

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,  
United States Department of Labor,

Complainant,

v.

OSHRC Docket Nos. 98-  
0755 and 98-1168

AVCON, INC.; VASILIOS SAITES AND NICHOL  
SAITES,

Respondents.

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SECRETARY OF LABOR,  
United States Department of Labor,

Complainant,

v.

OSHRC Docket No. 99-0958

ALTOR, INC. and/or AVCON, INC. and/or  
VASILIOS SAITES, individually, and d/b/a  
ALTOR, INC., and/or AVCON, INC. and NICHOL  
SAITES, individually and d/b/a ALTOR, INC.,  
and/or AVCON, INC.

Respondents.

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SECRETARY OF LABOR,  
United States Department of Labor,

Complainant,

v.

OSHRC Docket No. 00-1402

SHARON and WALTER CONSTRUCTION, INC.  
Respondent.

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**AMICUS CURIAE BRIEF OF  
WISCONSIN MANUFACTURERS & COMMERCE AND  
WISCONSIN COUNCIL OF SAFETY**

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## INTRODUCTION

The Occupational Safety and Health Review Commission ("the Commission") invited interested *amici curiae* to file briefs regarding its authority to "pierce the corporate veil" and extend remedial orders entered against a cited employer to its purported successor or alter ego. Wisconsin Manufacturers & Commerce and Wisconsin Council of Safety accept the Commission's invitation. For two primary reasons, the Commission may neither pierce the corporate veil nor extend remedial orders to any person or entity other than the cited employer.

First, the Commission lacks the statutory authority to order any form of equitable remedies. Second, in light of the significant and effective remedial powers that the Occupational Safety and Health Act ("the OSH Act") expressly provides to the Secretary of Labor and Commission, the Commission's contemplated use of such equitable remedies would dramatically and unnecessarily expand the scope of the regulatory authority established by the Act. For these reasons, the Commission cannot and should not order equitable remedies.

## ARGUMENT

### **I. The Commission Lacks the Authority to Pierce the Corporate Veil to Hold Individuals Personally Liable for Violations of the Act or to Extend A Remedial Order to a Purported Successor or Alter Ego of a Cited Employer.**

Despite the superficial appeal of allowing the Commission to "pierce the corporate veil" or extend a remedial order to a purported successor or alter ego of

a cited employer, neither the Occupational Safety and Health Act nor the Administrative Procedure Act give the Commission the authority to do so. The Commission may only exercise the statutory authority expressly granted to it by Congress. The Commission lacks the statutory authority to exercise the equitable power to pierce the corporate veil or extend a remedial order to a purported successor or alter ego of a cited employer.

- A. The Commission lacks the authority to order the equitable remedies of piercing the corporate veil or imposing liability on purported successors or alter egos of the cited employer.

Piercing the corporate veil is an equitable remedy. *United States v. Andrews*, 146 F.3d 933, 941(D.C. Cir. 1998); *see also Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991); *see also C M Corp. v. Oberer Development Co.*, 631 F.2d 536, 539 (7th Cir. 1980). The roots of the doctrine of successorship also lie in equity. *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir. 1995). Equitable remedies may only be granted by a court with equity powers applying the federal common law – not by an administrative agency.

As a matter of constitutional and administrative law, absent an express Congressional grant of authority, administrative agencies do not have equitable powers. *Conway v. U. S.*, 326 F.3d 1268, 1277 (Fed. Cir. 2003); *Abatti v. Comm'r of the Internal Revenue Serv.*, 859 F.2d 115, 117-118 (9th Cir. 1988)(the rule that administrative agencies do not have equitable powers "originated when the Tax Court was an administrative agency and lacked the equitable powers of a court, but [the rule with respect to the Tax Court] remains valid today because, even as

an Article I court, the Tax Court's jurisdiction to grant equitable relief is strictly limited"). Thus, the Commission cannot order equitable remedies such as piercing the corporate veil of an incorporated employer to find personal liability on the part of its officers or shareholders or extending remedial orders to a purported successor or alter ego of a cited employer.

Indeed, the federal courts have refused to allow the Commission to exercise equitable powers. For example, the Second Circuit held that the Commission does not have the authority to excuse an untimely filed notice of contest of an OSHA citation. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 221 (2nd Cir. 2002). The court concluded that the OSH Act requires the Commission to conduct its proceedings in accordance with the Federal Rules of Civil Procedure and, therefore, the relevant statutory language circumscribed the Commission's authority.

For these reasons, the Commission lacks statutory authority to order equitable remedies. Likewise, the Commission cannot cite the alleged successors or alter egos of an employer.

B. The Administrative Procedure Act prohibits the Commission from sanctioning individuals and purported successors or alter egos of the cited employer.

The Commission is prohibited under the Administrative Procedure Act from imposing a "sanction" except when the sanction is within the jurisdiction expressly delegated to the agency and authorized by statute. 5 U.S.C. § 558(b). The definition of "sanction" includes "the imposition of penalties or fines," "the

taking or withholding of property" and "the assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees." 5 U.S.C. § 551(10)(C)-(E). Therefore, imposing liability on individual employees, officers, directors, managers or shareholders of an employer by piercing the corporate veil of the employer and extending a remedial order to an employer's purported successor or alter ego are "sanction(s)" under the Administrative Procedure Act. The Commission can order these sanctions only if they are within the jurisdiction delegated to the Commission *and* authorized by law. 5 U.S.C. § 558(b).

The sanctions of piercing the corporate veil and extending a remedial order to a purported successor or alter ego of an employer are not within the Commission's jurisdiction as delegated by Congress nor are the sanctions authorized by law. Congress did not expressly provide the Commission with the authority to pierce the corporate veil or extend a remedial order to an employer's purported successor or alter ego.

Only an "employer" can be issued a citation, prosecuted by the Secretary of Labor or held liable by the Commission for a violation of the OSH Act. 29 U.S.C. § 659. The OSH Act defines "employer" to mean "a *person* engaged in a business affecting commerce who has employees[.]" 29 U.S.C. § 652(5)(emphasis added). The term "person" means one or more *individuals*, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons. 29 U.S. C. § 652(4)(emphasis added).

One cannot simply substitute the word "individual" for the word "person" in the definition of "employer." The OSH Act does not define the term "individual." However, the meaning of the term "individual" can be determined in part from the use of the term by Congress throughout the statute. For example, Congress authorized sanctions against "any individual" who gives advance notice of an inspection. 29 U.S.C. § 651(b)(10). Similarly, in describing judicial authority to temporarily restrain working conditions that could cause death or serious physical harm, Congress authorized the courts to prohibit the employment or presence of any "individual" in locations or under conditions where such imminent danger exists, except those "individuals" whose presence is necessary under enumerated circumstances. 29 U.S.C. § 662(a).

Thus, although the OSH Act does not define the term "individual," Congress' use of that term throughout the OSH Act indicates that the meaning of "individual" is different than the meaning of the term "person" in 29 U.S.C. 652(5). The only reasonable reading of the OSH Act is that the term "employer" in the context of a corporation which employs people does not include the corporation's employees, officers, directors, managers and shareholders and personal liability of such individuals is not authorized under the OSH Act. This conclusion is supported by the listing of forms of business entities following the word "individual" in the definition of "person." 29 U.S. C. § 652(4). Absent express Congressional authorization, the only reasonable reading of the OSH Act is that the term "employer" does not include the employees, officers, directors,

managers or shareholders of a corporation which employs people. Such personal liability is not authorized by the statute.

In sum, for the Commission to assert that it has the authority to pierce the corporate veil of an employer and to extend remedial orders to the employer's purported successors and alter egos would require the Commission to expansively interpret three statutory terms ("employer", "person" and "individual"). Such a legal machination would be inconsistent with the Administrative Procedure Act's constraint that an agency's authority is expressly limited to those matters "within the jurisdiction delegated to the agency and authorized by law." 5 U.S.C. § 558(b).

The Commission cannot look outside the OSH Act to other sections of the federal statutes for support that the OSH Act's definition of "person" could also include successors or alter egos of cited employers. By looking outside the OSH Act for authority, the Commission would be relying upon legal authority outside the "jurisdiction delegated to the agency and authorized by law." 5 U.S.C. § 558(b). This the Commission cannot do.

Setting aside the point for a moment, 1 U.S.C. § 5 does not authorize the Commission to extend a remedial order to a purported successor or alter ego of an employer. 1 U.S.C. § 5 states:

"The word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", in like manner as if these last-named words, or words of similar import, were expressed."

1 U.S.C. § 5 is irrelevant to an interpretation of the OSH Act. Congress did not use the word "company" in the OSH Act. The OSH Act does not use the word "association" in reference to the word "corporation" as the interpretative guidance of 1 U.S.C. § 5 requires. 29 U.S.C. § 652(4). Therefore, the interpretative guidance of 1 U.S.C. § 5 is irrelevant to, and of no value in, interpreting the word "association" in the OSH Act. 1 U.S.C. § 5 cannot provide a basis by which the OSH Act's definition of "person" could include successors and alter egos of an employer.

Finally, the fact that the Commission may "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, *or directing other appropriate relief*" also does not grant the Commission equitable powers. 29 U.S.C. § 659(c)(emphasis supplied). The phrase, "or directing other appropriate relief", is too vague to be the predicate of an expansive new interpretation of the Commission's remedial authority.

A statute is impermissibly vague under the Due Process Clause if it (1) "fails to provide fair warning as to what conduct will subject a person to liability," or (2) does not "contain an explicit and ascertainable standard to prevent those charged with enforcing the statute's provisions from engaging in 'arbitrary and discriminatory' enforcement." *Karlin v. Foust*, 188 F.3d 446, 458-59 (7th Cir. 1999). An important factor affecting the degree of clarity necessary to satisfy the Constitution is whether constitutional rights are at stake, because the degree of vagueness that the Constitution will tolerate "depends in part on the nature of the

enactment [and the] sever[ity] of consequences [stemming from] imprecis[ion].”  
*Karlin v. Foust*, 188 F.3d at 458.

Significant constitutional rights would be at risk if the Commission determines its authority includes equitable powers. Thus, the Constitution will not tolerate vagueness in whatever portion of the OSH Act on which the Commission may rely as the basis for any newly asserted equitable powers.

Allowing the Commission to pierce the corporate veil and extend remedial orders to and employer's purported successors and alter egos would fail to “provide those who must enforce and apply the law objective standards with which to do so.” *Karlin v. Foust*, 188 F.3d at 459. To the contrary, not even the federal courts are uniform in their formulation of the applicable tests. *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir. 1995)(“the successorship question is difficult because of the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution”). With respect to piercing the corporate veil, over the years, various courts have, in a manner more conclusory than enlightening, articulated the test as where the purported successor was a “mere agent,” “shell,” “conduit,” “puppet,” “dummy,” “alias,” “adjunct,” “tool,” “instrumentality” or “alter ego” of the parent.

Given these significant constitutional and legal concerns, for the Commission to determine it can order the equitable remedies of piercing the corporate veil to hold individual employees, officers, directors, managers or shareholders of corporate employers personally liable and to extend remedial

orders to their purported successors and alter egos is not "within the jurisdiction" delegated by Congress to the Commission and not "authorized by law" as required by the Administrative Procedure Act. 5 U.S.C. § 558(b). Neither the OSH Act nor the Administrative Procedure Act grant the Commission equitable powers. However, while the Commission cannot exercise equitable powers, its express statutory authority is both broad and sufficient to accomplish its mandate from Congress.

## **II. The Commission's Statutory Authority Adequately Advances the OSH Act's Principal Purpose.**

The purpose of the OSH Act is the assurance of "safe and healthful working conditions for working men and women." 29 U.S.C. § 651(b). The Commission's statutory authority is broad and more than adequate to attain this policy.

Therefore, it is unnecessary for the Commission to pierce the corporate veil or extend remedial orders to purported successors or alter egos of the cited employer to effectuate the OSH Act's purpose.

The Secretary of Labor relies in large part upon workplace inspections to attain the OSH Act's principal purpose. 29 U.S.C. § 657(a). Aside from a reasonableness limitation on the time and manner of workplace inspections, the OSH Act places little or no constraint on the Secretary's discretion to conduct such inspections in any way that she deems fit. *Irving v. U.S.*, 162 F.3d 154, 162 (1st Cir. 1998). In undertaking such investigations the Secretary is also empowered to

compel the attendance and testimony of witnesses and the production of evidence under oath. 29 U.S.C. § 657(b).

The Secretary of Labor also has certain rule-making authority to create workplace safety and health standards. 29 U.S.C. § 655(b). This authority includes the ability to promulgate, without notice or comment, emergency temporary standards that take immediate effect if the Secretary determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such an emergency standard is necessary to protect employees from such danger. 29 U.S.C. § 655(c).

The Secretary of Labor also has the specific authority to order employers to pay for personal protective equipment and workplace monitoring; and to prescribe the type and frequency of medical examinations or other tests made available and paid by the employer to determine whether employees have been adversely affected by hazardous workplace exposure. 29 U.S.C. § 655(b)(7).

Finally, the Secretary of Labor also has the authority, via a petition to a United States district court, to shut down workplaces that could reasonably be expected to cause death or serious physical harm. 29 U.S.C. § 662(a).

Thus, the Secretary of Labor and the Commission have strong and adequate direct remedial authority that makes the exercise of equitable powers unnecessary.

## CONCLUSION

For the above reasons, the Commission may neither pierce the corporate veil of a corporate employer nor extend remedial orders to any person or entity other than the cited employer.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of March, 2004.

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BY   
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