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## STATEMENT OF THE ISSUES

In its briefing order issued October 18, 2001, the Commission requested the parties to address the following issues:

1. Whether the administrative law judge erred in affirming Item 1 of Citation 1, which alleges a violation of 29 C.F.R. § 1926.501(b)(11), and, if not, in characterizing the violation as willful.
2. Whether the administrative law judge erred in affirming Item 1 of Citation 2, which alleges a violation of 29 C.F.R. § 1926.503(a)(2), and, if not, in characterizing the violation as repeat.

## STATEMENT OF THE CASE

### 1. Statement of facts

Sharon and Walter Construction, Inc. ("S&W"), is a general contracting company which performs roofing, siding, carpentry, masonry, and other services in New Hampshire (J.D. 1; Tr. 319-320, 448, Ex. ALJ-1, Stip. 3).<sup>1</sup> It maintains its principal office in Concord, New Hampshire, where it has six permanent employees on the payroll and approximately 30 roofing workers listed in its register (J.D. 2; Tr. 449, 323, 352, 546-547).<sup>2</sup> S&W did about a million dollars worth of roofing business in the year 2000 (Tr. 367).

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<sup>1</sup> In this brief, "J.D." references refer to the decision in this case of Administrative Law Judge Michael H. Schoenfeld, dated July 27, 2001; "Tr." references refer to the hearing in this case held in Boston, Massachusetts, on April 10 and 11, 2001; "Ex." references refer to the exhibits admitted into evidence at that hearing. "Br." references are to the opening brief in this case filed by Sharon and Walter Construction, Inc., on November 26, 2001.

<sup>2</sup> In using the terms "employees" and "independent contractors" in her statement of facts, the Secretary follows the application of those terms adopted by Judge Schoenfeld, rather than that advocated by S&W. However, it is not possible to determine on the record what percentage of the number of "registered" roofers, as described by Carolyn Rivas (Tr. 546-547), are actually S&W employees.

Violative working conditions

In April 2000, S&W was installing a metal roof over the existing roof of the town maintenance building in Pittsfield, New Hampshire (Tr. 335-336). On the morning of April 20, S&W had a crew of two men working on that roof, Robert H. Bell III and Paul Noyes. The building had a pitched roof, with a slope of about 5.5 in 12 (J.D. 7; Tr. 32-33); the roof had no protected sides and edges and was, at its lowest point, 15.9 feet from the ground. (Tr. 27, 33; Ex. C-3; see J.D. 7; Ex. ALJ-1, Stip 4). Working on a metal roof is always more dangerous than working on a shingled roof (Tr. 525); on April 20, however, the weather was misty and the metal already slippery from rainfall the day before, making conditions even more hazardous (J.D. 7; Tr. 173-174, 250, 288). At about 9 a.m., Robert Bell fell off the roof to the ground, sustaining serious injuries which required surgery and extended physical therapy. (Tr. 178-179, 252).

Neither Bell nor Noyes was wearing any fall protection gear such as a fall protection harness. Jensen had said that he would provide everything needed on the job, including fall protection harnesses (Tr. 167-168). S&W possessed eight fall protection harnesses (Tr. 380, 423), but there was no fall protection equipment of any kind at the worksite on April 20 (Tr. 174-175, 287-289).<sup>3</sup> Nor had either Bell nor Noyes had any form of fall protection on their two previous days of work on this roof (J.D. ; Tr. 184-185, 247-248). Jensen personally observed both men working on the roof without fall protection on each of those days, and again on April 20<sup>th</sup>; he even held conversations with them while they were up

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<sup>3</sup> The Pittsfield police officer who responded to the accident scene made a focused search for fall protection equipment (Tr. 174-175, 250, 287-289). He even looked in the bed, cab, and behind the seat of the S&W truck at the site, without finding a single piece of fall protection of any kind. *Id.*

on the roof (J.D. 7; Tr. 172, 337, 338-339). Bell had complained to Jensen about the roof being slick that morning (J.D. 7, 8 n. 9; Tr. 176-177; 251-252). Jensen responded that the job had to get done by the next day (J.D. 8 n. 9; Tr. 176, 252-252).<sup>4</sup> After Bell's accident, Noyes was taken to another worksite, where he worked for the rest of the day on the roof of a two story building, again with no fall protection of any kind (Tr. 254-256).

At the hearing, Bell stated that he never attended any safety meetings while working for S&W, that he never attended any classes concerning safe work on a roof, and that he was never taught either how to install or maintain a guard rail system at a roof perimeter (J.D. 11; Tr. 146-147, 150-151, 180-181, 194-195). Noyes also stated that he had never received any fall protection training (J.D. 12; 256-258, 268). Jensen acknowledged that Paul Noyes had never received fall protection training, and, more generally, that he had not trained any employee in fall protection at any time in the prior two years (J.D. 12; 399). However, he claimed that Robert Bell attended regular safety meetings in 1996 (J.D. 11; Tr. 223, 358, 398). He said that Bell had personally installed guard rails and was seen to wear a personal fall arrest harness (J.D. 11-12; Tr. 358).

#### Walter Jensen and his businesses

Under one business name or another, Walter Jensen has been in the roofing business since at least 1969 (J.D. 10; Tr. 313, 352-353). Respondent Sharon and Walter Construction, Inc., has been operating in corporate form since 1995. Its sole stockholder is Walter Jensen, who serves as its

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<sup>4</sup> Judge Schoenfeld commented that neither Bell nor Jensen seemed "to speak with complete veracity" about their conversation of that morning, but noted that Noyes, whose credibility was nowhere questioned, overheard both Bell's complaint about the slipperiness and Jensen's answer that the work had to get done by the next day (J.D. 8 and n. 9).

president and director (J.D. 8; Tr. 320). Prior to its incorporation, Walter Jensen owned and operated a company registered as a fictitious name business, Walter Jensen, d/b/a S&W Construction. Jensen was the sole owner of that business, which he founded in 1969; he ran it on a daily basis until it was dissolved in 1995 (J.D. 14, Tr. 312, 315-316).<sup>5</sup>

On July 12, 1995, about six weeks after the demise of the fictitious name company, S&W was incorporated; it continued in exactly the same business activities in exactly the same geographical area as S&W, the fiction (J.D. 10; Tr. 316, 318). S&W, the corporation, continued to perform work under a contract made with S&W, the fiction, without revising or redrafting the agreement (Tr. 323, 324-329, 350). It even wrote checks for some of its corporate obligations on the checking account of S&W, the fiction (J.D. 16, Tr. 414-415). S&W Corporation has the same office address and telephone number as the old business (J.D. 15; Tr. 323, 352, 449). It has the same employees (J.D. 15; Tr. 66, 448, 352, 400-401), and uses the same independent contractors (J.D. 15; Tr. 510-512, 534). It also uses much of the same equipment, for Jensen purchased many of Walter Jensen d/b/a S&W Construction's assets at its bankruptcy sale, including four trucks, ladders, staging, staging planks, wooden brackets, skill saws, a bench saw, and numerous hand tools (J.D. 14-15; Tr. 321-322, 347, 407-408). Jensen described the nature of the work performed by the two entities in the same terms, with perhaps some difference in the proportions of the tasks performed; most relevantly, he characterized both companies as performing "some" roofing work (J.D. 14 n. 19; Tr. 312-320).

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<sup>5</sup> The fictitious name business filed for dissolution in bankruptcy in 1995, initially attempting to continue operations under Chapter 11, an effort which failed, followed by the takeover of the business and disposition of its assets by the trustee in bankruptcy under Chapter 7 (Tr. 345-346).

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The two companies also share a history of OSHA violations, most pertinently of the standards at issue in this case. In 1995, the fictitious-name S&W was cited at two separate worksites for violation of the fall protection standard, § 1926.501(b)(11); it contested both citations and both were affirmed in April, 1998, approximately two years before the accident in this case (J.D. 9, Exs. C-5, C-13, C-14). Following the first of those inspections, OSHA CSHO Rook, the same CSHO who conducted the inspection in this case, informed Walter Jensen personally of the requirements of the standard in a closing conference, as Judge DeBenedetto noted in his opinion on the case (J.D. 9; Ex. C-5 p. 3).<sup>6</sup> In 1996, corporate S&W was cited for violated 29 C.F.R. § 1926.451(a)(4), a guardrail standard , and entered into an informal settlement with a payment schedule (J.D. 9; Tr. 413).

S&W's relationship with its workers

Robert Bell was first employed by S&W in November or December 1996; when hired, he did yard work, paving, concrete work and roofing (Tr. 146-147, 331, 333). On June 26, 1998, Walter Jensen had Bell sign a form that he provided, indicating that Bell had become a subcontractor for S&W (J.D. 5; Tr. 147, Ex. R-13, p. 2 ["Sub-Contractor Disclaimer Form"]). Bell signed the form because Jensen told him that he couldn't get his paycheck otherwise (Tr. 147). At the same time, Jensen told Bell that he had to purchase his own liability insurance and where to go to buy it (Tr. 147- 8). After

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<sup>6</sup> Judge DeBenedetto commented in that case that the "persistent violations and the lack of motivation, despite the compliance officer's efforts to promote understanding on the part of the roofers regarding the necessary precautions to be taken during the performance of roofing work, were so egregious as to render Jensen's professed safety program totally unconvincing" (Ex. C-5, p. 5). In assessing an aggregate penalty of \$29,600 for Jensen's violations of 1926.501(b)(11) and 1925.503(a)(2), the judge remarked that in view of the "flagrant nature of the violations," the Secretary's assessed penalties were actually "singularly temperate" (Ex. C-5, p.8).

Bell signed the Sub-Contractor Disclaimer Form and purchased the insurance, he did exactly the same kind of work as he had done before. Nothing changed in his employment conditions (J.D. 5; Tr. 148).

Bell left S&W to work at other jobs from 1998- March 2000 (Tr. 148-150). He returned to S&W's employ on Monday, March 13, 2000 (J.D. 4). On Friday, March 17, 2000, Bell was again told by Jensen that in order to get his paycheck he would have to execute the Sub-Contractor Disclaimer Form (J.D. 4; Tr. 151). Carolyn Rivas, S&W's office manager, was aware that Bell had to sign the Disclaimer Form in order to get paid, and went over the form with Bell (Tr. 554, 559).

The Disclaimer Form Bell signed in March 2000 avers (1) that Bell is self-employed, (2) that he owns his own tools and equipment, (3) that he provides his own fuel for his own equipment, (4) that he provides his own insurance for his own equipment, (5) that he is free to solicit other business and (6) that he isn't employed by S & W Construction, Inc. (Tr. 151; Ex. R-13).

The actual conditions of Bell's work were entirely different. In actual practice, Bell did not own or provide his own tools and equipment except for a personal tool belt holding a hammer, a pencil, and a tape measure (J.D. 3; Tr. 167). Bell used only S&W's truck on the job, for which S&W provided the fuel (J.D. 3). Bell was not free to solicit other business elsewhere; rather, he was required to report to work at 6 or 6:30 each morning and his routine workday lasted until about 4:30 p.m. (J.D. 3; Tr. 156). Each day, Jensen told him what he would be doing on that day and exactly how the job was to be done. (J.D. 3; Tr. 155-156, 165, 168, 210). Over the course of the six weeks he worked for S&W, Bell was assigned to perform roofing work, yard work, demolition work, foundation work, plowing, parking lot sweeping, shop cleaning and equipment cleaning (J.D. 3; Tr. 161-6, 157; Ex. C-7). S&W provided all of the tools, materials and equipment (such as nail guns, screw guns, rakes, shovels, roofing metal,

screws, ladders, dust pans, brooms, trucks, scaffolding, extension cords) necessary for Bell to perform these jobs (J.D. 3; Tr. 166-7). Occasionally, Bell had to buy some materials for a particular job; he was always reimbursed by S&W (J.D. 3; Tr. 167, 563). If he finished up a particular job he was working on before his 4 p.m. quitting time, Bell could not just go home at his own discretion, but instead was required to return to the shop for another assignment (J.D. 3; Tr. 151, 156-157, 207). He was paid a flat rate of \$150 per day as long as he worked a full day; if he left early, he would not be paid the full \$150; if he finished the task more quickly, he would not profit from his speed (J.D. 3; Tr. 157).<sup>7</sup> He was never paid by the job (J.D. 3; Tr. 157). Bell did not consider himself self-employed, but rather to be an employee of S&W; he signed the Disclaimer only because he could not get his paycheck otherwise (J.D. 4; Tr. 152-153).

Jensen told Bell on Friday, March 17, 2000, that he had to get liability insurance in order to work and he told him where to get it, then had an S&W supervisor drive Bell to the insurance company (J.D. 5; Tr. 154). Bell purchased the liability insurance under the name of "Bob Construction", a name he made up at the time, and has never used for any other purpose (J.D. 4; Tr. 154, 155; R-13, p. 5).<sup>8</sup> Bell also agreed to purchase the insurance, as Jensen required, solely in order to get paid (Tr. 155).

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<sup>7</sup> S&W's contract for the roofing work in Pittsfield called for it to be paid \$14,500, without regard to the number of days needed to complete the job (Tr. 335-336). S&W would profit from finishing the job speedily, since its labor expense would be less, but Bell would actually lose money by making haste, since he might reduce the number of days his services were required.

<sup>8</sup> "Bob Construction" was neither previously nor subsequently registered with the state of New Hampshire. Bell had no business cards for "Bob Construction", did not have a sign on any vehicle advertising "Bob Construction", did not advertise "Bob Construction" anywhere, and did not maintain a business telephone for "Bob Construction" (Tr. 154-5). The name was invented solely to comply with S&W's sub-contractor requirement.

While working for S&W, Bell never worked for any other employer. (Tr. 157) Bell believed that he was not allowed to hire anyone else to perform the work that he had been told to do (Tr. 156) Other than the Disclaimer Form, he executed no documents and made had no contracts with S&W to perform any particular job (Tr. 159).<sup>9</sup> He believed he could be fired or quit at any time (Tr. 159). Bell testified that there was no difference at all in his jobs for S&W between the time he was called an employee and either of the times he was referred to as a subcontractor (J.D. 5; Tr. 183). S&W itself took no further steps to maintain the appearance of a subcontractor relationship. Bell's paychecks were made out to Robert Bell himself, not "Bob Construction" (J.D. 4; Tr. 155, 563) .

The second worker at the Pittsfield site, Paul Noyes, had been hired as a laborer when Bell complained after initially being sent out to the job alone (J.D. 4 and n. 3; Tr. 169-171). Jensen told Bell to go to a temporary labor agency and find a worker (J.D. 4 and n. 3; Tr. 170-171); Bell approached Noyes and told him he would be working for S&W Construction (Tr. 241). Noyes had regular hours, with no discretion to set his own schedule, and was paid a flat rate of \$75 per day in cash "underneath the table" (J.D. 3, 4 and n. 3; Tr. 241-242, 268). Noyes was paid with cash that he received from Bell, who got it from Jensen. *Id.* There is no record of Noyes as either an employer or a subcontractor in S&W's records (Tr. 570); however, Jensen gave the \$75 to Bell daily to pass on to Noyes (J.D. 4 n. 3; Tr. 170-171). This money was not deducted from the \$150 that Bell was paid (J.D. 4 n. 3; Tr. 171, 274, 586, Ex. R-13). On April 20, the day of the accident, Jensen personally paid Noyes \$75 at the

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<sup>9</sup> S&W produced a document it asserted was a contract between Jensen and Bell (Ex. R-14). The document, however, was wholly unexecuted, since neither party had signed it. It dated from Bell's previous employment with S&W, and in no way referred to the relationship between Bell and S&W that began in March, 2000.

end of the day (Tr. 256).<sup>9</sup> Noyes did not consider himself to be self-employed, signed no contract or disclaimer form, brought no tools or material with him to the jobsite, and believed he could be fired or quit at any time (J.D. 4 and n. 3, *see* J.D. 6; Tr. 243-244). He considered S&W to be his employer, and regarded Bell as a his immediate supervisor (Tr. 241-242).<sup>10</sup>

## 2. Administrative proceedings and decision below

Following the inspection, OSHA cited S&W Corporation for willful violation of 29 C.F.R. § 1926.501(b)(11), for failing to provide fall protection for its workers exposed to a fall greater than six

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<sup>9</sup> S&W's records show that on April 20, 2000, Bell was given an extra \$75 in cash. (R-13, p. 9; Tr. 586). This apparently documents money Jensen gave to Bell for Noyes, which Bell had not yet passed along. No such records exist for the two previous days Noyes worked at the Pittsfield site.

<sup>10</sup> At the hearing, S&W called two former employees whom it described as among its independent contractors, Rodney Sargent and Justin Murphy. The working relationship of each of these two men with S&W was distinctly different from that of Bell and Noyes. Both men were actively in business for themselves: Sargent, under the name Rodney Sargent General Contractor, Murphy under the name Murphy's Construction (Tr. 507, 533). Sargent had been in business for himself for 14 years; he finds and bids his own discrete construction jobs; he had business cards and maintains business assets (including staging, wooden ladders, metal picks, and brackets); he also had his own safety equipment (including body harnesses, lines and toe rails) (J.D. 6; Tr. 507-508, 511). He received a flat rate of \$300 per day from Jensen, but made his own hours, can leave a job at any time of day and "pretty much does what he wants." (Tr. 507-508, 515, 519-20, 526). Murphy's business was also a sole proprietorship, doing remodeling and roofing work in the Concord area; he had been in business, either on his own or with his brothers, for ten years. (J.D. 6; Tr. 533-4, 541). He had business cards and additionally advertised; maintained business assets ("pretty much everything" needed for roofing work or carpentry) and safety equipment; and had incurred debt in the business' name (J.D. 6; Tr. 533, 537-538, 541-542). He too made his own hours: "If it gets too hot, I go home. And if it's nice, I keep working." (Tr. 542). But even if he stopped work early, he still got the same amount of money for the day that he'd get if he had worked the full day (Tr. 542-543).

feet from a steep roof with unprotected sides and edges; a penalty of \$7,000 was proposed.<sup>11</sup> It also cited S&W for repeated violation of 29 C.F.R. § 1926.503(a)(2) for failing to train its employees concerning fall hazards and fall hazard protection; a penalty of \$3,750 was proposed for this violation.<sup>12</sup>

S&W timely contested the citations, and a hearing was held before administrative law judge Michael H. Schoenfeld. At the hearing, S&W contended, *inter alia*, that it could not be cited for violation of any duties toward Bell and Noyes under the OSH Act because these two workers performed their tasks for S&W as independent contractors rather than employees. It further contended

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<sup>11</sup> That standard provides:

**29 C.F.R. § 1926.501 Duty to have fall protection**

\* \* \*

(b) . . . (11) *Steep roofs* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.500(b) defines a "steep roof" as a roof with "a slope greater than 4 in 12 (vertical to horizontal)."

<sup>12</sup> That standard relevantly requires:

**29 C.F.R. § 1926.503 Training requirements**

(a) *Training program* . . . (2) The employer shall 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, [and] safety net systems ....

that it could not be cited for repeated violation of the Act because the citations upon which OSHA relied for that characterization had in fact been issued to a different entity, the old fictitious-name business.

In his decision and order, Judge Schoenfeld upheld both the citations and their characterizations. As an initial matter, he rejected S&W's claim that Bell and Noyes, the employees on whose exposures the citations were based, were actually independent contractors. He noted that S&W required its employees to sign documents establishing a putative independent contractor relationship, but held such documents were not controlling where that relationship was contravened by numerous indicia of a common law employer/employee relationship, citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (J.D. 2, 4). Thus, the judge noted that S&W's workers controlled none of the essential terms of their employment, had no risk of loss nor potential for profit, and did not even provide their own tools (J.D. 2-4). He additionally noted that S&W had engaged in true arms-length independent contractor relationships which were distinctively different from its relationships with Bell and Noyes (J.D. 5-7).

He found that S&W had violated the terms of § 1926.501(b)(11) by allowing its employees Bell and Noyes to work on a steeply sloped roof with no fall protection.<sup>13</sup> He additionally found that the violation was properly characterized as willful because S&W as a corporation, and Walter Jensen personally, had a heightened awareness of the applicable standard based on prior citations for violation of this standard which had been affirmed in April 1998 (J.D. 9). Thus, Judge Schoenfeld found that Jensen personally had been apprised of the standard's requirements during a 1995 closing conference

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<sup>13</sup> S&W had stipulated that Bell was working on a steeply sloped roof without fall protection at a height greater than six feet (Ex. ALJ 1, Stip. 4).

following an OSHA inspection, noting that Judge DeBenedetto had made the same finding in his 1998 decision (Ex. C-5) disposing of Jensen's contest of the citations issued based on that 1995 inspection. In addition, the judge found that another element in corporate S&W's heightened awareness was a 1996 citation for violation of the guardrail requirement in § 1926.451(a)(4) (J.D. 9). Accordingly, he held that the violation was properly characterized as willful.

He also upheld the violation of § 1926.503(a)(2). He noted that Bell and Jensen testified in direct contradiction to each other on the question of whether Bell had ever received fall protection training (J.D. 11-12). However, the judge found that the violation was established even without resolving the inconsistencies (J.D. 12). It was uncontroverted that Bell had not received any training following the January 1998 effective date of a change in the OSHA fall arrest systems requirements, and it was likewise undisputed that Noyes had never received any fall protection training of any kind. *Id.*

Judge Schoenfeld further concluded that the violation was properly characterized as repeated. In so holding, he noted that question of basing this characterization on a prior citation to an entity to which the current employer stood in a successor relationship was an issue of first impression before the Commission (J.D. 13). He found that both the doctrines of successor liability and of alter ego provided a precedential structure supporting the imputation of the history of the fictitious name entity to the corporation. *Id.* He noted that successor liability will attach where there is a substantial continuity between the two entities, where the function of employees and the business of the employer did not change, where there was continuity of supervision and work force, and the successor company purchased many of the prior entity's assets. *Id.*, citing *Fall River Dyeing & Finishing Corp v. NLRB*, 482 U.S.27 (1987). He likewise considered the evidence to suggest strongly that S&W Corporation is

the alter ego of the fictitious name company, and that the two may be considered a single "true employer" under established labor law precedent, citing *NLRB v. Hospital San Rafael Corp.*, 42 F.3d 45 (1st Cir. 1994).

## ARGUMENT

### I S&W Committed A Willful Violation of 29 C.F.R. § 1926.501(b)(11)

#### A. The standard was violated

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions). *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218 (No. 88-821, 1991).

The elements of the fall protection violation are undisputed on the facts, but S&W argues that it is not an "employer of employees" within the meaning of 29 U.S.C. § 652(5), and that the OSH Act and standards promulgated thereunder do not apply to the cited roofing operation. It argues instead that Bell was an independent contractor, wholly self-employed, who vended his services to S&W in a free market (Br. 6, 21-29).

In response, we note initially that S&W's brief on discretionary review makes no mention whatsoever of Paul Noyes, who was present at the Pittsfield worksite on the same three work days that Robert Bell worked, and who testified in detail as to the terms and conditions of his employment at the hearing. Anyone reading only S&W's brief on review would have no inkling of Noyes' existence. Yet

the Secretary's citation squarely encompasses both the workers at S&W's roofing work site on April 20, 2000. Thus, Citation 1, Item 1, relevantly describes the violative conduct as follows:

Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels was not protected from falling . . . :

Clark Street, Pittsfield, NH - Employees working on the steep roof were not adequately protected from falls.

(Ex. C-10, p.6)(emphasis added).

Accordingly, we will show that there are two insuperable legal objections to S&W's position: first, S&W does not and cannot raise the assertion of independent contractor status with respect to Paul Noyes, on whose exposure the citation was also based; and second, Bell was indeed an S&W employee within the meaning of the OSH Act, under established legal principles and both Commission and judicial precedent.

1. Noyes was an S&W employee

The Supreme Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) ("*Darden*"), set forth the process for to determining the existence *vel non* of a common law employment relationship, commenting that all aspects of the relationship are relevant, but that the central inquiry is:

. . . the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are 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.

503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) [footnotes omitted]).

The Commission has articulated a number of factors for making this determination, including:

- 1) Whom do the workers consider to be their employer?
- 2) Who pays their wages?
- 3) Who has the responsibility to control the activities of the workers?
- 4) Does the alleged employer have the power to control the workers?
- 5) Does the alleged employer have the power to hire, fire, or modify the employment conditions of the workers?
- 6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
- 7) How are the workers' wages established?

*Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1804 (No. 93-54, 1996) quoting *Van*

*Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (No. 87-214, 1989) (consolidated).<sup>14</sup>

*Accord Vergona Crane Co.* 15 BNA OSHC 1782 (No. 88-1745, 1992); cf. *Timothy Victory*, 18 BNA OSHC 1023, 1026-1027 (No. 93-3359, 1997) (awarding EAJA fees on grounds Secretary was not substantially justified in considering boat owner to be employer of sea urchin divers where, *inter alia*, owner exercised no control over either means or manner of harvesting, divers provided most of their own equipment, controlled their working hours, and participated in the risk of gain or loss since they were paid on a percentage basis with a share of the catch).

There can be no question that Noyes was S&W's employee. While he was selected by Bell at the labor agency, it was at Jensen's direction (Tr. 170), and Noyes' understanding was always that

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<sup>14</sup> The Commission expressly found its analysis to be consistent with *Darden's*, noting that the two analyses shared a number of factors. *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637-38 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994).

Jensen was his boss and Bell merely his immediate supervisor (Tr. 241-242). Jensen defined the terms of his employment: in cash, off the books, "underneath the table." It was Jensen who decided that Noyes would be paid \$75 per day in cash, and Jensen who paid it (Tr. 171, 274); Noyes bore no risk of loss and had nothing to gain from individual initiative. Although the money was transmitted to Noyes by Bell, it did not come out of the \$150 per day that Bell was paid. *Id.* Jensen set his hours, directed his work, and supplied all the materials and tools Noyes used in performing his assigned tasks. Indeed, after Bell had fallen, suffered severe injuries, and been taken away in an ambulance, Jensen drove Noyes to another S&W worksite and sent Noyes up on another dew-slick roof to work with no fall protection for the balance of the day (Tr. 254).<sup>15</sup>

Application of the *Rockwell* factors to these facts inexorably yields the conclusion that Noyes was S&W's employee. If there were even a shred of doubt beforehand, any suggestion that Noyes was not S&W's employee collapses entirely in the face of the fact that, after Bell went to the hospital on April 20, Jensen assigned Noyes to another roofing job and personally drove him to it. This is uniquely

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<sup>15</sup> S&W does not claim before the Commission that Noyes was an independent contractor -- indeed, S&W's brief on discretionary review never acknowledges Noyes' existence. The company has abandoned that claim, which it had voiced during the hearing (Tr. 570-571). However, there can be no support for any such claim in any event. Noyes did not execute a Subcontractor Disclaimer; instead, it was Jensen's intention to keep him off the books entirely -- "underneath the table." His name does not appear anywhere in S&W's records, yet Jensen paid him \$75 through Bell on two days and directly on the third. Throughout that time, Noyes acted entirely at Jensen's direction, especially after Bell's accident, when Jensen personally drove him to another roofing worksite. Noyes was not a roofer; was not in any kind of business for himself; brought no tools, materials or equipment to the job; had no discretion over his hours; had no authority to hire anyone to assist him on the job; could quit or be fired at any time, and no amount of initiative and inventiveness on his part would have had any effect on the amount of money he was paid. The work Noyes did for S&W required virtually no skill; he served as Bell's helper until the accident, and afterward worked at another site doing what Jensen told him. Noyes cannot be characterized as anything but S&W's employee.

a transaction in an employer/employee relationship; the employer exercising full control over his worker and protecting his interests by making sure that he got a full day's work for a full day's pay, even if the employee had just witnessed a serious accident to a co-worker. Indeed, the employer even exposed the employee to the same conditions that produced the accident at the previous worksite, since Jensen sent Noyes up onto another wet roof.

No other characterization but employee adequately describes Noyes' relationship with S&W; accordingly, the standard applies to S&W's worksite according to its terms. All other violation elements are conceded; accordingly, the violation is established.

## 2. Bell was an S&W employee

While the violation is established with reference to Noyes alone, the record shows that Bell, likewise, was S&W's employee.<sup>16</sup> Thus, the record shows that Jensen controlled all aspects of Robert Bell's work life. We have seen that his hours, methods, materials, and pay were all wholly controlled by Jensen. *Supra*, pp. 5-8. Bell signed the Disclaimer Form which is S&W's principal basis for arguing an independent contractor relationship only because he couldn't collect his pay if he didn't. *Id.* We have also seen that, as Judge Schoenfeld noted, S&W knew perfectly well how to engage in a genuine, arms-length subcontractor relationship. *Supra* p. 9, n.10.

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<sup>16</sup> S&W refers to Bell's statements to the CSHO and the hospital describing himself as self-employed as "admissions against interest" (Br. 4-6). What they actually are in the context of the instant case, however, is irrelevancies. Whether or not Bell was S&W's employee within the meaning of the OSH Act is not controlled by the statement of any person, either putative employer or putative employee, but rather is determined by the totality of the relationship seen through the lens of the common law. *Darden, supra*.

B. The violation was willful

1. S&W knowingly disregarded the requirements of 29 C.F.R. § 1926.501(b)(11)

A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. 29 U.S.C. § 666(a); *Revoli Constr. Co., Inc.*, 19 BNA OSHC \_\_\_\_, 2001 WL 1568807, \*4 (O.S.H.R.C.) (No. 00-0315, 2001); *L.E. Myers Co.*, 16 BNA OSHC 1037, 1046 (No. 90-945, 1993); *Williams Enterp.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *Revoli at id.*; *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (Nos. 82-630 *et al.*, 1991); *see Donovan v. A. Amorello & Sons*, 761 F.2d 61 (1st Cir. 1985). Thus, a willful violation may be found where the employer knows of the legal duty to act, and knowing an employee is exposed to a hazard, nonetheless fails to correct or eliminate the hazardous exposure. The employer need not harbor malicious motives or a bad purpose, nor possess a "specific intent" to violate a provision of the Act, in order to commit a willful violation. *Reich v. Trinity Indus., Inc.*, 16 BNA OSHC 1670 (11th Cir. 1994); *Kaspar Wire Works*, 18 BNA OSHC 2178, 2184 (No. 90-2775, 2000).

S&W admits that it had actual knowledge of the standard (Br. 14). The point is also made evidentially, since the CSHO who conducted the inspection in this case had personally discussed this standard with S&W's president, Jensen, in a 1995 closing conference following an OSHA inspection. In that meeting, CSHO Rook gave Jensen a printed copy of OSHA's fall protection standards, highlighting the specific ones - steep roof and training standards - cited in that case and in this one, and

reviewed in detail with Jensen the requirements of 29 C.F.R. § 1926.501(b)(11) (Tr. 43-44). The company, through Jensen, also had actual knowledge that the two employees were working on the roof with no fall protection, as they had done on each of the two prior workdays that week. Jensen stood and talked with the two men while they were on the roof. In fact, when Bell complained about the slickness of the roof, Jensen ignored it and told him simply to get the work done.

The willfulness of this violation could not be more plain: the employer had actual, detailed knowledge of the standard and its requirements. The employer watched as two employees worked on the steep roof with no fall protection on three separate days. There was no fall protection equipment of any kind anywhere at the worksite, although the company possessed eight safety harnesses. And the employer shrugged off a safety complaint directly related to a fall hazard, responding only with a suggestion that the employees work quickly. S&W deliberately disregarded known safety requirements and knowingly allowed its workers to work without fall protection on a slick metal roof which was 16 feet above the ground. The violation cannot be characterized as anything but willful.

2. S&W has not made out the affirmative defense of good faith because it did not have an objectively reasonable belief that Bell and Noyes were not its employees

An employer may defend itself against a willful characterization by demonstrating that it had a good faith opinion that the violative condition conformed to the requirements of the Act. *E.g.* *MJP Constr. Co., Inc.*, 19 BNA OSHC \_\_\_\_; 2001 WL 1464398, \*10 (O.S.H.R.C.) (No. 98-0502, Nov. 16, 2001); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064 (Nos. 82-630, 84-731, 84-816, 1991). The test of good faith is an objective one--"whether the employer's

belief concerning the factual matters in question was reasonable under all of the circumstances" and therefore "nonfrivolous." *Id.*; see *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 165 (1st Cir. 1987) (employer's attitude toward compliance can be evaluated only by the external objective evidence). Where that state of mind is shown by the actions of a supervisory employee, it is imputed to the employer, like employer knowledge. *Access Equip.*, 18 BNA OSHC 1718, 1727 (No. 95-1449); *North Line Landing*, 19 BNA OSHC 1465, 1472 (No. 96-721, 2001). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-442 (7th Cir. 1997); *Keco Indus., Inc.*, 13 BNA OSHC 1161, 1169 (No. 81-263, 1987).

S&W argues that it "reasonably believed" in good faith that Bell was not its employee (Br. 17), and that it therefore had no duties under the Act.<sup>17</sup> In making this assertion, S&W bears the burden of proving that it had an objectively reasonable good faith belief that its complete failure to address the fall hazards Bell faced, and ultimately fell victim to, conformed to the requirements of the OSH Act. See *North Line Landing*, 19 BNA OSHC at 1476; *Morrison-Knudsen*, 16 BNA OSHC at 1124, 1127. It is true that a company may defend against a willful characterization by arguing on the basis of a legal position, but any such argument, just as with an argument founded on a factual claim, must be objectively founded and demonstrably reasonable. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC

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<sup>17</sup> We note again that this argument is irrelevant to the outcome of this issue, since S&W does not and cannot argue that Noyes was not its employee; by extension, the company could not possibly argue that it believed in good faith that Noyes was not its employee.

at 2068-2070 (argument that section of the Act did not apply to employer accepted as good faith defense to willful violation where employer reasonably relied on “reasonable, but in our view incorrect, interpretation of [statutory provision]” where one circuit court of appeals had already noted provision was “ambiguous” without resolving issue, and position was then being actively asserted before another circuit court, even though employer’s position was ultimately unsuccessful before that court); *Peterson Bros. Steel Erection*, 16 BNA OSHC 1196, 1200 (No. 90-2304, 1993) (company was not reasonable in relying on decision which in turn relied on two prior decisions that had already both been reversed on appeal), *aff’d Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 576-577 (5th Cir.1994) (same).

Thus, an unreasonable belief, however fervently held, will not serve to shield an employer from liability for the willfulness of his conduct. Saying that a thing is so – even compelling an employee to sign a Disclaimer Form that says a thing is so – not only doesn’t make it so, but doesn’t even make it reasonable to believe that it is so, when all the available legal precedent is stacked up against it. S&W simply cannot have had a good faith belief, under either Commission or court law, that Noyes and/or Bell were not its employees. As we have seen, there is Supreme Court and longstanding Review Commission precedent to the contrary of S&W’s purported belief that it could successfully create an independent contractor relationship merely by forcing its employees to sign a disclaimer and buy separate liability insurance before getting paid.<sup>18</sup> Much of that precedent was solidly in place by the

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<sup>18</sup> It is beyond the scope of the present case to inquire further into the legal effectiveness of that “Subcontractor Disclaimer Form,” but the fact that Bell signed it only because he had to in order to collect his pay (J.D. 4) is at a minimum suggestive of the type of coercion which renders otherwise legally binding contracts void *ab initio*.

time S&W was incorporated in 1995; *Darden*, for example, was decided in 1992, *Van Buren-Madawaska* (applying the Commission's pre-*Darden* economic realities test) in 1987. As the Commission has stated, "an employer has a duty to inquire into the requirements of the law." *Peterson Bros.*, 16 BNA OSHC at 1200, citing *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5<sup>th</sup> Cir. 1991) and *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

By contrast, S&W cites no legal authority whatever for its position that an employer can turn putative employees into independent contractors merely by requiring them to sign a form. The cases the company cites (Br. 23), to the extent that they have any application here, actually tend to support the Secretary.<sup>19</sup> S&W makes no showing that it relied in any way on prior legal authority or advice of counsel – or indeed that it consulted any source other than Walter Jensen's personal desires – in arriving at its position. *Compare General Motors, Electro-Motive Div.*, 14 BNA OSHC at 2068-2070 (good faith defense to willful characterization accepted where advice of counsel frequently sought and faithfully followed as basis for objectively reasonable good faith belief in legal interpretation). The company had no objectively reasonable basis for believing that Bell was an independent contractor; the

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<sup>19</sup> Thus, *United States v. Thorson*, 282 F.2d 157, 162-163 (1<sup>st</sup> Cir. 1960), found an independent contractor relationship for the purposes of assessing whether Social Security payroll taxes must be paid, applying the pre-*Darden* "economic realities" test; the court determined the company was not an employer where it exercised no actual control over the means and details of the putative employees' work, and employees could choose whether or not to accept a specific job, sometimes worked for competitors and then returned, and had no specified working hours. We have seen that the exact opposite situation obtains here. *Tri State Developers v. United States*, 549 F.2d 190, 192-196 (Ct.Cl. 1977) articulated the same analysis, familiar to both the Commission and the courts, looking to the realities of the workplace relationship and reached the same result, finding that siding and roofing workers were not employees where they worked principally on their own schedules, owned and used their own tools, negotiated their pay rates, and hired help or chose partners for specific jobs at their own discretion and expense. Again, the factual picture in the present case is precisely opposite.

legal sham it created with the Disclaimer Form cannot render its position, flying in the face of well-established legal principles, objectively reasonable. It is an unreasonable position, and no flourishing of compulsory Sub-Contractor Disclaimers can ever render it otherwise.<sup>20</sup> S&W's assertion of a good faith defense to the willful characterization must be rejected.

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<sup>20</sup> Even assuming arguendo that Bell should be considered to be S&W's subcontractor, S&W would still be liable for the fall protection violation under the multi-employer worksite doctrine. Thus, under Commission and court precedent, a general contractor is held responsible for the violations of a subcontractor "where it could reasonably be expected to prevent or detect and abate the violation due to its supervisory authority or control over the worksite." *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2129-2130 (92-0851, 1994); *Universal Constr. Co., Inc. v. OSHRC*, 182 F.3d 726, 732 (10<sup>th</sup> Cir. 1999). S&W claims that Jensen had completely fulfilled this duty by telling Bell to put on his safety harness. (S&W refers to Jensen's admonition as if it were established fact (Br. 24-25), but it is not. Bell directly disputed it, and Judge Schoenfeld declined to resolve the dispute as ultimately immaterial.)

S&W's assertion is incorrect. Even if his obligations were the lesser duties of a general contractor, Jensen had not fulfilled his safety duties. First, there is no assertion in the record that Jensen told Bell and Noyes to put their harnesses on at any time on the prior two days that the two men worked at the Pittsfield site, though it is undisputed that Jensen visited the site and saw the two men working on the roof without fall protection on both of those prior days. Here, as in *Centex Rooney*, the violations "were in plain view [and] had existed for a significant period of time. 16 BNA OSHC at 2130. Second, even if Jensen did indeed tell Bell to put on his harness, and Bell did indeed ignore him, Jensen had not taken all the steps available to him to abate the hazard. Thus, the cited standard clearly specifies guardrails and nets as possible means of abatement along with safety harnesses and lifelines. S&W's reliance (Br. 25, 29) to *IBP, Inc. v. Herman*, 144 F.3d 861, 864 (D.C. Cir. 1998) is misplaced, because, unlike the general contractor in that case, whose only available method to require safety compliance from its subcontractor was to cancel the contract, Jensen had alternatives. Thus, like the employer in *Universal* (which expressly distinguished *IBP*), S&W "had plenary control and authority over the worksite and could itself either correct a hazard created by any subcontractor, even without that subcontractor's consent, or direct any subcontractor to abate a hazard and abide by safety standards." *Accord Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 819 (6<sup>th</sup> Cir. 1998) (general contractor liable for failure to provide fall protection where subcontractor's failure to take adequate measures was visible for some time).

In view of the body of applicable caselaw, then, even if Bell were an independent contractor, Jensen still could not have had an objectively reasonable belief that he had done all that was necessary to abate the fall hazard at the Pittsfield worksite.

## II S&W Committed A Repeat Violation of 29 C.F.R. § 1926.503(a)(2)

### A. The standard was violated

This standard requires that an employer provide a competent person to train its employees regarding the recognition of fall hazards and how to minimize them – the correct and appropriate use of different fall protection systems, the correct and adequate procedures for the erection, maintenance, disassembly and inspection of fall protection systems – and the requirements of the OSH Act (Tr. 270); 29 C.F.R. § 1926.503(a)(2). In addition, retraining is required when "inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill." 29 C.F.R. § 1926.503(c)(3).

Once again, S&W directs its arguments solely to the facts involving Bell, and ignores the existence of Paul Noyes (Br. 17-21). Once again, however, the citation squarely encompasses the exposures of both employees. Citation 2, Item 1 charges that:

1926.503(a)(2): The employer did not assure that each employee was trained as necessary, by a competent person qualified in items (i) through (viii) of this subparagraph:

Clark Street, Pittsfield, NH - Employees were not trained in the recognition and avoidance of unsafe conditions relating to their work, operation and use of fall protection systems and the safety regulations involved in roofing work.

(Ex. C-10, p. 8)(emphasis added). Accordingly, we address this violation with respect to both Noyes and Bell.

#### 1. Paul Noyes never received any training whatsoever

Jensen admitted at the hearing that Paul Noyes received no training; in fact he said that he had not trained any employee in roofing safety within the prior two years (Tr. 399, 481). This admission

alone suffices to establish the violation.

Other facts of record show that Paul Noyes began working for S&W on Monday, April 17, 2000, spent two days and part of a third working on the roof at issue in this case, and finished the third day by working on another roof, following Bell's accident (Tr. 248-249, 254-255). Yet Noyes never received any training whatsoever from S&W about working safely on roofs (Tr. 257-258). Thus, his un rebutted testimony establishes that he had no experience whatsoever with wearing personal fall protection and that he was never trained by S&W about how to use personal fall protection, how to wear a harness, attach a lanyard or anchor to a safe point on a roof, how to install, maintain, or inspect a guard rail system, or how to work safely on a roof. *Id.* He was never sent to any classes addressing how to work safely on a roof and no one ever demonstrated to him how to use personal fall protection. *Id.* He was never told anything about OSHA's fall protection standards. *Id.* The violation is established.

2. Robert Bell received no current training and had not previously been trained in compliance with the standard

Bell had never done any roofing work prior to his first stint of employment with S&W in late 1996 (Tr. 145-146). Bell claimed that when he worked for S&W between 1996 and 1998 and again in 2000, he never attended a single safety meeting. S&W, Bell said, never held any tool box meetings, never sent him to any classes about working safely on a roof, never gave him any training about how to install and wear a fall protection harness and lanyard, never trained him about how to install or maintain a guard rail system, never trained him about how to install safety nets, never trained him in any way

whatsoever about how to work safely on a roof, and never told him anything about OSHA's fall protection standards (Tr. 180-181).

S&W, while conceding it had provided no training within the prior two years, claimed it had trained Bell during his earlier employment. However, no evidence documented this claim. Thus, Walter Jensen's assertions that Bell had attended safety meetings when he was an employee and that he had seen Bell two or three times in the office where training sessions were being held (Tr. 358, 398) were actually undercut by S&W's sole piece of documentary evidence, a training session Attendance and Certification Sheet on which Bell's signature does not appear (Ex. R-6). Nor, even assuming that all this training took place as stated, did S&W claim, let alone document, that any of the training was done by a "competent person" within the meaning of the standard. In any event, since Jensen admitted that S&W had conducted no fall safety training for the two previous years, it is undisputed that S&W did not retrain Bell following the January 1998 effective date of the provision of § 1926.502(d) which disallowed the use of previously acceptable body belts, substituting a requirement for the use of a full harness with a lifeline system. As the judge noted, this omission alone can establish the violation (J.D. 12).

**B. The violation was repeated**

The Commission and the courts interpret the statute to provide that a violation is repeated where an employer commits more than one violation of the same standard, or substantially similar violations of different standards. A violation may be classified as a repeat violation under section 17(a) of the Act, 29 U.S.C. § 666(a), if at the time of the alleged repeated violation, there was a Commission final order against the same employer for a previous substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). ("*Potlatch*") The Secretary establishes a *prima facie* case of similarity by

showing that the prior and present violations are for failure to comply with the same specific standard. *Potlatch* at 1062-1064; *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167 (No.90-1307, 1993), *aff'd per curiam*, 19 F.3d 643 (3d Cir. 1994); *R. G. Friday Masonry*, 17 BNA OSHC 1070, 1073-1074 (Nos. 91-1873 & 91-2027, 1995).

S&W argues that it cannot be charged with a repeated violation of the standard because it is not the same entity as Walter Jensen d/b/a S&W Construction (Br. 18-19).<sup>21</sup> As we show, for the purposes of characterizing a violation as repeated under the OSH Act, 29 U.S.C. § 666(a), S&W Construction, Inc., is appropriately characterized as either a successor company to, or an alter ego of, Walter Jensen d/b/a S&W Construction.

1. S&W Construction, Inc., is a successor company to Walter Jensen d/b/a S&W Construction

The Supreme Court has held that determining successorship is "primarily factual in nature and is based upon the totality of the circumstances of a given situation" and requires that the focus be "on whether the new company has 'acquired substantial assets of its predecessor and continued, without

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<sup>21</sup> S&W also objects to the use of the prior citations as too old to serve as the basis for the present citations under OSHA's three year policy (Br. 19-21). OSHA's policy, as set forth in its Field Inspection Reference Manual ("FIRM"), is to characterize a violation as repeat under 29 U.S.C. § 666(a) if the citation is issued within three years of a final order against the employer for violation of the same standard (Tr. 49-50, FIRM at Chapter III(C)(2)(f)(3)(a)(1)). In arguing that the repeat citation was not issued in accordance with the FIRMS's three-year rule (Br. 19-20), S&W overlooks the fact that it is the final order date of the prior citation, not the date of the earlier violation or the issuance date of the citation, that is relevant. The instant citations were issued on June 29, 2000 (C-10; Tr. 50). On May 13, 1998, less than three years earlier, a citation for violation of the fall protection training standard cited in this case, 29 C.F.R. § 1926.503(a)(2), became a final order of the Commission (Ex. C-14). That citation, issued to Walter Jensen d/b/a S & W Construction, was affirmed following a hearing before Administrative Law Judge DeBenedetto (Ex. C-5; Tr. 49); *see n. 6, supra*.

interruption or substantial change, the predecessor's business operations.'" <sup>22</sup> *Fall River Dyeing & Finishing Corp., v. NLRB* ("Fall River"), 482 U.S.27 (1987), citing *Golden State Bottling Co., Inc. v. NLRB*, 94 S.Ct. 414, 425 (1973). The key in determining successor liability is whether there is "substantial continuity" between the enterprises. *Fall River*, 482 U.S. at 43-46. <sup>23</sup> Among the factors looked to in determining "substantial continuity" are (1) whether the business of both employers is the same, and whether employees of the new company are doing (2) the same jobs in (3) the same working conditions (4) under the same supervisors (5) for some of the same customers. *Fall River at id.*

Applying those factors here, we find that S&W has followed very closely in the fictitious-name company's footsteps. S&W's business is identical with that of Walter Jensen d/b/a S & W Construction - general contracting, painting, roofing, siding, carpentry and snow removal. (Tr. 314, 319-20). Since the businesses are the same, the jobs of the workers of each entity and the essential working conditions

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<sup>22</sup> Successorship has been found where the new employer purchases only a part of the assets of the predecessor employer. *Golden State Bottling Co. Inc.*, 94 S.Ct. at 424, citing *N.L.R.B. v. Interstate 65 Corp.*, 453 F.2d 269 (Cir. 6th 1971). As long as there are other indicia of "substantial continuity" between the two legal entities, the fact that the successor purchased the assets on the open market is not determinative (*see infra* n. 25). Nor does a hiatus of as much as 7 months between the predecessor's demise and the successor's start-up constitute an "interruption" so as to militate against a finding of successor liability. *Fall River*, 482 U.S. at 45-46. Here, there was merely a brief period of time, about six weeks, between when Walter Jensen d/b/a S & W Construction ceased operating and S&W began (Tr. 412-13).

<sup>23</sup> At least one district court has commented in *dicta* that it considers imposition of successorship liability to be consistent with the purposes of the OSH Act. Thus, in *Secretary of Labor v. H.M.S. Direct Mail Service, Inc.*, 752 F.Supp. 573, 581 (W.D.N.Y. 1990), *rev'd in part on other grds and remanded*, 936 F.2d 108 (2nd Cir. 1991), the court noted that it found nothing in OSHA or its legislative history addressing the issue of successor liability for OSHA violations but remarked that "in view of OSHA's broad preventative and remedial scheme," Congress intended federal courts to impose successor corporation liability in the OSHA context when the violator sold or transferred its operation to another entity which merely continued the business much the same as before.

are as well; this is borne out by Bell's descriptions of the tasks he performed during his employment stints in 1996-1998 and 2000. Walter Jensen conceded that he ran both businesses in their entirety on a daily basis, disposing of the question of identity of supervision; again, Bell and Noyes' experience in this individual case bears out the general point, for Jensen visited their worksite once or twice daily to direct their operations. Conditions also remain the same in many ways: aside from doing the same work, S&W possesses many of the physical assets formerly belonging to the fictitious name business, purchased at the bankruptcy auction, and it conducts its business from the same address and telephone number as the previous company. Corporate S&W even paid at least one of its debts with a check drawn on the bank account of Walter Jensen d/b/a S & W Construction. S&W continued to perform on a contract made by Walter Jensen d/b/a S & W Construction, indicating a common customer base between the two entities; the same might be inferred from the fact that S&W continues its operations in the identical area as the fictitious name business. In short, S&W essentially picked up exactly where Walter Jensen d/b/a S & W Construction left off. Corporate S&W can very appropriately be called a successor to the fictitious name company on these facts.

2. S&W Construction, Inc., is the alter ego of Walter Jensen d/b/a S&W Construction

The First Circuit Court of Appeals, in which this case arises, has characterized the alter ego doctrine as having somewhat wider application than the successorship doctrine. *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d. 45, 50 (1st Cir. 1994) ("*San Rafael*"). *San Rafael* describes the alter ego doctrine, when applicable, as producing a similar legal result, however, stating that under the alter ego doctrine "in certain situations one employer will be regarded as a continuation of a predecessor, and the

two will be treated interchangeably for purposes of applying labor laws." *Id.*<sup>24</sup> That case specifies the factors the courts look to in determining alter ego status: "similarity between the old and new companies in relation to management, business purpose, operation, equipment, customers and supervision, as well as ownership." *Id.* at 50. While the *San Rafael* court recognized that a factor in determining alter ego status is whether the alleged alter ego entity was created and maintained in order to avoid labor obligations, it made clear that, in its view, a wrongful motive is not required for finding that one entity is the alter ego of another. *Id.* at 51.

Of the listed factors, the *San Rafael* court considered "continuity of ownership" to be the most important. *Id.* at 51. That most important factor for a finding of alter ego status is clearly present here. Walter Jensen was the sole founder and sole owner of both Walter Jensen d/b/a S & W Construction and S & W Construction, Inc. (Tr. 315-316, 320). While the First Circuit has also said in analyzing alter ego status that "[no] one factor is controlling, and all need not be present to support a finding of 'alter ego status'" (citing *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990)), the relationship between the fictitious name business and the corporate S&W satisfies all factors set forth for a finding of alter ego status, with the sole exception of for bad motive. (It is interesting that Judge Schoenfeld, with his personal experience of the demeanor of the witnesses,

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<sup>24</sup> The Commission has long looked to law developed under the NLRA for doctrines applicable in its own proceedings. Thus, in *Advance Specialty Company, Inc.*, 3 BNA OSHC 2072 (No. 2279 1976), it relied on factors developed by the National Labor Relations Board in determining whether two ongoing, separately incorporated business entities should be treated as a single entity for purposes of the Act. While those factors are specific to the circumstances of two ongoing concerns and are, therefore, not applicable to the case at issue, the Commission's adoption of them indicates a willingness on its part to embrace NLRA law as it relates to the determination of when the legal distinctions between two separate entities should be ignored.

commented that bad motive may also have been present. J.D. 10 and n. 12 ). There can be no question as to the great similarity between the old and new companies in relation to management, business purpose, operation, equipment, customers and supervision. Thus, with respect to management, operation and supervision, Walter Jensen has run both businesses on a daily basis, telling his workers exactly how he wanted a job to be done, as sole proprietor in the one case, and sole shareholder, president and director in the other (Tr. 156, 310, 315-316, 320). With respect to business purpose, Walter Jensen d/b/a S & W Construction was engaged in general contracting, painting, siding, snow plowing, carpentry and roofing; S & W Construction, Inc. is also a general contracting business, doing painting, siding, snow plowing, carpentry and roofing (Tr. 314, 319-20, 344). Much of the equipment, including trucks, ladders, staging, hand tools (hammers, sledge hammers, axes, shovels), wooden brackets, skillsaws, and a bench saw previously used by Walter Jensen d/b/a S & W Construction, is now being used by S & W Construction, Inc. (Tr. 322, 408).<sup>25</sup> With respect to common customers, we have seen that the corporate business continued to perform on a contract with the fictitious name business (Tr. 323-329, 350), and the fact that the company conducts the identical type of work in the identical location strongly suggests that other common customers exist. Indeed, since the company

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<sup>25</sup> At the hearing, S&W emphasized that it had purchased these assets not from Walter Jensen d/b/a S & W Construction but from the trustee following the bankruptcy of Walter Jensen d/b/a S & W Construction (Tr. 321-322), suggesting that this fact is sufficient to break the continuity between itself and the fictitious name business such that a finding of a repeat violation would be inappropriate. While addressed in the context of a successor liability case, the Supreme Court in *Fall River* squarely addressed the situation in which a company purchased assets on the "open market" and concluded that "[s]o long as there are other indicia of 'substantial continuity,' the way in which a successor obtains the predecessor's assets is generally not determinative of the 'substantial continuity' question." 482 U.S. at 44 n. 10.

conducts its business from the same location, with the same address and phone number as before and essentially the same name, it is perfectly possible that many people have no idea that there have been two companies. Indeed, the company seems to consider itself a unitary entity, since Jensen described the corporation as having been founded in 1969 in a 1999 filing with the state of New Hampshire (Tr. 346), and even wrote a corporate check on the fictitious-name company's account (Tr. 414-415).

As we have seen, S&W itself has been cavalier about maintaining any distinction between itself and Walter Jensen d/b/a S & W Construction. If anything, its casual attitude towards the separate identities of the two businesses reflects the truer situation: the two companies, one incorporated and one not, are a single, continuous business enterprise, and one is the alter ego of the other. In this context, the two entities may be treated as one, and, again, it is appropriate to charge S&W, the corporation, with the citation history of the fictitious name business. Accordingly, the citation for violation of the fall safety training provision should be affirmed as repeated.

### **III S&W's Other Arguments are Without Merit**

On directing review, the Commission reserved identification of the issues to be addressed for its subsequent briefing order (Direction for Review, September 5, 2001). When issued, the Commission's briefing order requested briefs solely on the two questions set forth on p. 1, *supra*. Since the Commission did not request briefing on any procedural issue, although S&W sought review on several of them (*see* Pet. for Discretionary Review, pp. 2, 8-11), these questions must be taken as resolved, and the judge's dispositions of them affirmed. *Revoli, supra*, 2001 WL 1568807 at \*3 (Commission "ordinarily decides only those issues that are set forth in the direction for review or the briefing notice"); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n. 4 (Nos. 86-360 *et al.*, 1992) ("[t]he only

objections . . . raised to the judge's decision that have sufficient support to merit review are those directed for review").<sup>26</sup>

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<sup>26</sup> In any event, S&W's claim that the period of time provided in 29 C.F.R. § 2200.34(a)(1) to file a complaint is jurisdictional and therefore may not be enlarged (Br. 7-9) is simply wrong. As the Tenth Circuit has stated:

We note that it was the filing of the notice of contest . . . that invoked the jurisdiction of the Commission. 29 U.S.C. § 659(c) [citations omitted]. The filing of a complaint is not mandated by the statutory grant of jurisdiction, but is simply a procedural rule promulgated by the Commission pursuant to 29 U.S.C. § 661(g). The complaint and answer are filed simply to formulate the issues to be resolved by the Commission. [citation omitted].

*United States by Donovan v. Howard Electric Co.*, 798 F.2d 392, 394 n. 2 (10<sup>th</sup> Cir., 1986).

S&W, citing Fed. R. Civ. P. 9, also urges as a procedural objection (Br. 9-11) that the Secretary "did not specifically plead in its [*sic*] 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 . . . ." Nothing in either Commission Rule 34(a)(2) or Fed. R. Civ. P. 9 required the Secretary to so plead. The Secretary was not raising any issue as to the "legal existence" or Sharon and Walter Construction, Inc., or to its capacity to be sued in a "representative capacity."

S&W also errs in saying the Secretary has never indicated a position on successorship (Br. 21). The Secretary has long held that her enforcement actions, to the extent that they may have future effect, are incumbent upon successor entities. This policy is so deeply embedded in the Secretary's enforcement program that it is reflected in each citation issued. Thus, each of S&W Construction's 1995 citations is plainly on its face directed to "S&W Construction and its successors" (Ex. C-13, p. 1; Ex. C-14, p.1). Indeed, the citations issued in the instant case are likewise plainly addressed to "S&W Construction, Inc. and its successors" (Ex. C-10, p. 1). These documents alone clearly indicate the Secretary's longstanding policy. The Commission itself has noted the Secretary's practice, *e.g.* *GAF Corp.*, 9 BNA OSHC 1451, 1452 n. 2 (No. 77-1811, 1981) ("there is no evidence that the facility has been reopened by this employer or a successor in interest"). In any event, the Secretary is entitled to proceed by adjudication, including administrative adjudication, in announcing her policies. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 111 S.Ct. 1171, 1179 (1991) ("when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress"). Any other approach could debilitate the Secretary's enforcement program, for, as a court of appeals has remarked, "[w]e worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name." *Reich v. OSHRC (Jacksonville*  
(continued . . .)

CONCLUSION

For the reasons stated above, the Commission should affirm the cited violations and their characterizations and affirm the penalties assessed by the administrative law judge.

Respectfully submitted,

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<sup>26</sup> (...continued)

*Shipyards*), 102 F.3d 1200, 1203 (11<sup>th</sup> Cir. 1997). And, as the courts have long remarked, it is the repeat violator who "requires a greater than normal incentive to comply with the Act". *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978).