[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11844
Non-Argument Calendar

Agency No. 16-0287

SAMSSON CONSTRUCTION, INCORP.,

Petitioner,

versus

SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondent.

Petition for Review of a Decision of the
Occupational Safety and Health Review Commission

(January 19, 2018)

Before JULIE CARNES, NEWSOM, and HULL, Circuit Judges.

PER CURIAM:

The Secretary of Labor brought this enforcement proceeding before the Occupational Safety and Health Review Commission seeking an order affirming three "citation items" and $32,000 in proposed penalties resulting from scaffolding-related violations discovered during an Occupational Safety and Health Administration ("OSHA") inspection of a Samsson Construction Inc. worksite in Port Richey, Florida. Following a bench trial, an administrative law judge ("ALJ") affirmed the citations and civil penalties, and Samsson filed a petition for review with this Court. We affirm.

I

In September 2015, two OSHA officers performed an impromptu safety inspection on Samsson's construction site at a Port Richey Verizon store after observing three workers on a noticeably noncompliant scaffold. The inspection resulted in three[1] citation items alleging different violations of OSHA's scaffolding standard, all of which exposed Samsson's employees, who were applying stucco to the store's façade, to the risk of hazardous falls. In particular, the citation items charged that Samsson had committed (1) a serious violation of 29 C.F.R. § 1926.451(e)(1)[2] by allowing its employees to use the scaffold frame (rather than a

[1] The Secretary also originally cited Samsson for one additional violation, but that citation item was later withdrawn.

[2] "When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold

ladder) to access the upper level of the scaffold; (2) a willful violation of 29 C.F.R. § 1926.451(b)(1)[3] by failing to ensure that the scaffold was fully planked; and (3) a willful violation of 29 C.F.R. § 1926.451(g)(4)(i)[4] by using scaffolding that was missing the top and mid guardrails. Samsson contested the three citation items—and the $32,000 in proposed penalties—and the Secretary filed a formal complaint with the Commission.

Following a bench trial, an ALJ affirmed all three citation items and proposed penalties. Samsson filed a petition for direct review, which the Commission declined, thereby making the ALJ's decision the Commission's final order. Samsson timely appealed to this Court arguing (1) that the ALJ erroneously imputed a Samsson supervisor's actual knowledge of the scaffold violations to the company, and (2) that the ALJ improperly concluded that the second and third citation items constituted "willful" violations. We consider Samsson's arguments in turn.

In so doing, we give "considerable deference" to the Commission's decision—which here, as already explained, is the ALJ's. *Fluor Daniel v. OSHRC*,

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access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access." 29 C.F.R. § 1926.451(e)(1).

[3] "Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports[.]" 29 C.F.R. § 1926.451(b)(1).

[4] "Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews." 29 C.F.R. § 1926.451(g)(4)(i).

295 F.3d 1232, 1236 (11th Cir. 2002). In particular, we review the Commission's factual findings only for "substantial evidence," and we will overturn its legal conclusions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Quinlan v. Sec'y of Labor*, 812 F.3d 832, 837 (11th Cir. 2016); *see also* 5 U.S.C. § 706(2)(A).

II

To establish a prima facie case under the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, the Secretary must show "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran Group, Inc. v. DOL*, 722 F.3d 1304, 1307 (11th Cir. 2013). Here, Samsson stipulated to the first three elements, leaving the only remaining issue whether Samsson knowingly disregarded the Act's requirements. The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program. *Id.* at 1311. Here, we agree with the ALJ that both predicates are met.

A

The ALJ imputed actual knowledge to Samsson through its stucco-work supervisor, Floyd Wood—who had 58 years of experience, had built approximately 1,500 scaffolds, admitted to knowing the OSHA scaffolding requirements, and acknowledged the noncompliance of the scaffolding at the construction site. The general rule in this Circuit is that knowledge of a supervisor is imputed to the employer—*unless* the supervisor is the "actual malfeasant" who created the hazard that violated the Act. *ComTran*, 722 F.3d at 1316. If the supervisor is the "actual malfeasant," then his "rogue" conduct will not be imputed to the employer—*unless*, by his roguish malfeasance, the supervisor exposes not only himself but also his subordinates to the hazard, in which case the supervisor's knowledge of the violation *is* imputed. *Quinlan*, 812 F.3d at 841. Accordingly, the ALJ reasoned, even as the "actual malfeasant" who created the hazard, Floyd Wood's actual knowledge was properly imputed to Samsson because he knew that his subordinates John Wood and Tyler Checo were using (and thus being exposed to) a noncompliant scaffold.

On appeal, Samsson contends that the ALJ improperly imputed Floyd Wood's actual knowledge of the scaffold violations. Specifically, Samsson attempts to avoid application of *Quinlan*'s rule allowing imputation where one or more subordinate employees are exposed to hazardous conditions by arguing (1)

that John Wood was misclassified as a "subordinate" when in fact he was a second stucco "lead" and (2) that Tyler Checo—an undisputed "subordinate"—worked only from the lower level of the scaffold and was therefore not exposed to the hazard on the top level. Samsson's arguments are unavailing. Even reclassifying John Wood as a stucco "lead" rather than a "subordinate" results in the same conclusion because clear record evidence demonstrates, contrary to Samsson's assertions, that Tyler Checo was in fact exposed to the hazardous violative conditions—and at the very least, there is "substantial evidence" to support the ALJ's finding to that effect. *See, e.g.*, Trial Tr. 125:7–10 ("Q. And did [Checo] sometimes have to go up to the top level of the scaffold in helping you with the stucco work? A. Yes, sir.") (testimony of Floyd Wood); App. Vol. III, Item 21, Statement of John Wood at 2 ("My father Floyd, Tyler and I worked from the top level. We were on the top level both days, maybe 3 hours tops for both days.").

Therefore, Floyd Wood's actual knowledge was properly imputed to Samsson.

B

Moreover, and in any event, the ALJ separately determined that Samsson had constructive knowledge of the scaffold violations—a sufficient basis for proving a "knowing[]" violation—because its failure to implement an adequate safety program made the misconduct reasonably foreseeable.

Samsson has not challenged the ALJ's constructive-knowledge determination on appeal. Accordingly, Samsson has waived any argument as to that dispositive issue. *See, e.g.*, *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). Even beyond the waiver, Samsson has admitted in its brief to us the predicate for a finding of constructive knowledge—namely, that it "did not have a written safety program [and that] its program consisted solely of once-a-week meetings led by its safety director, which did not cover scaffold safety." Br. of Petitioner at 3; *accord, e.g.*, Trial Tr. 248:15–24, 255:3–14 (testimony of Samsson owner Richard Matassa explaining absence of meaningful safety program); App. Vol. III, Item 21, Statement of John Berrick at 1 (similar). Accordingly, by its own admission—and by its failure to challenge this finding on appeal—Samsson, at the very least, had constructive knowledge of the violations, which alone is sufficient to support the ALJ's conclusion that Samsson "knowingly disregarded" the Act's requirements.

III

Samsson also argues that the ALJ improperly concluded that the second and third citation items constituted "willful" violations. A "willful" violation "is, in its simplest form, an intentional disregard of, or plain indifference to, OSHA requirements," *Fluor Daniel*, 295 F.3d at 1239, and generally requires that a party possess a "heightened awareness" of the applicable OSHA regulation, *Lanzo*

Const. Co. v. Occupational Safety & Health Review Comm'n., 150 F. App'x 983, 986 (11th Cir. 2005).

The ALJ determined that the second and third citation items constituted "willful" violations on the ground that it was permissible to impute to Samsson the state of mind of any supervisor who exhibited a heightened awareness of the illegality of the conditions and a state of mind of conscious disregard or plain indifference to employee safety. The ALJ determined that because supervisor Floyd Wood had 58 years of experience working from scaffolds, had actual knowledge of the OSHA standard's requirements, and was aware that the conditions at the site did not meet those requirements, he had a "heightened awareness" of the applicable OSHA regulation and consciously disregarded the standard and manifested plain indifference both to his own safety and to the safety of his subordinate employees in order to "get the job done" quickly. Therefore, the ALJ concluded, Floyd Wood's state of mind, knowledge, and conduct were imputed to Samsson for purposes of finding that the violations were "willful."

On appeal, Samsson appears to argue that the ALJ's "willful"-violation determination was unfair because (1) it is a safety-conscious company that would not have intentionally put its employees at risk; (2) there is nothing else it could have done to prevent the violations; (3) it had no prior history of OSHA violations; (4) no injuries occurred as a result of the violations; and (5) designating the

violations as "willful" does not benefit the safety of its employees, but only punishes Samsson.

None of Samsson's arguments—however persuasive they may or may not be—actually challenges the ALJ's application of the governing law. The ALJ correctly concluded that Floyd Wood was a supervisor who exhibited a heightened awareness of the illegality of the conditions and a state of mind of conscious disregard or plain indifference to employee safety. Under our precedent, that is sufficient. *See, e.g.*, *Fluor Daniel*, 295 F.3d at 1240 (holding that "when the Secretary alleges that a violation was willful, a company cannot defend itself by claiming that it acted in good faith"); *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1356–57 (11th Cir. 2000) (holding that an employer's reliance on company employees to avoid hazards does not excuse employer's own conscious disregard for safety). Accordingly, we must agree that Floyd Wood's state of mind, knowledge, and conduct were properly imputed to Samsson for purposes of finding that the violations were willful.

IV

For the foregoing reasons, and especially in view of the deference owed to the ALJ's decision, we hold that the ALJ correctly concluded that Samsson had actual and constructive knowledge of the scaffolding violations and that the second

and third citations items constituted "willful" violations. Accordingly, we deny the petition and affirm the Commission's decision.

AFFIRMED.