[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10820
Non-Argument Calendar

Agency No. 16-0291

AUSTAL, U.S.A., L.L.C.,

Petitioner,

versus

DEPARTMENT OF LABOR,

Respondent.

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

(November 15, 2018)

Before MARTIN, JORDAN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Austal, U.S.A., L.L.C., appeals the Occupational Safety and Health Review Commission's order affirming a citation for violation of 29 C.F.R. § 1915.133(a).[1] On appeal, Austal argues that the administrative law judge, (1) relying on improper evidence and an inadequately defined standard, erroneously concluded the miller tool is unsafe; (2) incorrectly found employer knowledge of the hazard existed; and (3) erroneously rejected Austal's unpreventable employee misconduct defense. Austal requests that we deny enforcement of the order. After careful review of the record and the parties' briefs, we affirm.

I

Because we write for the parties, we assume their familiarity with the underlying record and recite only what is necessary to resolve this appeal.

On August 3, 2015, in response to an employee complaint about an unsafe hand tool known as the "miller tool,"[2] Compliance Safety and Health Officer ("CSHO") Stephen Yeend conducted an on-site investigation of Austal. During the course of his investigation, CSHO Yeend observed two brief demonstrations of

[1] The administrative law judge similarly affirmed a violation, in the alternative, of the General Duty Clause of the Occupational Health and Safety Act (the "OSHA"). *See* 29 U.S.C. § 654. Because we conclude the citation is due to be affirmed for the violation of § 1915.133(a), we need not reach the General Duty Clause citation. *See, e.g.*, *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1199 & n.7 (5th Cir. 1997) ("[S]tandards are the preferred enforcement mechanism and . . . the General Duty Clause serves as an enforcement tool of last resort.").

[2] According to Austal, a miller tool "is a Metabo angle grinder with a toothed saw blade."

employees using the miller tool. He had never previously evaluated any miller tool as part of an Austal inspection. CSHO Yeend also interviewed hourly and management employees and, following the on-site visit, received documents from Austal and the angle grinder manufacturer, Metabo, pursuant to a subpoena. CSHO Yeend initially recommended that the Secretary issue a citation for a serious violation of § 5(a)(1) of the OSHA, *see* 29 U.S.C. § 654(a)(1), which the Secretary did on January 20, 2016. The Secretary later moved to amend the citation to allege, in the alternative, a serious violation of § 1915.133(a), and the ALJ granted the motion to amend on October 7, 2016.

The ALJ held hearings on March 14–15, 2017, and April 25–26, 2017. At the hearings, the ALJ heard testimony from, among others, five employees injured at Austal while using miller tools and eleven Austal supervisors and foremen tasked with daily oversight of employees. The ALJ also reviewed a significant amount of documentary evidence, including user manuals, Austal's safety briefings, and personnel emails discussing miller tool use, design, and safety. The ALJ issued an opinion affirming the violation of § 1915.133(a) on November 9, 2017, and the decision became the Commission's final order on January 4, 2018.

II

We are bound to affirm the ALJ's findings of fact, and its finding of a violation on the basis of those facts, if they are supported by substantial evidence in the record. *See Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n*, 683 F.2d 361, 363 (11th Cir. 1982) ("In evaluating the decision of the Commission, we recognize that its findings and conclusions must be upheld if supported by substantial evidence[.]"). *See also* 29 U.S.C. § 660(a) ("The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."). "[S]ubstantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Fluor Daniel v. Occupational Safety and Health Review Comm'n*, 295 F.3d 1232, 1236 (11th Cir. 2002) (internal quotation marks and citation omitted). This deferential standard precludes us from re-weighing conflicting evidence or credibility determinations. *See Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1300 (11th Cir. 2014). *See also Martin v. Sullivan*, 894 F.2d 1520, 1529 (11th Cir. 1990) ("Even if the evidence preponderates against the Secretary's factual findings, we must affirm if the decision reached is supported by substantial evidence.").

In addition, an agency's legal determinations are to be overturned only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Fluor Daniel*, 295 F.3d at 1236 (internal quotation marks and citation omitted). Accordingly, we defer to the Secretary's reasonable interpretations of relevant regulations. *See id.*

The initial burden is on the Secretary to "make out a prima facie case for the violation of an OSHA standard[.]" *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (citation omitted). Specifically, 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." *Id.* (citation and internal quotation marks omitted). If the Secretary makes this showing, the burden then shifts to the employer to prove any affirmative defenses. *See ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013).

Austal does not contest § 1915.133(a)'s applicability. Accordingly, we limit our discussion to the points raised on appeal: whether the miller tool was unsafe, whether Austal had knowledge of the danger, and whether Austal's affirmative defense was properly rejected.

III

In support of its assertion the ALJ erred in finding the miller tool unsafe, Austal points first to the lack of a definition of "unsafe" in the regulations. Austal also argues that the ALJ erred in relying on the following evidence: biased employee testimony; warnings in the manufacturer's manual about using a toothed saw blade on its angle grinders; emails which predated the introduction of the miller tool model in use at Austal at the time of CSHO Yeend's investigation; and an email sent from Metabo to Austal after a number of employees injured by miller tools had initiated litigation against Austal and Metabo. For the following reasons, we are not persuaded by Austal's arguments and conclude there was substantial evidence in the record to support the citation.

A

1

Austal points out numerous times that § 1915.133(a) lacks a definition for the term "unsafe." But Austal fails to explain why this requires us to vacate the Commission's order, which alone is reason to reject the argument. *See, e.g.*, *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682 (11th Cir. 2014) ("Abandonment of an issue can also occur when passing references appear in the argument section of an opening brief, particularly when the references are mere

'background' to the . . . main arguments or . . . are 'buried' within those arguments." (citation omitted)).

There exists "[a] fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citation omitted). The ALJ acknowledged the absence of a definition for "unsafe" in the regulation, and turned to the *New Oxford American Dictionary* (3d ed. 2010), for guidance. That dictionary defines "unsafe" as "not safe; dangerous," with the latter defined as "able or likely to cause harm or injury." These definitions comport with our general understanding of the word "unsafe," especially in the context of a hand tool. We do not believe the word "unsafe" is so vague, in this instance, as to warrant denial of enforcement of a citation under § 1915.133(a).

Concluding that a hand tool violates a safety standard because it is likely to cause injury is not at odds with OSHA's purpose and scope. *See* 29 U.S.C. § 651(b) ("Congress declares it to be its purpose . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions[.]"). Austal does not (and cannot) reasonably argue that it did not have notice of what § 1915.133(a) prohibits. And, because Austal provides no

alternative definition, we see no reason to conclude that the ALJ's definition was flawed or that the regulation is hopelessly vague. We therefore decline to reverse on this ground.

2

Austal next argues that because most of the injured employee witnesses who testified are also involved in civil litigation against Austal relating to those injuries, they are not credible and the ALJ should have disregarded their testimony. It asserts the ALJ failed to take into account certain, unspecified "objective factors" in assessing the witnesses' credibility. Austal alternatively contends that the witnesses' testimony did not support a finding that miller tools are unsafe because the employees conceded they received training on the use of miller tools, admitted that Austal disciplines those who violate rules regarding miller tool use, and admitted that at least some of the injuries claimed were due to distraction or failure to follow rules.

Contrary to Austal's assertions, the ALJ engaged in a lengthy credibility determination, spanning nearly two pages, in which she analyzed not only the injured employees' testimony, but also that of the supervisory employees testifying on behalf of Austal. She noted all of the witnesses who testified were potentially at risk of allowing self-interest to influence their testimony, and specifically made

findings as to portions of "immaterial" and "material" testimony. She also expressly listed other factors she considered, including demeanor; topics which elicited defensiveness, evasiveness, or increased nervousness from each witness; the internal consistency of each witness's testimony; and the degree to which testimony appeared rehearsed.

Both the injured employee and supervisory employee witnesses offered extraneous, "immaterial" testimony at the hearings. None of the immaterial testimony offered by either the injured employees or supervisors was particularly credible, according to the ALJ, but she concluded that the material testimony was largely undisputed, and that other evidence in the record supported her ultimate findings. Specifically, the undisputed, material evidence showed that several employees were injured using miller tools; that Austal supervisors were aware of these injuries; and that Austal never disciplined any employee injured while using the miller tool for misuse of the tool or any other safety infraction. After review of the record, we agree.

As noted, we are not permitted to reweigh credibility determinations at this stage. *See Sumpter*, 763 F.3d at 1300. We conclude the ALJ's credibility analysis was sound in that it relied on corroborating record evidence and offered an exhaustive list of factors evaluated in reaching a conclusion.

3

Austal also attacks the ALJ's reliance on the Metabo manual's warnings against attaching a toothed saw blade to an angle grinder, which was precisely the type of saw that Austal attached to the angle grinder. Austal asserts that because it was in regular contact with Metabo, and because representatives from Metabo never corrected—and in fact encouraged—Austal's use, Austal was not using the tool in a manner inconsistent with manufacturer recommendations. So, according to Austal, the ALJ's consideration of the manual "in a vacuum" was error.

The ALJ noted that manuals for all models of Metabo grinders used at Austal contained the same warning against using toothed saw blades. The manuals advised that the risk of kickback—defined as a sudden reaction to a pinched or snagged rotating wheel which causes rapid stalling of the rotating accessory and causes the tool to be forced in the opposite direction—was increased by the use of a toothed saw blade. Austal's own incident logs indicate miller tools were responsible for 29 kickback-related injuries between January of 2013 and October of 2014, whereas all of Austal's other tools combined accounted for only 12 kickback-related injuries. The manual's warning was therefore relevant. And, as evidenced by the preceding discussion, nothing in the decision suggests the ALJ

considered the manual "in a vacuum"; indeed, it was one of several pieces of documentary evidence the ALJ relied upon in reaching her conclusion.

Austal's continued communication with Metabo, given the standard of review, does not relieve it of liability. As the ALJ pointed out, the individual with whom Austal regularly communicated at Metabo was a sales person with no background in safety. Further, we cannot say that the ALJ was mistaken in saying that "Austal did not need Metabo to alert it of the dangers of using miller tools—its own employees had informed Austal of the dangers inherent in the use of miller tools for years, based on actual experience."

4

Austal next contends that the ALJ's reliance on "Safety Grams," which are communications issued to employees to foster awareness of potential hazards, contravenes OSHA's purpose by discouraging employers from complying with the Act. Importantly, three Safety Grams were related to miller tools, and two of them had extensive lists of "dos & don'ts" for use. One Safety Gram specifically warned employees that 90% of all injuries involving miller tools were caused by kickback.

Austal seems to suggest that a document generated by an employer that identifies a specific hazard cannot be used to demonstrate the existence of the

hazard or to show that the employer had knowledge of the hazard, lest employers be dissuaded from warning employees about hazards in the future. But Austal has offered nothing more than a conclusory argument to support its assertion the ALJ should have ignored these Safety Grams. We therefore see no reason that evidence which is relevant and indicative of a safety hazard should not be considered in a proceeding to determine whether an employer is "issu[ing] or permit[ting] the use of unsafe hand tools." § 1915.133(a).

5

Austal points to a number of emails it asserts the ALJ should not have considered, as a number of them were sent as far back as 2011 and discussed earlier miller tool models. Austal also contends the ALJ should not have considered a 2015 email in which a Metabo representative stated that Metabo did not approve of any wheel on their grinders other than bonded abrasive or diamond wheels, because the email was sent after certain injured employees had initiated litigation against Austal and Metabo.

We first note that the ALJ primarily relied on these emails to demonstrate employer knowledge of the hazard—an issue further discussed below. With respect to safety, the emails demonstrate an ongoing process of consultation among Metabo, its engineers, and Austal's supervisory employees to attempt to reduce the

expressly acknowledged dangers inherent in miller tools that were evidently never remedied. Such evidence is probative of both employer knowledge and the persistent risk of kickback characteristic of these types of tools.

With respect to the 2015 email sent from a Metabo sales representative to Austal's distributor of Metabo products, Austal's arguments are again unavailing. As the ALJ pointed out, the email was sent after the initiation of litigation, but prior to the OSHA inspection, which is the key event in these proceedings. And irrespective of the timing of this email relative to the civil suit, the fact remains Austal received this warning in 2015, the warning was a reiteration of the warning in the manufacturer's manual, and its employees were still using miller tools as of the date of the hearing in 2017.

For the foregoing reasons, we conclude there was substantial evidence in the record to support the ALJ's finding that the miller tools were unsafe.

B

Austal devotes a single paragraph to arguing that the ALJ erred in finding Austal knew of the hazard by conflating Austal's knowledge of the fact employees used miller tools with knowledge that its employees were exposed to hazards from miller tools. Austal argues that its training materials, protective gear, and miller

tool use rules, taken as a whole, support only a finding that it was aware employees used miller tools and took steps to ensure their safety.

The ALJ reviewed a number of key emails demonstrating Austal was aware miller tools presented a danger of injury due to kickback. For example, in one email, sent in May of 2011, Austal's director of module manufacturing reached out to the senior safety and health manager, Christopher Blankenfeld, and others, explaining the large order of new miller tools was "garnering significant complaints from the shop floor . . . stating that they are unsafe and that someone is going to get hurt." Mr. Blankenfeld responded, in part, "[a]ny tool that we put these miller blades into will be just as dangerous. These blades were never designed to be used in a hand power tool." He also stated Metabo was working on a redesign of the tool, while another company was working on a replacement blade to be used in place of the miller tools. In October of 2011, in an email discussing the increase in price for miller tools, Mr. Blankenfeld wrote "[i]f we can't afford a better[,] smarter tool[,] we need to take the necessary steps at [sic] making a better[,] smarter employee." In January of 2014, Austal's process engineer wrote to Mr. Blankenfeld and other supervisors stating:

> I'm looking at the safety metrics, we have had multiple discussions with the trades about improvements. Their biggest complaint is the Metabo—as usual. . . . I had spoken with Metabo about a year back . . . [t]he salesmen

> said that if we are not satisfied with the design, they would entertain a . . . buy-back. . . . Can we pursue a new design with the trades' input, so we can finally get this as close to right as possible?

In response, Mr. Blankenfeld noted that, in deciding on a new model, they should keep in mind the fact that Austal had approximately 11 OSHA recordable injuries a year involving a miller tool. Eventually, he also wrote:

> Another issue is the Miller Blades themselves, they were never designed to be put on an angle grinder; these blades are manufactured for use in fixed table milling machines. They have become status quo in most manufacturing industries though for use on Angle Grinders. I wish we could find something different that works as well. . . . I think our focus should not be on replacing the tools being used but continued retraining of the employees[.] . . . Another solution for this would be to find a cutting wheel that is not as lethal as the miller wheel.

The ALJ did not conflate knowledge of the tool's use with knowledge of its dangers. To the contrary, the ALJ found direct knowledge of the dangers. The statements in these emails, as well as emails containing ongoing discussions with Metabo representatives about redesigning the miller tools, taken together with records of 29 kickback-related injuries in 22 months and a Safety Gram acknowledging the heightened risk of kickback, provide substantial evidentiary support for the ALJ's finding of employer knowledge.

C

Finally, Austal argues that it adequately established the affirmative defense of unpreventable employee misconduct. The ALJ concluded that Austal had failed to establish this defense because it could not show that it had a work rule prohibiting the use of miller tools and because it offered no evidence to show that it disciplined any of the injured employees for misuse of the tool resulting in the injury.

According to the ALJ, any use of an unsafe tool is a violation of § 1915.133(a). As a result, Austal cannot satisfy any prong of the employee misconduct test. Stated differently, because Austal could not show that a rule existed to prohibit the use of the miller tool all together, it could not take steps to discover a violation of such a rule, and could not enforce such a rule when it discovered violations. Austal has not pointed us to any authority which shows that this was error.

The ALJ also concluded that, to be able to accept Austal's assertion that any employee injured was necessarily misusing the tool, Austal would have to show it actually enforced a work rule to prevent the misuse. Given, however, that Austal provided no documentary evidence of disciplining injured employees, and that

none of the injured employees testified to having been disciplined following injury, the record supports the ALJ's rejection of the affirmative defense.

IV

For the foregoing reasons, we affirm the Commission's order.

AFFIRMED.