07-1399-ag

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELAINE CHAO, Secretary of Labor,

Petitioner,

v.

THE BARBOSA GROUP, INC. d/b/a EXECUTIVE SECURITY and the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

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

REPLY BRIEF FOR THE SECRETARY OF LABOR

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APRIL 2008

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The Commission's decision to reclassify Barbosa's follow-up care citation was error. The Commission held that mere partial compliance by an employer, regardless of its subjective intent or the reasonableness of efforts to comply with the standard, is sufficient to defeat willfulness. If left to stand, this holding would substantially weaken the law of willfulness. As such, the Commission's decision creates a dangerous precedent that should be reversed.

Moreover, there is no view of the evidence that would allow a reclassification of the violation from willful to serious. Barbosa's intent with respect to its follow-up care violation was the same as its intent with respect to its failure to provide hepatitis B vaccinations, and the Commission unanimously affirmed the classification of that violation as willful. The evidence shows that the relevant Barbosa executives knew of the standard's requirements but decided that the expenses its employees incurred for follow-up care would not be paid. Moreover, Barbosa's provision of health care benefits was not an objectively reasonable attempt to cover the copayments and

time and travel expenses that its employees incurred here. The Commission's decision should be reversed and the willful classification should be reinstated.

Barbosa's brief spends surprisingly little time defending the Commission's stated rationale. Instead, it raises a host of new arguments for leaving the Commission's result intact. As explained below, Barbosa's arguments are either waived or insufficient. This Court should reject them and reverse the Commission.

I. This Court has, and the Commission had, Jurisdiction to Hear this Matter.

Barbosa first argues that because the violation took place at an INS facility, the Commission and this Court lacked jurisdiction over the citation under section 4(b)(1) of the OSH Act. This argument, not raised at any time until now in these proceedings, should be rejected. Section 4(b)(1) of the OSH Act states that the Act does not apply to "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29

U.S.C. § 653(b)(1). As explained below, this exception to coverage is not jurisdictional and Barbosa waived it by not raising it before the Commission. Further, even if it were jurisdictional, it does not apply here.

A. Section 4(b)(1) is not a Limitation on Subject Matter Jurisdiction.

Though Barbosa argues to the contrary, the exception provided by section 4(b)(1) is not a matter of subject matter jurisdiction that may be raised at any time, because there is no clear indication that Congress intended it to "count as jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). In *Arbaugh*, the Supreme Court articulated a bright line rule to determine whether a statutory provision is jurisdictional, and thus amenable to being raised at any time. *Id.* At issue were provisions under Title VII that, when read together, prohibited claims against employers having fewer than 15 employees. *Id.* at 504-05. After the plaintiff prevailed at trial, the employer moved to dismiss on the ground that it had fewer than 15 employees. *Id.* at 508. The employer

argued that the requirement concerned subject matter jurisdiction, and could be raised at any time. *Id.*

In considering the argument, the Court noted that the 15 employee requirement appeared neither in the statute's jurisdictional provision nor the general federal question statute. *Id.* at 515. Rather, it appeared in a separate section that did not speak in "jurisdictional terms." *Id.* Given the unfairness involved and the potential for waste of judicial resources, the Court refused to characterize the requirement as one of subject matter jurisdiction absent a clear statement by Congress to the contrary. *Id.* Finding none, the Court held that the number of employees requirement was merely an element of the plaintiff's claim for relief and did not raise a jurisdictional issue. *Id.* at 516.

Applying *Arbaugh*, this Court has refused to treat threshold statutory issues as jurisdictional where they did not appear in the provision labeled "jurisdiction." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 80 n.11 (2d Cir. 2006) (noting that court of appeals did not have to consider whether the district court had the power to order divesture and whether the

plaintiff was an injured party under 47 U.S.C. § 401(b), where the language creating those issues did not arise in section 401(a), labeled "jurisdiction"). And the D.C. Court of Appeals has decided in the wake of *Arbaugh* that the Administrative Procedure Act's requirement that only "final agency action" is reviewable, 5 U.S.C. § 704, is not a jurisdictional predicate to seeking administrative review because Congress did not clearly state that it related to subject matter jurisdiction. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 184-85 & n.6 (D.C. Cir. 2006); *see also Long Term Care Partners v. United States*, 516 F.3d 225, 238-39 (4th Cir. 2008) (assuming the same without deciding).

Likewise here, there is no indication that section 4(b)(1) was intended to deprive the Commission or this Court of subject matter jurisdiction. As was true in *Arbaugh* and *Ellis*, there is no reference to section 4(b)(1) or its requirements in either of the provisions that give the Commission and the courts of appeals jurisdiction to hear matters under the Act. *See* OSH Act §§ 10(c) & 11, 29 U.S.C. §§ 659(a) & 660. And like the APA provision involved in *Trudeau*, section 4(b)(1) itself

does not state that the Commission or the courts lose jurisdiction to hear OSHA citations where another federal agency has statutory authority to regulate occupational safety and health.

Moreover, section 4(b)(1) is intended to eliminate duplication of effort and resources in the protection of occupational safety and health. *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir. 1986). A claim that section 4(b)(1) exempts coverage, made on appeal after an evidentiary hearing, does not serve to eliminate duplication of effort; rather, by that time most of the effort involved in the adjudication of the dispute has already been expended. The only effect would be to relieve an employer already found to have violated the OSH Act of its obligations for abatement and penalties. Thus, the policy behind the provision does not support the idea that Congress intended that it could be raised at anytime in the proceedings. Instead, the more general goal of ensuring worker safety and health should control where a claim of duplication is not timely made.

This Court's decision in *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119 (2d Cir. 1978), supports the view that section 4(b)(1) is not jurisdictional. In that case, OSHA sought a warrant to inspect an airline hanger. *Id.* at 121. The owner sought to quash the warrant on the grounds that safety and health at the hanger was within the FAA's jurisdiction, and therefore section 4(b)(1) exempted OSH Act coverage. *Id.* This Court ruled that OSHA's inspection could go forward. Because the section 4(b)(1) inquiry involved "complex questions of law and fact," this Court determined that the proper course was to allow it to be raised by the employer in the course of enforcement proceedings before the Commission. *Id.* at 122. Thus, the employer was required to exhaust its administrative remedies, which was particularly appropriate because "administrative review is forthcoming and the agency will be given an opportunity to apply its expertise." *Id.*

Although *Northwest Orient* did not explicitly address whether section 4(b)(1) is jurisdictional, the plain import of the decision is that it is not. If it were a matter of jurisdiction, the court would have been forced to address the issue before

enforcing the warrant, rather than deferring to the administrative proceedings. To the same effect are the decisions of the Commission, which hold that section 4(b)(1) is an affirmative defense that must be established by the employer and may be waived if not timely asserted. *See*, *e.g.*, *Rockwell Int'l Corp.*, 17 O.S.H. Cas. (BNA) 1801, 1803 (Rev. Comm'n 1996) (stating that section 4(b)(1) is an affirmative defense to be proved by the employer); *Lombard Brothers, Inc.*, 5 O.S.H. Cas. (BNA) 1716, 1717 (Rev. Comm'n 1977) ("It is well-settled that the nature of section 4(b)(1) is not jurisdictional but exemptory and that the affirmative defense permitted by the section cannot be raised beyond the hearing stage of the proceedings.").

In support of its argument that section 4(b)(1) is jurisdictional, Barbosa relies on *U.S. Air, Inc. v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) and *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980). Those cases are not persuasive and should not be followed. They predate *Arbaugh* and do not apply its clear statement rule. Further, they are inconsistent with *Northwest Orient* for the reasons set

out above. Finally, they provide no reasoning to support their determination that section 4(b)(1) is jurisdictional, but merely assert it. *See U.S. Air*, 689 F.2d at 1193; *Columbia Gas*, 636 F.2d at 918. Thus, this Court should find that section 4(b)(1) is not jurisdictional and that Barbosa waived the defense by not asserting it at the hearing stage.

B. Even if Section 4(b)(1) Were Jurisdictional, Barbosa Has Failed to Show that it Applies Here.

Barbosa's section 4(b)(1) argument also fails on the merits. As the party invoking an exception to statutory coverage, Barbosa bears the burden of proving section 4(b)(1)'s applicability. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). Barbosa has failed to carry its burden here.

Section 4(b)(1) is intended "to eliminate any duplication in the efforts of federal agencies to secure the well-being of employees." *Northwest Orient*, 574 F.2d at 122. However, Congress did not intend to eliminate OSHA's jurisdiction merely because of "hypothetical conflicts." *Id.* Thus, "mere possession by another federal agency of unexercised authority

to regulate certain working conditions is insufficient to displace OSHA's jurisdiction." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241 (2002).

In order to establish preemption under section 4(b)(1), then, it must be shown that (1) another federal agency has statutory authority "to prescribe or enforce" health and safety regulations related to the "working conditions" at issue, and (2) that the agency has actually exercised that authority by "issuing regulations having the force and effect of law." *Rockwell Int'l Corp.*, 17 O.S.H. Cas. (BNA) 1801, 1803 (Rev. Comm'n 1996); *see also Mallard Bay*, 534 U.S. at 242 (stating that it is necessary to examine "the contours" of the agency's exercise of its statutory authority, not merely the existence of that authority).

1. Barbosa has Failed to Show that INS has Relevant Statutory Authority.

Barbosa fails to make either showing. First, it fails to point to any statutory authority allowing the INS to either prescribe or enforce occupational safety and health regulations for private contractors such as Barbosa. Review of the

Immigration and Naturalization Act reveals none. *See* 8 U.S.C. § 1101 *et seq*.

2. Even Assuming that It Had the Authority, Barbosa has Failed to Establish that the INS Exercised It.

Second, even assuming such statutory authority existed, there is no indication that the INS has exercised it. Statutory authority is exercised, for the purposes of section 4(b)(1) preemption, where the agency has "promulgat[ed] specific regulations or . . . assert[ed] comprehensive regulatory authority" over the working conditions at issue. *Mallard Bay*, 534 U.S. at 243. Again, Barbosa points to no INS regulations governing bloodborne pathogen exposure in its detention centers, and review of the INS regulations reveal none. *See* 8 C.F.R. § 1.1 *et seq*. Nor has Barbosa pointed to any assertion by INS of comprehensive authority over occupational safety and health in its detention centers.

Indeed the record, if anything, shows the contrary. Rather than asserting that its authority was infringed upon once Barbosa was cited, the INS sent a letter requesting that Barbosa comply with the OSH Act and the bloodborne

pathogen standard. R. Vol. 8, Ex. R-11 at 314. Barbosa offered as an exhibit at trial the INS's bloodborne pathogen exposure control plan, but the plan states that its "authority" is found in OSHA's bloodborne pathogen standard.[1] R. Vol. 7, Ex. R-2 at 2. Further, the plan states that it should be made available to "INS employees and available to a representative of OSHA upon request." *Id.* Thus, this plan is simply an implementation of OSHA's requirements, not an assertion of comprehensive regulatory authority over bloodborne pathogen exposure.

3. Section 4(b)(1) Is Not Invoked By Contract.

In the end, Barbosa's argument resolves to the contention that the INS exerted authority over occupational safety and health by virtue of the contract between itself and the INS. That position is also refuted by the law and the facts.

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[1] Indeed, the bloodborne pathogen standard requires that all employers whose employees are reasonably anticipated to be exposed to blood have such a plan. 29 C.F.R. § 1910.1030(c)(1). As a federal agency, the INS is required to comply with the OSH Act and OSHA's standards. OSHA Act § 19(a), 29 U.S.C. § 668(a). Barbosa was cited for its failure to have such a plan, A-8, and its liability on that citation is not at issue here.

First, a federal agency may not exercise section 4(b)(1) preemption by contract. *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983). Rather, preemption is only effective where the agency "implements the regulatory apparatus necessary to replace those safeguards required by the Act." *Id.* Such safeguards are not present where standards may be enforced only by contract termination, a penalty that stands in "sharp contrast" to the criminal and civil penalties provided by the OSH Act. *Id.* at 1421 & n.3. "To hold otherwise would permit any federal agency to dilute, without congressional approval, the safety standards and remedies contained in the Act." *Id.* Indeed, OSHA's regulations make clear that all federal contractors must comply with OSHA rules. 29 C.F.R. § 1960.1(f).

Moreover, nowhere in the contract does INS arrogate to itself all authority over occupational safety and health. To the contrary, the INS interpreted the contract as requiring Barbosa to "comply with all federal, state and local health laws and regulations." R. Vol. 8, Ex. R-11 at 309. While the contract requires Barbosa to comply with INS "rules,

regulations, and related procedures," A-26, Barbosa has failed to identify any such INS rule, regulation, or procedure relating to occupational safety and health. Barbosa relies on various contractual provisions in support of its argument, but none show that the INS has attempted to displace OSHA regulation. Barbosa also relies on the facts that the INS provided training, had a bloodborne pathogen exposure plan and reporting requirements, and provided protective equipment. Respondent Brief at 25-26. These facts are less indicative of an intent to preempt OSHA than of an intent to comply with its requirements.

Finally, Barbosa analogizes the INS detention center to a military base, and claims that Congress could not have intended the OSH Act to apply in such circumstances. Respondent Brief at 28-29. There is, indeed, an exemption for *federal employees* engaged in activities involving "uniquely military equipment, systems, and operations." 29 C.F.R. § 1910.1(e). But Barbosa's employees were not federal employees or engaged in military operations. Further, the caselaw holds that defense contractors must comply with the

OSH Act. *See*, *e.g.*, *Ensign-Bickford*, 717 F.2d at 1421 (rejecting section 4(b)(1) claim by DoD contractor making anti-tank test rockets); *MEI Holdings, Inc.*, 18 O.S.H. Cas. (BNA) 2025, 2027 (Rev. Comm'n 2000) (rejecting section 4(b)(1) claim by DoD contractor manufacturing explosives), *aff'd without op.* 247 F.3d 247 (11th Cir. 2001). Barbosa's military analogy adds nothing, and its jurisdiction defense should be rejected.

II. The Standard Against Which Barbosa's Partial Compliance Should Be Judged is Objective Reasonableness.

Turning to the merits, the Commission reclassified the medical follow-up citation from willful to serious based on only two findings: (1) that Barbosa's conduct partially complied with the requirements of the standard, and (2) that Barbosa's "personnel . . . receive[d] the treatment required by the standard." SPA-15.

As explained in the opening brief, the effect of the Commission's determination is that employers may avoid willfulness findings, regardless of their intent, if they take some steps to partially comply with the standard. Rather, the standard to be used is whether those efforts are objectively

reasonable. Petitioner Brief at 27-30. To be objectively reasonable, an employer's efforts should be aimed at full compliance with the standard: partial compliance is not objectively reasonable where the employer knows that its efforts will not meet the standard's requirements. *Id.*; *see Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1240-41 (11th Cir. 2002); *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1155-56 (11th Cir. 1994).

The Commission's decision is thus a substantial departure from precedent, and it would preclude willful citations for employers that, for example, deliberately pay only 75% of the required costs for follow up treatment. The Secretary took this appeal because of these troubling implications.

Barbosa attempts to defend the Commission's decision by pointing to *Brock v. Morello Bros. Const., Inc.*, 809 F.2d 161 (1st Cir. 1987), suggesting that it articulates a less stringent standard for willfulness.[2] Respondent Brief at 47-49. But

[2] Barbosa is incorrect when it states that the Secretary's litigation position is entitled to only "limited deference."

Brock is fully consistent with the idea that partial compliance, alone, is insufficient to defeat a finding of willfulness.

In *Brock*, the issue was whether the ALJ's finding that the employer had willfully failed to comply with roof safety standards was supported by substantial evidence, and the court found that it was. 809 F.2d at 163, 166. There an OSHA inspector had visited a roofing contractor's worksite and found several violations of the roof safety standard. *Id.* at 163. When the inspector returned the next day, he found that the contractor had made substantial efforts to cure the violations, but it still had machines on the roof and employees working too close to the edge without proper protections, and cited the employer. *Id.*

Unlike the Commission in this case, *Brock* did not end its analysis of the case with the fact that the employer had partially complied with the standard. *Id.* at 165. Rather, it looked to whether the ALJ could have found that those were

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Respondent Brief at 34 n.11. To the contrary, even the Secretary's interpretations that are embodied in citations are entitled to *Chevron* deference. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991); *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 & n.4 (D.C. Cir. 2003).

reasonable efforts to comply with the standard as the contractor understood it. *See id.* The court noted that while the contractor had received the pertinent regulation two weeks earlier, it stated that the regulations were not so clear that the employer must have known all the details. *Id.* In addition, there was testimony that the OSHA inspector's statements might have misled the employer about the requirements of the standard. *Id.*

Thus *Brock* considered whether the employer attempted to fully comply with the standard as he understood it; it certainly does not stand for the proposition that partial compliance, irrespective of the reasonableness of those efforts, is sufficient to defeat willfulness. *Brock* does not help Barbosa, and because the Commission did not apply the correct standard, reversal is necessary. *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 109 (2d Cir. 1996) (stating that a decision based on an impermissible interpretation of the statute must be reversed).

III. The Commission's Decision Did Not Apply Existing Law.

Rather than defending the legal implications of the Commission's decision, Barbosa's main argument attempts avoid the issue by arguing for a different construction of the decision. Barbosa says that the Commission's majority "simply applied a well-established definition of 'willful' to the facts of this case" and argues that the majority's finding on this score is supported by substantial evidence. Petitioner Brief at 34; *see also id.* at 50. Barbosa's interpretation is supported by neither the text of the decision nor the record.

"An OSHA violation is willful if it is committed with intentional disregard of, or plain indifference to, the requirements of the statute." *Lakeland Enterprises of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 747 (7th Cir. 2005). While the majority correctly articulated this standard, SPA-14, there is no indication in the decision that it actually applied it. The whole of its discussion is as follows:

> With regard to the violation of 29 C.F.R. § 1910.1030(f)(3), the post-exposure evaluation and follow-up treatment item, Barbosa paid—either directly or through workers' compensation—for the

> initial post-exposure evaluation obtained by its injured security personnel at a local hospital. All of these personnel also obtained the post-exposure evaluation and follow-up treatment required by 20 C.F.R. § 1910.1030(f)(3) pursuant to Barbosa's employer-provided health care coverage. However, Barbosa not only failed to cover the co-pay associated with this treatment, but it also charged leave to the injured personnel for the work-time spent obtaining this treatment. While Barbosa's conduct does not fully comply with the requirements of the cited provision, its personnel did receive the treatment required by the standard. Under these circumstances, Chairman Railton and I find no evidence in the record that Barbosa demonstrated an intentional disregard rising to the level of willfulness and, therefore affirm the violation as serious. *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1444-45, 1993-95 CCH OSHD ¶ 30,239, pp. 41,652-53 (No. 91-103, 1993) (employer's efforts to prevent violation sufficient to negate willfulness, even if efforts are insufficient to fully eliminate hazardous conditions)*, aff'd without published opinion*, 52 F.3d 1122 (D.C. Cir. 1995).

SPA-14 to SPA-15 (footnote omitted).

Willfulness requires an inquiry into the employer's knowledge of the standard and of the violative conduct. *See*, *e.g.*, *Brock*, 809 F.2d at 164. As the forgoing discussion shows, there is nothing in the majority's decision to suggest it conducted such an inquiry. Nowhere did it consider any evidence concerning Barbosa's knowledge either about the

standard or its failure to cover the costs at issue. The majority neither considers nor rejects the Secretary's evidence on these points. It does not discuss any of the few items of evidence relied upon Barbosa in its brief here to support the decision. And while it notes that Barbosa's provision of health benefits covered some of the costs at issue, the majority makes no inquiry into whether Barbosa thought it was fully complying with the standard by so doing.

Moreover, Commissioner Rogers, in her dissent, does engage with such facts about Barbosa's intent. She specifically found that Barbosa "consciously refused . . . to cover the co-pay associated with post-exposure treatment." SPA-22. The majority did not engage her on this point, which suggests that it was not conducting an inquiry into Barbosa's state of mind as required by the accepted legal standard.

Further, the fact that the majority left the ALJ's factual findings on willfulness undisturbed weighs against a reading of the decision as an application of existing law. The ALJ specifically found that

> Barbosa knew of the [of the no-cost requirement], and made the economically-based decision not to supplement whatever the employees' medical insurance covered. Barbosa did so in the full knowledge that the employee medical insurance coverage was insufficient to render post-exposure care cost free to the employees.

A-167. The Commission left these findings undisturbed. Certainly, had it been applying the accepted definition of "willful," the majority would have addressed them and explained why they were unsupported by the record.

The ALJ also relied on Barbosa's argument that its contract with INS precluded it from complying with the standards requirements in this regard. A-167. The ALJ rejected that contention and instead found that by "maintaining such a narrow focus on the terms of its contract with INS, and its seeking to absolve itself of responsibility, especially in the face of employee requests, complaints and faxes, constitutes plain indifference." *Id.* Again, this finding would have been set aside if the majority was simply applying the accepted understanding of willfulness, but the decision makes no mention of it.

In addition, at no time before the Commission did Barbosa ever challenge the ALJ's findings directly. Rather, Barbosa argued it had a good faith belief that it was not required to comply with OSHA regulations under the INS contract. *See* R. Vol. 13, Doc. 41 at 24-32; R. Doc. Vol. 13, Doc. 43 at 9-18. It is clear that the Commission did not accept that proposition.

Thus, Barbosa's construction of the Commission's decision is untenable. The majority did not merely apply the existing law, but disregarded it. It instead made a finding based merely on the fact that Barbosa had partially complied with the standard, without regard to whether the failure to comply completely was based on some reasonable excuse. Because the majority's decision cannot be understood as anything other than a failure to apply the correct legal standard, it should be reversed. *New York State Elec. & Gas Corp.*, 88 F.3d at 109.

IV. Barbosa May Not Defend the Commission's Decision By Suggesting Alternative Factual Grounds on Which to Affirm.

Barbosa argues that there is substantial evidence on which the Commission might have relied to find that it did not disregard the statute willfully. Respondent Brief at 37-40. The flaw in this approach is that in administrative review, it is improper to affirm a factual determination on a basis other than that articulated by the agency. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]t is . . . familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders."); *Twum v. INS*, 411 F.3d 54, 61-62 (2d Cir. 2005).[3]

[3] Barbosa cites *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4 (1st Cir. 1993), for the proposition that "this Court may affirm the Commission's decision on any ground supported by the record." Respondent Brief at 44. *Simpson, Gumpertz* does not help Barbosa, however, because there the court affirmed on alternative *legal* grounds—it rejected the Secretary's interpretation of the applicable regulation. The Commission is not a policymaking body entitled to deference

Rather, where there are factual questions left open to decide, the general rule is that the reviewing court must remand to the agency. *Twum*, 411 F.3d at 61-62. As discussed above, the Commission applied the incorrect legal standard in evaluating the record, and at a minimum remand is necessary to allow it to apply the correct legal standard.

However, there is no need to remand here. As discussed below, the evidence allows only one conclusion—that Barbosa's violation was willful—and the various arguments that Barbosa makes in its brief do not call that conclusion into doubt. Thus, a remand "would serve no purpose and is therefore inappropriate." *Empire Co., Inc. v. OSHRC*, 136 F.3d 873, 878 (1st Cir. 1998); *see also Marshall v. Western Elec., Inc.*, 565 F.2d 240, 246 (2d Cir. 1977); *Brennan v. OSHRC*, 492

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in its interpretation of regulations, *see Martin v. OSHRC*, 499 U.S. 144, 154-55 (1991), and therefore there is no need to remand in such a case. By contrast, Barbosa's argument here implicates *factual* findings: whether Barbosa acted willfully. This is a matter "which Congress has exclusively entrusted" to the Commission and which "an appellate court cannot intrude upon" by affirming on grounds other than those articulated by the Commission. *Chenery*, 318 U.S. at 88.

F.2d 1027, 1032 (2d Cir. 1974). This court should reverse and reinstate the willful classification.

V. No Reasonable Person Could Conclude that Barbosa's Intent in Violating the "At No Cost" Requirement Was Not Willful.

The record allows only one conclusion: that Barbosa willfully refused to pay for all the costs its employees incurred in obtaining follow-up treatment. Therefore, this Court should reinstate the willful classification.

A. The Evidence Unequivocally Establishes Barbosa's Willfulness.

First, the evidence is undisputed that Greco incurred costs for follow-up care, and the company refused to pay for it.[4] Greco was injured when he cut his thumb on a razor that had been hidden in a facility. Tr. 102. He was taken to the hospital in Batavia where he was treated and instructed to follow up with a visit to his personal doctor. Tr. 102-03. He was forced to take two days off of work without pay for this

[4] The willfulness citation is based on Barbosa's failure to cover the costs of three of its employees: Greco, Beck, and Spiotta. As discussed below, however, Barbosa's failures with respect to Greco are particularly striking and sufficient in themselves to reverse the Commission's decision outright.

treatment, and make co-payments for the doctor's visit and medication. Tr. 104-05. Greco asked his supervisor, Archer, to reimburse him for the time off and the co-payments. Tr. 104-06, 114, 121. Archer said that it was "not the Company's responsibility." Tr. 121; *see also* Tr. 106. Barbosa does not deny any of these events. *See* Respondent Brief at 38-39; *see also* R. Vol. 12, Doc. 28 at 4.

Second, the evidence is undisputed that Barbosa knew about the requirements of the regulation. Vanzant admitted that he had read the standard several times, and McMichael had attended several training courses on it. Tr. 244, 254, 321, 329, 394-95. In addition, Barbosa employees had faxed Barbosa's management the portion of the bloodborne pathogen standard highlighting § 1910.1030(f), dealing with the provision of follow-up care at no cost. Tr. 44, 165-66, 244, 246; A-136; R. Vol. 4, Ex. C-12. McMichael told OSHA that she remembered speaking to Archer about it, including post-evaluation and follow-up. A-136. Again, at no time has Barbosa ever challenged any of these facts.

Third, when offered the opportunity to explain Barbosa's failure to pay Greco's expenses, McMichaels and Vanzant did not provide any remotely adequate excuse. In particular, they:

> admitted that they had not provided the post exposure evaluations to these employees at no cost. Mr. Vanzant, in talking to him said, you know, that he was aware of the exposure incidents. He told me that it is up to the employee to go find these. If they want these services they can get it themselves.
>
> Again, Ms. McMichael said that they were not going to provide the post exposure medical evaluations. That they may provide those services or post exposure evaluations if one of their employees had actually contracted a disease from their exposure. At that point, they might. They knew that [—] in talking with Ms. McMichael, they knew the total cost was not covered.
>
> She said, Well, we pay enough already for these employees with the dollars for their medical insurance coverage.

Tr. 255-56; *see also* A-135 to A-136. Again, neither McMichael nor Vanzant denied making these statements. Further, as the ALJ noted, the very defense that Barbosa asserted at trial—that it thought it was precluded from covering these expenses by the contract with INS—was absurd and demonstrated a high level of callousness to its employee's safety. *See* A-167. And there is nothing in the record to show

that McMichael or Vanzant actually paid Greco's expenses even after the citation was issued, which itself shows Barbosa's intent.

Thus, the evidence unequivocally shows that Barbosa knew of the standard's requirements, knew that Greco had incurred follow-up costs, refused to pay them, and did so for no justifiable reason. This establishes an intentional or knowing disregard of the bloodborne standard and a plain indifference to employee safety as a matter of law. This Court should reverse the Commission outright and reclassify the follow-up care violation as willful.[5]

B. Barbosa Fails to Show that it Did Not Have the Requisite Intent.

Barbosa first attempts to call its willfulness into doubt by suggesting that it did not know of Greco's request for reimbursement because he did not appeal Archer's denial to

[5] Barbosa suggests that by this argument the Secretary is taking the position that the Commission was compelled to impose a penalty of $63,000. Respondent Brief at 39. This is incorrect. While the Secretary believes that a finding of willful is required by the evidence, she has merely asked for a remand on the issue of the size of the penalty. Petitioner Brief at 44-45.

higher levels of management. Respondent Brief at 39. However, it is clear that under the OSH Act, "[k]nowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *New York State Elec. & Gas*, 88 F.3d at 105. The record establishes that Archer was Greco's supervisor, Tr. 99-101, and again, Barbosa does not dispute this fact. Thus, Archer's knowledge alone is sufficient for a willfulness finding. *See id.* Further, McMichael and Vanzant admitted to knowing its employees incurred costs that were not covered. Tr. 255. Nonetheless, they failed to pay them. Barbosa gets nowhere with its knowledge defense.

Barbosa also notes that it had made arrangements with the Western New York Occupational Medical Center, a clinic at the hospital in Batavia, for treatment of its employees who were injured on the job. Respondent Brief at 39-40; Tr. 311-13, 387-88. It suggests that by so doing, it met its obligation for the provision of follow-up care because there "was no testimony [that Greco] could not obtain follow-up treatment" at the clinic instead "of going to a personal physician." Respondent Brief at 40.

The record does not support this contention. Greco testified that the nurse on duty at the INS facility instructed him to go to the hospital in Batavia, and after being treated there he was told to follow up with his personal physician. Tr. 102. Thus, Greco was merely following doctor's orders in going to his personal physician. Moreover, there is nothing in the record to establish the range of services Barbosa contracted for with the clinic, or if the clinic even had the capability to provide follow-up care of the sort Greco needed here.

Similarly, McMichael's self-serving, *post hoc* statement that Barbosa would pay for time after an exposure event if required by a doctor is of no help to Barbosa. Tr. 442; *see* Respondent Brief at 39, 48. It provides no excuse for Barbosa's failure to pay Greco's co-payments. And Greco's follow-up treatment was required by the clinic, Tr. 102-03, so even under this policy, Barbosa should have covered Greco's time. But it did not, and therefore this testimony does not save Barbosa from a willful classification.

Barbosa tries to distance itself from McMichael's and Vanzant's admissions to the OSHA inspector, claiming that the Commission "was not required to credit this hearsay" because it addressed issues that were "hotly contested." Respondent Brief at 54. But the statements involved are admissions by a party opponent, and thus excluded from the definition of hearsay. Fed. R. Evid. 801(d)(2). The testimony was received without objection and is highly probative of Barbosa's intent at the time in question.

More important, Barbosa's suggestion that this evidence is in dispute is incorrect. In fact, though both McMichael and Vanzant testified, neither denied making these statements. Barbosa notes that McMichael said that some parts of the compliance officer's notes about what she said were taken out of context or incorrect, Respondent Brief at 55, but McMichael never said the investigator's recollections about her reasons for nonpayment of the follow-up care were incorrect. *See* Tr. 424. One would expect that she would have contradicted such a crucial piece of evidence if it were, in fact, incorrect. Such generalized assertions do not create a genuine dispute.

Barbosa suggests that McMichael and Vanzant thought that Barbosa was providing "sufficient" coverage by virtue of the health and workers compensation insurance. Respondent Brief at 54, 55. However, the testimony that Barbosa references reveals no indication that either McMichael or Vanzant thought that this insurance would provide all required follow-up without cost to the employees. *See* A-135 to A-136; Tr. 419-20. To the extent that McMichael or Vanzant thought it was "sufficient," they simply thought that Barbosa should not be required to do more than provide insurance. *See id.* But that is exactly the point—the question here is why Barbosa did not pay for expenses not covered by the insurance. And on that question, the above-quoted testimony is clear: "If they want these services they can get it themselves . . . We pay enough already." Tr. 256; *see also* A-135 to A-136.

Thus, the only reasonable conclusion from the record is that Barbosa intentionally disregarded, or was plainly indifferent to, the requirements of the bloodborne pathogen

standard. This Court should therefore reinstate the willful classification.

VI. Barbosa's New Claim that it Did Not Know it was Required to Pay its Employee's Costs is Without Merit.

Finally, Barbosa argues that it did not know that it was required to pay for the costs its employees incurred for follow-up care. Respondent Brief at 42-46, 50, 52. These arguments are without merit and have been waived in any event by Barbosa's failure to assert them any prior time in these proceedings.

The most striking defect in Barbosa's argument is that Barbosa has not pointed to any testimony from its executives stating that they did not know that the bloodborne pathogen standard required payment for the employee follow-up care at issue here. Both McMichael and Vanzant testified at the hearing, but said no such thing. And neither expressed confusion to the OSHA inspector either. Tr. 255-57; A-135 to A-136. To the contrary, as discussed above, the record establishes their intimate knowledge with the bloodborne standard and the provision at issue here. Tr. 165-66, 244,

246, 254-55, 321, 329, 394-95; A-135 to A-136; R. Vol. 4, Ex. C-12. This is reason enough to reject Barbosa's argument.

In any event, this is the first time Barbosa has made this argument in the case, and it is not preserved for review. *Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 446-47 (2d Cir. 2006). This is especially so to the extent it requires some factual showing not in the record. *Id.* Because this claim was not raised during the hearing, there was no opportunity for the parties to adduce evidence on this point. In addition, because good faith is a defense for Barbosa, any gap in the evidence is fatal to its claim. This Court should refuse to consider this argument.

VII. Barbosa's New Fair Notice Argument Should Be Rejected.

For the first time on appeal, Barbosa argues that it did not have "fair notice" that "at no cost" meant that it was to pay for the time and travel costs its employees incurred in obtaining follow-up treatment. Respondent's Brief at 43-46 (*citing Beverly Healthcare-Hillview*, 21 O.S.H. Cas. (BNA) 1684 (Rev. Comm'n 2006)). As a preliminary matter, this argument

provides no defense to Barbosa's failure to pay Greco's co-payments. In any event, this argument comes too late in these proceedings and is without merit.

A. Barbosa Waived its Fair Notice Argument by Failing to Raise it Below and by Failing to Cross-Petition.

Barbosa's reliance on *Beverly* should not be considered by this Court, because it is one that, if accepted, would require vacating citation. *See Fabi Constr. Co. v. Secretary of Labor*, 508 F.3d 1077, 1088-89 (D.C. Cir. 2007); *Beverly Healthcare-Hillview*, 21 OSH Cas. (BNA) at 1688. The general rule is that an appellee may not, absent a cross appeal, "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999); *see also Reich v. OSHRC*, 998 F.2d 134, 136-37 (3d Cir. 1993) (failure of respondent to cross-petition deprived court of jurisdiction to consider argument); *Dole v. Briggs Const. Co., Inc.*, 942 F.2d 318, 320 (6th Cir. 1991) (same).

Because the natural effect of Barbosa's fair notice argument is to call the entire citation into question, a cross-

petition is necessary. *Federal Energy Adm'n v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (refusing to consider respondent's argument which, if accepted, would result in a modification rather than affirmance of the judgments, where no cross-petition was filed); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (same). Moreover, for the reasons discussed above under point VI, Barbosa waived the argument by failing to present it below. This Court should refuse to hear Barbosa's untimely fair notice argument.

B. This Court Should Not Follow Beverly.

Even taken on its merits, Barbosa's new *Beverly* argument does not help it. As an initial matter, *Beverly* merely held that employers did not have fair notice that "at no cost" includes employee time and travel. It did not suggest employers had no fair notice that they were required to reimburse employees for their out of pocket costs resulting from treatment for an exposure event. But such costs are at issue here—Barbosa failed to reimburse Greco for his copayments even after Greco asked that they be paid. Thus, the *Beverly* argument does not help Barbosa.

In any event, *Beverly* is unpersuasive. *Beverly* agrees that OSHA's interpretation of the "at no cost" language to require payment for expenses associated with the treatment is reasonable. 21 O.S.H. Cas. (BNA) at 1687. *Beverly* also agrees that OSHA clearly set forth this interpretation in an opinion letter in 1999, before the citations at issue. *Id.* It nonetheless found that the employer did not have notice because it felt this interpretation was "at odds with" another letter issued in 1987 by the Wage and Hour Division of the Employment Standards Administration – a separate agency in the Department of Labor. *Id.* This letter, which interprets a regulation promulgated under the Fair Labor Standards Act, states that time spent waiting for medical treatment must occur during normal work hours to be "compensable." *Id.* In addition, the Commission stated that the requirement to pay travel costs was not included in OSHA's compliance instructions (CPLs). One member of the Commission in *Beverly* dissented, and the Secretary has appealed the Commission's ruling to the Third Circuit.[6]

[6] *Beverly* has been fully briefed before the Third Circuit and is

The Secretary believes *Beverly* is incorrect. The decision rests on a perceived conflict between the 1999 and 1987 interpretative letters. No employer would be confused by the letters. The 1987 letter was issued by a separate agency that has no responsibility for administering the bloodborne pathogen standard. It was not purporting to interpret the bloodborne pathogen standard. Indeed, it was published four years before the final bloodborne pathogen standard was published. Further, contrary to what the Commission said, CPL 2-2.44D plainly states that if receipt of required medical follow up "requires travel away from the worksite, the employer must bear the cost." R. Vol. 4, Exh. C-2 at 49. Finally, the Commission ignored a Ninth Circuit case that had upheld OSHA's like interpretation of similar language in the inorganic arsenic standard. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1239 (9th Cir. 1984). This Court should not follow *Beverly*, and it should reject Barbosa's late fair notice claim.

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scheduled for oral argument on June 5, 2008.

CONCLUSION

For the foregoing reasons, as well as those in the Secretary's opening brief, the decision of the Commission reclassifying the medical evaluation and follow-up violation from willful to serious should be reversed, and the matter should be remanded for an assessment of the penalties to be imposed for that violation as well as training and exposure control plan violations.

Respectfully submitted.

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April 2008

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I hereby certify that on April 7, 2008, I served ten copies of the foregoing brief to the Clerk of the United States Court of Appeals for the Second Circuit by overnight mail, postage prepaid. I further certify that on April 7, 2008, I served two copies of the brief by overnight mail, postage prepaid, upon the following:

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