# 18-2831

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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**EUGENE SCALIA, ESQ., SECRETARY OF LABOR,**

Petitioner,

v.

**ANGELICA TEXTILE SERVICES, INC.,**

and,

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,**

Respondents.

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

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**AMICUS CURIAE IN SUPPORT OF ANGELICA TEXTILE SERVICES, INC. AND COURT APPOINTMENT AMICUS CURIAE SUPPORTING THE COMMISSION**

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**CORPORATE DISCLOSURE STATEMENT**

**PURSUANT TO FRAP 29(A)(4)**

The **Chamber of Commerce of the United States of America** declares that it is a non-profit corporation that offers no stock, there is no parent corporation, and no publicly traded corporation currently owns 10 percent or more of this entity's stock.

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving workplace safety and health matters.

The vast majority of the Chamber's members are subject to the Occupational Safety and Health Act ("Act"). As potential recipients of citations issued by the Secretary of Labor, these members have a vital interest in ensuring that the Secretary and the Commission correctly interpret and fairly enforce the Act. That interest is particularly important when, as here, the Secretary seeks broad and unchecked authority to classify safety and health violations as repeated under the Act. The Chamber accordingly has a significant interest in this Court's resolution

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), amicus affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

of the Secretary's petition. While all parties have consented to the filing of this brief, amicus has moved for leave of the Court to file this brief at the direction of the case manager.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Occupational Safety and Health Act ("OSH Act" or "Act") provides for penalties to be assessed against employers who violate regulations and standards issued under the Act. 29 U.S.C. §§ 666(a)-(d) (1990). Further, the OSH Act allows for increased penalties for "[a]ny employer who willfully or repeatedly violates the requirements of section 5 of this Act [29 U.S.C.S. § 654 (1970)], any standard, rule, or order promulgated pursuant to section 6 of this Act [29 U.S.C.S. § 655 (1970)], or regulations prescribed pursuant to this Act [.]" 29 U.S.C. § 666(a) (1990).

The Act does not define "repeatedly," and for many years, the Commission and the courts struggled to define the term, with no "consistent [or] authoritative answer." *Potlatch Corp.*, 7 BNA OSHC 1061, 1062 (No. 16183, 1979). The Commission brought clarity to the issue in *Potlatch*, which by the Secretary's own account, "embodies the Secretary's reasonable interpretation of the term 'repeatedly' in section 17 of the OSH Act." Brief of Petitioner at 19. *Potlatch* explained that a "violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a *substantially similar* violation." *Potlatch*, 7 BNA OSHC at 1063 (emphasis added). "[T]he Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply

with the same standard." *Id.* The burden then shifts to the employer to rebut the showing of similarity with "evidence of the disparate conditions and hazards associated with these violations of the same standard." *Id.*

That is exactly what the Commission did here: It considered the disparate conditions and hazards associated with Angelica's violations and concluded that Angelica had rebutted the showing of similarity. The Secretary's attacks on the Commission's factual findings fail for several reasons.

First, the Secretary accuses the Commission of departing from *Potlatch* without a reasoned explanation. But the Commission made no such departure. Instead, it did what it is Congressionally tasked with doing. It reviewed the facts of the case and applied the law—the *Potlatch* test—to those facts. The Secretary's mere disagreement with the outcome does not support an assertion of reversible error.

Next, the Secretary asserts that his definition of "repeatedly" is entitled to *Chevron* deference. But there is no disagreement between the Secretary and the Commission about the meaning of "repeatedly"; it is well established that "repeatedly" means "substantially similar." So, there is no need to defer. And although the Secretary would find that the conditions and hazards associated with Angelica's violations are substantially similar, his view of the *facts* is not entitled

to deference. Indeed, deferring to his view of the facts would usurp the Commission's statutory role.

Finally, the Secretary's position would effectively impose strict liability on employers for repeat violations, unfairly subjecting them to enhanced penalties without regard to whether they had notice of the need to take steps to correct a hazard.

## ARGUMENT

### I. The Commission Applied Its Longstanding Framework For Classifying Repeat Violations And Found That The Factual Record Does Not Warrant Repeat Classification

There is no dispute that *Potlatch* governs the analysis as to whether a violation under the OSH Act is "repeated." *See* Brief of Petitioner at 19; Brief of Pro Bono Counsel at 25. And that is the framework the Commission applied here.

In *Potlatch*, the Commission provided much-needed clarity for the term "repeatedly": "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a *substantially similar* violation." *Potlatch*, 7 BNA OSHC at 1063 (emphasis added). When the prior and present violations are for failure to comply with the same standard, the Secretary has met his prima facie burden of showing the violations are substantially similar. *Id.* But the analysis does not end there; the employer may then rebut this showing of substantial similarity by

presenting "evidence of the disparate conditions and hazards associated with these violations of the same standard." *Id.*

Thus, the fact that an employer is cited multiple times under the same standard is not dispositive. For example, an employer's failure to protect employees from fall hazards requiring the use of belts and fall restraints is often cited under the same standard as an employer's failure to require employees to use seat belts in earthmoving equipment. *See id.* Although both situations violate the same safety standard, they often involve "disparate conditions and hazards" such that the employer may show they are not repeat violations. *Id.*

The Commission faithfully applied *Potlatch*'s framework here. After determining that the Secretary had established a prima facie case, the Commission turned its analysis to whether Angelica was able to rebut the case with evidence of disparate conditions and hazards associated with the violations. The Commission found that Angelica had met its burden. In the predicate violation, Angelica's Edison facility failed to have site-specific lockout/tagout procedures that listed the types of machines requiring maintenance/service, the types of energy sources for those machines, the location of those energy sources, and the means for isolating specific energy sources—deficiencies which, together, "were significant enough to render those procedures substantially ineffective." *Angelica Textile*, slip op. at 17, 19-20. By contrast, the citations at issue at the Ballston Spa facility pertained to

discrete insufficiencies in specific verification and isolation procedures within otherwise comprehensive, machine-specific lockout/tagout procedures. Those deficiencies were "minimal" compared to Angelica's "nearly complete failure to comply" at Edison. *Id.* at 20. Thus, the Commission concluded "the evidence shows that the violations took place under disparate conditions." *Id.*

## II. The Secretary's Contrary Arguments Are Unavailing

The Secretary disagrees with the Commission's factual finding and attempts to shoehorn that disagreement into grounds for reversible error. Each of his arguments fails.

### A. The Commission Faithfully Applied *Potlatch*

The Secretary accuses the Commission of departing from *Potlatch* in several ways. *First*, he claims that the Commission "did not actually consider whether Angelica's violations … at Edison and Ballston Spa resulted in similar hazards" and "failed to assess the similarity of the workplace conditions involved in the violations." Brief of Petitioner at 26. But the Commission reviewed the factual record in detail and concluded that "the violations took place under materially different circumstances." *Angelica Textile*, slip op. at 20. The mere fact that the Secretary would have reached a different conclusion based on the record is not grounds for reversal.

*Second*, the Secretary claims that *Potlatch* precludes the Commission from considering the relative breadth of an employer's violations. *See* Brief of Petitioner at 27. But *Potlatch* does not purport to set forth an exhaustive list of factors relevant to determining substantial similarity. Because *Potlatch* did not establish an exhaustive list of factors to consider in evaluating substantial similarity, the Commission in *Angelica* was free to consider all the factual evidence except those factors expressly excluded by *Potlatch* from the analysis. And stark differences between the breadth of violations underlying different citations often are probative of "disparate conditions and hazards." *See Potlatch*, 7 BNA OSHC at 1063. It was reasonable for the Commission to conclude that "a comprehensive failure to comply with … [lockout/tagout] responsibilities" is not substantially similar to "two types of discrete deficiencies in a company's machine-specific procedures." *Angelica Textile*, slip op. at 19. An employee who is given no instructions likely faces different hazards than an employee who has comprehensive but not exhaustive instructions.

*Finally*, the Secretary claims that the Commission improperly considered Angelica's knowledge as to whether its procedures at Ballston Spa constituted violations. Brief of Petitioner at 33. The Commission did note that, following its Edison citation, "Angelica took affirmative steps to achieve compliance and avoid similar violations." *Angelica Textile*, slip op. at 20. But the Commission made

clear that it was not "requiring a heightened state of mind, or scienter." *Id.* n.22. Rather, it was assessing whether Angelica "failed to discover and eliminate a hazardous condition despite having heightened notice of its duty to [do so] by virtue of [its] prior OSHA citation"—an exercise that the Secretary agrees is one of *Potlatch*'s "aims." Brief of Petitioner at 28.

Indeed, an employer's notice of the need to take steps to prevent a second violation is important in the context of the enhanced penalties imposed for repeat violations. *See George Hyman Constr. Co.*, 582 F.2d 834, 840 (4th Cir. 1978), *Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005). In order to properly identify repeat violations that "indicate a failure to learn from experience," "substantially similar" should be "defined sufficiently narrowly that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation." *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998). The Secretary has stated that "OSHA is in full agreement with [*Caterpillar*'s] principle and believes that both its enforcement guidance and the caselaw of the Review Commission and the courts have been consistent with it. Application of this principle assures fairness even to very large employers." OSHA Standard Interpretation Letter (July 13, 1999), *available at* https://www.osha.gov/laws-regs/standardinterpretations/1999-07-13-1 (last visited Feb. 27, 2020).

The Secretary nevertheless claims that the Commission cannot consider an employer's efforts to abate the predicate violation. Brief of Petitioner at 37. But an employer's efforts at abatement often are relevant to whether he knew he "needed to take steps to prevent the second violation." *Caterpillar*, 154 F.3d at 403. After all, "unless the employer has previously been made aware that his safety precautions are inadequate, there is no basis for concluding that a subsequent violation indicates the employer requires a greater than normal incentive to comply with the Act." *George Hyman Constr. Co.,* 582 F.2d at 841; *see Caterpillar*, 154 F.3d at 403 (evaluating an employer's notice of the need to take steps to prevent the second violation); *Potlatch*, 7 BNA OSHC at 1091-92 (Barnako, concurring in part, dissenting in part) ("If the facts surrounding the subsequent violation are so different from those giving rise to the abatement order that it cannot be said that the employer had actual notice its safety precautions with respect to the subsequent violation were inadequate, then a repeated violation should not be found.").

A prior citation alone does not necessarily provide sufficient notice because the hazard that a given OSHA standard seeks to protect against is often broader than the factual circumstances underlying a violation. Different factual circumstances can lead to the same hazard, and a citation notifying an employer that he needs to implement safeguards in *one* factual scenario does not necessarily

give him notice that he needs to implement safeguards in *other* factual scenarios that happen to create the same hazard.

The Commission's decision in *Mondo Construction Co.* illustrates this important nuance. 25 BNA OSHC 1285 (No. 13-1322, 2014). *Mondo* considered whether a citation involving OSHA trenching standards qualified as a repeat violation. The Secretary claimed that "the violations were 'substantially similar' because both involve[d] 'a failure to protect employees from the hazards of potential trench collapse.'" *Id.* (quoting Brief of Petitioner at 9). But as the ALJ explained, "[t]he problem with the Secretary's theory is that it attempts to tie 'substantial similarity' to the nature of the hazard rather than the factual circumstances of the violation." *Id.* Accepting that approach would impermissibly "broaden" the concept of substantial similarity such that "the first citation would not give the employer 'notice of the need to take steps to prevent the second violation.'" *Id.* The facts in *Mondo* demonstrate why that is so: "[T]he hazard of trench collapse could encompass both the failure to adequately shore or slope a trench (29 C.F.R. §1926.652(a)(1)) and the failure to conduct daily inspections of a trench (29 C.F.R. §1926.651(k)(1))." *Id.* But "the underlying citations alleged failures to adequately protect a trench, while the instant citation alleges that Respondent used an inadequate technique to install or remove that protective system." *Id*. at 1291. "Despite the similarity of the hazard, a citation for not

adequately protecting a trench would not necessarily place the employer on notice of the need to conduct daily inspections of a properly protected trench." *Id.* Characterizing the failure to do so as a repeat violation would unfairly penalize the employer by greatly expanding the concept of substantially similar.

In the present case, the Commission appropriately considered whether Angelica was "on notice of the need to take steps to prevent the second violation" and whether the violation "indicate[d] a failure to learn from experience." *Angelica Textile*, slip op. at 20. In so doing, the Commission looked at Angelica's actions as well as whether it had the requisite notice in order to sustain a repeat violation. "Given the Secretary's acceptance of the abatement method," the Commission found "no basis … to conclude that Angelica knew its safety precautions and corrective actions were inadequate." *Angelica Textile,* slip op. at 19 n.21. Holding Angelica liable for a repeat violation under these circumstances would unfairly impose enhanced penalties without enhanced culpability. *See Caterpillar, Inc.* 154 F.3d at 403 (finding that the OSH Act established enhanced penalties for repeated violations and therefore such violations must have enhanced culpability). And more broadly, precluding the Commission from considering whether an employer was on sufficient notice of the corrective actions needed would undermine an employer's ability to rebut the presumption of substantial similarity and effectively impose strict liability on employers whenever the

Secretary alleges that the two citations are violations of the same or similar standards.

### B. The Secretary Is Not Entitled To *Chevron* Deference Because There Is No Dispute About The Meaning Of "Repeatedly"

As a last resort, the Secretary claims that his interpretation of the term "repeatedly" is entitled to *Chevron* deference. Brief of Petitioner at 44. But the Secretary and the Commission agree that "repeatedly" means "substantially similar." And there is no dispute that *Potlatch* provides the relevant guidance for assessing substantial similarity. *See* Brief of Petitioner at 43. Accordingly, there is no need to grant deference to the Secretary. This is not a situation where the Court is faced with competing definitions of an ambiguous word in a statute.[2] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843-44 (1984).

As explained above, the Commission faithfully applied *Potlatch* and found disparate conditions sufficient to rebut the inference of substantial similarity. The Secretary's disagreement with that factual finding is not a question of statutory interpretation that implicates *Chevron*. And granting the Secretary deference on

[2] The Secretary has failed to establish why, when using traditional tools of statutory construction, the statute is ambiguous. *Chevron*, 467 U.S. at 843 n.9. Merely stating that a word in a statute is ambiguous, without an analysis does not support giving the Secretary deference.

his view of the facts would impermissibly usurp the Commission's statutory role. *See* 29 U.S.C. § 660(a) (1970).

For that reason, the Secretary's reliance on this Court's decision in the *Sec'y of Labor v. Cranesville Aggregate Cos., Inc.*, 878 F.3d 25 (2d Cir. 2017), is misplaced. The Secretary cites *Cranesville* to suggest that Angelica's citations themselves embody his interpretation of the OSH Act. But the issue in *Cranesville* was whether MSHA or OSHA had jurisdiction of the worksite at issue. 878 F.3d at 27-28. In *Cranesville* this Court held that the Secretary had decided that the Mine Act did not apply because OSHA—not MSHA—had issued the citations. *Id.* at 33, 36. Here, by contrast, there is no interpretation embedded in the citation; the Secretary merely has alleged the classification of the citations are repeated. And whether the citations are properly classified as repeat is a factual determination—belonging to the Commission—that is conclusive if supported by sufficient record evidence. *See* 29 U.S.C. § 660(a) (1970). The record supports the Commission's factual finding here, and that defeats the Secretary's complaints.

## III. The Secretary's Position Frustrates The Purpose Of The OSH Act And Disproportionally Impacts Large Employers

This petition boils down to the Secretary's dislike of the Commission's decision in this case. The Secretary wants the analysis for a repeat violation of the same standard to start and end with a similar hazard, where "hazard" is broadly defined. If an employer violates the same provision of a standard, then according

to the Secretary, the employer was on notice and should be liable for a repeat violation. And if an employer violates a different provision of a standard, but that provision addresses the same hazard, then the Secretary believes the employer is also liable for a repeat violation. The Secretary's position essentially imposes strict liability on employers by eliminating any consideration of whether the employer understood the similarities of the hazards. This does not align with the Congressional scheme of the OSH Act, which establishes enhanced penalties for repeat violations—penalties that are the maximum amount issued by the agency and equal to those of willful violations and thus inherently include a knowledge component.

As explained above (*see supra*, Part II.A), different factual situations can result in the same hazard. Turning back to *Mondo*, the hazard in both citations was of a trench collapse. 25 BNA OSHC 1285 (No. 13-1322, 2014). The alleged repeat violation in that case was based on different standards, but the Secretary's position was that the violations were substantially similar because they involved the same hazard. *Id.* at 1291. The ALJ identified the flaw in that analysis by looking at the notice the employer was on to correct the first violation. The first violation was for not protecting employees from cave-in hazards by adequate protective systems. The second violation was for using an inadequate technique to install or remove a protective system. While both citations addressed trenching

hazards, the ALJ found that the notice afforded in the first citation did not put the employer on notice of the steps needed to correct the second violation. *Id.*

The Secretary fears that analyzing the disparate factual scenarios would enable an employer who fails to fully comply with a provision once to escape a repeat violation through minimal compliance. But as long as the first citation gave the employer notice of the steps it needed to correct the hazard giving rise to its second violation, the fact that the employer made halfhearted attempts to comply will not allow it to evade penalties for a subsequent violation if it failed to do what it already knew it needed to do.

The significance of the Secretary's theory and its impact on the employer community should not be lost on this Court. Employers are covered by certain safety and or health standards that apply to their operations based on the nature of the hazards involved in the methods, means, and processes of their operations. Unless the employer's operations change, those same standards will apply for the duration of the business's operation. And large employers, by virtue of their size and the number of facilities within their enterprises are at a great risk of repeats, due to nothing more than the scale of their operations. In fact, the Secretary opposes such unfairness foisted on large employers. *See* OSHA Standard Interpretation Letter (July 13, 1999), *available at* https://www.osha.gov/laws-regs/standardinterpretations/1999-07-13-1 (last visited Feb. 27, 2020).

Under the Secretary's approach, *Potlatch*'s substantial similarity test would give short shrift to key factors that must be evaluated with respect to the standard and hazard in question. Under this paradigm, employers will routinely face repeat violations even when there is no heightened awareness of the need for corrective actions in the second instance. Such result defies Congressional intent, fair notice and due process, and is contrary to the case law.

## CONCLUSION

The Commission made a factual determination, one that is conclusive when supported by substantial evidence in the record. And, contrary to the Secretary's arguments, deference is not at issue here. For the reasons above, the Secretary's petition must be denied.

## CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 3,613 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Tressi L. Cordaro

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