

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant

OSHRC Docket No.
00-1402

and

SHARON AND WALTER
CONSTRUCTION, INC.

Respondent

**RESPONDENT'S SHARON AND WALTER CONSTRUCTION, INC
SUPPLEMENTAL BRIEF**

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INTRODUCTION

It is elementary and fundamental Constitutional law that individual states under the Tenth Amendment retain the right to make and determine their own laws. State laws establishing and regulating corporations and limited liability companies were enacted for a variety of important and beneficial societal and economic reasons, including, but not limited to, shared ownership, accumulation of capital and limiting personal liability. Without the influence and impact of corporations, America would not be the country that it is.

Varied bodies of statutory and case law about corporations have developed in each State's legal system. Counter balancing each State's laws and legal precedents is a body of Federal law regulating interstate commerce activities, including Labor, and OSHA laws and regulations. While these Federal laws regulate certain activities within each State that impact interstate commerce, they do not override existing and established State laws. So these two bodies of law mutually co-exist, interact, and complement each other, as needed. There are no Federal laws regulating the creation, control, and regulation of corporate matters. This area has been left to the individual States.

In this case, S & W Construction, Inc. (hereinafter S&W Co.,Inc), a small N.H. company with less than 10 employees, contracted with Robert Bell, a subcontractor, to do a roofing job in Pittsfield, N.H. Subcontractor Bell, known to be an experienced, trained roofer, was required to furnish a liability insurance binder on himself, with S&W Co, Inc as a named insured, before starting work on that job, and did so.

Under N.H. law, a self-employed subcontractor like Bell, was not required to have workmen's compensation coverage on himself, and didn't. On the day of the accident, S&W Co.,Inc had a general manager making the rounds to check progress and needs of all company jobs as well as subcontracted work. During these rounds, he stopped and talked with Bell at the Pittsfield roofing site. Bell was observed not wearing nor using any mandatory safety equipment to protect him from falling off the roof.

The S&W Co., Inc general manager told Bell to put on his safety harness immediately before doing any further work. Bell had access to that safety equipment which was on site, had previously used it, and was aware of how to properly use such devices. Aware of these facts and having had advised Bell that personal protection equipment was required to be used for his safety, the general manager left the site to continue making his company rounds. It was learned later that day that Bell had fell off the roof after failing to put on that safety equipment as he was told.

At both the emergency room at the hospital, and in his early interviews with OSHA investigators, Bell said he was self-employed and not an employee of S&W Co, Inc. Despite this voluntary admission of self-employment, OSHA still proceeded against S&W Co., Inc. as an Employer, and issued citations initiating this case.

At trial, the OSHA inspector-witness was forced by the Judge, over the objection of his OSHA counsel, to turnover these notes where Bell readily admitted his self-employment and independent contractor relationship with S&W Co., Inc. In responding to requests for production of such information, OSHA attorney's had previously claimed confidential and privileged status for such notes and failed to disclose them.

Both Bell and S&W Co, Inc. freely contracted and allocated rights and responsibilities between them in their contract. Bell was paid a lump sum for the job with no taxes withheld, and was later given a year end 1099 tax form reporting this amount in compliance with I.R.S. rules and regulations. This important issue, raised in the earlier brief, needs clarification as well. Is a general contractor liable for safety violations of its subcontractors on a small job site?

The Department of Labor OSHA brief was filed late and didn't receive any extension to do so. S&W Co., Inc filed a Motion to Strike that brief as untimely, which has yet to be ruled upon. It should be reviewed and granted and the brief stricken and not considered. Otherwise, the rules of procedure have no effect and would be constantly disregarded. 29 CFR 2200.41 (a) (2).

Now, given the latest direction for supplemental briefs on specific issues, S&W Co, Inc fears those larger legal issues will override and obscure the specific facts and circumstances of its case. While clarification of the big picture is important, the practical and realistic application of the OSHA law in this case is very important to this small N.H. business, too. This should not be forgotten.

So to the extent possible, S&W Co., Inc seeks a factually specific decision on its case within the broader context of any legal opinion clarifying OSHA law and these other cases.

S&W Construction, Inc. was the only party cited in this case. The reasonable time for citations for this April 2000 accident has long since passed. Due process of law under the 5th Amendment of the U.S. Constitution requires that a party be given notice and opportunity to be heard on any claims raised against them. This due process requirement guarantees fair procedures when the government imposes a burden on an individual, prevents arbitrary government, avoids mistaken deprivations, and allows persons to be aware of and respond to charges against them.

The fundamental requirement of "due process of law" is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. *Anderson National Bank v. Lueckett*, 321 U.S. 233, 64 S.Ct. 599, Ky, 1944.

LEGAL ARGUMENT

Under the Tenth Amendment, the U.S. Constitution reserves to States those powers and rights not specifically delegated to the Federal government. The establishment and regulation of corporations is such a specific power traditionally exercised and reserved to the States.

Any legal analysis for legal liability under OSHA law or enhanced penalties relating back to bankrupt and defunct corporations, or to parent and subsidiary corporations, or to corporate officers and employees, must necessarily include application of existing New Hampshire statutes, precedents, and case law.

The concept of piercing the corporate veil to extend personal liability to corporate officers, employees, and shareholders is a little used remedy and rarely invoked doctrine of law. State courts have been reluctant to find circumstances whereby the corporate veil is pierced and liability is extended to beyond the corporation.

N.H. courts do not "hesitate to disregard the fiction of the corporation" when circumstances would lead to an inequitable result. Terren v. Butler, 134 N.H. 635, 639,640 (1991), quoting Ashland Lumber Co. v. Hayes, 119 N.H. 440,441 (1979). The New Hampshire Supreme Court enunciated the alter ego doctrine, i.e. piercing the corporate veil, in Village Press, Inc v. Stephen Edward Co., Inc. 120 N.H. 469, 471 (1980); also Druding v. Allen, 122 N.H. 823 (1982).

The Village Press Inc. Court expressly declared the following test to determine whether a plaintiff will succeed in an attempt to pierce the corporate veil:

" Under the alter ego doctrine . . . piercing the corporate veil is not permitted solely because a corporation is a one man operation. Similarly, the fact that one person controls two corporations is not sufficient to make the two corporations and the controlling stockholder the same person. under the law. In order to avail oneself of the benefit of the alter ego doctrine, thereby piercing the corporateveil, the plaintiff must establish that the corporate entity was used to promote an injustice or fraud. In determining whther it is appropriate to aply the alter ego doctrine, other courts have inquired whether the corporation is undercapitalized, and whether the stockholder is using the corporation to further his own private business rather than that of the corporation."

The U.S Department of Labor, through OSHA, should be required like all other litigants to timely plead and prove their case with competent evidence. OSHA, in its citation against the S&W Co, Inc., had the opportunity to broaden the citation to others if merited, but didn't. The issues of successor liability, alter ego, piercing the corporate veil, as well as officer, and employee liability could have all been raised in its violation citation, or later by amendment, as facts became known. Indeed, OSHA had sought such information during the discovery process.

Despite the opportunity to raise these issues, the OSHA violation citation failed to do so. Had this occurred, then those issues, and/ or other parties could have been brought in to litigate the matter. However, for what ever reason, this did not occur. It now seems much too late and well beyond any such statute of limitation to do so.

The earlier business (which OSHA assumed S&W Co, Inc was a successor in interest) was adjudged bankrupt and liquidated through sale of assets by the U.S. Trustee's Office which supervise bankruptcies. After several years attempting a business reorganization in the mid-1990's, Walter Jensen d/b/a S & W Construction was forced by Court order into a Chapter 7 liquidation. Jensen was locked out and his business assets involuntarily sold off to pay creditors.

As such, at no time did both businesses exist simultaneously so U.S. v. Best Foods about parents subsidiary liability is not applicable. This was not a case where a successful business incorporates and transferring all its assets to the new corporation in exchange for stock.

The only aspect of the old business remaining was the resolution of the mid-1990's OSHA violations not discharged in bankruptcy. The final resolution thereof occurred in mid-1998, just less than the three year time period for a repeat violations. If the reference were violation date, then these new violations were well beyond that three year period.

In mid-1996, a new company S&W Construction, Inc was incorporated. The old business tradename had been abandoned by the Trustee as having no value when no one sought to buy the name of a local, defunct, and bankrupt business.

While OSHA investigators, and attorneys had historical information on the old company, no effort was made to plead S&W Co., Inc as a successor in interest responsible for its earlier OSHA violation record.

Walter Jensen, mindfully of his personal liability for business operations, and just out of the unpleasant experience of bankruptcy, decided to incorporate a new business in mid-1996, after seeking input from his legal and financial advisors. This business started from scratch. Nothing remained from his earlier business after the Trustee liquidated it to pay creditors.

While extension of a predecessor's OSHA safety violation record might be attributable to a successor corporation under some circumstances, that is not the case under this factual scenario in this matter. There was clear break of continuity between the two businesses. The involuntary takeover and sale of the first company's assets by the bankruptcy trustee to pay creditors was that break in any chain of continuity. Nothing could be further from the truth than to find that S&W Co, Inc is the successor in interest to the prior company with OSHA violations back in the mid-1990's.

Clearly, there were other overriding financial circumstances causing the demise of the earlier company. This was not a case of change in business structure primarily to jettison an adverse OSHA safety violation record.

In other cases, OSHA should prove by a preponderance of competent evidence, that the sole and primary reason for the demise of the earlier business was to dispose of avoid an OSHA safety violation history. Also, it must be proven that the newer company is a true successor in interest under pertinent state laws.

Even if the Commission were to find that successor liability is within the realm of OSHA law, it must be properly raised with advance notice and opportunity to be heard for all parties. It seems that OSHA thinks liability can be extended to others without adhering to the law of the land, including legal requisites assuring due process of law. Obviously, such is not the case.

Personal liability has been extended to individuals required to withhold and pay form 941 withholding taxes to the I.R.S. on behalf of a corporation. 26 USC 1461. However, this has been explicitly done by statute passed by Congress and approved by the President. Any attempts to extend OSHA power into such realm clearly would require enactment of such a comparable law and not mere extension of case law by Commission decision.

If and when such a change in the law is sought, then it should be proposed and debated by the industry representatives, the Department of Labor, and other interested parties before Congressional committees and Congress itself.

As to other questions raised in the Supplemental Briefing Notice, to the extent not previously addressed herein, the response is as follows.

The Commission cannot direct appropriate relief toward any non-parties without violating their due process of law rights. Any such appropriate relief can only be directed to parties before the Commission. 29 USC 659. The Potlatch cases shows this was two different entities.

The definition of "person under 1 USC 5 is prospective when it refers to successors or assigns of a company. In this case, liability for enhanced penalties flows forward, and not backwards to any possible predecessors in interest, particularly when any alleged predecessor has been defunct and nonexistent for many years.

The extension of liability to corporate successors in interest, corporate officers, and employees under OSHA laws and regulations would greatly increase the amount and intensity level of litigation in such cases. As much as this Federal agency reasonably believes that the end justifies the means, such is not true under our Constitutional system of government.

By comparison, the 4th amendment protects citizens from unreasonable searches and seizures without a prior search warrant supported by probable cause established before a Judge. As a sanction for violating these 4th amendment rights, any items seized are suppressed and excluded from evidence. Crime prevention has at least as high a purpose as worker safety under OSHA laws. Disregarding long established judicial precedent is not the way to enforce OSHA laws. bringing the problems to the attention of Congress for remedial action, if deemed necessary is the proper route to follow.

Corporations and LLC's shield individual investors and shareholders from personal liability to corporate, and business creditors. If the business doesn't do well, and can't pay creditors, is it fair for company owners to avoid personal liability for those corporate debts? No, probably not, but those are the rules of the game when you do business with corporations. You know that in advance and take that risk when doing business with them.

Is it fair for a business to dissolve, or reincorporate to shed an adverse OSHA safety record? Probably not, even more so if you work for OSHA, or are an injured worker, but again those are the rules of the game. Yes, there are exceptions to all laws which require specific and definite evidence to establish. Those exceptions can never be presumed and need to be properly and timely pleaded, and proven in court.

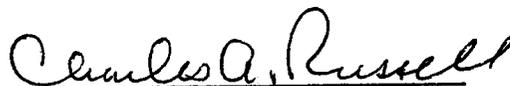
However, before extending corporate liability to officers, and employees of corporations, there would need to be a serious national debate in Congress and in Statehouses as to whether to change such laws. Should hundred of years of jurisprudence about limiting liability and corporations be overturned because OSHA policy is more important?. Undoubtedly, the police in the interest of crime prevention have repeatedly made compelling arguments about the end justifying the means so that the 4th amendment should be ignored. Obviously, those efforts have been unsuccessful.

So the OSHA policies embodied in its laws are subject to control and regulation from long standing statutory and case law. The corporate veil should not be pierced in this case. OSHA did not even timely raise the issue. No one parties were properly brought into this case nor are they subject to regulation and control by the Commission under its "other appropriate relief" statute.

For the reasons stated herein, and previously in the earlier brief, the OSHA case and decision against S & W Construction, Inc. should be reversed. The subcontractor was responsible for his own safety, and required to comply with OSHA law which he didn't. The unfortunate result was not the fault of S & W Construction, Inc.

February 29, 2004

Respectfully Submitted
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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2004, I served a copy of this brief by fax and mail on Ray H. Darling, Jr. Executive Secretary, OSH Review Commission, and by first class mail upon the following named individuals/ parties.

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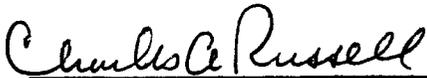
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