



regulations. The Secretary proposed penalties totalling \$692,000. In a brief order, Administrative Law Judge John H. Frye, III vacated the citations as moot, and the Secretary takes exception to that ruling. We hereby set aside the judge's order and remand for further factual findings.

The entire factual record consists of an un rebutted affidavit by JSI's president, Gary K. Lorenz, as supplemented by a conference call between the judge and counsel which the judge noted in his order. The facts may be briefly summarized: Subsequent to the issuance of the citations, JSI closed all its operations at Mayport due to cancellation of its lease with the Navy, and it dismissed all the employees who had been working there. Two other shipyards operated by JSI (Bellinger Yard and JAX Yard) have also been closed and JSI's two manufacturing plants either have been or are in the process of being sold. JSI is selling some of its real property to the City of Jacksonville and will be leasing other real property to acquire funds to pay creditors. The affidavit attests that JSI "is permanently and irrevocably out of the ship repair business or any like or related business, and will exist, if at all, only for the purpose of asset disposal." The judge's decision notes that counsel for the Secretary "agreed that [JSI] has ceased its ship repair operations and is engaged in winding up its affairs." However, as of the date of the affidavit, JSI employed seventeen employees in "business-termination activities" including accounting, inventory, administration, personnel matters such as workmen's compensation, security, and property maintenance.

It is a fundamental constitutional principle that courts can only adjudicate controversies between litigants. The existence of a case or controversy is fundamental to the tribunal's jurisdiction to hear and decide the case. *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). As a jurisdictional matter, its resolution does not turn on whether or to what extent the parties present or are willing to present argument on any issue. See *Armstrong World Indus. v. Adams*, 961 F.2d 405, 421 (3d Cir. 1992); *Office of Comm. of United Church of Christ*, 826 F.2d 101, 105 (D.C. Cir. 1987). Rather, as the Supreme Court has frequently stated, the parties must have a "legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

If a quarrel between the parties is hypothetical, abstract, or academic, it will not be considered appropriate for judicial resolution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). While voluntary cessation of allegedly violative conduct does not make the case moot, mootness can arise if all effects of the alleged violation have been eliminated and if there is no reasonable expectation that the violation will recur. *County of Los Angeles*; see *United States v. W.T. Grant Co.*, 345 U.S. 629, 635 (1953) (judge did not err in dismissing a proceeding where “there was no significant threat of future violation and . . . no factual dispute about the existence of such a threat”).

When it established the Act, Congress recognized that employers have the primary control over the work environment. *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1088 (7th Cir. 1975). Accordingly, the obligation to provide a safe and healthful workplace and to comply with OSHA standards is placed on the employer, and a business organization must comply with the Act so long as it is an employer having employees as those terms are defined in the Act. Section 3(5) and 3(6), 29 U.S.C. § 652(5) and (6). *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1636 n.2, 1991-93 CCH OSHD ¶ 29,689, p. 40,254 n.2 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 (No. 87-214, 1989).

Since liability under the Act is premised on the existence of a business enterprise having an employment relationship with those whom the Act is intended to protect, we conclude that a proceeding may properly be considered moot where the employer has effectively corrected the alleged violations by terminating its employees and where there is no reasonable likelihood that the employer will resume the employment relationship. The record, however, does not support the judge’s finding that mootness exists in the circumstances here.

Although the parties agree that JSI has discontinued its ship repair activities, as of the date of Lorenz’ affidavit JSI remained an ongoing business enterprise with employees

at the worksite in question.<sup>2</sup> Accordingly, the affidavit fails to establish that this proceeding presents no active case or controversy with respect to the Secretary's allegations.

Nevertheless, as of the time of the affidavit JSI was actively engaged in the process of terminating all of its business activities. The affidavit itself is dated October 28, 1992, approximately 20 months ago, and therefore most likely does not accurately reflect the conditions at JSI's worksite as they presently exist. Since mootness may arise at any stage of the proceedings, *see Reich v. Contractors Welding of Western New York, Inc.*, 996 F.2d 1409 (2d Cir. 1993) (case becomes moot during judicial review of a Commission decision), we will afford the parties an opportunity to supplement the record with evidence as to JSI's current employment status.<sup>3</sup>

Accordingly, we remand to the judge for further evidence and factual findings in an expedited manner on whether JSI is still an employer as defined at 29 U.S.C. § 652(5). In

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<sup>2</sup>Regardless of the status of the ship repair work, two of the Secretary's citation items allege violations of recordkeeping standards. The recordkeeping requirements, among other things, serve an informational purpose for employees generally. *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2133-34, 1991-93 CCH OSHD ¶ 29,953, pp. 40,963-64 (No. 89-2614, 1993). Furthermore, since the record does not reveal the content of JSI's injury and illness logs and the nature of the hazards reflected in them, we cannot conclude that the proper completion of those logs, as required by the Secretary's citations, would not have a direct and immediate bearing on JSI's remaining employees.

<sup>3</sup>Our dissenting colleague expresses his concern that if the judge determines that JSI has permanently discontinued its business operations and finds again that the case is moot, JSI would be totally relieved of responsibility for allegedly exposing its employees to hazardous working conditions which resulted in the death of two of its employees. The majority is equally concerned whenever any fatality occurs at any workplace. Here, however, a finding of mootness would not affect in any way the Secretary's authority to refer this case under the criminal provisions of section 17(e) of the Act, 29 U.S.C. § 666(e). We would also note that our colleague admits there is no evidence that JSI has made any business decision in order to avoid the OSHA citations and proposed penalties at issue here. Indeed, the majority is not aware of any case in the Act's history where such an action by an employer has been alleged. Therefore, we do not believe that a finding of mootness here would encourage employers to go out of business to avoid OSHA citations and penalties nor would such a finding send a message that employers are not responsible for providing their employees a safe and healthful workplace.

the event the judge determines that JSI comes within the statutory definition, he is to schedule an expedited hearing and conduct further proceedings as appropriate on the merits of the citation allegations.

  
Edwin G. Foulke, Jr.  
Commissioner

  
Velma Montoya  
Commissioner

Dated: September 30, 1994

WEISBERG, Chairman, dissenting:

The majority has chosen to remand this case to the administrative law judge for a determination as to whether JSI continues to have any employees on the worksite and is still an employer under the Act.<sup>1</sup> I do not quarrel with that decision insofar as a finding by the judge that JSI still has employees would simplify this case and would result in a hearing on the merits of the citation allegations. However, my colleagues also conclude that in the event JSI no longer has employees on the worksite, the case is moot. I strongly dissent from that finding. In my view, the citations issued by the Secretary against JSI for six willful, six repeated, and eight serious violations and the Secretary's proposed penalties of \$692,000 are appropriately before the Commission, this case is not moot, and the fact that JSI permanently discontinued its business operations does not relieve it of responsibility for allegedly exposing its employees to hazardous working conditions resulting in the deaths of two of its employees.

In resolving this difficult but important issue of first impression, whether an enforcement proceeding under the Act is rendered moot if during the litigation the employer permanently discontinues its business operations, there are two questions that need to be addressed: (1) whether the case is moot as a matter of law; and (2) assuming the case is not technically moot, whether the Commission should exercise its discretion to decide the case.

Initially it should be noted that the Secretary, the party that commenced this proceeding, is not seeking to terminate it.<sup>2</sup> The Secretary's citations and proposed \$692,000

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<sup>1</sup>In remanding this case my colleagues direct the judge to "expedite" further proceedings. The fatal crane accident took place in August 1991 and the citation issued in February 1992. JSI's motion to dismiss "for want of jurisdiction because of mootness" was made in October 1992 and the judge's order granting that motion issued February 2, 1993. In these circumstances and given that more than 2 years have elapsed since JSI terminated its ship repair business at the Mayport Naval Station, in my view it is a little late to "rush" to see if JSI continues to have any employees on the site.

<sup>2</sup>Compare *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983) (vacation of citations under the Federal Mine Safety and Health Act ("FMSHA") renders the case moot because it eliminates any prospect that the mine operator would be held liable for the alleged violations) and *Secretary of Labor v. Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 1990 WL 511702 (No. West 87-88, 1990) (Federal Mine Safety and Health Review Commission ("FMSHRC") holds case moot where the Secretary moves to dismiss, denying mine operator's request for a declaratory judgment).

in penalties as well as JSI's notice of contest are still outstanding. The Secretary has a legally cognizable interest both in the adjudication of the citation allegations and the assessment of penalties for any violations and has determined that adjudication of these claims remains appropriate and necessary. JSI, consequently, has a parallel interest in defending itself against these outstanding allegations and proposed penalties. Accordingly, I am hard pressed to find that this matter does not meet the prerequisites for the existence of a case or controversy. *See Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 416, 417, n.1 (1951).<sup>3</sup>

The fact that there will be no repetition of the alleged violations since JSI has closed its ship repair facility does not render this case moot. It is well established that an employer's voluntary discontinuance of the challenged conduct is not itself sufficient to render a proceeding moot. In *Whirlpool Corp.*, 8 BNA OSHC 2248, 2249, 1980 CCH OSHD ¶ 24,957, p. 30,793 (No. 9224, 1980), *rev'd and remanded on other grounds*, 645 F.2d 1096 (D.C. Cir. 1981), the Commission held that abatement following a citation "neither negates nor excuses an employer's failure to comply with the Act." A case also is not moot merely because the only issue before the Commission is the assessment of an appropriate penalty. The Act itself authorizes a contest by an employer only as to the proposed penalty amount. Thus, section 10(a) provides, in part, that an employer may "contest the citation or proposed assessment of penalty." (Emphasis added) 29 U.S.C. § 659(a). In sum, elimination of the violative conditions does not render penalties inappropriate although affirmative abatement may be a mitigating factor in the amount of the penalty.

Further, decisions by both the Commission and its judges make clear that citations are adjudicated based on the circumstances existing at the time the violations are alleged to have occurred regardless of whether there has been any intervening change in the employer's status. Thus, the Commission held in *GAF Corp.*, 9 BNA OSHC 1451, 1454 n.13, 1981 CCH OSHD ¶ 25,281, p. 31,244 n.13 (No. 77-1811, 1981) that subsequent closure of a plant "does

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<sup>3</sup>See also *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984) ("concrete interest in the outcome of the litigation" negates mootness); *Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("live" issue of Powell's claim for back salary remained viable as underpinning for a "case or controversy" although Powell had been seated in subsequent Congress).

not negate" a violation which occurred while the plant was in operation. Cf. *Gannett Rochester Newspaper Corp.*, 9 BNA OSHC 1590; 1594-95, 1981 CCH OSHD ¶ 25,323, p. 31,385 (No. 6352, 1981) (determination as to the feasibility of noise controls must be predicated upon facts as they existed at the time of the alleged violation and is not affected by subsequent renovations the employer made to its facility). I would find that a similar conclusion applies with respect to employers who have terminated their business activities. See *Price-Potashnick-Codell-Oman, A Joint Venture*, 78 OSAHRC 66/C9, p. 4 (No. 13171, 1978) (ALJ), in which the judge concluded:

The fact that the PPCO Joint Venture has completed the work it contracted to accomplish and is no longer in business does not change its status as an employer at the time of the inspection. Dissolving the Joint Venture some two years later cannot relieve PPCO of responsibility for the antecedent violation, nor does that dissolution render the violation moot. The violation occurred at a time when PPCO was a viable, going business. PPCO must be held accountable.

This holding appears to be consistent with a case arising under FMSHA. As a judge for the FMSHRC held,

The respondent's assertion that since it has ceased operations, it is inappropriate to impose any civil penalty assessment for the violation . . . is rejected. The Act mandates the imposition of a civil penalty assessment when a violation of any mandatory safety or health standard has occurred.

*Secretary of Labor v. Steele Branch Mining*, 15 FMSHRC 1667, 1701, 1993 WL 410486 (No. WEVA 92-953) (ALJ).<sup>4</sup> These principles articulated under FMSHA are equally applicable to violations of the OSH Act, such as those alleged in the instant case, for which penalties are mandated. See also *Secretary of Labor v. Mountain Energy, Inc.*, 2 FMSHRC 3558, 1980 WL 101756 (No. SE 80-5, 1980) (penalties assessed despite the closure of a mine and the termination of the operator's business).<sup>5</sup>

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<sup>4</sup>Given the dearth of Commission precedent directly on point concerning this issue, these judges' decisions are of interest although technically they lack value as precedent.

<sup>5</sup>I note in this regard that the cases cited by the majority for the proposition that an entity may be held liable for previous violative conduct only so long as it employs employees (*Loomis Cabinet Co.* and *Van Buren-Madawaska Corp.*) do not address that issue. On the  
(continued...)

Having concluded that this case is not moot as a matter of law and that the Commission is not barred from considering this case, I would further hold that the Commission should not as a matter of discretion decline to consider this case. In my view, further proceedings in this case would effectuate the purposes and policies of the Act.

In *Cuyahoga Valley Ry. v. United Transportation Union*, 474 U.S. 3, 6 (1985), the Supreme Court, in holding that the Commission lacks authority to review the Secretary's decision to withdraw a citation against an employer, recognized that "enforcement of the Act is the sole responsibility of the Secretary." While the instant case does not involve the Secretary's decision either to issue or to withdraw a citation, matters outside the Commission's review authority, nevertheless *Cuyahoga* suggests that some prosecutorial discretion should be accorded the Secretary in the instant case. Here the Secretary as prosecutor has determined that this case should go forward notwithstanding that JSI has ceased its ship repair operations, and that further proceedings would be an appropriate use of the Secretary's limited resources and would help effectuate the purposes of the Act. Such a determination by the Secretary is not unreasonable, particularly where the instant case involves fatalities, numerous alleged willful and repeat violations, and a large proposed penalty of \$692,000.

Moreover, this case does not appear to involve an employer who is essentially judgment proof. The record shows that while JSI<sup>6</sup> has ceased its ship repair operations, JSI has retained some real estate formerly occupied by the Jacksonville facility with a view toward leasing it in an effort to acquire funds to pay creditors.

I believe the Commission's obligation to decide cases without regard to changed conditions, including the termination of the business, is essential to the overall enforcement of the Act. Because of the sheer number of workplaces throughout the country, Congress

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<sup>5</sup>(...continued)

contrary, the issue in those cases is whether the cited entity was, at the time of the alleged violation, the employer of the employees who were exposed to the hazard and therefore appropriately cited.

<sup>6</sup>JSI is a wholly-owned subsidiary of Fruehauf Trailer Corporation.

understood that the remedial purpose of the Act “to assure so far as possible . . . safe and healthful working conditions,” section 2(b), 29 U.S.C. § 651(b), cannot be achieved through an enforcement mechanism alone without the voluntary cooperation of those affected by the Act. Thus, the Act contemplates “encouraging” and “stimulating” employers and employees to undertake efforts to enhance the safety and healthfulness of working conditions. Section 2(b)(1); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978). At the same time, however, Congress recognized that some employers are more willing to accept this responsibility than others, and Congress provided monetary penalties to induce compliance by those employers who otherwise would not take appropriate measures to identify and correct hazardous conditions in their workplaces. *Dunlop v. Rockwell Intl.*, 540 F.2d 1283, 1292 (6th Cir. 1976).<sup>7</sup> The Commission itself recognized this principle in one of its earliest decisions, *Crescent Wharf & Warehouse Co.*, 1 BNA OSHC 1219, 1222, 1971-73 CCH OSHD ¶ 15,687, p. 20,980 (No. 1, 1973): “[C]ivil enforcement provisions such as those prescribed by the Act are primarily intended to induce voluntary compliance.” See *Brennan v. OSHRC (Interstate Glass Co.)*, 487 F.2d 438, 441 (8th Cir. 1973) (characterizing as “well-reasoned” an argument that vacation of all proposed penalties would frustrate the purpose of the Act by “nullifying the employer’s incentive in self-policing and self-enforcement”). Thus, the civil penalties the Commission assesses under section 17 of the Act, 29 U.S.C. § 666, have long been considered at least partially deterrent in that an effect of the penalties is to persuade all employers to comply with the requirements of the Act. *Frank Irey, Jr., Inc. v. OSHRC*,

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<sup>7</sup>The Supreme Court has also recognized that the ratio of inspectors to workplaces renders the possibility of inspection alone insufficient for effective enforcement of the Act. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). (Court upheld OSHA regulation permitting employees to choose not to perform assigned task because of reasonable apprehension of death or serious injury coupled with reasonable belief that no less drastic alternative is available.) See also *Murder in the Workplace: Criminal Prosecution v. Regulatory Enforcement*, G. L. Mangum, 39 Labor Law Journal 220-31, 230 (1988) and *OSHA After Ten Years*, M. Rothstein, 34 Vanderbilt Law Review 71-139, 94-5 (1981) which discuss workplace inspections as part of the OSH Act compliance scheme and the limited number of inspectors compared to the number of workplaces.

519 F.2d 1200, 1204 (3d Cir. 1974), *aff'd on hearing en banc*, 519 F.2d 1215 (1975), *aff'd sub nom. on other issues Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).<sup>8</sup>

In view of the above, in my judgment assessment of penalties for any violations JSI may have committed is necessary in order to make it clear that employers cannot avoid their responsibilities under the Act even if they subsequently do go out of business. Such a clear message is particularly appropriate in the instant case, where JSI not only has been cited for high-gravity violations resulting in employee fatalities but for willful and repeated violations as well based on its extensive prior history of noncompliance.<sup>9</sup>

To find as the Commission majority does that an employer's cessation of business renders the citation enforcement proceeding moot clearly sends the wrong message concerning an employer's responsibility to provide a safe and healthful workplace. There is no evidence in the instant case that JSI terminated its operations in order to escape penalties. Nor do I believe that most employers would be motivated or able to do so. However, I believe it is naive to think that some employers facing economic difficulties or employers with smaller operations such as those found in the construction industry would not be tempted by the opportunities suggested by the majority decision today. To permit employers to walk away from responsibility for exposing employees to hazardous working conditions regardless of the magnitude of these violations merely because they subsequently cease operations undermines the goals embedded in the Act itself. In my view this is the

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<sup>8</sup>*Cf. National Indep. Coal Operators' Assn. v. Kleppe*, 423 U.S. 388, 401 (1976). (Under Federal Coal Mine Health and Safety Act, "[a] major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective" given the infrequency of inspections.)

<sup>9</sup>JSI has been the subject of numerous proceedings before Commission judges. While not all of these cases resulted in affirmed citations, a review of the judges' decisions in those cases indicates that violations were found in at least six prior cases.

real issue posed by this case, rather than whether there are any employees left on JSI's premises to turn off the lights.

Stuart E. Weisberg  
Stuart E. Weisberg  
Chairman

Dated: September 30, 1994



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1825 K STREET NW  
4TH FLOOR  
WASHINGTON, DC 20006-1246

FAX:  
COM (202) 634-4008  
FTS (202) 634-4008

SECRETARY OF LABOR  
Complainant,

v.

JACKSONVILLE SHIPYARDS, INC.  
Respondent.

OSHRC DOCKET  
NO. 92-0888

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 4, 1993. The decision of the Judge will become a final order of the Commission on March 8, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before February 24, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1825 K St. N.W., Room 401  
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

  
Ray H. Darling, Jr.  
Executive Secretary

Date: February 4, 1993

Docket No. 92-0888

**NOTICE IS GIVEN TO THE FOLLOWING:**

**Daniel J. Mick, Esq.**  
**Counsel for Regional Trial Litigation**  
**Office of the Solicitor, U.S. DOL**  
**Room S4004**  
**200 Constitution Ave., N.W.**  
**Washington, D.C. 20210**

**Jaylynn Fortney, Esq.**  
**Regional Solicitor**  
**Office of the Solicitor, U. S. DOL**  
**Suite 339**  
**1371 Peachtree St., N.E.**  
**Atlanta, GA 30367**

**Robert E. Mann, Esquire**  
**Stac A. Stobart, Esquire**  
**Seyfarth, Shaw, Fairweather &**  
**Geraldson**  
**55 East Monroe Street, Suite 4200**  
**Chicago, IL 60603**

**John H. Frye, III**  
**Administrative Law Judge**  
**Occupational Safety and Health**  
**Review Commission**  
**One Lafayette Centre**  
**1120 20th Street, Suite 990**  
**Washington, D.C. 20036-3419**



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
 One Lafayette Centre  
 1120 20th Street, N.W. — 9th Floor  
 Washington, DC 20036-3419

PHONE  
 COM (202) 608-6100  
 FTS (202) 608-6100

FAJC  
 COM (202) 608-6088  
 FTS (202) 608-6088

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Secretary of Labor,  
 Complainant,

v.

JACKSONVILLE SHIPYARDS, INC.,  
 Respondent.

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Docket No. 92-0888

**NOTICE OF COMMISSION DECISION AND REMAND ORDER**

The attached Decision and Order of Remand by the Occupational Safety and Health Review Commission was issued on September 30, 1994. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

September 30, 1994  
 Date

*Ray H. Darling, Jr.*  
 Ray H. Darling, Jr.  
 Executive Secretary

DOCKET NO. 92-0888

NOTICE IS GIVEN TO THE FOLLOWING:

**Daniel J. Mick, Esq.**  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

**Ms. Bobbye D. Spears**  
Regional Solicitor  
Office of the Solicitor, U.S. DOL  
Suite 339  
1371 Peachtree Street, N.E.  
Atlanta, GA 30309

**Robert E. Mann, Esquire**  
Seyfarth, Shaw, Fairweather &  
Geraldson  
55 East Monroe Street, Suite 4200  
Chicago, IL 60603 5803

**John H. Frye, III**  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Room 417/C  
1825 K Street, N.W.  
Washington, DC 20006 1246

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UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

v.

JACKSONVILLE SHIPYARDS, INC.,

Respondent.

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Docket No. 92-0888

MEMORANDUM AND ORDER

Respondent has moved to dismiss this proceeding on the ground that the total, permanent cessation of Respondent's business renders this citation enforcement proceeding moot.<sup>1</sup> In support of this argument, Respondent maintains that

... the penalty [which] OSHA seeks to enforce in this proceeding was intended by Congress to coerce abatement and to encourage future compliance. These penalties are not intended to punish for past misconduct, to generate revenue, to constitute some kind of a "violation tax" or to compensate anyone for damages. Complainant may prove that violations of the [Occupational Safety and Health Act of 1970, as amended] or of its standards existed in August of 1991 at the Mayport facility or Complainant may fail to carry her burden of proof. In either case, the outcome will be entirely academic; the facility has closed and the employer has ceased doing business. To carry on with the instant proceeding therefore truly would be to beat a dead horse.<sup>2</sup>

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<sup>1</sup>A ruling on this motion was held in abeyance pending the parties efforts to settle this case. These efforts have proved fruitless.

<sup>2</sup>See Respondent's brief in support of its motion at pp.3-4.

Respondent relies on, among other decisions, *Atlas Roofing Co., Inc. v. OSHRC*, 518 F.2d 990; *affirmed on other grounds*, 430 U.S. 442, 97 S.Ct. 1261 (1977) for its argument with respect to the purpose of the penalties provided for in the Act.

Respondent relies on *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S.Ct. 1379 (1979) for the proposition that a case is deemed to be moot where there is no reasonable expectation that the alleged violation will recur and events have completely and irrevocably put an end to the effects of the alleged violation. Respondent argues that the complete cessation of its business, attested to in an affidavit executed by its President and Chief Executive Officer, Gary K. Lorenz, assures that there will be no repetition of the alleged violation and eliminates the hazards identified by the citation.<sup>3</sup>

The Secretary opposes Respondent's motion on the ground that the notice of contest filed by Respondent serves to create a live controversy so long as it remains in effect. In order for the case to be moot, the Secretary believes that it would be necessary for Respondent to withdraw its notice of contest.<sup>4</sup>

I find that Respondent has demonstrated that this case is moot. Mr. Lorenz' affidavit indicates the enterprises in which Respondent has been engaged, states that Respondent has

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<sup>3</sup>In a conference call of February 1, counsel for respondent indicated that, although Respondent is winding up its affairs, it has retained some real estate formerly occupied by its Jacksonville facility with a view toward leasing it in an effort to acquire funds to pay creditors. Counsel for the Secretary agreed that Respondent has ceased its ship repair operations and is engaged in winding up its affairs.

<sup>4</sup>See Secretary's response to Respondent's motion. The Secretary also argues that a ruling in Respondent's favor would operate to exempt the seventeen employees who are engaged in winding up Respondent's business. In a reply, Respondent correctly points out that the granting of its motion would not have that effect.

ceased to operate all of them,<sup>5</sup> and describes the steps which are being taken to liquidate them. Further, Mr. Lorenz states that it would require an infusion of about \$30 to \$40 million in order for Respondent to recommence ship repair operations and that there is no intention to do so. The Secretary does not contest these representations. In this situation, it is clear that there will be no repetition of the alleged violations cited by the Secretary by this Respondent and that the hazards identified in that citation have been eliminated. Thus, the imposition of the proposed penalties would not carry out the purpose of the Act to provide for safe working environments by encouraging Respondent to reduce the number of hazards at its work places.<sup>6</sup>

This proceeding is dismissed as moot.

It is so ORDERED.



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JOHN H FRYE, III  
Judge, OSHRC

Dated: February 2, 1993  
Washington, D.C.

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<sup>5</sup>The affidavit indicates that Electro-Lube, Inc., which manufactured equipment to recycle oil-based materials, is up for sale. While the affidavit does not indicate that its operations have ceased, it does indicate that it was not engaged in the ship repair business.

<sup>6</sup>See § 2(b)(1) of the Act. *Cf. Secretary of Labor v. OSHRC & C F & I Steel Corp.*, 15 BNA OSHC 1209, 1210 (10th Cir. 1991): "C F & I informs us that it ceased operating the relevant coke ovens in 1984, but we lack any assurance that such operation will not resume. Given that possibility, review is appropriate because worker safety is implicated."