

No. _____

In the United States Supreme Court

Excel Modular Scaffold & Leasing Company
d/b/a Excel Scaffold & Leasing,
Petitioner,

v.

Occupational Safety & Health Review Commission;
Eugene Scalia, Secretary, Department of Labor
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Richard A. Sheehy
State Bar No. 18178600
SHEEHY, WARE & PAPPAS, P.C.
2500 Two Houston Center
909 Fannin Street
Houston, Texas 77010
(713) 951-1000 - Telephone
(713) 951-1199 - Facsimile
Email: rsheehy@sheehyware.com

QUESTION PRESENTED

- I. Did the United States Court of Appeals for the Fifth Circuit and the Administrative Law Judge (“ALJ”) err in ruling that Excel Modular Scaffold & Leasing Company d/b/a Excel Scaffold & Leasing Excel (“Excel”) abandoned or waived its affirmative defense based upon the impossibility or infeasibility of compliance with the standard set forth in 29 C.F.R 1926.106(d)?
- II. Did the Fifth Circuit and the ALJ err in ruling, in the alternative, that even if Excel did not abandon its affirmative defense of impossibility or infeasibility of compliance, such defense failed on the merits?

CORPORATE DISCLOSURE STATEMENT

Excel has no parent corporation, and no publicly held corporation owns 10% or more of Excel's stock.

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The decision of the Fifth Circuit is reported at 943 F.3d 748 (5th Cir. 2019). The decision of the ALJ is available at 2019 O.S.H. Dec. (CCH) ¶ 33697 (O.S.H.R.C.A.L.J. Oct. 24, 2018), and is also available on Westlaw at 2018 WL 6318303.

STATEMENT OF JURISDICTION

This case is on appeal from the Occupational Safety and Health Review Commission (“OSHRC”) (Docket No. 17-0679) to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued its opinion and judgment on November 26, 2019. Excel filed a Petition for Panel Rehearing on January 10, 2020, which the Fifth Circuit denied on January 30, 2020. On March 19, 2020, this Court issued an Order to address “ongoing public health concerns relating to COVID-19,” which extended “the deadline to file any petition for a writ of certiorari” to “150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.” The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

This case involves 29 C.F.R § 1926.106(d), part of the Occupational Safety and Health Administration's ("OSHA") regulations concerning "Personal Protective and Lifesaving Equipment," which provides in relevant part: "At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water."

CITATIONS TO THE RECORD

In lieu of the record, pursuant to FED. R. APP. P. 17 and Fifth Circuit Rule 30.2, the OSHRC filed a certified list of relevant docket entries in OSHRC Docket No. 17-0679. For purposes of citing to the record, Excel is conforming the references to the certified list of relevant docket entries. Therefore, the testimony taken before the Administrative Law Judge will be cited (Vol. __, page: lines); the Secretary's exhibits will be cited (Vol. 3, C-__); Excel's Exhibits will be cited (Vol. 4, R-__); and the pleadings will be cited (Vol. __, Item __). Pursuant to Fifth Circuit Rule 30.2(b), Excel separately filed four (4) copies of the Notice and Decision (Vol. 6, Item 46).

STATEMENT OF THE CASE

Excel manufactures scaffolds and provides scaffold construction and dismantling services to companies in the refining industry. In or around 2016, Marathon Refinery hired Excel to construct scaffolds underneath three docks in Galveston Bay, Texas. (Vol. 6, Item 46, pp. 2-4; App. 16a-18a). On September 12, 2016, a work crew that included Excel employee Luis Gonzalez (“Decedent”) constructed a scaffold bay underneath one of the docks. (*Id.*). Decedent was equipped with personal fall arrest systems and was wearing flotation devices. (Vol. 1, 91:16-18). During construction, Decedent attached his lanyard to a vertical leg of the scaffold, which suddenly dislodged and fell into the water, immediately dragging Decedent to the bottom of Galveston Bay. (*Id.*; *see also* Vol. 1, 87:10-91:15; Vol. 4, R-5, at DOL000053). Decedent drowned, and divers recovered his body later that day. (Vol. 4, R-5, at DOL000053).

OSHA subsequently commenced an investigation of the incident (Inspection No. 1177395). Ultimately, OSHA cited Excel with a violation of 29 C.F.R. § 1926.106(d), which requires employers to ensure that “[a]t least one lifesaving skiff is made “immediately available at locations where employees are working over or adjacent to water.” 29 C.F.R. § 1926.106(d).¹ (Vol. 5, Item 2). A lifesaving skiff is a small boat located close enough to a jobsite that it can attempt to rescue someone who falls into the water within a few minutes. (App. 4a). The Secretary classified Excel’s violation of the regulation as “serious” and proposed that Excel pay a penalty of \$12,675. (*Id.*)

¹ OSHA issued a total of four (4) Citations and Notifications of Penalty to Excel. (Vol. 5, Item 2). Over the course of subsequent proceedings, OSHA withdrew two of these citations—namely, Citation 1, Items 2 and 3). (Vol. 1, 7:10-22; Vol. 5, Item 31, 85:16-86:5). The ALJ also vacated Citation 1, Item 4 following the ALJ hearing. (Vol. 6, Item 46; App. 15a-29a). Accordingly, only the citation discussed above concerning the violation of 29 C.F.R. § 1926.106(d) is at issue in this case.

Excel timely filed a Notice of Contest on April 3, 2017. (Vol 5, Item 3). In its Notice of Contest, Excel asserted “impossibility/infeasibility of compliance” as an affirmative defense and expressly stated that “[d]ue to the above affirmative defenses, [Excel] likewise contests the proposed penalties and their classification.” (Vol. 5, Item 3, p. 6). Excel also pled infeasibility and impossibility of compliance as an affirmative defense in its Answer. (Vol. 5, Item 8, pp. 3-4). There is no dispute that Excel timely and adequately pled this affirmative defense.

The matter was heard before the Administrative Law Judge (“ALJ”) on March 19-20, 2018. (Vol. 1 and 2). Before the trial commenced, the ALJ asked counsel about the issues for trial. In doing so, she asked about the following provisions of the parties’ Agreed Prehearing Statement:

F. Concise statement of issues of fact that remain to be litigated:

Citation 1, Item 1:

1. Whether failing to have a lifesaving skiff immediately available exposed [Excel’s] employees to a substantial probability of death or serious injury under the facts and circumstances of this case.

2. Whether the proposed penalty is appropriate.
[. . .]

G. Concise statement of issues of law that remain to be litigated:

1. Whether Citation 1, Item 1 is a serious violation of the Act[.]

(Vol. 1, 8:24-10:1; Vol. 5, Item 24, pp. 15, 17). The ALJ also read into the record the following portion of the parties’ Agreed Prehearing Statement:

[Excel] violated 29 C.F.R 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and [Excel] reasonably could have known of the violative condition[.]

(Vol. 1, 8:13-17; Vol. 5, Item 24, p. 14).

Inquiring further into these matters, the ALJ then engaged in the following colloquy with counsel:

JUDGE CALHOUN: All right. With that No. 3 as I read it, with the stipulations on that particular violation, does that indicate that—let's see—Citation 1 is not an issue. You are saying here that the Respondent—there is an agreement that Respondent violated that by not having the skiff immediately available; that the employees were exposed to the cited condition; and that Respondent reasonably could have known of the violative condition. It looks like applicability of the standard may be the only thing that you are not agreeing to? Does the Court not understand what that stipulation is?

MR. GRUBBS [Excel's Counsel]: Basically the stipulation is, Judge, we stipulate we did not comply with the standard. However, we challenge the serious type of the violation classification.

JUDGE CALHOUN: So you are only challenging the classification?

MR. GRUBBS: The classification and, of course, that goes along with that, the penalty amount.

JUDGE CALHOUN: Okay. All right. I just wanted to be sure that I understood what was remaining at issue in this Item. All right. So we are talking about the serious classification and the corresponding penalty, which is \$12,675.

(Vol. 1, 8:13-10:1).

The ALJ hearing went forward, and on October 9, 2018, the ALJ issued her decision in which she affirmed OSHA's citation for a "serious" violation of 29 C.F.R. § 1926.106(d). (Vol. 6, Item 46; App. 15a-29a). Specifically, the ALJ found that Excel failed to have a skiff immediately available at the dock where Decedent and his crew were working. (Vol. 6, Item 46, pp. 4-10; App. 18a-24a). The ALJ also held that Excel had abandoned or waived its affirmative defense of infeasibility and impossibility of compliance. (Vol. 6, Item 46, p. 6; App. 20a). Also, in a single footnote, the ALJ alternatively opined that the impossibility/infeasibility defense, if considered, would fail on the merits. (*Id.*).

Excel filed its Petition for Discretionary Review with the Commission on October 19, 2018. (Vol. 6, Item 47). The Commission declined to direct review and issued a Notice of Final Order dated November 27, 2018. (Vol. 6, Item 51). Excel timely filed a Petition for Review with the United States Court of Appeals for the Fifth Circuit on January 23, 2019. On November 26, 2019, the Fifth Circuit denied the Petition for Review and upheld the ruling of the ALJ and the Commission. (App. 1a-14a). On January 10, 2020, Excel timely filed a Petition for Panel Rehearing, which the Fifth Circuit denied on January 30, 2020. (App. 34a).

ARGUMENT

In its Opinion, the Fifth Circuit concurred with the ALJ that Excel waived the affirmative defense of impossibility/infeasibility by failing to specifically mention the defense in the Agreed Prehearing Statement, or during a one-minute colloquy with the ALJ shortly before trial. (App. 7a-10a). Alternatively, the Panel concurred with the ALJ that Excel did not meet its burden to support the defense of impossibility/infeasibility. (App. 10a-12a). However, the record shows that Excel did not “unequivocally intend” to abandon the defense as required for waiver. Moreover, the uncontested facts presented during and after trial show that the presence of a skiff at the site of the accident under the particular circumstances of this case was infeasible and would not have prevented Decedent’s death. Accordingly, Excel respectfully submits that the Fifth Circuit and the ALJ erred.

I. The ALJ and the Fifth erred in ruling that Excel abandoned or waived its affirmative defense of impossibility/infeasibility.

Waiver is the intentional relinquishment of a known right, power, or privilege. *Taita Chem. Co., Ltd. v. Westlake Styrene Corp.*, 246 F.3d 377, 388 (5th Cir. 2001). A party may waive a right through either (1) an actual intention to relinquish it, or (2) conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. *Id.* The party asserting waiver—here, the Secretary—bears the burden of proof on the issue. *Id.*; *see also F.D.I.C. v. Duffy*, 47 F.3d 146, 150 (5th Cir.1995). Intention is the prime factor in determining the question of waiver, and the acts, words or conduct relied upon to establish waiver must be such as to manifest an unequivocal intention to no longer assert the right. *See First Interstate Bank of Arizona*,

N.A. v. Interfund Corp., 924 F.2d 588, 595 (5th Cir. 1991); *see also N.J. Collins, Inc. v. Pac. Leasing*, 235 F.3d 1339 (5th Cir. 2000).

A. Excel’s prehearing filings and statements were consistent with the assertion of the impossibility/infeasibility defense.

It is undisputed that Excel included the defense of “impossibility/infeasibility of compliance” as an affirmative defense in its answer to the citation. (Vol. 5, Item 8, pp. 3-4). It is equally undisputed that Excel *never*—either in written or oral representations to the ALJ—stated any intent to waive this defense. Nevertheless, the Fifth Circuit agreed with the ALJ’s conclusion that Excel waived this defense because (1) Excel did not specifically reference the infeasibility defense in the joint Prehearing Statement, and (2) Excel did not specifically mention the infeasibility defense during a one-minute colloquy with the ALJ immediately before trial. (App. 7a-10a, 19a-20a). Neither of these actions, however, manifest the type of unequivocal intent required for waiver.

Specifically, in its Notice of Contest (as well as in its Answer) Excel asserted the affirmative defense of infeasibility. (Vol. 5, Item 3, p. 6). Further, the Notice of Contest expressly stated that “[d]ue to the above affirmative defenses, [Excel] likewise contests the proposed penalties and their classification.” (*Id.*). Thus, from the beginning, Excel made clear its intent to challenge both the classification of the violation and the penalties associated with such classification *based on the affirmative defense of infeasibility*.

Consistent with this assertion, in the parties’ Agreed Prehearing Statement, Excel identified as issues of fact that remained to be litigated: (1) “[w]hether failing to have a lifesaving skiff immediately available exposed [Excel’s] employees to a substantial probability of death or serious injury under the facts and circumstances of this case,” and (2) “[w]hether the proposed penalty is appropriate.” (Vol. 1, 8:24-10:1; Vol. 5, Item 24, pp.

15, 17). Excel also identified as an issue of law that remained to be litigated “[w]hether Citation 1, Item 1 is a serious violation.” (*Id.*). Likewise, in the one-minute pre-trial parley with the ALJ, Excel’s counsel expressly stated that Excel continued to challenge both “[t]he classification [of the violation] and, of course, that goes along with that, the penalty amount.” (Vol. 1, 8:13-10:1).

Thus, at the outset of this case, Excel expressly asserted the infeasibility defense in *direct reference* to its challenges to both classification and penalties. Excel later expressly preserved these challenges in both the Agreed Prehearing Statement and in the pre-trial colloquy with the ALJ. There is absolutely no discrepancy between Excel’s pre-trial statements and its continued assertion of the infeasibility defense. To the contrary, Excel’s express preservation of its challenges to classification and penalties is *100% consistent* with its continued assertion of the defense. Certainly, Excel’s conduct does not manifest any “unequivocal intent” to waive such defense.

Nevertheless, it appears that the ALJ and the Fifth Circuit were troubled by Excel’s failure to mention the infeasibility defense by name in the Agreed Prehearing Statement or during the pre-trial colloquy with the ALJ. But, nothing in the Agreed Prehearing Statement requested or required the parties to explicitly re-assert any affirmative defenses that had already been set forth in its previous pleadings. (Vol. 5, Item 24). Rather, the Agreed Prehearing Statement merely requested a “concise statement” of the issues of fact and law to be litigated. (*Id.*). Likewise, during its conversation with Excel’s counsel, the ALJ did not seek any information—directly or indirectly—concerning Excel’s affirmative defenses; rather, the ALJ merely sought clarification concerning the scope of Excel’s stipulations. (Vol. 1, 8:13-10:1). In both instances, Excel’s statements/responses—which expressly preserved the challenges to which the infeasibility defense applied and in

support of which Excel had previously expressed its intent to assert the defense—were wholly compatible with its retention of the defense.

Moreover, the analysis of the ALJ and the Fifth Circuit—which appears to equate Excel’s omission of a specific reference to the infeasibility defense with waiver—overlooks the main issue. The critical inquiry is not whether Excel might have more clearly expressed its intent to pursue the infeasibility defense during its pre-trial statements. Rather, it is whether Excel’s conduct as a whole manifested a *clear and unequivocal intent* to abandon the defense or was *so inconsistent* with the assertion of the defense as to induce a reasonable belief in abandonment. *Taita*, 246 F.3d at 388; *First Interstate*, 924 F.2d at 595. As discussed above, Excel’s pre-trial conduct simply did not manifest any unequivocal intent to relinquish the defense and was not in the least inconsistent with maintaining this defense.

B. The parties actually tried Excel’s impossibility/infeasibility defense.

The undisputed conduct of the parties during and after trial bears out the fact that Excel never intended to waive its impossibility/infeasibility defense. Specifically, the impossibility/infeasibility defense consists of two prongs: (1) that compliance with the cited standard was not possible, and (2) that the company used alternative means of protection. *See Sec’y of Labor v. All American Concrete, Inc.*, 2012 WL 6861258, at *13 (OSHRC, Dec. 31, 2012) (24 BNA OSHC 1566) (Calhoun, J.) (*citing Brock v. Dun-Par Engineered Form Co.*, 843 F.2d. 1135, 1136 (8th Cir. 1988)). At the ALJ hearing, Excel elicited, and the Secretary made no objection to, testimony that supported both of these prongs.

For example, Excel introduced photographic evidence that showed the cramped conditions underneath Dock 34, where the accident occurred when Decedent fell into the

water. (Vol. 3, C-20, at DOL000536-37, DOL000544). When shown these photos by Excel's counsel on cross-examination, the Secretary's first witness—Excel employee Adrian Guajardo—confirmed that it was not possible to navigate a skiff in that confined space:

Q. If you had a boat out there, a skiff, what we are calling a boat, **would they have been able to use the boat to retrieve him?**

A. No.

Q. Why not?

A. Well, one, because between the beams and the down pillars, they have cross pillars. **And a boat is not able to go through** unless, I mean, the tide has to be pretty low for that boat to fit through.

(Vol. 1, 143:7-16) (emphasis added)

Q. All right. Was there any – **you said one of the problems with having a skiff or a boat available is there's all these sort of blockages?**

A. **Yes.**

Q. **Would it be hard to maneuver in there?**

A. **Yeah.** There is a better picture I can show you in C-20.

Q. C-20?

A. I can show you the cross pillars where –

[. . .]

Q. And we actually have a better than that picture [referencing C-20 at Bates no. 536]. **But it's not able to get in; is that what you're saying?**

A. **Yeah. It [the skiff] won't be able to get – it won't be able go through because of that cross pillar.**

(Vol. 1, 146:8-147:3) (emphasis added)

A second witness—former Excel employee Pedro Ventura—was also asked questions about the feasibility of meeting the Standard:

Q. All right. Could you – could you get a rowboat in there very easily?

A. Can I what?

Q. Yeah. *Could you get a rescue boat in that area where the accident happened?*

A. *Oh. No.*

(Vol. 1, 264:8-13) (emphasis added). This evidence—establishing the first prong of Excel’s infeasibility/ impossibility defense—was received without objection.

So too was the trial testimony that supported the second prong of Excel’s infeasibility defense: that Excel furnished multiple alternative means of protection against the potential hazard of working over water to its employees working under Dock 34. Excel required its employees, including Decedent, to wear personal flotation devices (“PFDs”). (Vol. 1, 91:16-18; 105:4-10; 141:3-7; 173:22-174:2; Vol. 2, 381:14-19; 484:11-15; Vol. 5, Item 31, 63:12-64:1). Excel likewise furnished life preserver rings on and around the dock for the same purpose. (Vol. 1, 212:11-18; 296:25-297:7; Vol. 2, 380:4-6; Vol. 5, Item 31, 64:2-22; 66:4-12; 70:9-71:10).

The ALJ also received testimony, without objection, that while OSHA did not require fall protection underneath the dock (because Excel employees were always working below ten (10) feet from the platform or the water’s surface) (Vol. 2, 410:22-412:7; Vol. 5, Item 31, 71:11-72:4), Excel nonetheless required employees to use it. (Vol. 1, 87:10-18; 141:8-142:12; 169:2-17; 184:25-185:10; 279:7-9; 303:6-9). This constituted yet another protective measure to guard against the potential hazards of working over water—and more evidence supporting the second prong of Excel’s infeasibility/impossibility affirmative defense. (Vol. 5, Item 31, 72:5-73:2).

Further, in its post-submission brief (which Excel properly served on the Secretary’s counsel), Excel discussed the infeasibility defense *at length*. (Vol. 5, Item 40, pp. 2-13).

Plaintiff never made any waiver-based objection to the trial evidence or the post-submission briefing. Indeed, in its “Motion to Strike Respondent’s Defenses”—filed several days *after* Excel’s post-submission brief—the Secretary conspicuously failed to mention *one word* about the infeasibility defense. (Vol 5, Item 41).

Although, on appeal, the Secretary predictably claimed to have been “surprised” and “prejudiced” by the infeasibility defense, the facts listed above tell a very different story. The Secretary’s conduct—namely, the fact that it (1) permitted Excel to introduce evidence relevant to the infeasibility defense without objection on waiver grounds, and (2) did not move to strike the infeasibility defense despite the fact that Excel vigorously argued this defense in its post-submission brief—shows that the Secretary reasonably anticipated the defense as a live issue in the case. Indeed, to the extent any “waiver” has occurred in this case, it is by the Secretary, whose actions during and after trial were wholly inconsistent with any intent to assert any objection to the infeasibility defense.

In sum, Excel has—from the very outset of this case—expressly asserted the infeasibility defense in connection with its challenges to the citation’s classification and penalties. Excel expressly preserved these challenges in the Agreed Prehearing Statement and in the one-minute pre-trial colloquy with the ALJ. Although Excel did not mention the infeasibility defense by name, its express preservation of the challenges to classification and penalties was wholly consistent with its continued assertion of the defense. Further, Excel introduced evidence relevant to this defense at trial and submitted extensive post-trial briefing on this defense without objection from the Secretary. Clearly, Excel has not manifested the “unequivocal intent” required to waive its infeasibility defense, and the holdings of the ALJ and the Fifth Circuit were in error.

II. The ALJ and the Fifth Circuit erred in alternatively ruling that Excel failed to meet its burden to prove the defense of impossibility/infeasibility.

In its opinion, the Fifth Circuit also agreed with the ALJ's alternative ruling that Excel "failed to establish by a preponderance of the evidence that it was impossible for the company to comply with [the Standard]." (App. 10a-12a, 20a). In reaching this conclusion, the Fifth Circuit did not controvert Excel's assertion that the presence of a skiff would not have prevented Decedent's death, or that a skiff would not have been able to navigate in the area where Decedent was working. Instead, the Court appears to hold that, because it may have been possible for a skiff to navigate in *other* areas of the jobsite—*i.e.*, where no accident occurred—Excel could have partially complied with the regulation and, therefore, was not entitled to the infeasibility defense. (App. 10a-12a). Excel respectfully maintains that this reasoning misconstrues the defense, especially as it applies to the classification of the violation.

A violation of an OSHA regulation may be deemed serious "if there was a substantial probability that death or serious physical harm could have resulted from the condition"—here, the failure to provide a skiff under Dock 34, where Decedent was working. *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 737 (5th Cir. 2016 citing 29 U.S.C. § 666(k)). Further, an employer's burden to establish an infeasibility defense demands a *site-specific* evaluation of the applicable standard. *See, e.g., Sec'y of Labor v. Manson Constr. Co.*, 2017 WL 1788442, at * 7 (OSHRC, April 27, 2017) (26 BNA OSHC 1568). Thus, as applied to Excel's challenge to the classification and penalties associated with the citation, Excel's burden was to demonstrate infeasibility of complying with the Standard under the *specific circumstances* existing at the time of the accident.

As set forth in Section I(B) above, Excel introduced evidence at trial (and in the post-trial deposition of its expert witness, David Doucet) demonstrating that compliance with the Standard was infeasible underneath Dock 34 because a skiff could not have been deployed and successfully navigated to rescue Decedent. Similarly, the evidence and eyewitness testimony offered at trial establish—without contradiction—that a skiff would have been useless to prevent the type of accident that occurred under the circumstances that existed under Dock 34. Because the evidence establishes that it was not feasible for Excel to comply with the Standard under the particular circumstances that existed under Dock 34, the absence of a skiff did not present a “substantial probability” of death or serious physical harm. *Sanderson*, 811 F.3d at 737. Accordingly, Excel established the elements of its defense with respect to the challenged classification and penalties associated with the citation, and therefore, the Fifth Circuit and ALJ’s decisions were erroneous.

Conclusion and Prayer

For the foregoing reasons, Excel respectfully requests that this Court issue a writ of certiorari to review the rulings of the Fifth Circuit and the ALJ.

Respectfully submitted,

By: /s/ Richard A. Sheehy

Richard A. Sheehy

State Bar No. 18178600

SHEEHY, WARE & PAPPAS, P.C.

2500 Two Houston Center

909 Fannin Street

Houston, Texas 77010

(713) 951-1000 - Telephone

(713) 951-1199 - Facsimile

Email: rsheehy@sheehyware.com