
SECRETARY OF LABOR,
Complainant,

v.

SHARON AND WALTER CONSTRUCTION
CORPORATION,

Respondent.

DOCKET No. 00-1402

APPEARANCES:

Carol J. Swetow, Esquire
Ralph R. Minichiello, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Complainant

Charles A. Rusell, Esquire
Concord, New Hampshire
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background, Procedural History and Jurisdiction

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (“the Act”). At all times relevant to this proceeding, Respondent Sharon and Walter Construction Corporation (“S&W Corporation”) operated a general contracting business, which performed roofing, siding, carpentry, masonry, snow plowing and painting. In its Answer, S&W Corporation admits that it is an employer engaged in a business affecting commerce, and I so find. Accordingly, I hold that the Commission has jurisdiction over the subject matter and the parties within the meaning of section 3(5) of the Act.

This case arose as a result of an accident which occurred at one of S&W Corporation's work sites at a building located on Clark Street in Pittsfield, New Hampshire. On April 20, 2001, an employee of S&W Corporation fell off the metal pitched roof of the building. Neither Robert H. Bell III, the employee, nor Paul Noyes, another worker who was assisting Bell on the roof, were protected by any means of fall protection.

Following the resulting OSHA inspection, the Secretary issued one citation for a willful violation of 29 C.F.R. §1926.501(b)(1), and one citation for a repeat violation of 29 C.F.R. §1926.503(a)(2) to S&W Corporation.¹ The citation for the repeat violation is based on a prior final order entered against Walter Jensen, d/b/a S&W Construction, ("S&W") and Walter Jensen, individually. This case thus presents an issue not yet determined by the Commission, that is, whether, and under what circumstances, a prior final order may be imputed against an alleged successor corporation for the purpose of classifying a later violation as repeat. The hearing in the instant case was conducted from April 10, 2001 to April 12, 2001. No affected employees sought to assert party status. Both parties have submitted post-hearing briefs.

Whether the Exposed Workmen were Employees of S&W Corporation

As a preliminary matter, I reject S&W Corporation's contention that Bell and Noyes were independent contractors, and that it therefore had no employees exposed to the alleged violation. To determine whether an employer-employee relationship exists for the purposes of the Act, it is necessary to look to the general principles of agency law. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992). A fundamental inquiry on this issue is whether the putative employer retained the right to control the manner and means by which the job was performed. *Id.*² Under First Circuit

¹ The Secretary initially sought a penalty of \$28,000 for the willful violation and \$5,000 for the repeated violation. The Secretary later reduced the penalties sought to \$7,000 and \$3,750, respectively, based on the size of the employer. (Tr. 45-52, Ex. C-10).

² Other considerations include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Timothy Victory*, 18 BNA OSHC1023, 1026 (No. 93-3359, 1997) *citing Vergona*

precedent, the assumption of entrepreneurial risk or reward by a putative employee is a prominent factor in this inquiry. *Labor Relations Div. of Constr. Indus. of Mass. v Teamsters Local 379*, 156 F.3d 13 (1st. Cir, 1998).

The evidence demonstrates that Bell and Noyes incurred no entrepreneurial risk or reward through their work for S&W Corporation. Their salaries were fixed and constant, (Bell received \$150 a day, and Noyes received \$75.00 a day), and if they finished an assignment early, they were not free to leave and still receive their pay. (Tr.150-151, 157, 242-243). Other than the liability insurance policy Bell obtained at the direction of Walter Jensen, S&W Corporation's owner and president, Bell incurred no other work related expenses. Bell testified that he never had his own business and, other than his own tool belt, he did not supply any of the materials or tools for the work he performed for S&W Corporation. If there were items he had to purchase, such as screws or nails, Jensen reimbursed him, and Jensen also paid for the gas in the S&W Corporation van Bell drove. (Tr. 31-32, 145-146, 151-152, 166-167). Similarly, Noyes provided no materials or tools for the job, and incurred no work related expenses. (Tr. 244).

A number of other facts show that Jensen controlled the manner in which Bell and Noyes performed their work. Bell told Stephen Rook, the investigating OSHA compliance officer, ("CO"), that he was under the direction and control of Jensen throughout the entire day. (Tr. 127). Bell was required to report to the shop every morning at 6:30 a.m. to receive his daily assignment, which could include sweeping, cleaning equipment, or operating a snow plow, in addition to roofing work. Once Bell finished a job, he was required to return to the shop, where Jensen would give him another job or task. (Tr. 158-159, 165-167, 368-369). Both Bell and Noyes believed that they could be fired or could quit at anytime. (Tr. 156, 165, 244). Of significance, after Bell's accident, Jensen put Noyes to work at a different job site. (Tr. 242-244). If, as S&W Corporation asserts, Noyes were a subcontractor Bell retained to assist with the roofing work at the subject site, Jensen would not have had the authority to send Noyes to a different job following Bell's accident.

It is also probative that, when Bell returned to work for S&W Corporation, he did not sign the S&W Corporation's "sub-contractor's disclaimer form," (which identifies Bell as a "self-

Crane, 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992).

employed individual”), until March 17, 2000, even though he commenced work on March 13, 2000. (Tr. 155, Ex. R-13, p.5). While this may appear inconsequential because of the apparently insignificant time period between the two dates, the fact that S&W Corporation employed Bell and put him to work without having the signed disclaimer form is inconsistent with S&W Corporation’s argument that an independent contractor relationship was formed. It also lends credence to Bell’s assertion that he signed the form only because he was told he would otherwise not get paid. (Tr. 151).

Contrary to S&W Corporation’s assertion, the facts that Bell signed the disclaimer form, purchased a general liability insurance policy at Jensen’s insistence, and was treated as an independent contractor for tax purposes, do not necessarily signify that an independent contractor relationship was created. A business association containing most, if not all, of the indicia of an employer/employee relationship is not transformed into an independent contractor relationship simply by these expedients. Rather, the substance of the relationship is controlling over the form. *See Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637-1638 (No. 88-2012, 1992). Further, S&W Corporation appeared to ignore the fabricated form of the relationship as it issued salary checks to “Robert Bell” rather than to “BOB Construction,” a name devised by the insurance broker who sold Bell his liability policy and in which name the liability policy was issued. (Tr. 154-155). Finally, it is undisputed that Noyes never signed such a disclaimer form and purchased no liability policy.³

In support of its contention, S&W Corporation notes that Bell himself defined the terms of his employment when, following the accident, he told the emergency room personnel that he was an independent contractor. Bell does not deny that he made this statement. He did, however, explain that when he told the emergency room personnel that he worked for S&W Corporation, they “got back” to him and told him that S&W Corporation was not “covering” him. Bell also explained that

³ During the hearing, Jensen testified that Noyes was not an employee, and that he did not authorize Bell to retain Noyes on behalf of S&W Corporation (Tr. 378-379). Bell, however, testified that Jensen told him to retain a laborer from a temporary agency, and gave Bell the money to pay the laborer. (Tr. 170-171). I observed Jensen’s demeanor during the hearing. In addition, I have considered the evidence that Noyes’ salary did not come out of Bell’s daily salary, and that Jensen is not without a strong interest in portraying Noyes as an independent contractor. I find Jensen’s testimony on this issue unbelievable. In any case, Jensen did not deny that he put Noyes to work at another site after the accident. (Tr. 380).

he believed he was supposed to say he was an independent contractor. (Tr. 197). I observed Bell's demeanor on the stand and found him to be a credible witness on this issue. I also found his explanation understandable. In any event, his statement is not dispositive, especially when compared with the weight of evidence supporting a finding that Bell was an employee.

S&W Corporation also notes that, during Bell's first term of employment with the company, from 1996 to 1998, Bell's liability carrier paid for the costs of damage incurred from a fire which occurred at a job site Bell was involved with in 1998. (Tr. 187-189, 362-363).⁴ There is, however, no support in the record for S&W Corporation's assertion that Bell's carrier investigated the fire and made a determination that Bell was indeed an independent contractor. The evidence revealed only that there was a claim, and that it was paid through a liability policy Bell obtained only because Jensen directed him to do so. (Tr. 198-188). This is insufficient to support a legal conclusion that Bell was an independent contractor at the time. In any case, while events which occurred during an earlier term of employment may be some evidence of the nature of a later relationship, they are not dispositive here, especially since the second term occurred almost two years after the first, and S&W Corporation submitted no evidence to show that Bell, rather than Jensen, controlled the manner and means by which Bell performed his work during this earlier term of employment. Indeed, S&W Corporation admits that Bell was initially hired in 1996 as an employee and not an independent contractor. (Tr. 331-332). It is true that Bell signed a disclaimer form two years into his first term of employment, but, other than Jensen's assertion that Bell did not perform roofing work until he signed the form, there is no evidence that the terms of their working relationship changed in any way after he signed the form. In fact, Bell testified that there was no change.⁵ (Tr. 183, 332, Ex. R-13).

In an effort to rebut the evidence showing that Bell and Noyes were employees, S&W Corporation called to the stand Rodney Sargent and Justin Murphy, two witnesses who identified themselves as independent contractors and who have performed work for S&W Corporation. Sargent testified that he has worked on hundreds of jobs for Jensen and was paid a flat rate of \$300 per day,

⁴ Bell left S&W Corporation's employ after the fire, and did not return until March, 2000. (Tr. 147-151).

⁵ It cannot be ignored that Jensen sent Bell to the broker who arranged for Bell's liability coverage. (Tr. 147-148).

plus \$200 per day for each subcontractor he hired. Sargent also testified that he used his own tools and other equipment, but conceded that when he was missing a tool or piece of equipment, he borrowed it from Jensen. (Tr. 511-512, 515-517). Sargent further testified that he kept his own hours and paid his own taxes and insurance premiums, when he did work for S&W Corporation. (Tr. 519). Murphy testified that he performed contracting work for 15 or more clients, including S&W Corporation, since he started his own business in the area in June, 2000, and that he, too, owned his own tools and equipment. (Tr. 536-538, 541-542). Murphy also testified that his fees varied; sometimes he was paid by the square foot, sometimes he was paid by the day, and sometimes he was paid a flat rate for the whole job. (Tr. 538). Even if paid by the day, however, he earned the same amount regardless of what time he left the job. (Tr. 542-543).

S&W Corporation argues that the terms of its business relationships with Sargent and Murphy were representative of the manner in which it retained all of its laborers and roofing workers, including Bell and Noyes. I am not persuaded by this argument. However one wishes to classify the relationships that S&W Corporation maintained with Sargent and Murphy, it is clear that the terms of those relationships were not the same, nor even similar to the employment relationship S&W Corporation had with Bell and Noyes. Unlike Bell and Noyes, Sargent and Murphy used their own equipment, kept their own hours, and incurred a potential for a loss. Additionally, through the course of his inspection, CO Rook discovered evidence showing that S&W Corporation hired other employees under terms similar to those under which Bell and Noyes were employed, indicating that Sargent and Murphy's terms were not in fact representative of S&W Corporation's work force. (Tr. 97-101).

S&W Corporation further contends that the testimony of Sargent and Murphy, along with testimony from Darren Brown, the police officer who investigated the accident and who also performed contracting work in the area, represent common industry practice in the area. (Tr. 284-285, 299, Resp. Brief, pp. 3-4). S&W Corporation may very well be correct that these three witnesses performed their contracting work in accordance with common industry practice in the area. It does not necessarily follow, however, that Bell and Noyes were therefore independent contractors. Indeed, the testimony elicited from Sargent and Murphy served to emphasize the differences between the two types of business relationships, and confirms that Bell and Noyes were

employees, rather than independent contractors. S&W Corporation's contention is accordingly rejected.⁶

The Alleged Willful Violation - 29 C.F.R. § 1926.501(b)(11)

Citation 1, Item 1 alleges a willful violation of 29 C.F.R. § 1926.501(b)(11). The cited standard requires the use of guardrail systems with toeboards, safety net systems, or personal fall arrest systems where employees are on a steep roof with unprotected sides and edges of 6 feet (1.8 m) or more above a lower level. For purposes of the standard, a "steep roof" is a roof with "a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. §1926.500(b). During the OSHA investigation, CO Rook took measurements of the roof and determined that the slope of the roof was 5.5 in 12, vertical to horizontal, showing that the roof had a "steep slope" as that term is defined in the standard. (Tr. 32-33). S&W Corporation submitted no proof to contradict this evidence. The parties stipulated that Bell was working on a roof with unprotected sides on April 20, 2000, that he was not protected from falling by a guardrail system, a safety net or a personal fall arrest system, and that the roof was more than 6 feet above the lower level. (Ex. ALJ 1). Also, the Secretary asserts, and S&W Corporation does not dispute, that Noyes was on the roof with Bell on that day without the appropriate fall protection, and that that neither worker used fall protection while on the roof on the Monday or Tuesday before the accident. (Tr.172). The evidence thus demonstrates that the standard applies, that its terms were violated, and that S&W Corporation employees were exposed to the hazard of a fall. This hazard was exacerbated by the fact that the metal roof was slippery from the prior day's rainfall. (Tr. 173-174).

The evidence also demonstrates that S&W Corporation had actual knowledge of the violation. Jensen admitted that he saw Bell and Noyes on the roof without fall protection on the morning of the accident. (Tr. 338-339). Jensen was also present at the site on the Monday and Tuesday before the accident and saw Bell on the roof on both days without fall protection. (Tr. 172,

⁶ Even if Bell and Noyes had been independent contractors, S&W Corporation might still be liable for the alleged violations. Under Commission precedent and the multi-employer work site doctrine, a general contractor has a duty, whenever reasonable, to prevent or detect and abate violations, based on its supervisory authority or control over the work site. *McDevitt Street Bovis Corp.*, 19 BNA OSHC 1108 (No. 97-1918, 2000). Jensen exerted the type of control contemplated by this doctrine at the subject site.

337). Jensen's actual knowledge may be imputed to S&W Corporation, as he was the president and owner, and managed S&W Corporation on a daily basis (Tr. 318-320). The Secretary thus established a prima facie violation of the standard.⁷

S&W Corporation argues that the failure of Bell and Noyes to use safety harnesses amounted to unpreventable employee misconduct. S&W Corporation has not meet its burden of proving this defense.⁸ First, there was no evidence that S&W Corporation had any rule regarding the use of fall protection when necessary. Second, there was no evidence that S&W Corporation communicated fall protection requirements to its employees, and, as is discussed below, Jensen admitted that he had not trained any of his employees in the use of fall protection for the previous two years. (Tr. 399). Third, S&W Corporation did not prove that it took reasonable steps to discover violations or to enforce the asserted requirement to use fall protection.

In fact, the only effort Jensen arguably made to abate the hazard on the day of the accident is disputed. Jensen claims that he told Bell to use a personal fall arrest harness on the morning of the accident. Bell does not deny that the two had a conversation that morning, but denies that Jensen said anything about a harness or safety protection, even after Bell purportedly said that the roof was slippery and that he did not trust it. (Tr. 176-177, 338-339, 376).⁹ Neither witness appeared to speak with complete veracity. It is unnecessary, however to make a credibility finding on this issue. Even if Jensen's version were true, it is clear that an insufficient effort to abate the hazard was made. Jensen did not threaten discipline, indicate that he would dock Bell's pay, threaten not to use Bell

⁷ For the basic elements of the Secretary's prima facie 5(a)(2) case, see *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

⁸ It is well settled that, in order to establish the defense of unpreventable employee misconduct, an employer must prove that it has "(a) established work rules designed to prevent the violations, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations, and (d) effectively enforced the rules when violations were discovered." *Jensen Constr.Co.*, 7 BNA OSHC 1477, 1479 (No.76-1538, 1979).

⁹ Noyes, who was at the job site when this conversation occurred and is no longer working for Jensen, recalled overhearing Bell tell Jensen that the roof is slippery, and overheard Jensen tell Bell that the job had to get done by the next day. (Tr. 251-252).

in the future if he did not use a safety harness on the roof, or even attempt to determine if any safety harnesses were available on site. (Tr. 342). Indeed, the more reliable evidence demonstrates that there was no safety harness or other means of fall protection on site, or in the S&W truck, and this fact was confirmed by the police officer who arrived at the scene shortly after the accident. (Tr. 175, 250, 283, 287-289). This citation item is affirmed.

The Secretary has classified this violation as willful. A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. A focal point for this determination centers on the employer's state of mind at the time of the violation. A heightened awareness of the illegality of the conduct, coupled with a failure to correct or eliminate a known hazard, will establish the requisite scienter for the imputation of a willful violation. *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-753, 2000).

The required "heightened awareness" is amply demonstrated in this case. In May of 1995, S&W, then an unincorporated business owned and run by Jensen, was inspected by OSHA at two different job sites. These inspections resulted in the issuance of two citations which alleged violations of 29 C.F.R. §1926.501(b)(11). (Tr. 312-317, Ex. C-14, Ex.C-13, Ex. C-5).¹⁰ These citations were affirmed on April 6, 1998, and the Commission judge who heard and decided the case made a finding of fact that Jensen, personally, was apprised of the standard's requirements during a closing conference following the earlier of the two OSHA inspections. (Ex. C-5). The evidence also demonstrates that, in 1996, almost one year after S &W Corporation was incorporated, it was cited for a violation of 29 C.F.R. §1926.451(a)(4), for failing to provide standard guardrails and toeboards at the open sides and ends of platforms located more than 10 feet above the ground. (Tr. 318, Ex. C-11).¹¹ Despite this heightened awareness, Jensen allowed Bell and Noyes to perform work on the metal roof at the subject site without fall protection for three days. Further, even if believed, Jensen's alleged direction to Bell to use a harness is, without any further action to assure its use, insufficient to change the classification of this violation.

¹⁰ S&W filed a petition for bankruptcy in the 1990's and was dissolved in 1995. (Tr. 316, Ex. R-7). S&W Corporation was formed on July 12, 1995. (Ex. R-10).

¹¹ The August 2, 1996 citation was ultimately settled. (Ex. R-9)

S&W Corporation contends that Jensen did not act willfully because he, in good faith, believed that Bell was an independent contractor. If Jensen were under this impression in good faith, S&W Corporation's contention might have more merit. Jensen is not, however, an unsophisticated businessman. He has been in the roofing business since at least 1969, and, in the mid-1990's, he owned several other businesses, including a limited liability company, a taxi cab company, a roofing company and a realty company. (Tr. 313, 352-353). He has a history of prior OSHA citations, a number of which occurred during the latter part of the existence of S&W, shortly before Jensen commenced bankruptcy proceedings. (Tr. 353). Further, the fact that Jensen required Bell to sign the disclaimer form in 1998, while S&W was in the midst of litigating an OSHA citation, raises a reasonable inference that Jensen was motivated, at least in part, to avoid OSHA liability. In addition, the testimony of Sargent and Murphy make it clear that Jensen knew very well how to create a true independent contractor relationship, when necessary. Based on these factors, as well as the evasive manner Jensen responded to the Secretary's questioning on this issue during trial, I find that Jensen did not have a good faith belief that Bell and Noyes were anything but employees of S&W Corporation on the day of the accident.¹² This citation is properly classified as willful.

The Secretary proposed a penalty of \$7,000 for this citation item. (Tr. 45). In arriving at that figure, CO Rook took into consideration the gravity of the violation and the probability and severity of injury. The violation was given a high severity, based on the serious nature of permanent disability or death which would occur if a worker were to fall off the roof, and a greater probability due to the on-site circumstances, that is, that the roof was metal and was slick from the prior day's rainfall. The gravity-based penalty was initially \$70,000, but S&W Corporation received an 80 percent adjustment for size, and a 10 percent adjustment for history. No adjustment was made for good faith due to the willful classification. I find that CO Rook's gravity and severity analysis was

¹² S&W Corporation asserts that it is "free to select any of the myriad ways of doing business that best suits its needs as long as it is legal." As a general proposition, Respondent is correct. Motivation, however, is not irrelevant, and an employer is not free to create business forms or associations to avoid application of the labor laws. *See eg CEK Indus. Mechanical Contractors v NLRB*, 921 F.2d 350 (1st. Cir. 1990), where the First Circuit determined that it was appropriate to consider antiunion animus as a major factor in determining the alter ego status of a parallel corporation formed for the purpose of avoiding NLRA obligations.

appropriate. The reduction for size was also appropriate, given that there was no evidence relating to the actual size of Jensen's company, beyond Bell, Noyes, and the admitted other four employees. (Tr. 318). The 10 percent reduction based on history was also appropriate. The proposed penalty of \$7,000 is assessed.

The Alleged Repeat Violation -29 C.F.R. §1926.503(a)(2)

Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. §1926.503(a)(2).¹³ CO Rook proposed this item because, on questioning Bell and Noyes, it became apparent that neither had knowledge of fall protection techniques, usage and assembly, and because Jensen said that he did not train his subcontractors. (Tr. 47-48). In this regard, Jensen testified that none of his employees performed roofing work, and that, therefore, he has trained no employees in roofing safety within the last two years. (Tr. 399). As set out above, however, the evidence demonstrates that two workers who performed roofing work for Jensen were in fact employees and not independent contractors. Consequently, at least as to Bell and Noyes, Jensen had a duty to provide appropriate fall safety training.

Bell testified that he never attended any safety meetings while working for S&W Corporation, that he never attended any classes for working safely on the roof, and that he was never taught how to install or maintain a guard rail system. He also testified that he was not trained in the use of harnesses or perimeter nets and that he was never advised of OSHA's fall protection standards by anyone at S&W Corporation. (Tr 146-147, 150-151, 180-181, 194-195). Jensen, on the other hand, testified that Bell attended regular safety meetings in 1996 and that, during this first term of employment, Bell had installed guardrails and was observed wearing personal fall arrest body harness systems. (Tr. 358). Jensen also testified that S&W Corporation had conducted safety meetings every Friday and every morning, at least as of September, 1996, and that he had spoken

¹³ The cited standard requires an employer to:

...assure that each employee has been trained, as necessary, by a competent person qualified in the following areas: (i) The nature of fall hazards in the work area; (ii) The correct procedures for erecting, maintaining, disassembling and inspecting the fall protection systems to be used; (iii) The use and operation of guardrail systems, personal fall arrest systems, safety net systems...

personally to everybody about staging and the use of harnesses. Jensen said that he sometimes saw Bell in the office with another employee, Mike Foyer, when they were discussing safety, and that Scott Haggart, a fire fighter, paramedic and police officer Jensen hired for the purpose of creating an OSHA compliant company, was at times also present during these meetings. (Tr. 223, 358, 398).¹⁴ S&W Corporation offered no affirmative proof, however, that Bell was ever trained in the use of OSHA-compliant fall protection systems. Furthermore, even if S&W Corporation's argument, that Bell nonetheless knew how to use such systems during his first term of employment were true, there is no proof that Bell was retrained following the January, 1998 amendment of the standard relating to acceptable fall arrest systems.¹⁵ In any event, it is undisputed that no fall protection training was provided at any time to Noyes. (Tr. 256-258, 268).

I find that the standard applies, its terms were violated, and that Bell and Noyes were both exposed to the cited hazard. In addition, because S&W Corporation had a duty to train these employees, and because Jensen was well aware of the requirements of the standard due to earlier citations involving this and a related standard, I find that S&W Corporation had knowledge of the violation. This citation item is affirmed.

This violation has been classified as repeat. A violation is repeated if at the time it occurred, the same employer had a Commission final order against it for a substantially similar violation. *Potlach Corp.*, 7 BNA OSHC 1061, 1064 (No. 16183, 1979). It is not disputed that a violation of 29 CFR §1926.503(a)(2) was found against S&W as well as Walter Jensen, individually, on April 6, 1998, and that it became a final order on May 13, 1998. (Tr. 50, Ex. C-5)¹⁶ At issue is whether,

¹⁴ Haggart testified that he worked part time in an "on and off" basis for S&W Corporation from around January, 1996 to May, 1997. The services he provided involved obtaining HAZCOM forms, which he filled in, attending some safety meetings, and forwarding a book, pamphlets and a video he obtained from OSHA to S&W Corporation. He did not know how S&W Corporation used the book, pamphlets and video, and he performed no work for S&W Corporation after May, 1997. (Tr. 222-230)

¹⁵ 29 C.F.R. §1026.502(d) contains the criteria for acceptable personal fall arrest systems, and, effective January 1, 1998, was amended to provide that "body belts are not acceptable as part of a personal fall arrest system." *Id.*

¹⁶ The citation on which the May 13, 1998 final order was based was issued in May of 1995. (Tr. 49) This violation was itself a repeat violation, based on a May, 1992 citation for noncompliance

for the purposes of classifying a violation as repeat, a final order against a sole proprietorship and its owner, individually, may be imputed to a subsequently-formed corporation. The Secretary contends that S&W Corporation is so closely identified with S&W that the prior final order issued against the latter may be imputed to the former.

The Commission has not yet addressed the issue of whether, and under what circumstances, a violation found against one company may be imputed to a successor company for classification purposes. As the Secretary points out, however, two different legal theories - successor liability and the alter ego doctrines - lend support to the conclusion that, in this case, it is appropriate to charge S&W Corporation with the history of the prior final order.¹⁷ In this regard, developing federal case law inquires into whether, on the facts of the particular case, a corporate form should be disregarded to avoid frustrating the purpose of a federal law. *Brotherhood of Locomotive Engrs v Springfield Terminal Ry Co.*, 210 F.3d 18 (1st Cir. 2000).

It is important to clarify that the issue is not whether to impute a new liability where none existed, but what classification is appropriate for an affirmed violation. Nonetheless, the doctrine of successor liability is instructive to the extent it holds that, in certain circumstances, a successor corporation should be held accountable for the actions of a predecessor company. The Supreme Court addressed this doctrine in an NLRB case involving a claim of unfair labor practices. *Fall River Dyeing & Finishing Corp v. NLRB*, 107 U.S. 2225 (1987). *See also NLRB v Burns Int'l Sec. Serv. Corp.*, 406 U.S. 272 (1972). In *Fall River*, the Court upheld the NLRB's determination that there was substantial continuity between the predecessor and successor corporations, where the functions of the employees and the business of the employer did not change, the employees continued to work under the direction of the same supervisors, and the successor corporation had purchased most of its predecessor's real property, machinery and equipment, even though the continuing company terminated production of one major type of product. *Id.* In affirming the NLRB's application of the successor employer test, the Court noted that the doctrine requires an

of 29 CFR§1926.21(b)(2). (Ex. C-5)

¹⁷ S&W Corporation's argument that the Secretary's failure to initially plead successorship is rejected. Both parties were aware of this issue and tried it fully.

inquiry into a totality of the circumstances. *Id* at 2237. There is also persuasive authority that the doctrine of successorship applies in OSHA cases. *See H.M.S. Direct Mail Serv.*, 752 F. Supp. 573 (W.D.N.Y. 1990), where the court determined that the doctrine applies in an action pursuant to section 11(c) of the Act for wrongful discharge of an employee who had asserted his rights under OSHA. *Id* ¹⁸

The following facts are pertinent to this inquiry. Walter Jensen was the sole owner of S&W, which he was in charge of running. He is also the president and sole shareholder of S&W Corporation, which he is also in charge of running. (Tr. 312-317, 320). S&W Corporation is in the same business as S&W, and, in fact, continued performance on a parking lot sweeping contract S&W had had with Bradley's since 1993. (Tr. 312-314, 319-329, 349-350).¹⁹ Following S&W's dissolution in 1995, Jensen purchased some of its assets during a bankruptcy sale, including four trucks, ladders, staging, staging planks, wooden brackets, skill saws, a bench saw, and various hand tools. (Tr. 321-322, 347, 407-408).²⁰ S&W Corporation began operating only six weeks after S&W

¹⁸ At least one commission judge has used the NLRB test in the context of determining classification of a penalty. *See Trinity Indus.*, 1990 OSAHRC LEXIS 251, (No. 88-2691, 1990), *aff'd on other grounds* 15 BNA OSHC 1481 (1992). While it is not clear whether the Commission would adopt the test in these circumstances, some guidance is given in *Joel Yandell*, 18 BNA OSHC 1623 (No. 94-3080, 1999). In finding that the Secretary had jurisdiction to issue a citation to an employer who had ceased doing business after the violation but before issuance of the citation, the Commission considered that an employer might change its status to avoid the consequences of the Act. *Id.* at 1626. The Commission also considered the potential that a future violation may be characterized as "repeat" based on a prior order entered against an employer who ceased doing business following the entry of the prior order, but then reestablished itself and repeated the violation. *Id.* at 1629, fn 9. It is unclear, however, whether the Commission intended to address only the situation where the employer reestablishes the same business entity. When addressing the imputation of a prior order solely for the purposes of finding a repeated violation, the Commission referred to a situation in which the "individual (or entity) resumes business," and did not address, for that purpose, a change in corporate status or business form. *Id.* at 1628, (emphasis supplied).

¹⁹ Jensen testified that S&W performed general contracting, carpentry, painting, siding, snow plowing, and "some" roofing, and that S&W Corporation is a general contracting business which performs some snow plowing, siding, carpentry, roofing and masonry. (Tr. 312-314, 319-320).

²⁰ The fact that these assets were purchased at a bankruptcy sale rather than directly from the predecessor corporation does not change the result contained herein. Where there are other indicia of continuity, the manner in which a successor obtains a predecessor's assets is not determinative

ceased operations. Further, S&W Corporation has the same office address and telephone number as did S&W, and operates in the same geographical area. (Tr. 323, 352, 412-413 448-449).

There is also some evidence that S&W Corporation retained, in one form or another, S&W's work force. CO Rook testified that he observed the same employees at an S&W Corporation job site he inspected in 1996, as he had at an S&W job site he inspected in 1995, and, while they were not identified by name, OSHA Area Director David May testified that a comparison of the records from 1995 inspections of S&W and later inspections of S&W Corporation indicate a continuity of work force. (Tr. 66, 448). Jensen testified that there may have been one or two S&W Corporation employees who had worked for S&W, but he was careful to indicate that he was referring only to those workers he defined as "employees." Jensen did testify that 30 past employees are now independent contractors, and S&W Corporation's post-hearing brief admits that Jensen regularly does business with these subcontractors. (Tr. 352, 400-401, S&W Corporation's brief, p.7). Furthermore, both Murphy and Sargent testified to having performed work for Jensen both before and after the incorporation of S&W Corporation. (Tr. 510-512, 534). These factors, along with those listed above, support the conclusion that there is substantial continuity between S&W and S&W Corporation such that it is appropriate to use the prior final order as a basis for finding S&W Corporation in repeated violation of the same standard.

The Secretary's alternative argument, that S&W Corporation is the alter ego of S&W, is similarly persuasive. According to First Circuit precedent, the alter ego doctrine says that "in certain situations one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws." *NLRB v. Hosptial San Rafael Corp.*, 42 F.3d 45 (1st Cir. 1994), ("*San Rafael*"). Thus, obligations of one business entity may be enforced against another. *See CEK Indus. Mechanical Contractors v. NLRB*, 921 F.3d 350 (1st Cir. 1990). On this issue, the NLRB and the courts consider the similarity between the old and new companies in management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *San Rafael, supra*. While the Commission has not applied the alter ego doctrine under the precise facts of this case, it has found that, where two ongoing companies share a common work

of this issue. *Fall River Dyeing & Finishing Corp. Supra*, at 2236, fn 10.

site and have interrelated and integrated operations, and have other indicia of mutual identity, the purposes of the Act are best served if the two companies are treated as one. *Advance Specialty Co.*, 3 BNA OSHC 2072 (No. 2279, 1976).

The facts of this case demonstrate that S&W Corporation has the same management, business purposes, ownership, supervision and operation as did S&W. S&W Corporation also acquired some of S&W's machinery, and assumed performance on the parking lot sweeping contract. Additionally, there is evidence that Jensen himself treated the two business entities as interchangeable. Despite the dissolution of S&W, Jensen used checks from an S&W account to pay OSHA fines incurred by S&W Corporation, and on March 10, 1999, four years after S&W's dissolution, Jensen's application with the State of New Hampshire for a trade name identified S&W, not S&W Corporation, as the business concern, and gives April, 1969 - the date S&W was formed - as the formation date. (Tr. 329-331, 414-415).

This citation item is affirmed as a "repeat" violation. The Secretary has proposed a penalty of \$3,750.00 for this item. In proposing this penalty, the Secretary took into account the factors set forth in section 17 of the Act, including the fact that the prior final order on which the repeat violation was based was itself a repeat violation. (Tr. 49-53, Ex. C-5). The Secretary's analysis was appropriate. Accordingly, the proposed penalty is assessed.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 (1970).
2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter of this case.
3. Respondent was in violation of 29 C.F.R. §1926.501(b)(1), as alleged in Citation 1, Item 1. This violation was willful, and a penalty of \$7,000 is appropriate therefore.
4. Respondent was in violation of 29 C.F.R. §1926(a)(2), as alleged in Citation 2, Item 1.

This violation was repeat, and a penalty of \$3,750 is appropriate therefore.

ORDER

1. Citation 1, Item 1 is AFFIRMED. A penalty of \$7,000 is assessed.
2. Citation 2, Item 1, is AFFIRMED. A penalty of \$3,750 is assessed.

MICHAEL H. SCHOENFELD
Administrative Law Judge

Dated: Washington, DC