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SECRETARY OF LABOR,

Complainant,

v.

KENNY NILES CONSTRUCTION  
COMPANY,

Respondent.

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OSHRC Docket No. 95-1539

### ***DECISION***

Before: WEISBERG, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Ken S. Welsch erred in granting the motion for summary judgment filed by Kenny Niles Construction Company (“Niles Company”). Judge Welsch vacated the contested citation in this case under the then controlling precedent established by the decision of a divided Commission (Chairman Weisberg dissenting) in *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1993-95 CCH OSHD ¶ 30,766 (No. 92-0498, 1995), *appeal withdrawn*, No. 95-4788 (11th Cir. Nov. 9, 1995) (“*Taynton*”). In *Taynton*, the Commission held that the Secretary of Labor “had no jurisdiction to issue” a citation to an individual who was operating a sole proprietorship engaged in a business affecting commerce at the time of the alleged violations but was no longer engaged in business and no longer had any employees at the time the citation was issued. 17 BNA OSHC at 1208, 1993-95 CCH OSHD at p. 42,760. On review in the instant case, the Secretary concedes that Judge Welsch was correct in finding that this case is factually “indistinguishable” from *Taynton* and in concluding that he was therefore “bound to grant [Niles Company’s] motion for summary judgment based on the *Taynton*

case.” The Secretary argues only that *Taynton* was wrongly decided. In *Joel Yandell, d/b/a Triple L Tower*, OSHRC Docket No. 94-3080 (“*Yandell*”), which we also issue on this date, we have agreed with the Secretary’s argument and overruled *Taynton*. Therefore, for the reasons discussed more fully in *Yandell*, we reverse the judge’s decision in this case, deny the motion for summary judgment, and remand the case for further proceedings.

At the time of the alleged violations, Kenny Niles operated the Kenny Niles Construction Company as a single proprietorship with an office and principal place of business in Columbia, Missouri.<sup>1</sup> On or about March 27, 1995, a trench that was being excavated at a Niles Company worksite caved in, resulting in the death of a Niles Company employee. Based on an investigation of this fatality conducted by the Occupational Safety and Health Administration (“OSHA”), the Secretary issued Niles Company a citation alleging three willful violations of construction safety standards, each based on alleged employee exposure to trenching hazards. The Secretary proposed a total penalty of \$168,000. Niles Company contested all of the citation items and proposed penalties.

Over the course of the lengthy period between the March 27 cave-in and the issuance of the contested citation on September 20, Kenny Niles took a series of steps to close down first his excavation business and then his trucking business. As of August 15, 1995, when Niles closed his trucking business (a month before the citation now on review was issued), he no longer operated any businesses and he had no employees. On May 13, 1996, Niles averred, in the last of his five affidavits, *see supra* note 1, that he still had no employees, that he had not resumed any type of business operation, and that he did not intend to resume any business operations in the future. Based on these facts, which were not disputed by the Secretary, Judge Welsch concluded that, under the *Taynton* decision, Niles Company was

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<sup>1</sup>The five affidavits executed and filed by Kenny Niles in support of his motion for summary judgment (over a period of almost a year) indicate that he also did business under the names “Kenny Niles Construction & Trucking Co.” and “Kenny Niles Excavation & Trucking Company.” *See Kenny Niles d/b/a Kenny Niles Constr. & Trucking Co.*, 17 BNA OSHC 1940, 1995-97 CCH OSHD ¶ 31,300 (No. 94-1406, 1997).

not an “employer” as defined by the Act at the time the contested citation was issued and that the Secretary therefore lacked jurisdiction to issue it.

In *Yandell*, we this day overrule the Commission’s decision in *Taynton*. We hold that the Secretary has the authority under section 9(a) of the Act, 29 U.S.C. § 658(a), to issue citations to employers that have ceased doing business if they were engaged in a business affecting commerce and had employees at the time of the alleged violations. *Yandell*, slip op. at p. 7. Under this holding, it is clear that the Secretary had statutory jurisdiction to issue the citation that is now before us on review.

### **Order**

For the reasons set forth above, we reverse Judge Welsch’s decision below and remand this case to him for further proceedings consistent with this decision.

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Stuart E. Weisberg  
Chairman

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Thomasina V. Rogers  
Commissioner

Date: March 12, 1999

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Complainant, \*  
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v. \* OSHRC Docket No. **95-1539**  
 \*  
KENNY NILES CONSTRUCTION CO. \*  
Respondent. \*  
)

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, *et seq.*; hereafter called the “Act”) pursuant to respondent’s motion for summary judgment which was filed on April 16, 1996. Respondent asserts that, because it has not been in business since August 15, 1995, the Review Commission lacks subject matter jurisdiction or, in the alternative, the matter is moot. The Secretary’s response which was file on May 16, 1996, agrees that there is no genuine issue of material fact.

The court, having reviewed the pleading, finds there is no genuine issue of material fact and the case is resolved as a matter of law on the basis of summary judgment.

**Background**

Based on the pleadings, the following constitute the undisputed facts.

1. Respondent, Kenny Niles Construction Co. (Niles), a sole proprietorship with a principal place of business at 4501 I-70 Drive, S.E., Columbia, Missouri, was engaged primarily in sewer and waterline excavation and installation.

2. On or about March 27, 1995, at Niles' worksite located at 4101 Brown Station Road, Columbia, Missouri, there was an accident and one employee died.

3. OSHA investigated the accident and issued a willful citation on September 20, 1995, alleging violations of §§1926.21(b)(2)(ii), 1926.100(a) and 1926.652(a)(1), and proposing penalties totaling \$168,000.

4. On or about September 25, 1995, Niles filed a timely notice of contest to the willful citation.

5. Prior to issuance of the citation on June 6, 1995, Niles closed his excavation business, permanently laying off all employees and selling the majority of equipment to a competitor. On August 15, 1995, Niles closed another business known as Kenny Niles Trucking Company. Niles no longer operated any businesses or had any employees. By an affidavit dated May 13, 1996, Niles affirmed the since August 15, 1995, he no longer has any employees nor has resumed any type of business operation. Also, he states that he does not intend to resume any business operation in the future.

### **Discussion**

Niles moves for summary judgment on the basis that the Review Commission lacks subject matter jurisdiction pursuant to *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1995 CCH OSHD ¶ 30,179 (No. 92-498, 1995), because at the time the willful citation was issued, he was no longer in business and thus not an "employer" under the Act. In the alternative, if it is deemed subject matter jurisdiction exists, Niles argues that the matter is moot<sup>2</sup> pursuant to *Jacksonville Shipyards*, 16 BNA OSHC 2053, 1994 CCH OSHD ¶30,539 (No. 92-888, 1994), *appealed*, No. 95-2807 (11th Cir. 1995).

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<sup>2</sup>On October 27, 1995, Judge Loye granted a similar motion for summary judgment and dismissed April 12, 1994, citations against *Kenny Niles Construction & Trucking Company*, OSHRC Docket No. 94-1406, on the basis of mootness in accordance with the Commission's holding in *Jacksonville Shipyards*.

Summary judgment pursuant to Rule 56, Fed. R. Civil P., is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56 is incorporated by Review Commission Rule 61, 29 C.F.R. §2200.61. The moving party has the burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Celotex Corp. V. Catrett*, 477 U.S. 327 (1986), *remanded*, 826 F.2d 33 (D.C. Cir. 1987), *cert denied*, 484 U.S. 1066 (1988). All justifiable inferences are to be drawn in favor of the non-movant party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In this case, there is no genuine issue of material fact as to the Commission's jurisdiction. The Secretary does not dispute that as of August 15, 1995, Niles ceased business operations and terminated all employees and sold most of his equipment. OSHA's willful citation was not issued until September 20, 1995. Niles states that he permanently out of business and does not intend to re-enter business in the future. Niles' motion is supported by affidavits attesting to the dismissal of employees, sale of the business and equipment, and his intention not to re-enter the business. The Secretary submitted no rebuttal evidence disputing these facts. The Secretary argues that both Commission decisions were wrongly decided and should be overruled (Complainant's Opposition, pg.2).

The facts in this case are indistinguishable from the facts in the *Taynton* case. In *Taynton*, the Review Commission held that an employer an employer who went out of business and had no employees prior to the issuance of the citations was not an "employer" as defined by the Act. An "employer" is defined by § 3(5) as "a person engaged in a business affecting commerce who has employees."

Accordingly, based on the *Taynton* case, "no employer was ever properly issued a citation under section 9(a) of the Act, and no employer ever filed a notice of contest." OSHC at 1206. Despite having an opinion to the contrary, this judge is bound to grant Niles' motion for summary judgment based on the *Taynton* case. The Review Commission has long recognized that its judges must follow precedent established by the Commission. *Gindy Manufacturing Company*, 1 BNA OSHC 1717, 1973-74 CCH OSHD ¶ 17,790 (No. 5708, 1974); *All state Trailer Sales, Inc.*, 3 BNA OSHC 1183, 1184, 1974-75 CCH OSHD ¶ 19,627, p. 23,429 (No. 2446, 1975); and *United States Steel Corp.*, 9 BNA OSHC 1527, 1981 CCH OSHD ¶ 25, 283 ( No. 78-5940, 1981).

**ORDER**

Accordingly, Niles' motion for summary judgment is **GRANTED**. The willful citation issued to Niles on September 20, 1995, is vacated.

Dated this 24th day of May, 1996

/S/ \_\_\_\_\_  
KEN S. WELSCH  
Judge