record permits only one conclusion. *Brennan v. OSHRC* ("*John J. Gordon Co.*"), 492 F.2d 1027, 1032 (2d Cir. 1974).

The trailer satisfied the second part of the definition of "confined space," limited or restricted means for entry or exit, 29 C.F.R. § 1910.146(b), because the only means of entry was through the roof openings, or by the difficult process of manipulating the pin locks on the outside of the back doors. Rec. Vol. 6 at 1093, 1096-97; Rec. Vol. 10, Ex. C-37. Similarly, the exit was restricted since the trailer doors were locked from the outside, Rec. Vol. 2 at 293, and the only way to leave was through the roof openings. The trailer also fulfilled the third part of the definition, § 1910.146(b), because it is undisputed that the unventilated trailer was not designed for continuous employee occupancy. Rec. Vol. 4 at 716; Rec.

Vol. 14, Doc. 42 at 8. Moreover, the trailer met the definition of a permit space, § 1910.146(b), because it is also undisputed that the trailer contained an oxygen-deficient atmosphere hazardous enough to kill two employees. Rec. Vol. 1 at 5.

The record further establishes that Cagle's violated the disputed provision (29 C.F.R. § 1910.146(c)(2)), if it applied, since there is no dispute that the company failed to post danger signs informing exposed employees of the existence, location and danger of the waste breading trailer as a permit space. Rec. Vol. 14, Doc. 42 at 8. Nor is there any evidence that Cagle's used any other equally effective means of so informing employees. The ALJ found that employees had access to the violative condition in the trailer through the unprotected roof openings, and that Cagle's knew about their access to the violative condition. *Id.* at 7-8. Because the record permits only the conclusion that Cagle's committed the serious violation in question, this court should affirm that violation. Alternatively, the court should remand this case to the Commission to decide these issues.

Although the record contains the Secretary's undisputed basis for proposing a penalty of $5,000 for the serious violation in question, Rec. Vol. 4 at 876, 892, the Commission has statutory authority to assess penalties. See OSH Act, § 17(j), 29 U.S.C. § 666(j). Accordingly, should this court affirm the disputed serious violation, the Secretary respectfully requests that the court remand this case to the Commission to assess an appropriate penalty under section 17(j) of the Act, based on the existing record.

CONCLUSION

For these reasons, the court should reverse the Commission's holding that the permit standard did not apply, affirm the disputed serious violation of 29 C.F.R. §

1910.146(c)(2), and remand this case to the Commission for assessment of an appropriate penalty.

Respectfully submitted.

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