SECRETARY OF LABOR, Complainant, v. JOEL YANDELL, d/b/a TRIPLE L TOWER, Respondent.	OSHRC Docket No. 94-3080

DECISION

Before: WEISBERG, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

The Commission is once again presented with the question of whether the Secretary of Labor has statutory jurisdiction to issue a citation alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to an individual who has gone out of business following the alleged violations and has no employees at the time the citation is issued.[1] In *Ralph Taynton, d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1208, 1993-95 CCH OSHD ¶ 30,766, p. 42,760 (No. 92-0498, 1995), *appeal withdrawn*, No. 95-4788 (11th Cir. Nov. 9, 1995)("*Taynton*"), a divided Commission (Chairman Weisberg, dissenting) vacated a citation issued to such an individual "on the ground that the Secretary had no jurisdiction to issue it." In his decision in the instant case, Commission Administrative Law Judge Benjamin R. Loye relied on *Taynton* as controlling authority in granting a pre-hearing dismissal motion filed by the Respondent, Joel Yandell, doing

[1]The issue is also pending before us in *Kenny Niles Constr. Co.*, OSHRC Docket No. 95-1539, which we also decide on this day.

business as Triple L Tower ("Yandell").[2] For the reasons that follow, we reexamine and overrule *Taynton*, reinstate the citations issued to Yandell, and remand this case to Judge Loye for proceedings on the merits of the contested citation items and proposed penalties.

I. Facts Pertaining to Statutory Jurisdiction[3]

On March 11, 1994, all three of Yandell's employees were killed while they and Yandell were engaged in erecting a cellular communications tower. Just prior to the accident, Yandell had been operating a base-mounted drum hoist to lower the three employees from an elevated position on the tower, where they had been working. The hoist was not designed for personnel lifting, but the employees used it for that purpose by riding the "load block (ball)" while connecting their safety belts to a choker sling attached to the ball. The hoist was not equipped with a positive locking device. Indeed, the only safety mechanism on the hoist was a manual hand brake, which was not designed to hold a load.Yandell lowered the employees by using the hand brake while the hoist drum was in a free fall mode, with gearshaft disengaged. At the time the hoist failed, causing the three employees to fall "between 150 to 400 feet to their deaths," Yandell was not at the controls and the load block

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[2]The judge also relied on *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053, 1993-95 CCH OSHD ¶ 30,539 (No. 92-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997), a case in which the Commission dismissed, on the ground of mootness, an enforcement action against an employer that had ceased doing business. However, *Jacksonville* is no longer controlling authority. Following the reversal of the Commission's decision by the Eleventh Circuit, the Commission itself overruled *Jacksonville* in *Kenny Niles d/b/a Kenny Niles Constr. & Trucking Co.*, 17 BNA OSHC 1940, 1995-97 CCH OSHD ¶ 31,300 (No. 94-1406, 1997).

[3]The "facts" as set forth herein are derived primarily from the Secretary's complaint and the OSHA citations that were incorporated into that complaint. Yandell has denied these "facts" in its answer. However, as the party opposing a pre-hearing motion to dismiss, the Secretary is entitled to have the motion decided based on the assumption that the allegations of her complaint are true. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16, 92 S. Ct. 609, 614 (1972). We also rely on affidavits executed by Joel Yandell and by the OSHA compliance officer who investigated the workplace accident that led to this proceeding. These affidavits were filed in support of and opposition to the dismissal motion.

was suspended, presumably held in place only by the hand brake. Following the accident, Joel Yandell "immediately stopped operating as a tower erecting company." As of December 19, 1995, the day on which he executed an affidavit in support of his motion to dismiss, his sole proprietorship (Triple L Tower Company) had not engaged in business or had employees since the day of the accident.

Following an inspection and investigation that began two days after the accident, OSHA issued Yandell two citations on September 8, 1994: a citation for willful violations containing three items, and a citation for serious violations containing four items (including one item that alleged violations of six separate sections of an incorporated American National Standards Institute (ANSI) code for derricks). Penalties totaling $238,000 were proposed. All of the alleged willful violations and two of the items alleging serious violations were based on Yandell's use of the base-mounted drum hoist as a personnel hoist.

Under the reasoning of the *Taynton* decision, Judge Loye was required to vacate both of the contested citations on the ground that, following the accident in which all of its employees were killed, Yandell was no longer an "employer" as defined at section 3(5) of the Act and therefore the Secretary had no authority to issue a citation to Yandell under section 9(a) of the Act. *See* 17 BNA OSHC at 1206, 1993-95 CCH OSHD at pp. 42,757-58.

II. *Taynton* Re-examined

In *Taynton*, the Commission majority determined that the Act's remedial purposes would *not* be served by allowing OSHA to initiate an enforcement action against an employer such as Yandell because it has ceased doing business. The Commission reasoned, as follows:

> ...[P]enalties are intended to coerce the rapid abatement of violations and encourage prospective compliance, not to punish an employer for misconduct.... That a business has ceased to exist most certainly removes the presence of any hazards. Moreover, that employees will never again be exposed by the same employer to the hazard at issue here eliminates the need for prospective compliance.

17 BNA OSHC at 1206 n.3, 1993-95 CCH OSHD at pp. 42,757-58 n.3.[4]

Since *Taynton*, however, the U.S. Court of Appeals for the Eleventh Circuit has reversed a similar and related Commission holding, *i.e.*, that the *post-citation* cessation of an employer's business renders the civil penalty action moot. *Reich v. OSHRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200 (11th Cir. 1997). *See supra* note 2. In concluding that the Act's purposes *would* be served by removing the blanket prohibition, announced by the Commission in its decision in *Jacksonville*, against penalties in such cases, the court reasoned as follows:

> ...[W]e think our decision is consistent with the policies that OSHA was enacted to advance.... Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. We accept that OSHA must rely on the threat of money penalties to compel compliance by employers....
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> To let the cessation of business by an employer render a civil penalty proceeding moot might greatly diminish the effectiveness of money penalties as a deterrence.... We worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.
>
> More importantly, employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether. As long as a business operates, it should feel itself to be effectively under the applicable laws and regulations -- even on the last day. And, the continuing potential of penalties -- more so than injunctive relief -- makes these feelings real.

102 F.3d at 1203.

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[4]It is clear from the passage quoted above ("*penalties* are intended, etc.) that the *Taynton* majority confused the availability or advisability of a particular remedy (the assessment of penalties) with the existence of statutory jurisdiction to initiate an enforcement action under section 9(a) of the Act. Without deciding the issue here, we note that the cessation of business activity may be a circumstance that warrants a reduction in the Secretary's proposed penalties. It does not follow, however, from the fact that penalties *may* be inappropriate that the Secretary therefore lacks jurisdiction to issue a citation.

We recognize that the mootness issue that was before the Eleventh Circuit in *Jacksonville* is different from the issue of statutory jurisdiction that is before us in this case.[5] Nevertheless, we conclude that the Eleventh Circuit's analysis of the role of civil penalties in achieving the Act's objectives is fully applicable in this context. We further conclude that that court's reasoning is in direct conflict with the reasoning of the Commission in *Taynton*.[6] As the Secretary argues in her review brief, "[g]eneral deterrence, which aims to dissuade all persons from violating the law, 'is the foremost and overriding goal of all laws, both civil and criminal.' " *Citing and quoting Bae v. Shalala*, 44 F.3d 489, 494 (7th Cir. 1995). Yet, as the Eleventh Circuit correctly reasoned in *Jacksonville*, the blanket immunization of employers who cease operations after allegedly violating the OSH Act, from citations and

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[5]*Jacksonville* dealt with an employer that was engaged in a business affecting commerce and that had employees at the time it was cited by OSHA, but that went out of business while its contest of the citations was still pending before a Commission judge. In contrast, both this case and *Taynton* involved individuals who were operating sole proprietorships actively engaged in business at the time of the alleged violations, but who ceased doing business *prior to* the issuance of the contested citations.

[6]The Secretary argues that we should re-examine the *Taynton* decision in this case because that decision is contrary to "directly relevant" Federal court precedent "and to the purpose and policy of the OSH Act." We agree that reconsideration of the statutory jurisdiction issue common to these two cases is warranted. In "strongly dissent[ing]" from the Commission's holding in *Taynton*, Chairman Weisberg argued that "[t]he practical effect" of that holding would be "that OSHA does not have jurisdiction to cite, the Commission does not have jurisdiction to hear, and the Justice Department does not have jurisdiction to prosecute a case involving an employer who engages even in the most flagrant safety and health violations if ... that company's work force perishes as a result of those violations ...." 17 BNA OSHC at 1208, 1993-95 CCH OSHD at p. 42,760. If the contested allegations of the Secretary's citations are in fact true, *see supra* note 3, then we would be forced to conclude that the case that was merely hypothesized by the Chairman four years ago is now actually before us for a ruling. Thus, this case arises, according to the undisputed affidavit of the OSHA compliance officer, from a single, catastrophic workplace accident that resulted in the deaths of Yandell's entire work force. Moreover, the accident itself, according to the allegations of the Secretary's citations, was the result of Yandell's willful and serious violations of several occupational safety and health standards.

penalties under the Act, could "greatly diminish the effectiveness of money penalties as a deterrence" and could "creat[e] an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name." 102 F.3d at 1203.[7]

We realize, of course, that most employers would not and probably could not go out of business merely to avoid OSHA citations and that this issue is therefore unlikely to arise often. However, it is precisely in those cases where an employer changes its status, even in part, to avoid the consequences of violating the OSH Act, that the policies of the Act militate against the interpretation of section 9(a) that was adopted in *Taynton*. Moreover, while the majority in *Taynton* found that the Secretary's policy argument was less than compelling

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[7]*Hudson v. U.S.*, 118 S.Ct. 488 (1997), and *S.A. Healy Co. v. OSHRC*, 138 F.3d 686 (7th Cir. 1998), also cast doubt on the correctness and continuing vitality of *Taynton*'s assertion, *see supra*, that only remedial objectives are properly served by assessing civil penalties under the OSH Act. In *Taynton*, the Commission essentially drew a sharp line of distinction between "civil" penalties, which are "remedial" because they serve the goals of abatement and prospective compliance, and "criminal" penalties, which are "punitive" because they serve the goals of retribution and deterrence. This reasoning closely paralleled the approach taken in *U.S. v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989), to the resolution of issues under the Double Jeopardy Clause of the Fifth Amendment. *See Hudson*, 118 S.Ct. at 494, *citing Halper*, 490 U.S. at 448, 109 S. Ct. at 1902 ("As the *Halper* Court saw it, the imposition of 'punishment' of any kind was subject to double jeopardy constraints, and whether a sanction constituted 'punishment' depended primarily on whether it served the traditional 'goals of punishment,' namely 'retribution and deterrence.'"). In *Hudson*, however, the Supreme Court expressly repudiated its earlier decision in *Halper*, holding that "the *Halper* Court [had erred because it] bypassed the threshold question" of whether Congress had designated the sanction in question as "civil" or "criminal." 118 S.Ct. at 494. *Hudson* also criticized *Halper* for concluding that a sanction should be deemed "criminal," notwithstanding its Congressional designation as a "civil" sanction, simply because the penalty amount "appeared excessive in relation to its nonpunitive purposes." *Id.* In *S.A. Healey*, the Seventh Circuit reversed an earlier decision in the same case, which had followed *Halper*, and consistent with *Hudson*'s "respect for the legislative designation," 138 F.3d at 688, held that instance-by-instance penalties assessed under section 17(a) of the OSH Act, 29 U.S.C. § 660(a), were indeed "civil" penalties, notwithstanding the employer's claim that they were so disproportionate to the cited violations as to constitute "punishment." Thus, penalties can be permissible civil penalties under the OSH Act even though they also serve the goal of deterrence.

because that case was "the first time in the Act's history" that the issue had been presented, *see* 17 BNA OSHC at 1208, 1993-95 CCH OSHD at p. 42,759, we note that two cases (this case and *Kenny Niles, see supra* note 1) arose within months of the *Taynton* decision raising precisely the same issue. Although we enter no finding of bad faith in either of these cases, we must conclude that their appearance so soon after *Taynton* certainly indicates that the *Taynton* decision has a potential for mischief that the majority in *Taynton* underestimated.

"While the Commission normally considers itself bound to follow its own precedent, it has not hesitated to overrule that precedent when further deliberations have led it to conclude that an earlier case was wrongly decided ...." *Kenny Niles, d/b/a Kenny Niles Constr. & Trucking Co.*, note 2 *supra*, 17 BNA OSHC at 1941, 1995-97 CCH OSHD at p. 43,997. For the reasons stated above and below, we conclude that *Taynton* was wrongly decided. We therefore overrule *Taynton* and hold that the Secretary has the authority under section 9(a) of the Act to issue a citation to an individual or entity that was an "employer" at the time it allegedly violated the Act, even if it is no longer engaged in business and no longer has employees at the time the citation is issued. In other words, we hold that "the critical time for taking the jurisdictional snapshot" in order to determine whether the Secretary has statutory jurisdiction to initiate a civil enforcement action under the OSH Act "is when the violation is alleged to have taken place." *See Taynton* (dissenting opinion), 17 BNA OSHC at 1208, 1993-95 CCH OSHD at p.42,760.

We conclude that our holding is consistent with the statutory language set forth in sections 3(5) and 9(a) of the Act, 29 U.S.C. §§ 652(5) & 658(a). In reaching their contrary conclusion in *Taynton*, the Commission majority relied primarily on its interpretation of these two statutory provisions. Thus, it noted that section 9(a) provides, in pertinent part: "If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the *employer*" (emphasis

supplied in *Taynton*). It also pointed out that section 3(5) defines "employer" as "a person engaged in a business affecting commerce who *has* employees...." (emphasis again supplied in *Taynton*). Under the "plain language" of these two provisions, the *Taynton* majority concluded, Ralph Taynton was not an "employer" within the meaning of section 3(5) at the time he received the disputed citation and therefore "no *employer* was ever properly issued a citation under section 9(a)." *Taynton*, 17 BNA OSHC at 1206, 1993-95 CCH OSHD at pp. 42,757-58.

In reexamining *Taynton*, we are guided by the principles of statutory construction set forth by the Supreme Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843 (1997). In *Robinson*, a unanimous Court overturned an appellate court holding that the term "employee" as used in the retaliatory discrimination provision (§ 704(a)) of Title VII of the Civil Rights Act of 1964 does not include former employees. The Court stated that its "first step" in interpreting the disputed statutory provision was "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." 519 U.S. at 340, 117 S.Ct. at 846. It then explained that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, *the specific context in which that language is used, and the broader context of the statute as a whole*." 519 U.S. at 341, 117 S.Ct. at 846 (emphasis added). Applying these principles to the issue before it, the Court acknowledged that, "[a]t first blush," the term "employees" seemed to be used in section 704(a) "to refer to those having an existing employment relationship with the employer in question." *Id.* Nevertheless, after examining the provision in its "context," the Court concluded that its "initial impression...does not withstand scrutiny." *Id.* Accordingly, the Court interpreted section 704(a) as including former employees within its coverage, concluding that this interpretation was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 519 U.S. at 346, 117 S. Ct. at 849. *Cf. U.S. v.Pitt-Des Moines, Inc.*, No. 98-1767, slip op. at 9 (7th Cir. Feb. 18, 1999) ("In the absence of guidance" in the legislative history of the OSH Act on a question of statutory interpretation,

the court adopts the interpretation that is "more consistent with the Act's broadly remedial purpose").

Applying this reasoning to the language of sections 3(5) and 9(a), as quoted above, we conclude that the *Taynton* majority was clearly mistaken in characterizing that language as plain and unambiguous. *Taynton*'s interpretation of sections 3(5) and 9(a) is by no means the only reasonable construction of the statutory language at issue. The Secretary's interpretation of section 9(a) is just as compatible, if not more compatible, with the language of that section as the interpretation given it by the Commission in *Taynton*. We note that the key term "employer" is used twice in the first sentence of section 9(a). *See supra*. Where it is first used ("an employer"), it unquestionably refers to an individual or enterprise that is engaged in a business affecting commerce and has employees at the time it allegedly violates section 5 of the Act or any standard or regulation issued under the Act. As interpreted by the Commission in *Taynton*, the term has a different meaning the second time it is used. Specifically, *Taynton* construes the phrase "the employer" as referring to an individual or enterprise that is engaged in a business affecting commerce and has employees at the time it is cited by the Secretary. We conclude, however, that consistent with common grammatical usage of the definite article, the phrase "*the* employer"(emphasis added) is simply a reference *back* to the *same* entity previously described, in the first part of the sentence, as "*an* employer" (emphasis added)." This statutory language does not necessarily call for a reevaluation of that entity's status at the time the citation is issued. Thus, section 9(a) could be paraphrased as follows: "If the Secretary determines, upon inspection or investigation, that a particular individual or enterprise has violated section 5(a)(1), a standard, or a regulation and further determines that the individual or enterprise in question was an 'employer' at the time of the violation, then the Secretary shall with reasonable promptness issue a citation to *that* individual or enterprise."

We find support for this construction of the statutory language in section 11(c)(2) of the Act, 29 U.S.C. § 660(c)(2). The term "employee" as it is used in the Act, just like the

term "employer," is defined in the present tense. Thus, section 3(6) defines an "employee" as "an employee of an employer who *is* employed in a business of his employer which affects commerce" (emphasis added). Yet, in section 11(c)(2), Congress clearly used the term "employee" in a context that could *only* refer to *former* employees. In pertinent part, section 11(c)(2) provides that "[a]ny *employee who believes that he has been discharged*...in violation of this subsection may, within thirty days after such violation, file a complaint with the Secretary alleging such discrimination." *Cf. Robinson* (interpretation of § 704(a) of Title VII to include former employees). Since Congress clearly used the term "employee" in a context where it includes former employees, it is reasonable to conclude that Congress may also have used the related term "employer" in a context where it includes former employers.

When we view the term "employer" as it is used in the first sentence of section 9(a) in its "broader context," and in the light of its "primary purpose," *see Robinson*, 519 U.S. at 346, 117 S.Ct. at 849, it becomes clear that the interpretation of section 9(a) we have set forth above is the construction that is most compatible with the overall structure and purposes of the Act. Section 9(a) represents merely one part of an integrated and comprehensive enforcement scheme that is built on the foundation of section 5(a) of the Act, 29 U.S.C. § 654(a). Under sections 5(a)(1) and 5(a)(2), each "employer" is required to comply with the Act's "general duty clause" and with "occupational safety and health standards promulgated" by OSHA. Under section 8(a), OSHA is authorized to enter the workplace of any "employer" to conduct an inspection for the purpose of determining whether that employer is complying with, and/or an investigation for the purpose of determining whether that employer has complied with (*e.g.*, at the time of a workplace fatality), its duties under sections 5(a)(1) and (2). Under section 9(a), OSHA is authorized to issue a citation to "*the* employer" if its inspection or investigation leads it to conclude that the employer has failed to comply with its duties under section 5(a)(1), an OSHA standard, or an OSHA regulation "prescribed pursuant to this Act." Under section 10(a), OSHA is authorized to issue to "*the* employer" a notification of proposed penalties to be assessed for

the alleged violations described in the citation. Under section 10, "*the* employer" that has been issued such a citation and proposed penalty is given the option of allowing them to become final orders of the Commission by operation of law or of contesting them in a civil proceeding before the Commission. Under section 17(e), the Justice Department is authorized to bring a criminal action against "[a]ny employer who willfully violates" its duties under section 5 of the the Act if "that violation caused death to any employee."

There can be little doubt that section 5(a) is the foundation of the Act's enforcement scheme and that the critical time element in that scheme is the time at which the "employer" allegedly violated its duties under section 5(a). Thus, it is well established, under Commission and federal court case law, that the material time to be examined in resolving *most* issues that arise in a Commission proceeding is the time of the alleged violation(s). For example, compliance issues are resolved based on the circumstances that existed at the time of the alleged violation, without regard to subsequent events. *See, e.g., GAF Corp.*, 9 BNA OSHC 1451, 1454 n.13, 1981 CCH OSHD ¶ 25,281, p. 31,244 n.13 (No. 77-1811, 1981)("[S]ubsequent closure of a plant does not negate a violation that occurred while the plant was in operation"); *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) ("Abatement following the issuance of a citation neither negates nor excuses an employer's failure to comply with the Act"). Similarly, "liability" for civil penalties under the OSH Act "attaches at the time the violation occurred." *Jacksonville*, 102 F.3d at 1202. Accordingly, "for purposes of civil money penalties," the Commission and the courts must "look[] to the employer's status at the time of the violation, not at the time of trial." *Id.*

Under the approach taken by the Commission in *Taynton* to interpreting section 9(a), the potential exists for disruption of this statutory scheme at any stage of the enforcement proceeding because, at least in theory, the "employer" must continue to engage in a business

affecting commerce and to have employees at each stage of the process.[8] Any such adverse consequences are avoided if we adopt the Secretary's interpretation of the term "employer" as it is used in section 9(a) and the Act's other enforcement provisions to include former employers that were engaged in a business affecting commerce and that had employees at the time of the alleged violations. This interpretation, which we in fact adopt herein, is therefore "more consistent with the broader context of" the OSH Act than the interpretation that was adopted by the Commission in *Taynton*. *See Robinson,* 519 U.S. at 346, 117 S. Ct. at 849. It is also "more consistent with ... the primary purpose of" section 9(a). *Id.*

We have already concluded above that our interpretation of section 9(a) contributes to the goal of general deterrence, which "is the foremost and overriding goal of all laws, both civil and criminal." *Bae v. Shalala,* 44 F.3d at 494. It also contributes to another primary purpose of the Act's enforcement provisions, which is to encourage "prospective compliance" on the part of the cited employer. The Commission in *Taynton* concluded that the fact "that employees will never again be exposed by the same employer to the hazards at issue here eliminates the need for prospective compliance." 17 BNA OSHC at 1206 n.3,

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[8]For example, the *Taynton* decision seems to hold that, in a case such as this one, where the cited employer ceased doing business prior to filing its notice of contest, the Commission lacks "subject matter jurisdiction." Citing and quoting section 10(c) of the Act, 29 U.S.C. § 659(c), the *Taynton* majority reasoned that the Commission is only required to "afford an opportunity for a hearing" when an "employer" or an "employee" files a notice of contest; yet, in circumstances such as these, "no *employer* ever filed a notice of contest." *See* 17 BNA OSHC at 1205 n.1 & 1206, 1993-95 CCH OSHD at pp. 42,757 n.1 & 42,758 (emphasis supplied in *Taynton*). We conclude, however, that the issue before us is indeed, as we stated at the outset, a question as to whether the Secretary had statutory jurisdiction to issue the contested citations and not as to whether the Commission has subject matter jurisdiction over this case. The Commission has jurisdiction over this case under section 10(c) of the Act because "the Secretary transmit[ted] to the Commission" Yandell's notice of contest of citations "purportedly issued by the Secretary under section 9(a) of the Act." *Willamette Iron & Steel Co.*, 9 BNA OSHC 1900, 1904, 1981 CCH OSHD ¶ 25,427, p. 31,699 (No. 76-1201, 1981). Also, "it is clear that the Commission has subject matter jurisdiction to determine whether the Secretary has exceeded [her] authority to issue citations under the Act." *Id.*, 9 BNA OSHC at 1905, 1981 CCH OSHD at p. 31,700.

1993-95 CCH OSHD at pp. 42,757-58 n.3. However, this conclusion requires a leap which we decline to take. If indeed a cited "former employer" such as Taynton or Yandell never again resumes doing business in one form or another, then a final order against it would have no impact on its future business or employees. However, if that individual (or entity) does resume business, he will not only be obligated to comply with the Act, as the *Taynton* majority noted all employers are, but also, with a final order on his record, he would have an additional incentive to do so.[9]

This case, in fact, illustrates why we reject the *Taynton* majority's conclusion. The record does not show that the cited employer in this case "has ceased to exist." *Id.* At the time he filed his motion to dismiss, Joel Yandell still existed, even though he was no longer an employer doing business as Triple L Tower. He faced no legal bar, as a result of this proceeding, to the resumption of his business operations at any time he desired. Insofar as we know, based on the record before us, he may already have re-established his tower erecting company, under the same name or a different one. Indeed, in contrast to Ralph Taynton, Joel Yandell has not filed an affidavit in this proceeding claiming that his cessation of business activities was anything more than a temporary lull. *Cf. Taynton*, 17 BNA OSHC at 1207, 1993-95 CCH OSHD at p.42,759 ("According to Mr. Taynton, Service was irrevocably out of business, an allegation which was left unrebutted by the Secretary").

In any event, we conclude that, if Joel Yandell does re-enter the tower erection business (or any other business) in the future, the Act's purposes would be better served by requiring him to bring his past history with him, rather than allowing him to restart with a

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[9]The additional incentive is provided by the fact that future violations, if any, could be characterized as "repeated" within the meaning of section 17(a). A violation is repeated "if, at the time of the alleged repeated violation, there was a Commission *final order* against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979) (emphasis added). Under the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 3101 (1990), the maximum penalty that could be assessed for a repeated violation is $70,000, while the maximum penalty for a serious or other than serious violation is only $7000.

"clean slate." The proceeding on remand will allow the Commission to determine whether Yandell violated the Act in the manner that is alleged in the two contested citations. This determination could well have an effect on Joel Yandell's "prospective compliance," including his preliminary decision as to whether to re-enter the tower erection business and his subsequent decisions as to how to conduct that business if he does decide to become an "employer" once again. Allowing the Secretary to proceed with this enforcement action could therefore also have a substantial impact on the safety and health of future employees of Joel Yandell.

III. Order

For the reasons stated above, we overrule *Taynton*, reverse Judge Loye's order granting Yandell's motion to dismiss, reinstate the contested citations and proposed penalties, and remand this case to Judge Loye for further proceedings consistent with this decision.

Stuart E. Weisberg
Chairman

Thomasina V. Rogers
Commissioner

Date: March 12, 1999

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. JOEL YANDELL, d/b/a TRIPLE L TOWER, Respondent.	OSHRC Docket No. 94-3080

FINAL ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section *et seq*.; hereafter called the "Act").

Respondent, Joel Yandell, d/b/a Triple L Tower (Yandell), moves for dismissal of this action based on the Commission's holding in *Jacksonville Shipyards Inc*., 16 BNA OSHC 2053, 1994 CCH OSHD ¶30,539 (No. 94-888), which states 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." *Id*. at 2055. *See also; Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1995 CCH OSHD ¶30,766 (No. 92-0498, 1995)[the Commission is deprived of jurisdiction where the employer has ceased business and has no employees prior to the citation being issued.]

Respondent Yandell was issued citations on September 8, 1994, following a March 11, 1994 accident. In his December 19, 1995 affidavit accompanying the motion, Yandell states that following the accident he immediately ceased business operations and has not resumed or employed workers since that time.

Yandell's affidavit is undisputed; the Secretary opposes the motion on the sole ground that *Jacksonville* was wrongly decided.

However, Yandell has made the requisite showing for a dismissal under *Jacksonville*. In the absence of any factual basis on which to distinguish this case, the undersigned is constrained to following the holdings in that case and in *Taynton*.

Respondent's motion is **GRANTED** and this matter is **DISMISSED**.

So ORDERED.

/S/_____
Benjamin R. Loye
Judge, OSHRC

Dated: March 1, 1996