07-1399-ag

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 an Order of the Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF JURISDICTION 1

ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS

1. Statutory and Regulatory Background....................5

   a. The Bloodborne Pathogen Standard 5

   b. The Enforcement Scheme..............................8

2. Barbosa Provided Guards to the INS Detention Facility in Batavia, New York.................................9

3. Barbosa's Employees are Exposed to Blood 9

4. Barbosa Knew its Guards Were Exposed to Blood and Was Familiar with the Bloodborne Pathogen Standard 11

5. Barbosa Admittedly Failed to Comply with the Bloodborne Pathogen Standard 13

6. The Proceedings Below.......................................16

   a. The Serious Citation 16

   b. The Willful Citation 16

c. Proceedings before the ALJ 17

d. Review by the Commission 18

SUMMARY OF ARGUMENT 20

ARGUMENT

I. The Interpretation of the Statutory Term "Willful" is a Question of Law in Which the Secretary's Views are Entitled to Deference 23

II. The Commission Misinterpreted the Statutory Term "Willful." 25

A. *The Commission Disregarded the "Objective Reasonableness" Standard Used to Judge Whether Unsuccessful Attempts at Compliance Were Made in Good Faith* 25

B. *The Factors the Majority Actually Considered are Unrelated to Willfulness* 30

III. The Evidence, Viewed Most Favorably for Barbosa, Requires a Finding of Willfulness 33

A. *Barbosa's Conduct was Willful* 34

B. *The Record Does Not Allow a Conclusion that Barbosa Made Objectively Reasonableness Effort to Comply* 36

C. *Barbosa Cannot Prevail on its Good Faith Contract Defense* 40

D. Although the Commission Failed to Apply a Correct Understanding of "Willful" in Evaluating the Record, A Remand on this Question is Not Necessary 43

IV. The Case Should be Remanded For a New Assessment of Penalties 44

CONCLUSION 45

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

SPECIAL APPENDIX

Excerpts of 29 C.F.R. § 1910.1030 .... SPA-1

Decision of OSHRC dated February 5, 2007 .... SPA-9

TABLE OF AUTHORITIES

CASES: **Page**

A. Schonbek & Co., Inc. v. Donovan,
646 F.2d 799 (2d Cir. 1981) 25

A.E. Staley Mfg. Co.,
19 O.S.H. Cas. (BNA) 1917 (Rev. Comm'n 1999)
aff'd, 295 F.3d 1341 (D.C. Cir. 2002)............................29

A.E. Staley Mfg. Co. v. Secretary of Labor,
295 F.3d 1341 (D.C. Cir. 2002) 25, 26, 37, 40

A.J. McNulty & Co., Inc. v. Secretary of Labor,
283 F.3d 328 (D.C. Cir. 2002) 25, 26, 27

AJP Constr., Inc. v. Secretary of Labor,
357 F.3d 70 (D. C. Cir. 2004) 26

American Wrecking Corp. v. Secretary of Labor,
351 F.3d 1254 (D.C. Cir. 2003) 25, 27

Aviation Constructors, Inc.,
18 O.S.H. Cas. (BNA) 1917
(Rev. Comm'n 1999).................................. 28, 29, 31, 34

Beta Construction Co.,
16 O.S.H. Cas. (BNA) 1435
(Rev. Comm'n 1993).................................. 29, 33, 36, 40

Brennan v. OSHRC (Gerosa, Inc.),
491 F.2d 1340 (2d Cir. 1974) 44

Brennan v. OSHRC (John J. Gordon Co.),
492 F.2d 1027 (2d Cir. 1974) 43

Brock v. Morello Bros. Constr.,
809 F.2d 161 (1st Cir. 1987) 31

Brock v. Morysville Body Works, Inc.,
829 F.2d 383 (3d Cir. 1987) 2

Caterpillar Inc. v. OSHRC,
122 F.3d 437 (7th Cir. 1997) 27, 28

Caterpillar, Inc. v. Herman,
154 F.3d 400 (7th Cir. 1998) 35

Chao v. Russell P. Le Frois Builder, Inc.,
291 F.3d 219 (2d Cir. 2002) 23, 25, 33

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 24

Coleco Indus. Inc.,
14 O.S.H. Cas. (BNA) 1961 (Rev. Comm'n 1991) 39

Donovan v. Capital City Excavating Co.,
712 F.2d 1008 (6th Cir. 1983) 44

Empire Co., Inc. v. OSHRC,
136 F.3d 873 (1st Cir. 1998) 43

Fluor Daniel v. OSHRC,
295 F.3d 1232 (11th Cir. 2002) 24, 26, 27, 28

Hochstein v. U.S.,
900 F.2d 543 (2d Cir. 1990) 24

Marshall v. Western Elec., Inc.,
565 F.2d 240 (2d Cir. 1977), *overruled in unrelated part, Martin v. OSHRC (CF & I Steel Corp.)*,
499 U.S. 144 (1991) 43

Martin v. OSHRC (CF & I Steel Corp.),
941 F.2d 1051 (10th Cir. 1991) 2

Morrison-Knudsen Co., Inc./Yonkers Contracting Co.,
16 O.S.H. Cas. (BNA) 1105 (Rev. Comm'n 1993) 29

New York State Elec. & Gas Corp. v. Secretary of Labor,
88 F.3d 98 (2d Cir. 1996) 24, 33, 34

Reich v. Trinity Indus., Inc.,
16 F.3d 1149 (11th Cir. 1994) 26, 27, 28, 35, 44

Tampa Shipyards Inc.,
15 O.S.H. Cas. (BNA) 1533 (Rev. Comm'n 1992) 29

United States v. Mead Corp.,
533 U.S. 218 (2001) 24

Wal-Mart Stores, Inc. v. Secretary of Labor,
406 F.3d 731 (D.C. Cir. 2005) 24

STATUTES AND REGULATIONS:

Administrative Procedure Act,
5 U.S.C. § 706(2)(A)...23

11 U.S.C. § 362(b)(4) 2

Occupational Safety and Health Act of 1970,

§ 2(b), 29 U.S.C. § 651(b) 5

§ 6, 29 U.S.C. § 655 5

§ 10(c), 29 U.S.C. § 659(c) 1, 8, 44

§ 11(a), 29 U.S.C. § 660(a)...........................2, 3, 24

§ 11(b), 29 U.S.C. § 660(b) 1, 2, 8

§ 12(j), 29 U.S.C. § 661(j) 2, 8

§ 17(a), 29 U.S.C. § 666(a)......................................8

§ 17(b), 29 U.S.C. § 666(b) 8

§ 17(c), 29 U.S.C. § 666(c) 8

§ 17(j), 29 U.S.C. § 666(j) 8

29 C.F.R. § 1910.1030 3

29 C.F.R. § 1910.1030(b) 7

29 C.F.R. § 1910.1030(f)(1) 7

29 C.F.R. § 1910.1030(f)(1)(i).......................................31

29 C.F.R. § 1910.1030(f)(1)(ii)(A).............................3, 32

29 C.F.R. § 1910.1030(f)(2) 7

29 C.F.R. § 1910.1030(f)(ii)(A)..7

29 C.F.R. § 1910.1030(f)(ii)(B) 7

29 C.F.R. § 1910.1030(f)(2)(i)...................................4,16

29 C.F.R. § 1910.1030(f)(3) 3, 4, 7, 17, 31

MISCELLANEOUS:

Federal Register,

56 Fed. Reg. 64,004 (Dec. 6, 1991)......................5, 6

56 Fed. Reg. 64,009 6

56 Fed. Reg. 64,010 6

56 Fed. Reg. 64,015-16 6

56 Fed. Reg. 64,016-18 6

56 Fed. Reg. 64,097-98 6

56 Fed. Reg. 64,153 ....7, 31

65 Fed. Reg. 50,017 (Aug.16, 2000) 5

OSHA Directive No. CPL 2-2.44D at 8 6

OSHA Directive No. CPL 2-2.44D at 48 8

OSHA Directive No. CPL 2-2.44D at 49 8

PRELIMINARY STATEMENT

This petition for review is taken from a decision of the Occupational Safety and Health Review Commission ("Commission"). The majority decision was by Commissioner Horace A. Thompson. Former Chairman W. Scott Railton issued a concurring opinion, and Commissioner Thomasina V. Rogers dissented in relevant part. The Commission's decision is available on Westlaw at 2007 WL 962960.

STATEMENT OF JURISDICTION

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

This Court has jurisdiction over this petition for review pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b). The Commission entered a final order disposing of all contested claims on February 5, 2007. Secretary of Labor Elaine L. Chao filed her petition with this Court on April 4,

2007, within the 60-day time frame prescribed by statute. *See* OSH Act § 10(a), (b), 29 U.S.C. § 660(a), (b). The violation took place in Batavia, New York, within the geographical boundaries of this Court.

The respondent, The Barbosa Group, Inc., d/b/a Executive Security ("Barbosa"), is currently a debtor in bankruptcy in a proceeding pending before the United States Bankruptcy Court for the Southern District of Texas (Houston), Case No. 06-33659. The review proceeding before this Court is exempt from the bankruptcy statute's automatic stay provision under 11 U.S.C. § 362(b)(4). *See Martin v. OSHRC (CF & I Steel Corp.)*, 941 F.2d 1051, 1053-54 & n.2 (10th Cir. 1991); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 388-89 (3d Cir. 1987). Therefore, the pendency of the bankruptcy action does not affect this Court's jurisdiction to review the Commission's final order.

ISSUE PRESENTED FOR REVIEW

OSHA's bloodborne pathogen standard requires employers to provide post-exposure medical evaluation and follow-up treatment to employees "at no cost" following an

exposure incident. 29 C.F.R. §§ 1910.1030(f)(1)(ii)(A), (f)(3). The Secretary cited Barbosa for willfully violating that standard and proposed a higher penalty commensurate with the designation of willfulness.

The issue presented by this case is whether the Commission erred in holding that, merely because Barbosa had paid for some, but not all, of its employees' costs for medical evaluation and follow-up, the violation was not willful.

STATEMENT OF THE CASE

This petition for review arises from a challenge to citations for violations of OSHA's bloodborne pathogen standard, codified at 29 C.F.R. § 1910.1030.[1] After an inspection, the Secretary issued citations to Barbosa based on its failure to comply with this standard for security guards it provided to staff an INS detention facility located in Batavia, New York. One citation included two violations classified as serious, imposing proposed penalties totaling $6,750, and the other citation included two violations classified as willful,

[1] A copy of the relevant portions of this regulation is appended to this brief in the Special Appendix at SPA-1.

imposing proposed penalties of $63,000 each, for a total proposed penalty of $132,750.

Barbosa challenged the citations. After an evidentiary hearing, the ALJ upheld them in all respects and assessed the full penalties proposed by the Secretary. The Commission accepted Barbosa's petition for direction of review.

The Commission considered whether the willful citations should be reclassified as serious, and the penalties reduced accordingly. As to the first willful violation, which alleged that Barbosa did not make the hepatitis B vaccination available to its employees in violation of 29 C.F.R. § 1910.1030(f)(2)(i), the Commission upheld the willful characterization of the violation and the $63,000 penalty for that item.

With respect to the second willful violation, which alleged that Barbosa did not make a post-exposure medical evaluation or follow-up available at no cost in violation of 29 C.F.R. § 1910.1030(f)(3), the Commission reclassified the violation as serious. It then grouped the three serious violations together, and imposed a single fine of $6,300 for all them.

The Secretary filed this petition for review from the Commission's decision. Barbosa has not filed its own petition for review.

STATEMENT OF FACTS

1. Statutory and Regulatory Background

The Occupational Safety and Health Act of 1970 was enacted "to assure so far as possible" safe and healthful working conditions for "every working man and woman in the Nation." OSH Act § 2(b), 29 U.S.C. § 651(b). The OSH Act empowers the Secretary to promulgate and enforce workplace safety and health standards, OSH Act § 6(b), 29 U.S.C. § 655(b), and the Secretary has delegated this authority to OSHA, 65 Fed. Reg. 50,017 (Aug. 16, 2000).

a. The Bloodborne Pathogen Standard

In 1991, OSHA published its final rule on occupational exposure to bloodborne pathogens. 56 Fed. Reg. 64,004 (Dec. 6, 1991). In promulgating the standard, OSHA found that "employees face a significant health risk" from exposure to blood and other body fluids because they may contain hepatitis B virus and human immunodeficiency virus, among

other pathogens. 56 Fed. Reg. at 64,004. These viruses can result in serious illness and death. 56 Fed. Reg. at 64,009, 64,015-16.

Bloodborne pathogens can be transmitted through perenteral, mucous membrane, or non-intact skin exposure to contaminated blood or other body fluids. 56 Fed. Reg. at 64,010, 64,016-18. Correctional officers are subject to such exposures, OSHA noted, because of (1) the potential for being bitten and coming into contact with blood while subduing and controlling combative inmates, and (2) the possibility of puncture wounds and needle sticks during the search of inmates and their cells. 56 Fed. Reg. at 64,097-98. "Since there is no population that is risk free for HIV, HBV or other bloodborne disease infection," all occupational blood exposure is included within the standard. OSHA Directive No. CPL 2-2.44D at 8 (R. Vol. 4, Exh. C-2).

Among other things, the bloodborne pathogen standard requires employers to "make available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-exposure evaluation and follow-up to all

employees who have had an exposure incident." 29 C.F.R. § 1910.1030(f)(i). "Occupational exposure" means a reasonably anticipated employment-related contact with blood or other potentially infectious materials; "exposure incident" means a specific "eye, mouth, other mucous membrane, non-intact skin, or perenteral contact with blood or other potentially infectious materials." 29 C.F.R. § 1910.1030(b). Subsections (f)(2) and (f)(3) set out the particulars about how the vaccine and medical evaluation and follow-up are to be provided. 29 C.F.R. § 1910.1030(f)(2), (3).

The regulation requires that these vaccines and post-exposure medical services be made available "at no cost to the employee" and "at a reasonable time and place." *Id.* § 1910.1030(f)(ii)(A), (B). The intent here is to maximize the chance that the employee receives them, while at the same time leaving the ultimate decision about whether to receive the treatment with the employee. 56 Fed. Reg. at 64,153. The vaccination and medical evaluation and follow-up must be offered during normal working hours, and if offered away from

the work site, the employer must bear the cost of travel.
OSHA Directive No. CPL 2-2.44D at 49 (R. Vol. 4, Exh. C-2).

b. The Enforcement Scheme

OSHA's compliance officers regularly inspect workplaces. Upon discovery of a violation, a compliance officer may issue a citation in one of three categories: "not serious," "serious," or "willful." OSH Act § 17(a)-(c), 29 U.S.C. § 666(a)-(c). The highest penalties may be assessed for willful violations. *Ibid.*

If the employer challenges the citation, the Secretary must establish the violation in an evidentiary hearing before an Administrative Law Judge of the Commission. OSH Act §§ 10(c), 12(j), 29 U.S.C. §§ 659(c), 661(j). This becomes the final decision of the Commission unless the Commission directs review of the ALJ's ruling. OSH Act § 12(j), 29 U.S.C. §§ 661(j). The Secretary may obtain review of a final order of the Commission by filing a petition for review in the appropriate circuit court of appeals. OSH Act § 11(b), 29 U.S.C. §§ 660(b).

2. Barbosa Provided Guards to the INS Detention Facility in Batavia, New York.

Barbosa is based in Texas and has been in the security guard business since 1983. SPA-9; Tr. 584.[2] It has held various government security guard contracts around the country, including contracts for INS detention centers, since 1988. Tr. 384, 394, 585, 596. In 1998, Barbosa and the INS entered into a contract for the provision of security guards at a new detention facility located in Batavia, New York. A-11; Tr. 596. The Batavia facility employed 130 guards in all; Barbosa provided approximately 65 and INS provided the others. Tr. 60-61.

3. Barbosa's Employees are Exposed to Blood.

Barbosa guards were in charge of the care, custody, and control of INS detainees. Tr. 33, 125, 129. They risked coming into contact with blood when, for example, they

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[2] References to portions of the record reprinted in the Appendix or Special Appendix are cited "A-__" or "SPA-__," respectively. References to the hearing transcript are cited "Tr. ___"; the transcript is reprinted in manuscript form in the Appendix beginning at A-175. Other record materials are cited by reference to the Commission's June 6, 2007 certified list of releavant docket entries in the proceeding below.

responded to and broke up fights between detainees, when they responded to injuries and medical emergencies, or when they escorted injured or sick detainees to the facility's medical center. Tr. 34, 69, 101, 129, 184-85, 217. They could come into contact with blood on a daily basis. Tr. 34, 70, 101, 130, 141-42, 160, 186, 217.

OSHA's investigation revealed that, from the time the facility opened in 1998 through February 2002, there had been 165 fights, that 329 detainees had been charged with fighting, and that there had been 12 assaults on staff members. A-105. This averaged out to approximately 6 altercations per month. *Ibid.*

The record contains specific examples of exposure events. On one occasion a detainee assaulted two Barbosa guards, Frank Spiotta and Chris Beck. Tr. 130. The detainee struck Spiotta above the right eye, creating a laceration that bled and required stitches. Tr. 70, 130-31. Beck was bitten on his hand by the detainee, causing an open wound. Tr. 70, 130. The detainee was injured in the altercation as well, sustaining gashes which bled and required stitches. Tr. 71.

On another occasion a Barbosa guard named David Greco was injured as he was searching for contraband. Tr. 97, 102. He saw something in a "pipechase," and when he reached up to grab it, he sliced his thumb open on what turned out to be a razor that had been hidden there. Tr. 102. He received stitches for the injury. *Ibid.* He also received a blood test because the razor was "possibly dirty or used." *Ibid.*

4. Barbosa Knew its Guards Were Exposed to Blood and Was Familiar with the Bloodborne Pathogen Standard.

The evidence showed that Barbosa executives knew that the guards would be exposed in this way. Jean McMichael, Barbosa's Operations Manager and directly responsible for overseeing Barbosa's operations at the Batavia facility, conceded that Barbosa guards could be involved in altercations with detainees where blood would be present. Tr. 350, 383, 385-86, 399-400, 416-17; A-134. Bob Vanzant, the chief contracting officer who oversaw Barbosa's relationship with INS, also admitted that the guards were trained for activities such as the provision of first aid, the detention and use of force, escorting detainees and handling disorderly

conduct. Tr. 365-66. He said that it would not surprise him if the guards could come into contact with blood at any given moment. Tr. 348. Both McMichael and Vanzant admitted to OSHA that they had seen incident reports for the Greco, Beck, and Spiotta injuries. Tr. 255; A-135.

Barbosa was familiar with the requirements of OSHA's bloodborne pathogen standard. McMichael testified that she had attended a bloodborne pathogens training program four times that was conducted by Barbosa at the site of its Newark, New Jersey GSA contract. Tr. 394-95. She regarded the trainer Barbosa hired for those classes "one of the best." Tr. 395. She also told the OSHA compliance officer that she had taken every OSHA bloodborne pathogen course in the Houston area. Tr. 244. Vanzant said that he had read OSHA's bloodborne pathogen regulation several times. Tr. 321, 329, 361. Further, Barbosa employees had provided a copy of the standard to Barbosa's management, Tr. 44, 165-66, and McMichael and Vanzant told OSHA that they had received it, Tr. 244, 246.

5. Barbosa Admittedly Failed to Comply with the Bloodborne Pathogen Standard.

Barbosa conceded before the ALJ that its "contract employees did not get the Hepatitis B vaccination or adequate follow-up care as specified in the BBP standard." R. Vol. 12, Doc. 28 at 4. In particular, there is no dispute in the record that Barbosa did not offer its employees the Hepatitis B vaccination free of charge as the regulation requires, despite repeated requests to do so by individual employees, the union and the INS. Tr. 41-42, 109, 165, 168, 307, 342, 352, 358-59; R. Vol. 8, Exh. R-11.

Likewise, it is undisputed in the record that while Barbosa provided its employees with initial care following an exposure event (which Barbosa paid either through its workers compensation insurance or directly, Tr. 86, 88, 111) it did not provide medical evaluation and follow-up at no cost to its employees. For example, after Greco was cut by the concealed razor, he was forced to take leave without pay for the time necessary to see his doctor for follow-up, as ordered by the hospital that initially treated him, and to pay the co-payments

necessary for those visits. Tr. 104-06, 121. Barbosa refused to reimburse him for these expenses. Tr. 105-06, 114, 121. Similarly, Beck was forced to take time off without pay in order to cope with the side effects of an "AIDS cocktail" he was administered after being bitten by an inmate. Tr. 73-75. Spiotta who was also injured in this incident, was forced to use sick days while recovering from his wounds (during which Barbosa did not make contributions to his health plan).[3] Tr. 131-32, 151-53. Beck and Spiotta also incurred travel costs for their follow-up treatment, which Barbosa did not reimburse. Tr. 106, 132.

Both McMichael and Vanzant told OSHA that they knew the standard's requirements, but stated that Barbosa was not going to provide the required medical evaluation and follow-up at no cost to its employees. Tr. 255-56; A-135 to A-136. Vanzant argued that compliance with the standard's

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[3] Under the collective bargaining agreement, Barbosa made a payment to the union towards the employee's health insurance premium for each day that the employee worked. No contribution was made for days the employee took paid vacation. This payment was insufficient to cover the entire premium if the employee's family was covered. Tr. 36-40.

requirements was INS's responsibility. Tr. 330; A-100. At other points both Vanzant and McMichael suggested that Barbosa's contract with INS actually precluded Barbosa from complying with the standard's requirements. Tr. 324, 326, 411-12. However, Vanzant also testified that the contract required Barbosa to comply with federal, state, and local health laws and regulations. Tr. 343.

Both Vanzant and McMichael also offered more troubling explanations of their actions. Vanzant testified that OSHA regulations are merely "guidelines" that you are "supposed to follow."[4] Tr. 332. McMichael expressed impatience with union requests for vaccinations and post-exposure medical evaluation and follow-up, telling OSHA that "it was just something the union wanted," and that Barbosa should not have to cover it because "we already pay 'so much' in benefits for employees." A-120, A-136. Both McMichael and Vanzant

[4] Vanzant also testified as to his belief that the bloodborne pathogen standard did not apply to the Barbosa guards. Tr. 286-87, 319-21, 332, 355. However, Barbosa never advanced the theory, either before the ALJ or the Commission, that this mistake was reasonable and thus a defense to a willful classification. *See generally* R. Vol. 12, Doc. 28; R. Vol. 13, Docs. 36, 41, 43.

told OSHA that Barbosa should not have to pay anything more, and that employees wishing post-exposure follow-up should get it on their own. *Id.* at 120-21.

6. The Proceedings Below

a. The Serious Citation

After an inspection by an OSHA compliance officer, the Secretary issued two citations against Barbosa. A-8 to A-10. The first citation contained two violations related to Barbosa's failure to provide adequate training and an exposure control plan for bloodborne pathogens. A-8. This citation was ultimately upheld by the Commission. SPA-18. Barbosa's liability on this citation is not before this Court.

b. The Willful Citation

The second citation contained two violations classified as willful. A-9 to A-10. The first was for Barbosa's failure to provide vaccination to its employees as required by 29 C.F.R. § 1910.1030(f)(2)(i). A-9. Again, this violation was ultimately upheld by the Commission, SPA-18, and is not at issue here because Barbosa did not appeal.

The second willful violation was for Barbosa's failure to provide a medical evaluation or follow-up to the employee in violation of 29 C.F.R. 1910.1030(f)(3). A-10. The Commission also upheld this second violation, but reclassified it from willful to serious. It is this reclassification that is the basis for the Secretary's petition for review to this Court.

c. Proceedings before the ALJ

Barbosa contested the citations, R. Vol. 10, Doc. 2, and an evidentiary hearing was held before the ALJ. Barbosa conceded that its "contract employees did not get the Hepatitis B vaccination or adequate follow-up care as specified in the BBP standard." R. Vol. 12, Doc. 28 at 4. However, it argued that the INS, rather than it, had the duty to comply with these requirements. Alternatively, it argued that these violations should be classified as serious rather than willful, claiming that "Barbosa's management acted in good faith and their conduct was negligent at best [sic]." *Id.* at 16.

The ALJ rejected Barbosa's arguments and affirmed the violations as willful. A-166 to A-167. With respect to the vaccination violation, he found that Barbosa "knew of its duty

to act, and made a deliberate and carefully calculated decision not to act." A-167. Likewise, with respect to the requirement to provide medical evaluation and follow-up at no cost, the ALJ found that "Barbosa knew of the requirement . . ., and made the economically-based decision not to supplement whatever the employees' medical insurance covered . . . in the full knowledge that employee medical insurance coverage was insufficient." *Ibid.* He also rejected Barbosa's defense of alleged good-faith reliance on the contract as "unreasonable." *Ibid.* The ALJ affirmed the Secretary's proposed penalties of $63,000 for each willful violation. A-167 to A-169.

d. Review by the Commission

Barbosa appealed the ruling on willfulness to the Commission, arguing that a finding of willfulness was inappropriate because its management had a good faith belief that compliance with the bloodborne pathogen standard was the INS's responsibility. R. Vol. 13, Doc. 36 at 23-27; R. Vol. 13, Doc. 41 at 24-32. With respect to the vaccination violation, the Commission rejected this argument. SPA-15 to SPA-16. It found "no evidence that Barbosa's contract was intended to

remove OSHA compliance obligations from Barbosa," and that Barbosa had "no reasonable basis to conclude that it was contractually *prohibited* from offering the HBV vaccine to its employees." SPA-16 (emphasis in original). Accordingly, the Commission affirmed the vaccination violation as willful. *Ibid.*

With respect to the classification of the medical evaluation and follow-up violation, however, the Commission split. The majority decided to reduce this violation from "willful" to "serious." SPA-15. It noted that Barbosa did pay for the initial post-exposure evaluation, but it did not cover the co-payment associated with the follow-up treatment and charged leave to the employees for work time spent receiving the treatment. SPA-14 to SPA-15. 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," the majority observed. SPA 15. "Under these circumstances," it found no evidence that "Barbosa demonstrated an intentional disregard rising to the level of willfulness." *Ibid.*

Commissioner Rogers dissented from this part of the Commission's holding. She found that Barbosa's "state of mind was the same" for both the vaccination and medical evaluation and follow-up violations, and thus saw "no legally cognizable reason for distinguishing the characterization of the two items." SPA-22. "In neither case was there a 'plausible' basis for Barbosa to believe that the security personnel were not its employees and that it had no compliance obligation to them." *Ibid.* She would have held that the fact that Barbosa's personnel received post-exposure treatment "reflects upon the gravity of the violation rather than Barbosa's state of mind in intentionally refusing to abide by the requirements of the standard." *Ibid.*

SUMMARY OF THE ARGUMENT

The Commission's majority erred when it downgraded Barbosa's medical evaluation and follow-up violation from willful to serious. The evidence unequivocally established that Barbosa knew that its failure to provide the required follow-up at no cost violated the regulation. While the majority relied on the fact that Barbosa had paid for some of the medical

evaluation and follow-up, it ignored the established test with which partial-compliance defenses are evaluated: whether the employer's attempt to comply fully with the standard was objectively reasonable under the circumstances even if that attempt turned out to have fallen short of full compliance. Instead, it accepted Barbosa's attempt to comply partially with the standard as reason enough to excuse it from a finding of willful disregard of its compliance obligation – a compliance obligation Barbosa knew was not being met by its half-measures.

The majority's approach would eviscerate the willfulness standard and should be rejected. A holding that partial compliance with the standard defeats a finding of willfulness, regardless of the objective <u>un</u>reasonableness of the employer's efforts, would allow an employer to avoid enhanced penalties even when it decides as a matter of policy that it will only do 75% of what is required. Such a perverse result should be rejected.

The other fact relied on by the majority -- that the employees ultimately received the required medical attention --

is irrelevant to the willfulness inquiry because what is at issue is Barbosa's intent, not the steps Barbosa's employees took to protect themselves. As Commissioner Rogers noted, this fact goes to the gravity of the violation, and is properly considered only in the assessment of the penalty.

There is no reason for a remand to allow the Commission to reconsider the violation under the appropriate standard. It is undisputed that Barbosa knew that it was not providing the required medical evaluation and follow-up without cost to its employees. Indeed, Barbosa is not appealing the finding of a violation. There is no evidence in the record to support a determination that Barbosa's actions were objectively reasonable in failing to meet the standard.

Moreover, the Commission properly rejected Barbosa's defense that the contract somehow prevented it from providing the necessary medical services. If it was unreasonable for Barbosa to believe it was free from a duty to provide vaccines under the standard, the same defense should not be accepted as a rationale for reclassifying the medical evaluation and follow-up violation and significantly lowering the penalty. The

Commission should be reversed and OSHA's classification of the medical evaluation and follow-up violation as willful should be reinstated.

The case should then be remanded to allow the Commission an opportunity to consider the size of the appropriate penalty to be assessed for this violation. Further, because it had grouped the medical evaluation and follow-up violation with the two other serious violations in assessing a combined penalty, the Commission should revisit the penalties to be assessed for those violations as well.

ARGUMENT

I. The Interpretation of the Statutory Term "Willful" is a Question of Law in Which the Secretary's Views are Entitled to Deference.

A reviewing court should reverse the Commission if its decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). While a Commission finding of willfulness in a particular circumstance is a determination of fact, reviewed for substantial evidence, the Commission's

definition or application of the term "willful" is a matter of law. *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1236 (11th Cir. 2002); OSH Act § 11(a), 29 U.S.C.§ 660(a); cf. *Hochstein v. U.S.*, 900 F.2d 543, 548 (2d Cir. 1990) (willfulness generally reviewed for clear error but district court erred as a matter of law in finding failure to withhold taxes not willful).

In determining the correct legal standard, the Court applies traditional deference principles: "When the resolution of a question depends upon an interpretation of the Act's substantive provisions and Congress has not clearly expressed its aim, we defer to a permissible agency reading of the Act." *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 104 (2d Cir. 1996) (citing *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). This is based on a recognition that the views of agencies reflect a "body of experience and informed judgment," as well as respect for Congress's decision to entrust the administration of the statutory scheme to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

It is the Secretary's interpretation of the OSH Act that is entitled to deference. *Le Frois Builder*, 291 F.3d at 227. This deference stems from a recognition that Congress has delegated rulemaking authority to the Secretary, rather than to the Commission. *Ibid.* Commission interpretations, on the other hand, are treated as equivalent to those made by a nonpolicymaking district court. *A.J. McNulty & Co., Inc. v. Secretary of Labor*, 283 F.3d 328, 332 (D.C. Cir. 2002). Accordingly, the Secretary's interpretation of the term "willful" is entitled to deference. *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002).

II. The Commission Misinterpreted the Statutory Term "Willful."

A. The Commission Disregarded the "Objective Reasonableness" Standard Used to Judge Whether Unsuccessful Attempts at Compliance Were Made in Good Faith.

For purposes of the OSH Act, an act is willful if it is "done either with an intentional disregard of, or plain indifference to, the statute." *A. Schonbek & Co., Inc. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981); *see also American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1262 (D.C. Cir. 2003).

OSHA's citation for the willful failure to pay for post-exposure evaluations and follow-up treatments was based on this reasonable and established interpretation of that standard. The Commission's decision, while citing the "intentional disregard or plain indifference" standard, SPA-14, rejected a finding of willfulness based on an interpretation that is untenable as a matter of law. The Court should therefore defer to the Secretary and reverse.

At the outset, it is plain that the Commission ignored the undisputed evidence showing that Barbosa willfully violated the standard. A violation is willful where "the employer was actually aware, at the time of the violative act, that the act was unlawful." *AJP Constr., Inc. v. Secretary of Labor*, 357 F.3d 70, 74 (D. C. Cir. 2004).

Barbosa's subjective knowledge that it was violating the standard establishes willfulness as a matter of law. This is demonstrated by the holdings in *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1240-41 (11th Cir. 2002) and *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1155-56 (11th Cir. 1994). In those cases, the employers knew that they were violating the

applicable standard, but did so in the belief that their actions were more protective of worker health. *Ibid.* In each case, the court rejected that argument as a defense to willfulness. *Ibid.* If the employers were liable for willful violations in those cases, where they actually thought they were providing more protection for their employees, then *a fortiori* Barbosa is liable here where it had no such belief.

The caselaw recognizes an affirmative defense of good faith to a willful classification. *See*, *e.g.*, *American Wrecking*, 351 F.3d at 1263; *A.J. McNulty*, 283 F.3d at 338; *Caterpillar Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997). In particular, a "good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness." *A.J. McNulty*, 283 F.3d at 338. The undisputed facts here show Barbosa's knowledge that its conduct did not conform to the law and preclude such a finding as a matter of law. *See Fluor Daniel,* 295 F.3d at 1240-41; *Trinity Indus., Inc.*, 16 F.3d at 1155-56. Barbosa's executives conceded that they knew of the regulation's requirement to provide post-exposure evaluation and follow up at no cost. They knew of actual

employee exposure events, but failed to provide post exposure follow-up at no cost: employees were docked for time they missed for treatment and not reimbursed for copayments they incurred. Barbosa's subjective knowledge that it was violating OSHA's rules precludes a finding of good faith, especially where, unlike the employers in *Fluor Daniel* and *Trinity Indus.*, it was not trying to provide better protection for its employees. On its face, this alone is grounds to reverse the Commission.

In support of its holding the Commission relied on Barbosa's partial compliance with the regulation. To be sure, a good faith effort to comply completely with a standard that falls short of complete compliance will not be cited for a willful violation. Thus, an employer may defeat a prima facie case of willfulness by establishing that, though its efforts at compliance with the applicable standard were incomplete, its actions were "objectively reasonable under the circumstances." *Caterpillar*, 122 F.3d at 441-42; *Aviation Constructors, Inc.*, 18 O.S.H. Cas. (BNA) 1917, 1921 (Rev. Comm'n 1999). Until this case the Commission has repeatedly required employers to establish the objective reasonableness of their failed efforts

before deciding that their noncompliance was not willful. *See Spirit Homes Inc.*, 20 O.S.H. Cas. (BNA) 1629, 1630 (Rev. Comm'n 2004); *A.E. Staley Mfg. Co.*, 19 O.S.H. Cas. (BNA) 1199, 1202-03 (Rev. Comm'n 2000), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002); *Aviation Constructors, Inc.*, 18 O.S.H. Cas. (BNA) at 1921; *Beta Construction Co.*, 16 O.S.H. Cas. (BNA) 1435, 1444-45 (Rev. Comm'n 1993); *Morrison-Knudsen Co., Inc./Yonkers Contracting Co.*, 16 O.S.H. Cas. (BNA) 1105, 1124, 1127-28 (Rev. Comm'n 1993); *Tampa Shipyards Inc.*, 15 O.S.H. Cas. (BNA) 1533, 1541 (Rev. Comm'n 1992).

The objective reasonableness test is fundamentally incompatible with actual knowledge that one's efforts intentionally comprise no more than partial compliance. Ignoring the objective unreasonableness of Barbosa's deliberate policy of partial compliance, however, the Commission majority – tacitly departing from its well-established rule – found good faith on the flimsiest of grounds and without making any inquiry or findings about whether Barbosa's attempts to comply with the medical evaluation and follow-up requirement were objectively reasonable under the

circumstances. *See* SPA-14 to SPA-15. Thus, while it did not in terms articulate a new legal standard, its clear implication was that any partial compliance, even if never intended to result in full compliance, and therefore objectively unreasonable, may suffice to constitute good faith adequate to defeat a willfulness classification. Accordingly, the Commission committed legal error in its substitute of a relaxed legal standard for the applicable standard upon which the Secretary appropriately based her citation.

B. The Factors the Majority Actually Considered are Unrelated to Willfulness.

The majority found that Barbosa's conduct was not willful based on two facts: (1) that Barbosa's "personnel did receive the treatment required by the regulation," and (2) that Barbosa paid some, but not all, of its employees' follow-up costs. SPA-14 to SPA-15. As explained below, neither of these factors has a bearing on whether Barbosa's conduct was willful.

The bloodborne pathogens standard clearly does not require *employees* to obtain medical follow-up. Rather, the

standard requires the *employer* to "make immediately available" such treatment at no cost to the employee. 29 C.F.R. §§ 1910.1030(f)(1)(i), (f)(3); *see also* 56 Fed. Reg. at 64,153 (stating that the wording was changed in the final rule "to emphasize the employee's personal choice to participate"). Indeed, forcing an employee to seek treatment on his or her own is precisely what the standard seeks to avoid by holding the employer responsible for making such treatment available at no cost to the employee. Thus, the fact that the employee might have actually received follow-up is not connected with the relevant inquiry here: whether the employer complied with its obligation to make available medical evaluation and follow-up at no cost. The fact that an employee might have obtained care on his or her own is irrelevant to whether the employer was willful in failing to make it available in the first place. The willfulness inquiry necessarily looks at the employer's actions and state of mind, not the acts of its employees. *See Aviation Constructors*, 18 O.S.H. Cas. (BNA) at 1920 (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987)).

Nor is the mere fact that Barbosa paid some, but not all, of the follow-up care costs sufficient to establish that it did not act in a willful manner. Again, this fact does not reveal Barbosa's state of mind or measure the reasonableness of Barbosa's efforts. Indeed, the majority's determination that partial compliance is sufficient to defeat willfulness without regard to the employer's good faith would eviscerate the statutory willful violation classification. Under the majority's view, an employer's deliberate decision to provide mandated services at partial cost, and to thereby saddle employees with some of the costs, may be considered a good-faith attempt to comply with the standard.

Thus, according to this approach, an employer fully apprised of the standard's requirements could institute a formal policy of paying 75% of post-exposure treatment and evaluation costs without willfully violating the standard. The standard's "at no cost" provision mandates 100% payment, however. *See* 29 C.F.R. § 1910.1030(f)(1)(ii)(A); OSHA Directive No. CPL 202.44D at 48 (R. Vol. 4, Exh. C-2) ("The term 'no cost to the employee' means among other things, no 'out of pocket'

expense to the employee.") No prior Commission or court of appeal decision supports such a perverse approach to the question of willfulness. In any event, it is the Secretary's reasonable interpretation of the statute, not the Commission's, that is entitled to deference. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 229 (2d Cir. 2002)

The one case—*Beta Construction*—cited by the majority to support its position in fact undercuts it. SPA-15(citing *Beta Construction*, 16 O.S.H. Cas. (BNA) 1435, 1444-45 (Rev. Comm'n 1993)). That case plainly employs the standard that the majority here ignored. *Beta Construction*, 16 O.S.H. Cas. (BNA) at 1445. *Beta Construction* found that an employer had not willfully violated an OSHA safety standard because it had "plainly acted in an *objectively reasonable* manner and thus manifested good faith through the establishment and implementation of its safety standard." *Ibid* (emphasis added).

In contrast, the Commission's majority in this case made no findings that Barbosa's efforts to comply with the medical evaluation and follow-up requirements were objectively reasonable. And it offered no reason for departing from this

well-established standard to accept instead intentional partial compliance as sufficient grounds to negate willfulness. Further, as explained above, the statutory construction implicit in the majority's holding would gut the willfulness standard. Because "the Commission relied on a construction of the statute that is impermissible . . . its order must be set aside as arbitrary and capricious." *New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 109 (2d Cir. 1996).

III. The Evidence, Viewed Most Favorably for Barbosa, Requires a Finding of Willfulness.

A. *Barbosa's Conduct was Willful.*

The Court does not have to find per se willfulness in order to conclude that the record here establishes a prima facie case of willfulness that Barbosa failed to rebut and the Commission majority was remiss to disregard. A showing that the employer knows of the requirements of the standard, knows of conditions in its workplace that violate the standard, and fails to correct those conditions establishes a prima facie case of willfulness. *Aviation Constr.*, 18 O.S.H. Cas. (BNA) at

1920; *see also Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998); *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1154, 1155 (11th Cir. 1994).

Here the evidence shows that both McMichael and Vanzant were familiar with the standard in general and also knew of the standard's specific requirement to provide medical evaluation and follow-up at no cost to the employee. Tr. 244, 255-56, 321, 329, 361, 394-95; A-135 to A-136. They also knew of actual exposure incidents — Greco's razor cut and the altercation between the detainee and Beck and Spiotta — yet failed to cover all of the medical expenses associated with these events. Tr. 74-75, 104-06, 114, 121, 131-32, 152-53. Greco's request for reimbursement was refused, and McMichael and Vanzant told OSHA that it would not provide reimbursement to its employees. Tr. 105-06, 114, 121, 255-56; A-135 to A-136. None of these facts is contested, and thus the record establishes a prima facie case of willfulness on the medical evaluation and follow-up violation.

B. The Record Does Not Allow a Conclusion that Barbosa Made Objectively Reasonable Efforts to Comply.

Further, this record does not allow a finding that Barbosa made an objectively reasonable effort to comply with the medical evaluation and follow-up requirement. To be objectively reasonable, an employer must have made substantial efforts to meet the obligation fully. *See Beta Construction*, 16 O.S.H. Cas. (BNA) 1435, 1444-45 (Rev. Comm'n 1993). Two contrasting Commission decisions illustrate this requirement.

In *Beta Construction*, after having been cited before for OSHA violations, the employer hired a safety director who implemented a safety program. The program included regular employee training, updating the employer's safety manual, safety incentive awards, and monitoring to make sure the required training was done. 16 O.S.H. Cas. (BNA) at 1438-39. Even OSHA's compliance officer declared the program was "impressive." *Id.* at 1440. When employees nonetheless violated an OSHA standard, causing an employee's death, the Commission declined to find the violation willful. *Id.* at 1445.

Beta had "manifested good faith through its implementation of its comprehensive safety program." *Id.*

By contrast, in *A.E. Staley Mfg.*, 19 O.S.H. Cas. (BNA) 1199, 1202-03 (Rev. Comm'n 2000), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002), the employer knew of substantial problems with loose, friable asbestos in its plant through inspections and employee complaints. However, it often took two to three weeks for the damaged asbestos insulation to be cleaned up once it was reported to management. *Id.* at 1203. Although the employer attempted to abate the asbestos problems, its efforts were "sporadic and incomplete": no efforts were made to clean up problems identified at one building for over five years; the efforts by a contractor hired to remove the asbestos were inadequate. *Id.* at 1202-03. Thus, the Commission held that the employer's efforts were not objectively reasonable and upheld the willfulness classification. *Id.* at 1203.

Likewise, in this case, the only conclusion possible on the record is that Barbosa made no objectively reasonable effort to comply with the no-cost medical evaluation and follow-up rule. While Barbosa paid for the cost of initial treatment after

exposure incidents, it made no effort to insure that its employees received any post-exposure evaluations or medical follow-up at no cost. It refused to reimburse employees for co-payments they incurred for this care, and it required employees to take vacation time or time without pay to receive this treatment. Tr. 74-75, 104-06, 114, 121, 131-32.

Indeed, the things that it did provide -- workers' compensation insurance and contributions to its employees' health insurance premiums -- satisfied obligations independent of the bloodborne pathogens standard. Workers' compensation insurance is obligated by state law; the health insurance contributions were required by Barbosa's contract with its employees' union. Tr. 36-40. Certainly Barbosa cannot claim that it was attempting to comply in good faith with the bloodborne pathogens standard by relying on actions it took in fulfillment of other legal obligations that predictably fell short of complete compliance with its OSHA obligations. There is no evidence that Barbosa had a reasonable, good faith belief that compliance with these independent legal obligations would provide post-exposure care at no cost to its employees.

Even if Barbosa's acts might have had an incidental effect of defraying some of the cost of its employees' post-exposure care, they do not show a good faith intent to comply with the OSHA standard. *Cf. Coleco Indus. Inc.*, 14 O.S.H. Cas. (BNA) 1961, 1967 (Rev. Comm'n 1991) (finding willfulness not negated where an employer's elevator maintenance was "designed to insure elevator operation rather than safe elevator operation").

Moreover, the effect of Barbosa's conduct was actually to punish employees who obtained follow-up care because Barbosa charged leave -- paid or unpaid -- for the work these employees missed while obtaining treatment. In addition, Barbosa did not make per diem contributions to these employees' health plans for the time they missed seeking treatment. Tr. 36-40, 151-53. It cannot be said that the employer has made an objectively reasonable attempt to comply with the requirement to make post-exposure care available "at no cost" where its policies actually make it *more costly* for employees to obtain the care.

At best, Barbosa's efforts, like the attempts at asbestos abatement in *A.E. Staley*, were "sporadic and incomplete." Barbosa offered no evidence that it had a comprehensive policy — like the employer in *Beta Construction* — aimed at ensuring compliance by compensating employees for all costs associated with medical evaluation and follow-up, or that it attempted to reimburse employees fully once it learned of these failures. When pressed on this point, Barbosa executives merely said they thought that they had done enough in this regard by contributing to its employees' health insurance costs. A-120, A-136. Barbosa knew that its employees were incurring costs to obtain medical evaluation and follow-up, but took no steps to rectify the situation. Its efforts at compliance were not objectively reasonable, and therefore the Commission erred in re-characterizing this violation from willful to serious.

C. Barbosa Cannot Prevail on its Good Faith Contract Defense.

Barbosa did not assert a defense of partial compliance -- the grounds relied upon by the Commission's majority -- either

before the ALJ or the Commission. Instead, it argued that it had a good faith belief that its contract with INS either made compliance the INS's responsibility or, alternatively, the contract in fact precluded Barbosa from complying with the bloodborne pathogen standard's requirements. As the Comission majority recognized, this argument is totally without merit.

All three Commissioners rejected Barbosa's contract defense in agreeing with OSHA and the ALJ that its noncompliance with the standard's vaccination requirement was willful. SPA-16. All three also found Barbosa liable for violating the "at no cost" provision with respect to the post-exposure evaluation and follow-up treatment requirement. SPA-15, SPA-22. If the defense was insufficient to negate willfulness with respect to the vaccination-requirement violation, it must also be insufficient to negate willfulness for the violation of the medical evaluation and follow-up-treatment requirement. As Commissioner Rogers observed, Barbosa's "state of mind was the same for both violations." SPA-22.

Moreover, even taken on its merits, there is nothing to the contract defense. Barbosa pointed to no contract provision supporting the assertion that it was prevented by contract from providing medical evaluation and follow-up to its employees at no cost. It identified no contract provision under which the INS agreed to undertake these responsibilities. Review of the contract itself reveals none. *See* A-11 to A-98. And Barbosa has not appealed from the Commission's decision that the contract did not relieve Barbosa from its OSHA compliance obligations or somehow required it to ignore them.

Indeed, Barbosa’s own evidence is to the contrary. Barbosa’s executives admitted that it provided medical evaluation and follow-up treatment through its workers' compensation insurance and its contributions towards its employees’ health insurance premiums. *See*, *e.g.*, Tr. 310-12, 419-20. If Barbosa could partially comply with the follow-up medical care requirements in this manner, nothing prevented it from fully complying by paying all of its employees' medical evaluation and follow-up expenses. It did not, even though its

executives knew of Barbosa's obligation to do so. A-135 to A-136. The only possible conclusion on this record is that, contrary to the Commission majority's determination, Barbosa willfully failed to comply with its obligation to provide medical evaluation and follow-up at no cost.

D. Although the Commission Failed to Apply a Correct Understanding of "Willful" in Evaluating the Record, A Remand on this Question is Not Necessary.

Where the evidence adduced before the ALJ admits of only one conclusion, 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), *overruled in unrelated part*, *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144 (1991); *Brennan v. OSHRC (John J. Gordon Co.)*, 492 F.2d 1027, 1032 (2d Cir. 1974). Here, as explained above, Barbosa's subjective awareness of its failure to comply fully with the standard admits of only one conclusion – that its conduct was per se not in good faith as a matter of law. But even if the Court does not go so far as to find per se willfulness, even the most favorable view of the record for

Barbosa compels a finding that its failure to provide medical evaluation and follow-up at no cost was willful and that its partial compliance was not objectively reasonable. Therefore, a remand on this question of willfulness is unnecessary.

IV. The Case Should Be Remanded For a New Assessment of Penalties.

This matter should be remanded for a new assessment of penalties on three of the four violations in this case.

The OSH Act gives the Commission the authority to review the Secretary's proposed penalties. OSH Act §§ 10(c),17(j), 29 U.S.C. §§ 659(c), 666(j). Thus, when a reviewing court reverses the Commission's reduction of a violation from willful to serious, it remands the case for a new assessment of penalties. *See Brennan v. OSHRC (Gerosa, Inc.)*, 491 F.2d 1340, 1345 n.15 (2d Cir. 1974); *see also Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1155 (11th Cir. 1994); *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983). Because, for the reasons explained above, this Court should reverse the Commission's decision on willfulness for the violation of the "at no cost" provision regarding the medical

evaluation and follow-up treatment requirement, a remand for a new determination of the penalty is appropriate for this violation.

This review should also extend to the penalties to be imposed for the two serious violations for inadequate training and lack of an exposure control plan. This is because after the Commission reduced the medical evaluation and follow-up violation to serious, it grouped the violation with the other two serious violations and assessed a single penalty for the three in the amount of $6,300. This was lower than the $6,750 penalty recommended by the Secretary and the ALJ for the two serious violations alone. Thus, the Commission should conduct a new review of the appropriate penalty to be imposed for the two serious violations, as well as the willful failure to provide medical evaluation and follow-up treatment at no cost to the employee.

CONCLUSION

For the foregoing reasons, 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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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2007, I ten copies of the foregoing brief and the joint appendix to the Clerk of the United States Court of Appeals for the Second Circuit by overnight mail, postage prepaid. I further certify that on July 16, 2007, I served two copies of the brief and one copy of the joint appendix by overnight mail, postage prepaid, upon the following:

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