
SECRETARY OF LABOR,

Complainant,

v.

MERIDIAN CONTRACTORS, INC. ,

Respondent.

OSHRC Docket Nos. 94-0719 & 94-1305

DECISION AND ORDER

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Benjamin R. Loye erred in granting the motion to dismiss filed by Meridian Contractors, Inc. (“Meridian”) for both of the actions pending against it. Judge Loye dismissed the two cases 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*”). Therefore, for the reasons discussed below, we reverse the judge, deny the motion to dismiss, and remand these actions for further proceedings.

Meridian, a construction company that had its principal office and place of business in Dallas, Texas, was engaged in an apartment construction project in Broomfield, Colorado in 1993 and 1994. The Occupational Safety and Health Administration (“OSHA”) first inspected the Broomfield worksite on November 18 and 19, 1993. Based on the inspection, the Secretary issued a citation on February 4, 1994 for serious violations of the Act and

proposed penalties totaling \$27,000.¹ Meridian contested only the proposed penalties. The case was given docket number 94-0719 and assigned to Judge Loye.

OSHA inspected the worksite again on January 19, 1994. Based on that inspection, the Secretary issued a citation on March 25, 1994 for serious violations with proposed penalties totaling \$37,800, and a citation for willful violations with proposed penalties totaling \$88,200.² Meridian contested both the citations and proposed penalties. The case was given docket number 94-1305 and was also assigned to Judge Loye.

While these cases were pending before the judge, Meridian filed a motion to dismiss the two actions based on the Commission's decision in *Jacksonville*, in which the

¹In Docket Number 94-0719, the citation alleged serious violations of 29 C.F.R. § 1926.20(b)(1) (failure to have a safety program); § 1926.1060(a) (failure to train employees about ladders); § 1926.25(a) (failure to clear debris); § 1926.100(a) (failure to wear hard hats); § 1926.300(b)(2) (failure to guard exposed belt and pulley on compressor); § 1926.403(b)(1) (failure to protect employees from electrical hazards while using damaged receptacles); § 1926.403(b)(2) (failure to install electrical switch properly); § 1926.405(g)(2)(iv) (failure to install restraining device); § 1926.451(a)(4) (failure to install guardrails); § 1926.451(d)(4) (failure to provide adequate footing for scaffold); § 1926.451(d)(7) (failure to secure scaffold to building); § 1926.451(d)(10) (failure to install guardrails on scaffolds); § 1926.451(u)(3) (failure to install catch platform on roof); § 1926.500(b)(1) (failure to guard floor openings); § 1926.500(c)(1) (failure to guard wall openings); § 1926.500(d)(1) (failure to guard open-sided floors); § 1926.1052(c)(1) (failure to install handrails on stairways); § 1926.1053(a)(1)(ii) (failure to ensure job-made ladders built in accordance with ANSI standards); § 1926.1053(b)(1) (failure to extend and secure ladders); and § 1926.1053(b)(16) (failure to identify and withdraw from service defective ladders).

²In Docket Number 94-1305, the alleged serious violations were based on noncompliance with: 29 C.F.R. § 1926.21(b)(2) (failure to train about safety hazards); § 1926.25(a) (failure to clear debris); § 1926.102(a)(1) (failure to wear eye protection); § 1926.150(c)(1)(iv) (failure to ensure that fire extinguishers were adjacent to each stairway); § 1926.300(b)(2) (failure to guard exposed belt and pulley on compressor); § 1924.304(d) (failure to keep lower guard on saw closed); § 1926.451(a)(13) (failure to provide ladder for scaffold); § 1926.500(b)(8) (failure to guard floor holes); and § 1926.1051(a) (failure to provide safe means of access). The alleged willful violations were based on noncompliance with: § 1926.95(a) or, in the alternative, Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (failure to use safety equipment such as safety belts); § 1926.451(u)(3) (failure to install catch platforms on roofs); and § 1926.500(c)(1) (failure to guard wall openings).

Commission 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. Meridian submitted an affidavit signed by Charles M. Holbrook, Meridian’s president and only stockholder, in which he states “[t]hat since June 1, 1995 Meridian has had no employees, and the only remaining matters are to complete the necessary tasks prior to dissolution of the corporation” and “[t]hat Meridian is permanently and irrevocably out of the construction business or business directly related to construction.” The Secretary did not dispute Holbrook’s affidavit, but instead objected to summary judgment in part on the ground that *Jacksonville* was wrongly decided.³ The judge found in both of these cases that “Meridian has made the requisite showing for a dismissal under *Jacksonville*” and granted its motion for dismissal of these actions.⁴

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 two actions pending against Meridian are not moot.

³Although the Secretary initially argued in her response to the motion to dismiss and in her motion for reconsideration that the decision in *Jacksonville* can be distinguished from the issue presented in these actions, the Secretary has now abandoned that claim.

⁴In granting Meridian’s motion to dismiss, the judge also relied on *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1993-95 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). However, *Taynton* does not apply because unlike the respondent in that case, Meridian was still an employer when the citations giving rise to these cases were issued.

Order

For the reasons discussed above, we reverse the judge's decision below, deny Meridian's motion to dismiss, and remand this case to Judge Loye for further proceedings consistent with this decision.⁵

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: June 12, 1997

⁵Because the parties to both cases are the same and there are common issues of law and fact, we conclude that consolidation is appropriate under Rule 9 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.9. We therefore consolidate Docket Numbers 94-0719 and 94-1305.