
SECRETARY OF LABOR,

Complainant,

v.

CONTINENTAL ROOF SYSTEMS, INC. ,

Respondent.

OSHRC Docket No. 95-1716

DECISION AND ORDER

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

At issue is whether Administrative Law Judge John H. Frye, III erred in dismissing this case on jurisdictional grounds. Judge Frye dismissed this case under the then controlling precedent established by the Commission's decision (Chairman Weisberg, dissenting) in *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053, 1993-95 CCH OSHD ¶ 30,539 (No. 94-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997)(*"Jacksonville"*). The Commission's decision in *Jacksonville* was reversed by the Eleventh Circuit. Thereafter, the Commission held that it decided *Jacksonville* wrongly and overruled the decision. *Kenny Niles, d/b/a Kenny Niles Constr. & Trucking Co.*, 17 BNA OSHC 1940, 1997 CCH OSHD ¶ 31,300 (No. 94-1406, 1997)(*"Kenny Niles"*). For the reasons discussed below, we reverse the judge and remand this case for further proceedings.

Continental Roof Systems, Inc., (*"Continental"*), a roofing contractor, was retained by the National Park Service to repair the roof and chimneys of Franklin D. Roosevelt's home in Hyde Park, New York. The Occupational Safety and Health Administration (*"OSHA"*) inspected Continental's worksite and on October 23, 1995 issued three citations

for sixteen alleged violations.¹ The Secretary proposed a total penalty of \$139,600. Continental contested all the citations and proposed penalties.

During the hearing, Mark Nejme, Continental's president and sole stockholder, testified that by the end of 1995,² Continental was out of business, had no employees, and did not contemplate the resumption of business. In his decision, the judge found that "[t]he facts presented here are on all fours with the Commission's holding" in *Jacksonville*, which held that an administrative enforcement proceeding under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"), is rendered 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." 16 BNA OSHC at 2055, 1993-95 CCH OSHD at p. 42,229. The judge dismissed the case, concluding that the proceeding was moot and that, as a consequence, he lacked jurisdiction to decide the questions raised by the Secretary's complaint.

¹The citation alleged serious violations of 29 C.F.R. § 1926.95(a) (failure of employees to wear personal protective equipment); § 1926.153(k)(2) (LPG cylinders stored in the open); § 1926.307(c)(2)(i) (failure to guard power transmission shaft); § 1926.451(a)(3) (failure to have persons competent in scaffold erection erect and use scaffolds); § 1926.451(d)(4) and (a)(2) (failure to use adequate foundation for scaffold); § 1926.451(y)(3) (failure to fully deck or secure platform bracket); § 1926.451(y)(9) (failure to provide access ladder on scaffold); § 1926.501(b)(1) (failure to use fall protection); § 1926.501(b)(6) (failure to install guardrail on elevated walkway); § 1926.501(b)(10) (failure of employees to use fall protection); § 1926.1051(a) (failure to provide safe means of traversing distance); and § 1926.1053(b)(1) (failure to provide adequate side rails for portable ladders). The citation alleged willful violations of 29 C.F.R. § 1926.451(d)(7) (failure to secure scaffold to building); § 1926.451(d)(10) (failure to install guardrails and toeboards); and §§ 1926.451(y)(11) and (a)(4) (failure to install guardrails). The citation alleged other-than-serious violations of 29 C.F.R. § 1904.2(a) (failure to enter number of lost workdays on log of occupational injuries and illnesses); and § 1926.503(b)(1) (failure to prepare a written certification record for employee training).

² Nejme testified that "December 31st is when I got my last paycheck."

In *Kenny Niles*, the Commission overruled its decision in *Jacksonville*. The Commission found that “it is error to dismiss a case on the ground that it is ‘moot’” if “the Secretary continues to seek the assessment of penalties, and the employer continues to defend against them.” 17 BNA OSHC at 1945, 1997 CCH OSHD at pp. 44,000-01. Under this test, it is clear that the action pending against Continental is not moot.

Order

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

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: June 12, 1997