

No. 001-1402

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor
Complainant

v.

Sharon and Walter Construction, Inc.
Respondent

RESPONDENT'S SUPPORTING LEGAL BRIEF

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SECRETARY OF LABOR,

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SHARON AND WALTER
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Respondent.

OSHRC DOCKET NO. 00-1402

RESPONDENT'S SUPPORTING LEGAL BRIEF

NOW COMES the Respondent, Sharon and Walter Construction, Inc., hereinafter referred to as S&W Construction, Inc. by and through its attorney, Charles A. Russell, of Concord, New Hampshire, with Respondent's Supporting Memorandum of Law and states as follows in support of reversal of the earlier decision in this matter.

I. INTRODUCTION

The essential question in this whole case is whether Respondent has been improperly classified by Complainant, OSHA, to be an Employer of Robert Bell. This alleged Employee, Robert Bell, whom Respondent

reasonably believed to be a subcontractor, and not an employee, injured himself in a work related accident on April 20, 2000. The accident occurred as a direct result of Robert Bell's failure to follow OSHA mandated safety procedures, wearing a safety harness.

Robert Bell told OSHA Investigator, Steve Rook, that Bell considered himself a subcontractor. Previously, he told the hospital he was self-employed. In evidence, this is called an admission against interest. It is clearly against Bell's pecuniary interest to be a self-employed subcontractor since his liability insurance didn't cover his personal injuries.

In the penalty computation, Respondent is given the maximum permissible reduction of ten percent (10%) for a clean history, a citation free record of over the past three (3) years. Despite this, with no basis in fact nor law, the Complainant, OSHA, issued Respondent a citation for a Repeat Offense using July 10, 1995 and May 4, 1992 incidents occurring almost 5 and 8 years before the incident in this case to support the Repeat citation.

When questioned, no OSHA official can come up with any legal nor factual standard for repeat offenses to be brought against an Employer despite the Congressional grant of authority to issue administrative rules to

carry out the purposes of the OSHA law. In the absence of OSHA promulgating a pertinent regulation on repeat offenses, the benefit of any doubt should go against OSHA in such a determination. When the Complainant's District Director is asked about whether OSHA used any regulation or legal standard to attribute pre-incorporation citations against Walter Jensen, d/b/a S&W Construction (while a sole proprietor) to the Respondent corporation, the response was no agency policy or rule on it, and it was his discretionary decision. Tr. p. 487-488.

The Respondent reasonably believed that Robert Bell, and many others, were roofing subcontractors charged with practicing and adhering to OSHA safety standards. The Respondent's structuring of pay, insurance, subcontractor disclaimers and work delegation followed industry customs and patterns consistent with the independent contractor relationship which he had with many others.

Several other subcontractors testified they preferred this type relationship over being an employee. The Respondent reasonably believed that it was not the employer of Robert Bell. Darren Brown, a former policeman, testified to being a contracts administrator for a major developer.

Brown, with no personal interest in the case, testified that roofing work was regularly subcontracted out for his company.

Robert Bell acknowledged in the first instance upon admission to the hospital that he was self-employed. He also told OSHA investigators he was a subcontractor early on in this case investigation. Despite all this and other overwhelming evidence of this point, the Complainant chose to disregard Bell's statement that he was a subcontractor, had told the hospital that fact, and had signed a Subcontractor Disclaimer form relied on by Respondent.

Only after Mr. Bell found out his liability insurance didn't cover his injuries did things start to change. After that, it was clearly in his personal interest for Mr. Bell to be an employee of Respondent. Mr. Bell only called OSHA after he learned of his lack of insurance coverage for his accident. Only then did the testimony start to become ambiguous and muddled.

Respondent was not an employer of Robert Bell. Bell was a subcontractor who did roofing work, and not an employee of Respondent. To find otherwise is clearly against the great weight of the evidence.

II. PREJUDICIAL ERRORS OF PROCEDURE

The Complainant moved for an extension of time to file Complaint to which Respondent objected. The Motion was granted. Granting an extension of time to file a complaint was an abuse of discretion.. The failure to file a timely complaint within 20 days of the Employer's Notice of Contest precludes the Occupational Safety and Health Review Commission from having jurisdiction over this matter.

If the Employer contests, the Secretary shall immediately advise the Commission of such notification. 29 U.S.C. 659. Under 29 C.F.R. 2200.34, the Secretary shall file a complaint with the Commission no later than 20 days after Employer's receipt of Notice of Contest (dated July 12, 2000 and received July 14, 2000). The Secretary requested and was granted an extension by the Commission to file its complaint. The employer duly objected to such request; and also raised the issue in its answer as a defense seeking dismissal.

Case law is clear. Being one day late in filing a Notice of Contest, or Petition for Review is fatal to Respondent's case. Given the Secretary's high level of resources and staff, is it too much a burden to ask the Secretary

to comply with the same rules and receive the same sanctions for being one day or more late? Fundamental fairness mandates such a practice.

Administrative rules have force and effect of law. GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). The Commission had no authority to waive this 20 day law. Granting an extension to Department of Labor was beyond the power and authority of the Commission. The Commission has no power over citations issued by the Secretary until such time as a complaint is filed with the Commission.

The complaint was dated and filed August 24, 2000. Respondent is unaware of any prior contact between the Secretary and the Commission, except the Motion for Extension, until at least that late August date of the complaint. While the Secretary will undoubtedly argue 29 C.F.R. 2200.5 permits extensions of time, meaning deadlines can be waived or extended upon timely motion, there is no authority for the Commission, or an administrative law judge to waive or extend deadlines contrary to Congressional mandate and statute. "If Employer contests, Secretary shall immediately advise the Commission of such notification. 29 U.S.C. 659 (c)." This clearly was not done. The 20 day filing deadline for

complaints after receipt of the Employer's Notice of Contest is jurisdictional in nature. The Commission has no authority to waive or extend jurisdiction. Accordingly, the administrative law judge abused his discretion, and made an error of law in not dismissing the complaint. The Complaint was not timely filed.

III. IMPUTING PRIOR VIOLATIONS TO ALLEGED SUCCESSOR CORPORATION

The Judge on page 2 of the Decision and Order indicated that this case 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 purposes of classifying a later violation as a repeat.

The Secretary failed to properly plead the "alleged successor corporation status" of Respondent in accordance with requirements of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure require the Complainant to identify parties, and plead any special circumstances.

On page 2 of the Decision and Order, the Administrative Judge indicated this case presents an issue not yet determined by the Commission.

“Whether, and under what circumstances, a prior final order may be imputed against an alleged successor corporation for the purposes of classifying a later violation as repeat.” The Secretary did not specifically plead in its complaint that Respondent, Sharon and Walter Construction, Inc., was a successor-in-interest, and/or the “alter ego” of Walter Jensen, d/b/a S&W Construction which went bankrupt some 5 years before the citation in this case. Under Federal Rules of Civil Procedure Rule 9 Pleading Special Matters,

.... When a parties desires to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within pleader’s knowledge.

Review of the complaint does not reveal any such issues being raised by the Secretary. The Respondent-Employer raised the issue in its answer and Motion to exclude citations and violations predating Respondent’s date of incorporation. That Motion was denied. Objection was raised at trial to the admission of such evidence of adjudication against Walter Jensen, d/b/a S&W Construction where the date of citation predated Respondent’s

incorporation. That objection was overruled, but the Court agreed to make it a continuing objection for all such evidence.

The Court is clearly incorrect when it states in footnote 17 on page 13 of the Decision and Order that Respondent's "argument that the Secretary's failure to initially plead successorship is rejected. Both parties were aware of this issue and tried it fully." Respondent timely challenged and presented the issue procedurally both before and during trial. (Tr. p. 35-38.)

Respondent can't be found to be either implicitly or explicitly consenting to the trial of that issue. Federal Rules of Civil Procedure Rules 10 and 12 are likewise supportive of Respondent's position. Respondent was not named as a successor in interest to Sharon and Walter Construction. (Rule 10).

That defense was pleaded and preserved, Rule 12. Accordingly, the Complainant should have been precluded from raising this issue at trial.

IV. RESPONDENT DIDN'T ACT WILLFULLY

Respondent reasonably believed Robert Bell was a subcontractor over whom he had limited control. This is particularly true where the Administrative Law Judge ruled other witnesses (whom Respondent believed to be subcontractors like Bell) were found to be subcontractors,

and not employees. It took an Administrative Law Judge nearly 5 pages of analysis of facts and law in the Decision and Order (page 2 to page 7) to decide Bell was an employee. How could the Respondent's general manager, as a lay person, be so sure of the employee versus subcontractor status of Robert Bell so that Respondent's action could be considered willful?

While the Administrative Law Judge found Respondent's general manager, and principal to be a "not unsophisticated businessman," Decision and Order, page 10, this should not be construed as meaning his actions were willful. Knowledge and experience should not be equated with willfulness. Many business people regularly rely upon attorneys, accountants and others to provide the specialized expertise to assist in running a business. Even sophisticated businessmen can make mistakes or be negligent without being willful.

Under the "heightened awareness" test (Decision, Second Order, p. 9), the Administrative Law Judge utilizes 4 and 5 year old OSHA violations as evidence to establish and prove willfulness. Respondent moved to exclude both prior violations as too old. Additionally, the 5 year

old violation predates Respondent's incorporation. The Administrative Law Judge denied this Motion.

Now in the absence of an administrative rule on point, the Complainant seeks to have it both ways. The Respondent is given a benefit, a 10% penalty reduction based on a 3 year violation free history, Decision and Order, page 11. Complainant then seeks to change the rules and burden the Respondent for violations 4 and 5 years ago. Where the Complainant agency created the ambiguity, confusion and doubts about the law, either through inaction, or by creating it, the Complainant should not benefit from the confusion which it caused. Accordingly, the purported repeat violations from 4 and 5 years ago, or beyond, should have been excluded from consideration and evidence on both the issue of willfulness and on the issue of repeat violations.

In order to prove the Respondent's violation was willful, the Complainant must show by a preponderance of evidence that Respondent knew of the standard and its violation was voluntary, intentional, or with

plain indifference to the law. Brock v. Morello Bros., 809 F.2d 161, 164 (1st Cir. 1987). The focal point is the employer's state of mind when the violation was committed. There is no dispute that Respondent's principal, Walter Jensen, was aware of the safety standards for protection of workers on roofs. Indeed, both Respondent's witnesses, Sargent and Murphy, testified that Walter Jensen trained them in safety regulations and practices and loaned them safety equipment if they needed it (Tr. p. 510, 538). These witnesses also testified that the Respondent was very safety conscious (Tr. p. 527).

The Respondent corporation was cited for an OSHA violation in 1996 which it settled informally. In one of the paragraphs, Respondent agreed to comply with and follow OSHA safety regulations (Tr. p. 71, 71). Respondent expected that OSHA would give the Respondent a higher level of scrutiny over the next few years thereafter to assure compliance. Despite OSHA's knowledge and awareness of Respondent's past violation, the Respondent went nearly 4 years without being cited for another violation. The lack of any other violation in this 4 year period preceding the April 20,

2000 incident is affirmative evidence of the Respondent's lack of willfulness with regard to the alleged violation in this case.

Respondent's understanding, and case law, is clear that contractors have little, if any, control over subcontractors, particularly as to adherence to safety practices. So when Respondent supervisor, Walter Jensen, went to the Pittsfield job site on April 20, 2000, he carried this understanding of his much diminished level of control over a subcontractor versus an employee. That was his state of mind at the time Respondent observed Robert Bell working without benefit of a safety harness on a sloped roof. Respondent told him to wear his safety harness which was available in the truck onsite (Tr. p. 339). Respondent then left the area to check on other jobs.

Hindsight is 20-20. However, Complainant's compliance officer, Steve Rook, could offer no further guidance as to what Respondent should have done in that situation when Rook testified nearly one year later at trial. (I don't feel comfortable saying what the company should do." (Tr. p. 112, 113, line 18, 19). In order to find Respondent's actions were willful, Complainant needs to prove the violation of the safety standard was

voluntary, intentional, or with plain indifference to the law. Brock v. Morello Bros., 809 F.2d 161, 164 (1st Cir. 1986). OSHA witness, Rook, the chief investigator of this case, had nearly a year to prepare and come up with an answer as to what Respondent should have done on April 20, 2000. It wasn't on the tip of his tongue as it should have been on April 20, 2000 and at trial. Undoubtedly, his inability to set forth a clear and concise course of conduct for Respondent to have followed means this is a very ambiguous and gray area of law. If the Complainant's, OSHA's, investigator and compliance officer with 5 years experience and one year involvement in the case couldn't give an immediate answer to what Respondent should have done, then how would the Respondent be expected to know what to do on the spot without the benefit of Rook's 5 years of training, experience and expertise? (Tr. p. 19). Consequently, how could Respondent have willfully violated the safety regulation with intent or indifference thereto if OSHA can't tell him the proper course of conduct to follow in that situation?

Is it reasonable to expect the Respondent to have a higher level of knowledge and expertise than an OSHA employee? Obviously not! This

ambiguity that prevents Complainant from proving Respondent's acts were willful. Violation is not willful where employer reasonably believed rule did not cover its project. Donovan v. Mica Construction Co., 699 F.2d 431 (8th Cir. 1983), as cited in Brock v. Morello, 809 F.2d 161,164 (1st Cir. 1987). Respondent didn't believe he had a duty to act beyond telling Bell to put on a safety harness. An employer knows an employee is exposed to a hazard and fails to correct or eliminate the hazardous exposure commits a willful violation if the employer knows of the legal duty to act, for an employer's failure to act in the face of a known duty demonstrates the knowing disregard that characterizes as willfulness. Sal Masonry Contracting, Inc., 15 BNA OSCH 1609, 1613 (87-2007 1992). Clearly, both Respondent and OSHA witnesses were unclear what to do. If so, how could Respondent's actions be willful? Accordingly, the Complainant has failed to prove Respondent's acts were willful.

V. REPEAT STATUS, SECOND CITATION

If Respondent reasonably believed Robert Bell was a subcontractor like other witnesses who testified and the Court found to be subcontractors, then there would be no requirement for Respondent as the general contractor

to train the subcontractors. (Tr., p. 464, lines 7-12.) Additionally, independent witness, Darren Brown, who managed construction projects in New England and hired roofing subcontractors testified it was not the general contractors but subcontractor's responsibility to maintain compliance with OSHA standards. Tr., page 302, lines 6-14.

Respondent did train Robert Bell several years before on the safety requirements governing roofers when Robert Bell was paid as an employee and so classified by Respondent. There was also evidence that Robert Bell had used safety harnesses on other roofing jobs and Bell explained how safety harnesses were used. (Tr., p. 194.)

To support the repeat violation, the Secretary offered evidence, over the Respondent's Objection, of violations 5 to 8 years before this incident brought against a bankrupt, long defunct sole proprietorship previously run by Respondent's principal. In this second citation, like the first citation for willfulness, the Complainant seeks to use violations which accrue against a sole proprietorship run by Walter Jensen which filed bankruptcy in 1995 seeking to reorganize under Chapter 11. When bankruptcy reorganization stalled, the bankruptcy trustee stepped in and took over the business and

sold it off its assets via a sealed bids auction. The earlier business entity, a sole proprietorship, Walter Jensen, d/b/a S&W Construction was involuntarily terminated by the actions of the United States Bankruptcy Trustee. After that entity was liquidated, there was no such business entity remaining. This is not as Complainant sought to prove, a situation where Respondent is either a successor company, or is the alter ego of the earlier sole proprietorship. The United States Trustee acting under authority of Federal Bankruptcy closed and sold off the assets of the earlier sole proprietorship.

The Respondent was incorporated in July 1995. The one OSHA citation against the Respondent citation against the Respondent corporation was resolved by compromise in 1995 or 1996. The Respondent had a 3 year plus clean record with no OSHA citations and was given the maximum ten percent (10%) penalty reduction for that clean history. It was nearly 5 years since a like "failure to train" violation. It is disingenuous to grant the penalty reduction for Respondent's clean history and then to reverse positions and allege this is a repeat offense.

The OSHA field manual utilizes 3 years as the standard during which

a subsequent violation may be classified as repeat violation. It was an error of law, and an abuse of discretion to find OSHA violations 5 to 8 years old were able to support a repeat status citation. The Secretary has not promulgated any rule on point despite a clean grant of authority of Congress to do so. 29 U.S.C. 655, 666. Where an agency has failed to take a position, the court will not substitute its judgment, or attempt to surmise what the agency's position might have been; rather it insists that agency, to which Congress has delegated principal policy making authority choose and clearly articulate its rule. Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB, 46 F.2d 82, 92 (DC Cir. 1995). This is true for the lack of a "repeat citation time period" rule, as well as for the lack of an "imputation of prior citations to alleged successor corporation" rule. In the absence of such rules, and notice to the Respondent, and public in general, the Secretary should be estopped to argue for a longer time period beyond 3 years when it tells its own OSHA compliance officers that 3 years is the standard. To the extent any doubts remain, these should be resolved against the Secretary since that agency created the ambiguity problem. The Review Commission should not attempt to surmise what the appropriate rule

should be, but should find the lack of an appropriate rule means Respondent is incapable of violating it.

The same argument is raised on the “imputation of prior citations” issue. The District Director of Complainant testified he did not apply any statutory law, or administrative rule, prior to deciding that the Respondent was a successor corporation to which the 5 to 8 year old citation record was imputed for repeat purposes. Such a decision made without any standards for guidance is an abuse of discretion and against the weight of evidence. (Tr. p. 487, 488). Attention is directed to other legal arguments in the willful section in this brief which are incorporated by reference herein and won’t be reiterated herein. Accordingly, the decision should be reversed.

VI. EMPLOYEE VERSUS SUBCONTRACTOR

The key issue in this case is whether or not an employer-employee relationship existed between Respondent and the roofer, or whether he was a subcontractor. Other roofers testified, and the Judge found that they were, in fact subcontractors of Respondent. The decision inconsistently found, against the weight of evidence, that the roofer, in question, was not a subcontractor, but Respondent’s employee. Testimony of Darren Brown

was accepted as evidence of the common industry practice of utilizing subcontractors for roofing work (Tr. 299, 300.) (Decision and Order, page 8).

In finding the roofer in question was an employee and not a subcontractor, the primary responsibility for his safety and OSHA rules compliance was placed upon Respondent, not the subcontractor. The Secretary's investigation uncovered evidence that the roofer in question told the hospital he was self-employed. (Tr. p. 89). It was also undisputed that he told the OSHA investigator he was self-employed. (Tr. p. 122-124, 466). Finally, a subcontractor disclaimer form was signed by the roofer and given to the Respondent, who relied on it to classify him as a subcontractor.

The term "subcontractor" is defined at 29 CFR 1926.13 (c) as meaning a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair, citing MacEvoy Co. v. U.S., 322 U.S. 102, 108-9 (1944). Bell fits this definition of a subcontractor.

The legal issue of whether someone is an employee or an independent has been the subject of much litigation in the United States. The Internal

Revenue Service has sought to have independent contractors determined to be employees so that their employers are required to withhold taxes and Social Security from wages at their source. Case law has developed with various criteria to review and evaluate to determine whether someone is an employee or an independent contractor.

Central to that analysis is the control issue. Does the contractor hire the independent (sub)contractor to accomplish a result, or does he specify the details, hours of work, and manner in which the work must be done? The firm exercised no actual control over the means and detail of applicator's work, so that the applicators were independent contractors and were not employees. U.S. v. Thorson, 282 F.2d 157 (1st Cir. 1960). In 1977, the Court of Claims in Tri State Developers v. U.S., 549 F.2d 190 (Ct. Cl. 1977) held the applicators were independent contractors. Essentially, the Complainant's position is nearly identical to that of the Internal Revenue Service. It is a federal agency seeking to qualify a business, like the Respondent, for a more restrictive classification under federal law which imposes significantly higher administrative and regulatory burdens on the business. There are only a few ways in which roofs can be installed.

Respondent told Bell the job specifications before he started. It was not necessary for Respondent to control Bell in his work.

The Respondent's evidence on its face establishes a subcontractor relationship between Respondent and Robert Bell. Rather than giving him a W-2 tax form, the 1099 form is given to Bell. The taxes are not withheld from the money paid by Respondent to Bell. Bell is required to sign a subcontractor disclaimer form and provide proof of liability insurance (Tr. p. 361). A pattern and course of dealings has been shown by Respondent in the establishment of a list of 250 subcontractors who have done work for Respondent and are available for future work. The Respondent's treatment and dealings with Robert Bell is consistent with how it deals with other subcontractors (Tr. p. 547), some of whom the Court found to be subcontractors.

Robert Bell made choices. It is most unfortunate he was injured. However, he had knowledge and experience in utilizing safety equipment necessary for roofing. Others had seen him use safety harnesses, toe boards (Tr. p. 194, 195) and other safety equipment (Tr. p. 358, 359). Bell admitted to prior use of safety harnesses (Tr. p. 194). Respondent told him

to put on a safety harness. Bell refused to do so. He had worked other roofing jobs with other subcontractors and observed safety precautions in an effect. Respondent testified to seeing Bell, while an employee in 1997 and 1998 in safety meetings with Respondent's safety officer (Tr. p. 381, 382). Despite Bell's claim of lack of training, he successfully explained how safety harnesses were used (Tr. p. 194). Bell's own failure to use a safety harness was the cause of the accident.

The term subcontractor is considered to mean a person who agrees to perform any part of the labor or materials requirement of a construction contract. MacEvoy Co. v. U.S., 322 U.S. 102, 108-9 (1944). In IBP v. Herman, Secretary of Labor, 144 F.3d 861 (CA DC 1998), when independent contractors cleaning a meat packing plant violated OSHA regulations, the owner's ability to cancel the contract did not constitute control sufficient for plant operator to be held responsible for the contractor's failure to comply with OSHA regulations.

Robert Bell told the hospital at the time of admission that he was self-employed (Tr. p. 89). He likewise told OSHA investigators the fact he was a subcontractor (Tr. p. 122-124). Despite all the efforts of Complainant and

Bell since then to prove otherwise, the fact still remains that Robert Bell was a subcontractor of Respondent, and not an employee. Consequently, the decision should be reversed.

VII. CONCLUSION

This is a case that never should have gotten this far. Robert Bell told the hospital and Steve Rook of OSHA that he was a subcontractor. Robert Bell signed paperwork that every subcontractor dealing with Respondent filled out. Robert Bell went and procured a certificate of liability insurance covering his work. Robert Bell willingly read and signed the Subcontractor Disclaimer form without any signs of protest evident to Respondent's staff. The usual and customary industry practice of using roofing subcontractors was testified to by 5 separate witnesses, the Respondent, Robert Bell and 3 others. Taxes were not withheld from money paid to subcontractors, including Bell.

Despite all this overwhelming evidence that Robert Bell was a subcontractor, and not an employee of Respondent, Complainant has sought to proceed with this case. Complainant concedes this is not a multi-employer work site case. (Tr. p. 457.) Any such case law is not relevant

here. The cases are not brought as mere violations but as willful and repeat violations seeking to reach back 5 to 8 years to use violations given to a defunct sole proprietorship.

Robert Bell is a subcontractor and tells everyone as such until he finds out he has no insurance covering his accident. Suddenly, Robert Bell is unwilling to accept the burden of being self-employed, you must secure your own health insurance. A man's word is his bond, and his signature his mark of agreement. Robert Bell willfully signs a subcontractor disclaimer form for Respondent and provides a certificate of liability insurance. Respondent reasonably relies on these documents like anyone else would. Bell is treated exactly the same way by Respondent as many other subcontractors with whom Respondent deals. Bell, because of his lack of experience, is not paid as much as Rodney Sargent who has been at it fifteen years, but is that surprising?

OSHA then advances the legal argument that Respondent's subcontractor relationship with Bell is a sham. Despite such assertion, no attempt by Complainant is made to get two other successful subcontractors to testify on cross-examination as such. A fact witness, Darren Brown, the

first police officer on the accident scene, surprisingly has changed jobs and is now a contracts administrator for a major developer in New Hampshire. He offers unanticipated testimony that his company regularly subcontracts out roofing jobs and expects the subcontractors to be already trained and compliant with OSHA regulations. Darren Brown's testimony about usual and customary practices in the construction field in Massachusetts and New Hampshire is probably the most credible, unbiased evidence. Other than his early involvement as a police officer, he had no interest in the outcome. He said roofers were already expected to have safety training in their work field. It was not the general contractor's job to train them or assure OSHA compliance. This was Respondent's belief as well.

If Bell was a subcontractor, Respondent was not liable for his proper training in safety matters. Bell had been observed numerous times by many witnesses using a safety harness. When asked to explain how safety harnesses were used, Bell had little trouble explaining it to the Court. If Respondent had the duty to train Bell, how can it be reasonably argued that he hadn't if Bell used and knew and explained the process of installing and using safety harnesses? Bell had the expertise to use and explain safety

harnesses, but not the commitment to use them for his own safety. That was the problem.

Respondent's, Walter Jensen's, believing Bell to be a subcontractor, told him to put on his safety harness. Bell failed to do so, and was later injured. What else should have Respondent done? Respondent believed it had fulfilled its limited duty to his subcontractor over whom he had much diminished control. Respondent's actions are in accord with the IBP v. Herman decision.

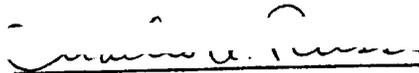
At trial, OSHA still wasn't sure what Respondent should have been done a year after the accident. How could Respondent be expected to know what to do on the spot? Moreover, how could Respondent willfully violate an OSHA rule in an acknowledgedly gray area of the law when OSHA itself had trouble advising what to do in the same situation? The earlier violations were too old and against a nonparty, now defunct. Nearly 4 years of violation free history purged them anyway. The Complainant has woefully

failed to meet its burden of proof in both citations. Accordingly, the Complaint should be denied.

Respectfully submitted,

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November 26, 2001

CERTIFICATE OF SERVICE

I hereby do certify that I served the foregoing Respondent's Supporting Legal Brief on the 26th day of November, 2001 by placing one copy of Respondent's Supporting Legal Brief in a postage prepaid envelope, addressed to:

Daniel J. Mick, Esquire
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
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and one copy of Respondent's Supporting Legal Brief in a postage prepaid envelope, addressed to: