United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. SHARON & WALTER CONSTRUCTION, INC. Respondent.	OSHRC Docket No. 00-1402

APPEARANCES:

Howard Radzely, Solicitor; Joseph M. Woodward, Associate Solicitor; Donald G. Shalhoub, Deputy Associate Solicitor; Alexander Fernández, Deputy Associate Solicitor; Daniel J. Mick, Counsel for Regional Trial Litigation; Jordana W. Wilson, Senior Trial Attorney; Laura V. Fargas, Attorney; U.S. Department of Labor, Washington, DC
For the Complainant

Charles A. Russell, Esq.
For the Respondent

DECISION AND ORDER

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

Sharon & Walter Construction, Inc. ("S&W II") is a contractor that provides a variety of construction services, such as roofing, masonry, and painting. At an S&W II worksite located in Pittsfield, New Hampshire, two workers were installing a metal roof on a town maintenance building without using fall protection, and one of the workers was injured when he fell off the roof. Following an inspection of the worksite, the Occupational Safety and Health Administration ("OSHA") issued two citations to S&W II under the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), 29 U.S.C. §§ 651-678, one alleging a willful violation of 29 C.F.R. § 1926.501(b)(11) and the other a repeat violation of 29 C.F.R. § 1926.503(a)(2). OSHA based the alleged repeat violation on previous violations of the same or equivalent standard by Walter Jensen d/b/a S&W Construction ("S&W I").

After a hearing, the late Administrative Law Judge Michael H. Schoenfeld affirmed the merits and characterization of both citations and assessed the amended proposed penalties of $7,000 for willful Citation 1, Item 1, and $3,750 for repeat Citation 2, Item 1.[1] For the reasons that follow, we affirm the judge.

BACKGROUND

S&W II was incorporated in New Hampshire on July 12, 1995, by Walter Jensen, who is the corporation's president, director, and solitary shareholder. Jensen was previously the sole proprietor of S&W I, which filed for bankruptcy on August 16, 1994, and ceased operations approximately six weeks prior to the formation of S&W II. S&W I was also based in New Hampshire and provided essentially the same construction services as S&W II.

OSHA inspected the Pittsfield worksite on April 20, 2000, the day of the accident, and issued S&W II two citations—one alleging a willful violation of 29 C.F.R. § 1926.501(b)(11) for its failure to provide fall protection for the two workers on the roof, and the other alleging a repeat violation of 29 C.F.R. § 1926.503(a)(2) for its failure to provide the two workers with fall protection training. In the repeat citation, OSHA noted that S&W I had been previously cited twice for failing to provide fall protection training under § 1926.503(a)(2) or its equivalent standard, and those citations became final orders on May 19, 1992, and May 13, 1998.

In affirming both of the violations at issue here, the judge rejected S&W II's claim that the two workers at the Pittsfield worksite were independent contractors rather than employees and, therefore, S&W II was not responsible for their safety. The judge also rejected S&W II's contention that it cannot be charged with a repeat citation based on the previous violations of S&W I. On review, S&W II challenges the judge's findings on both of these issues, as well as his decision to affirm the citation items and characterize the fall protection violation as willful.

DISCUSSION

I. Pending Motions

Before turning to the merits of S&W II's claims on review, we first dispose of two pending motions—the Secretary's motion seeking an extension of time to file her brief before the

[1] Prior to the hearing, the judge granted the Secretary's motion to amend the proposed penalty amounts from $28,000 to $7,000 for the willful violation and from $5,000 to $3,750 for the repeat violation.

Commission and S&W II's motion to strike the Secretary's brief as late. For the following reasons, we grant the Secretary's motion and deny S&W II's motion.

The Secretary's brief to the Commission was due to be filed on December 31, 2001. *See* Commission Rule 93(b)(1), 29 C.F.R. § 2200.93(b)(1) (briefs of other parties due 30 days after the first brief is served); Commission Rule 4, 29 C.F.R. § 2200.4 ("Computation of time."). Under Commission Rule 93(c), a party must file a motion seeking an extension of time for filing its brief no later than three days prior to the brief's due date. 29 C.F.R. § 2200.93(c). Therefore, the Secretary's motion here was due by December 26, 2001. *See* Commission Rule 4(a), 29 C.F.R. § 2200.4(a) (when computing a time period less than 11 days, the intervening Saturdays and Sundays shall be excluded). The Secretary, however, filed her motion one day late on December 27, 2001, due in part to the illness of the Secretary's Counsel. In its motion to strike the Secretary's brief—which she filed on January 4, 2002—S&W II does not argue that the Secretary's delay in filing her motion or the lateness of her brief prejudiced its case. Moreover, S&W II failed to object to the Secretary's motion within 10 days of its service on the company. *See* Commission Rule 40(c), 29 C.F.R. § 2200.40(c) (ten-day period for filing a response to a motion).

Under these circumstances, we find that the Secretary has shown good cause for enlarging the time period for filing a motion for an extension of time. Commission Rule 5, 29 C.F.R. § 2200.5 (Commission may, for good cause shown, enlarge any time period prescribed by its rules). Because S&W II has not alleged that it suffered prejudice or refuted the Secretary's showing of good cause, we grant the Secretary's motion seeking an extension of time for filing her brief and deny S&W II's motion to strike.[2]

[2] S&W II also argues on review that Chief Judge Irving Sommer, who was assigned to the case before Judge Schoenfeld, erred in granting the Secretary's motion to extend the time for filing a complaint. According to S&W II, the Secretary's failure to file a complaint within 20 days of the notice of contest precluded Commission jurisdiction, and therefore, "[g]ranting an extension [of time] to the Department of Labor was beyond the power and authority of the Commission." It is well established, however, that a timely notice of contest establishes jurisdiction with the Commission. *E.g., Willamette Iron & Steel Co.*, 9 BNA OSHC 1900, 1904, 1981 CCH OSHD ¶ 25,427, p. 31,699 (No. 76-1201, 1981). Here, there is no dispute that S&W II timely contested the citations at issue.

II. Employment Status of Pittsfield Workers

The judge rejected S&W II's contention that the two Pittsfield workers "were independent contractors, and that it therefore had no employees exposed to the alleged violation." In determining whether the Secretary has established that a cited entity is the employer of the particular workers at issue, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992). *See Allstate Painting and Contracting Co., Inc.*, 21 BNA OSHC 1033, 1035, 2005 CCH OSHD ¶ 32,804, p. 52,506 (No. 97-1631, 2005) (consolidated) (noting that Commission relies on *Darden* test to determine whether Secretary has met her burden to establish employment relationship). In *Darden*, the Court focused primarily on the extent of "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden,* 503 U.S. at 323. Factors relevant to that inquiry include:

> the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work, the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; [and] the provision of employee benefits and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (citation omitted).

On review, S&W II argues that the injured worker ("worker A") was an independent contractor; it has abandoned any such claim as to the other worker ("worker B"). Thus, S&W II does not dispute on review that it had at least one employee exposed to the cited conditions at issue under the alleged violations. Moreover, in light of the extensive record evidence establishing S&W II's control over worker A, we agree with the judge that he was also an employee of S&W II and reject the company's claim that he was an independent contractor. Indeed, Jensen set worker A's hours and assigned him jobs each morning. Worker A was not free to leave if he completed a job early, but had to return to S&W II headquarters for another job assignment or to perform maintenance work. While working for S&W II, he testified, he did not work for other employers and did not think he was free to solicit other employment. Although he did various types of work for S&W II, he did not have separate contracts for different work assignments; Jensen simply gave him assignments each morning. Except for the liability policy he purchased at Jensen's insistence, he incurred no expenses during his work for

S&W II. In fact, he brought no equipment to S&W II jobs other than a tool belt, was reimbursed by Jensen when he had to purchase materials such as screws and nails, drove an S&W II vehicle to worksites, and used an S&W II charge card to buy fuel for that vehicle. Worker A also testified that, at Jensen's direction, he hired worker B from a temporary agency to help him with the Pittsfield roofing job. It is undisputed that worker A paid worker B a daily wage of $75 with money Jensen provided worker A for that very purpose.

S&W II disputes that it controlled the manner in which worker A performed roofing work at the Pittsfield worksite and also contends that: (1) worker A signed a subcontractor disclaimer form and told emergency room personnel that he was a subcontractor; (2) S&W II paid him as if he were a subcontractor—it did not withhold federal income and social security taxes and provided him with a 1099 form instead of a W-2 at the end of the year; and (3) S&W II's relationship with him was consistent with the relationships it maintained with other subcontractors. These contentions do not support a finding that worker A was an independent contractor. Given the specific evidence to the contrary recited above, S&W II's assertion that it lacked control over the manner in which worker A installed the roof lacks merit. *See Allstate*, 21 BNA at 1035, 2005 CCH at 52,506 ("although no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers"). And even though worker A signed a subcontractor disclaimer form, his testimony shows that he was only driven to do so by Jensen's threat to withhold his weekly pay. That he did not sign the form until four days after S&W II hired him supports this determination.[3]

We further find that S&W II's failure to withhold federal income and social security taxes was simply an attempt to hide worker A's true status, not a bona fide reflection of an authentic independent contractor relationship. In fact, S&W II issued checks to worker A in his own name rather than in the company name listed on the liability policy Jensen required worker A to obtain. Finally, testimony from two S&W II workers who Jensen claims served the company as independent contractors shows that S&W II maintained a very different relationship with them than it did with the Pittsfield workers. Indeed, unlike the two Pittsfield workers, these workers testified that they used their own equipment, kept their own hours, and incurred a potential for loss to their respective businesses.

[3] We also note that S&W II previously employed worker A from 1996 through 1998. Near the end of that prior employment period he signed his first subcontractor disclaimer form for Jensen.

For all of these reasons, we conclude that the two workers at the Pittsfield worksite were both employees of S&W II.

III. Willful Citation 1, Item 1

A. Merits

Under this item, the Secretary alleged a violation of 29 C.F.R. § 1926.501(b)(11), which requires the use of fall protection for employees on a steep roof with unprotected edges.[4] S&W II does not dispute that fall protection was required on the roof at the Pittsfield worksite and that neither of the workers used such protection on two separate days before the accident and the day of the accident.[5] In addition, Jensen admitted that he saw worker A on the roof without a safety harness on the morning of the accident. Under these circumstances, we conclude that the Secretary has established a violation of the cited provision. *See Gary Concrete Prods., Inc.,* 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991) (noting that Secretary's burden includes establishing that standard applies, employer failed to comply with standard's requirements, and employer had actual or constructive knowledge of violative condition); *see also A.P. O'Horo Co.* 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223, pp. 39,128-29 (No. 85-369, 1991) (imputing actual knowledge of supervisory employee to employer).[6]

B. Characterization

The judge affirmed this violation as willful. S&W II argues that the fall protection violation should not be classified as willful because (1) it had a good faith belief that worker A was an independent contractor, not its employee, and (2) Jensen made a good faith attempt to

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[4] Section 1926.501(b)(11) provides:

> *Steep roofs.* Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

29 C.F.R. § 1926.501(b)(11). A "steep roof" is defined as a roof "having a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500(b).

[5] The record shows that the roof was more than six feet above the ground, its slope was 5.5 in 12, and the sides were unprotected. S&W II also stipulated that worker A was on the roof without any type of fall protection.

[6] On review, S&W II does not challenge the judge's decision to reject its unpreventable employee misconduct defense. Therefore, we consider this argument abandoned.

comply with the standard by instructing worker A to put on a harness after observing him on the roof without fall protection. We disagree.

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . .

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256-57 (No. 89-433, 1993). "[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature." *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648, 2001 CCH OSHD ¶ 32,484, p. 50,307 (No. 98-0502, 2001), *aff'd without published opinion*, 56 F. App'x 1 (D.C. Cir. 2003).

Here, Jensen's two companies had collectively received a total of four prior citations for violations of § 1926.501(b)(1l) or its equivalent standard. And the compliance officer who conducted the May 1995 inspection testified that he personally explained the fall protection standard to Jensen. Under these circumstances, we find that S&W II, through Jensen, had a heightened awareness of the violative condition and the requirements of the cited standard. *See MJP Constr. Co.*, 19 BNA OSHC at 1648, 2001 CCH OSHD at p. 50,307 (finding supervisor knew of standard's requirements based in part on his experience with another employer at a prior worksite). Despite this heightened awareness, Jensen knowingly allowed worker A to remain on the roof without fall protection on the day of the accident. *MVM Contracting Corp.*, 23 BNA OSHC 1164, 1167, 2010 CCH OSHD ¶ 33,073 (No. 07-1350, 2010) (finding conscious disregard based on superintendent's failure to order workers out of unprotected trench despite heightened awareness of standard's requirements).

In addition, Jensen testified that he instructed worker A to use fall protection, which worker A denied. We find that even if Jensen did issue such an instruction, it was patently inadequate to establish the requisite good faith effort to comply with the cited standard that would obviate willfulness. *Caterpillar Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD

¶ 31,134, p. 43,483 (No. 93-373, 1996) (finding employer "not spared from a willfulness finding by employing abatement procedures that were patently inadequate"), *aff'd*, 122 F.3d 437 (7th Cir. 1997). Even assuming the veracity of Jensen's statement, this single instruction was the sum total of Jensen's attempt to require the use of fall protection for this individual, who was working on a steeply-sloped metal roof that the evidence shows was still slippery from the prior day's rainfall. Moreover, taking Jensen at his word, when worker A resisted using fall protection, Jensen told him, "if you don't put on your safety harness, you're going to break your neck" but "[i]t's your life." Then, according to Jensen, he simply walked away from worker A upon observing that his instruction went unheeded. In these circumstances, we find that Jensen's conduct is evidence of a willful state of mind rather than a good faith attempt at compliance. *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1922, 1999 CCH OSHD ¶ 31,933, p. 47,379 (No. 96-0593, 1999) (finding efforts to comply with the cited standard inadequate to negate willfulness); *Caterpillar*, 17 BNA OSHC at 1733, 1995-97 CCH OSHD at p. 43,483.

Finally, we agree with the judge that S&W II lacked a good faith belief that worker A was an independent contractor. As the judge correctly found, Jensen is "not [] an unsophisticated businessman" and he "knew very well how to create a true independent contractor relationship," as evidenced by his dealings with the two other workers called as witnesses below by S&W II. And we have no cause to disturb the judge's demeanor-based credibility finding that Jensen responded evasively to questions from the Secretary's attorney at the hearing regarding the basis for Jensen's claim that worker A was an independent contractor. *Inland Steel Co.*, 12 BNA OSHC 1968, 1978, 1986-1987 CCH OSHD ¶ 27,647, p. 36,005 (No. 79-3286, 1986) (noting that Commission normally "accept[s] the administrative law judge's evaluation of the credibility of witnesses because it is the judge who has lived with the case, heard the witnesses and observed their demeanor.") Accordingly, we affirm this violation as willful.

IV. Repeat Citation 2, Item 1

A. Merits

Under this item, the Secretary alleged a violation of 29 C.F.R. § 1926.503(a)(2), which requires an employer to provide its employees with fall protection training.[7] S&W II does not

[7] Section 1926.503(a)(2) provides:

dispute that the requisite training was not provided, but maintains that no such training was necessary because none of its "employees" performed roofing work. Indeed, Jensen admitted that he provided no roof safety training to anyone during the year before or the year after the citation here was issued. Based on our finding that both of the exposed workers were employees of S&W II and not independent contractors, Jensen's admission that he provided no training supports affirming a violation. *See Gary Concrete*, 15 BNA OSHC at 1052, 1991-93 CCH at p. 39,449; *A.P. O'Horo*, 14 BNA OSHC at 2007, 1991 CCH OSHD at pp. 39,128-9. Moreover, even though Jensen claimed that worker A had received fall protection training during his prior employment with S&W II between 1996 and 1998, S&W II provided no evidence that such training ever occurred. *See* 29 C.F.R. § 1926.503(b) (requiring documentation of training under the cited provision). And worker B's testimony—that he was never provided fall protection training—is unrebutted and consistent with the compliance officer's testimony that both workers lacked sufficient knowledge to demonstrate that they had been trained in personal fall arrest systems, guard rail systems, and safety net systems. Under these circumstances, we conclude that the Secretary has established a violation of the cited provision.

B. Characterization

In determining whether this violation is properly characterized as repeated under section 17(a) of the Act, the Commission is faced with an issue of first impression: whether a change in an employer's legal identity precludes attributing the violation history of its earlier

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The employer shall assure that each employee has been trained, as necessary, by a competent person qualified in the following areas:

(i) The nature of fall hazards in the work area;
(ii) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;
(iii) The use and operation of guardrail systems, personal fall arrest systems, safety net systems, warning line systems, safety monitoring systems, controlled access zones, and other protection to be used;
(iv) The role of each employee in the safety monitoring system when this system is used;
(v) The limitations on the use of mechanical equipment during the performance of roofing work on low-sloped roofs;
(vi) The correct procedures for the handling and storage of equipment and materials and the erection of overhead protection; and
(vii) The role of employees in fall protection plans;
(viii) The standards contained in this subpart.

("predecessor") form to a new ("successor") form.[8] For the reasons set forth below, we find that although S&W I and S&W II have distinct legal identities, the Secretary's application of a repeat characterization here is permissible based on S&W II's nexus with S&W I's violation history.[9]

Section 17(a) provides for enhanced penalties against "[a]ny employer who . . . repeatedly violates the . . . Act." 29 U.S.C. § 666(a). This phrase, however, is not defined in the statute. *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1336-37 (10th Cir. 1982); *P. Gioioso & Sons Inc. v. Sec'y of Labor*, 115 F.3d 100, 103 n.2 (1st Cir. 1997). Thus, the first step in our analysis is to determine whether the language at issue has a plain meaning with regard to the particular dispute before us, or whether it is ambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The "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." *Id.* at 341. Here, we find no language in the statute that would compel restricting attribution of an employer's violation history to the identical legal entity, nor do we find anything that would preclude attribution of a predecessor's citation history to a successor. In these circumstances, we find that this language is ambiguous. *Id*. at 345

[8] The Commission long-ago addressed a number of issues involving section 17(a), holding that the violation upon which a repeated characterization is based must be 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). The focus in *Potlatch*, however, concerned the similarity of the hazards cited in the two citations and the number of prior violations needed to characterize a violation as repeated. *Id.* at 1062-64. There was no consideration of whether a predecessor employer's citation history may be attributed to a successor employer, as the legal identity of the employing entity in *Potlatch* did not change. Accordingly, the Commission's decision in *Potlatch* provides no authority for resolving the issue now before us. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding *stare decisis* not binding where question at issue was not "squarely addressed" in prior decision).

[9] In both its petition and brief before the Commission, S&W II argues that the judge erred in rejecting its claim that the Secretary failed to properly plead S&W II's alleged successor corporation status in accordance with Federal Rule of Civil Procedure 9(a). We find nothing in Fed. R. Civ. P. 9(a), however, that would require the Secretary to make such a specific pleading. S&W II's legal existence is not at issue in this case, and the company is not being cited in a representative capacity. Instead, S&W II was cited for its own violations, and its status as the "successor" of S&W I is relevant only for purposes of classifying the alleged repeat violation. Under Fed. R. Civ. P. 9(a), "[i]t is not necessary to aver the capacity of a party to sue or be sued . . . in a representative capacity . . . except to the extent required to show the jurisdiction of the court." Fed. R. Civ. P. 9(a) (amended 2007 without substantive effect.) Here, there is no question that the Commission has jurisdiction over S&W II as the cited employer, regardless of its relationship to S&W I.

(finding statute ambiguous as to whether its protections cover former employees in the absence of any temporal qualifier).

In resolving this ambiguity, we look to the context and purpose of the Act as a whole, and the particular provision at issue. *Id*. at 346 (adopting interpretation of ambiguous term that was "more consistent with the broader context of [the statute] and the primary purpose of [the particular provision]"); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99-100 (1992) (interpreting OSH Act State-plan provision by "[l]ooking to 'the provisions of the whole law, and to its object and policy,'" and holding state regulation at issue was pre-empted "as in conflict with the full purposes and objectives of the OSH Act") (citations omitted)). The stated purpose for the adoption of the Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b); *Gade*, 505 U.S. at 96. And the statute's broad preventive and remedial intent has been specifically recognized by the Supreme Court. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10-11 (1990). Indeed, the Court held that the Act "is to be liberally construed to effectuate the congressional purpose." *Whirlpool*, 445 U.S. at 13. In addition, the penalty provisions of the Act specifically reflect Congress's intent to separate out certain conduct as deserving of higher penalties. This enforcement framework creates a deterrent to an employer that might otherwise ignore potential hazards before the Secretary inspects its workplace and an enhanced deterrent against subsequent infractions "once alerted by a citation and final order." *Dun-Par*, 676 F.2d 1333, 1337. "The system of penalties contained in [section] 17 allows for increased fines when the need arises to provide an employer with added incentive" to comply with the requirements of the Act. *George Hyman Const. Co. v. Occupational Safety and Health Review Comm'n*, 582 F.2d 834, 841 (4th Cir. 1978). The threat of a repeat characterization, therefore, was designed to deter an employer from committing violations primarily by creating the potential that a future violation's penalty will be significantly greater. *Id.; Dun-Par*, 676 F.2d at 1337.

Given these considerations, we conclude that the statutory language in section 17(a) is most reasonably read to permit, in appropriate circumstances, the Secretary's application of a "repeat" characterization to cases where the cited employer has altered its legal identity from that of the predecessor employer whose citation history forms the basis of that characterization. Such an interpretation is not only consistent with the Act's purpose, but also ensures the effectiveness

of its enforcement scheme. *Whirlpool*, 445 U.S. at 13. In contrast, were we to restrict a repeat characterization to the legally identical employing entity, a construction employer, for example, could successfully avoid a repeat characterization for future violations by simply changing its legal identity for each new project. As the Commission has previously recognized in a similar context, to allow the cessation of a cited employer's operation to immunize that employer from a prior citation and penalty "could 'creat[e] an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.'" *Joel Yandell*, 18 BNA OSHC 1623, 1625 (No. 94-3080, 1999) (*quoting Reich v. OSHRC* (*Jacksonville Shipyards, Inc.*), 102 F. 3d 1200, 1203 (11th Cir. 1997)); *cf. Dessarrollos Metropolitanos, Inc. v. OSHRC*, 551 F.2d 874, 876 (1st Cir. 1977) (rejecting constitutional challenge to Secretary's repeat citation policy that limits fixed-establishment history to same establishment, but permits attribution of such history to multiple establishments of employer with floating work sites, noting that "[a] company with floating work sites will have little incentive to ensure full compliance with safety standards at each new job site from the outset if it has one almost free bite at the apple at each such site"). This same logic applies here. Thus, to preserve the very purpose of a repeat characterization, the language of section 17(a) is most reasonably interpreted to allow attribution of a predecessor's citation history to a successor in appropriate circumstances.

We now turn to consideration of the circumstances under which a predecessor's citation history may be attributed to a cited successor employer. Our analysis of this question is informed by how, in cases arising under other federal employment statutes, courts have determined the existence of such a link for the purpose of holding a successor entity liable for the obligations of a predecessor. The Secretary asks that we resolve this inquiry by applying a long-standing multi-factor test used by the National Labor Relations Board ("NLRB") and the courts to determine when, under the National Labor Relations Act ("NLRA"), a successor entity must satisfy the obligations of a predecessor.[10] *See, e.g., Nat'l Labor Relations Bd. v. Burns*, 406 U.S. 272, 280-281 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-52 (1964). As the Supreme Court observed, the focus of the NLRB test is on whether there is "substantial continuity" between the two enterprises. *Fall River Dyeing & Finishing Corp. v. Nat'l Labor*

[10] The Commission has previously looked to caselaw developed under the NLRA to inform its analysis of various legal issues. *See, e.g., General Dynamics Corp.*, 15 BNA OSHC 2122, 2129 (No. 87-1195, 1993) (timeliness of citations).

Relations Bd., 482 U.S. 27, 43 (1987). The factors the NLRB considers to determine "substantial continuity" include: "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River*, 482 U.S. at 43. Though originating under the NLRA, this test has also been applied to successor-related issues arising under a number of other federal employment statutes. *See, e.g.*, *EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d 1086, 1094 (6th Cir. 1974) (applying substantial continuity test to dispute under Title VII of the Civil Right Act of 1964 ("Title VII")); *Prince v. Kids Ark Learning Ctr., LLC*, No. 09-2365, 2010 WL 3767554 (8th Cir. Sept. 29, 2010) (same); *Sec'y v. Mullins*, 888 F.3d 1448 (D.C. Cir. 1989) (upholding application of the substantial continuity test to discriminatory discharge case arising under the Mine Safety and Health Act); *Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987) (same); *Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006) (applying substantial continuity multi-factor test under Family and Medical Leave Act).

Based on our review of relevant caselaw, we agree with the Secretary that an application of the substantial continuity test for the purposes of determining S&W II's violation history promotes the Act's goals of ensuring workplace health and safety by preserving the deterrent effect of a repeat characterization, and is appropriately adapted to a determination of the requisite nexus between a successor and a predecessor's violation history for purposes of ascribing a repeat characterization under the OSH Act.[11] *Dun-Par*, 676 F.2d at 1337; *see also Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1395, 2002 CCH OSHD ¶ 32,690, p. 51,560 (No. 97-0755, 2003) (noting that higher penalties induce future compliance with Act's requirements). Specifically, this test enables us to fully assess the nature and extent of the distinctions and similarities between a successor and predecessor based on criteria that are well-suited to the OSH Act and the facts of each case before us. *Howard Johnson Co., Inc. v. Detroit Local Joint Bd.*,

[11] We note that a district court has applied a substantial continuity test similar to the one used by the Sixth Circuit in *MacMillan* to determine whether an entity could be held liable for a predecessor's violation of Section of 11(c) of the OSH Act. *H.M.S. Direct Mail*, 752 F. Supp. 573, 580-81 (W.D.N.Y 1990). In that case, the district court concluded that the imposition of successor liability was consistent with the OSH Act and its legislative history. *Id.* at 581. *See also Nat'l Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 468 (D.C. Cir. 2010) (according deference to Secretary's interpretation of the Act).

Hotel and Rest. Employees, 417 U.S. 249, 263 n.9 (1974) (noting "successorship" cases require an analysis based on "the facts of each case and the particular legal obligation which is at issue[;] . . . [t]here is, and can be, no single definition of 'successor' which is applicable in every legal context"). That assessment, in turn, provides a sound basis for determining if there is a sufficient nexus between the predecessor's history and the successor such that the one is attributable to the other.[12]

We view the substantial continuity test formulated by the NLRB as focusing on factors that essentially fall into three categories. The first category—the nature of the business—is appropriate for our purposes here because continuity in the type of business, products/services offered and customers served indicates that there has been no substantive change in the enterprise. Such continuity also typically indicates that the nature of the activities associated with the business and the inherent safety and health considerations are likewise unchanged. Applying these factors here, we find that the business of S&W II is essentially the same as that of S&W I. S&W II does the same type of work as S&W I—roofing and other general construction services—and began operation only six weeks after S&W I ceased operations.[13] After incorporating S&W II, Jensen served S&W I's customers in the same geographic area, and continued to occupy S&W I's office and use its telephone number. In fact, a check drawn on an account belonging to S&W I was used to pay a debt of S&W II. Further, S&W II continued performance on a contract that S&W I had with one of its customers.

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[12] At the Commission's request, the parties' briefs in this case included discussion of the Supreme Court's decision in *U.S. v. Bestfoods*, 524 U.S. 51, 55-58 (1998) (applying common law to question of parent-subsidiary liability for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act). We note that our statutory interpretation analysis here is consistent with post-*Bestfoods* decisions applying the substantial continuity test to questions of successor liability in cases arising under federal employment statutes. *See, e.g., Dean Transp., Inc. v. N.L.R.B.*, 551 F.3d 1055 (D.C. Cir. 2009) (NLRA); *Shares, Inc. v. N.L.R.B.*, 433 F.3d 939 (7th Cir. 2006) (same); *Sullivan v. Dollar Tree Stores, Inc.*, 2010 WL 3733576 (9th Cir. 2010) (Family and Medical Leave Act); *Contract Transport*, 452 F.3d 543 (same); *Kids Ark*, 2010 WL 3767554 (Title VII)); *Brzozowski v. Correctional Physician Services, Inc.*, 360 F.3d 173 (3rd Cir. 2004) (same).

[13] This brief hiatus does not militate against a finding of successor responsibility. *See Fall River*, 482 U.S. at 45-46 (seven-month gap between predecessor's demise and successor's start-up); *Tree-Free Fiber Co.*, 328 N.L.R.B. No. 51, 1999 WL 305507 (1999) (finding sixteen-month gap insignificant).

The second category of factors under the substantial continuity test—the jobs and working conditions—is especially relevant under the Act because of its close correlation with particular safety and health hazards. Here again, the employing entity remained essentially unchanged. According to Jensen, both companies provided the same general construction services, including carpentry, masonry, siding, and painting. The employees of both S&W I and S&W II worked on construction sites, performing these same tasks. The hazards typical of these tasks also remained the same, as did the tools Jensen purchased at the bankruptcy sale of S&W I for S&W II's use.[14] And most noteworthy, given the nature of the citation at issue, is the fact that employees in both entities performed roofing work and faced the same attendant fall hazards.

The final category of factors relates to personnel. Continuity of the personnel who specifically control decisions related to safety and health is certainly relevant in the context of the Act because the decisions of such personnel relate directly to the extent to which the employer complies with the statute's requirements. Here, Jensen was in charge of both companies and ran their operations on a daily basis. He was the sole owner and supervisor of S&W I, and is the president, sole shareholder, and supervisor of S&W II. Accordingly, Jensen's control over decision-making in both companies, including that related to employee safety and health, weighs heavily in favor of attributing S&W I's citation history to S&W II. We also find, however, that although S&W II retained, in some form, S&W I's workforce, continuity of nonsupervisory employees among the two companies is not significant here because those employees are not responsible for OSH Act compliance and would not have supervised its implementation.

In addition, we note that the NLRB's substantial continuity test includes consideration of whether the same supervisors oversee the same employees. *Fall River*, 482 U.S. at 43. While that factor is specifically relevant to issues that arise under the NLRA, we find it lacks such

[14] The fact that S&W II obtained a portion of S&W I's assets at a bankruptcy sale does not defeat a finding of substantial continuity. In general, how a successor obtains the predecessor's assets is "not determinative of the substantial continuity question." *Fall River*, 482 U.S. at 44. n. 10 (purchasing assets on the "open market" does not preclude finding that entity is a successor). Further, an entity can still be a successor even if it does not purchase all of the assets of the predecessor. *Golden State Bottling Co., Inc. v. Nat'l Labor Relations Bd.,* 414 U.S. 168, 182 n. 5 (1973).

significance here.[15] The type and extent of workplace hazards depend more on the nature of the work, equipment, and safety-related decisions made by managers and supervisors than on how workers are paired with such supervisory personnel. Because we have already taken into account Jensen's control over the operations at issue here, his continuity of supervisory authority over particular employees adds little to our analysis.[16]

Considering the totality of the circumstances regarding these two companies, we find that the nature and extent of their similarities are sufficient to support the Secretary's conclusion that the violation history of S&W I is attributable to S&W II. *See Fall River*, 482 U.S. at 43 (determining successor liability is "primarily factual in nature and is based upon the totality of circumstances in a given situation").[17] And the record shows that S&W II's history includes two final orders for violations of the same or equivalent standard at issue here. *Walter Jensen, d/b/a S&W Construction*, 1998 CCH OSHD ¶ 31,571, 1998 WL 257207 (No. 95-1221, 1998)

[15] Indeed, other courts applying the substantial continuity test outside of NLRA matters also have declined to address whether there was the same alignment of employees and supervisors. *See, e.g., Sec'y of Labor v. Mullins*, 888 F.2d 1448, 14545 (D.C. Cir. 1989) (not discussing whether the same supervisors oversee the same employees in case under the Mine Safety and Health Act).

[16] We note that the Sixth Circuit in *MacMillan* considered two additional factors not discussed by the Supreme Court in *Fall River*—whether the successor company had notice of the claim of violative conduct against the predecessor and the predecessor's ability to provide relief. *MacMillan*, 503 F.2d at 1094. As for the first of these factors, the record shows that S&W II had knowledge of the two citations issued to S&W I because both entities had the same president. As for the second of these factors, the ability of the predecessor to provide relief is not relevant here because the cited violation was committed by the successor, not the predecessor. It is the predecessor's citation history, not an unresolved citation, that is at issue. And that history is relevant solely for the purpose of attributing it to the successor in order to determine the appropriate characterization and penalty of the successor's own violation. Moreover, to effectuate the deterrent purpose of the repeat characterization the successor *must* bear the burden of the violation history, otherwise the successor would have no incentive to refrain from simply continuing to reincorporate under different names. In short, the predecessor cannot "provide relief," where the crux of that relief is the application of the violation history to the successor.

[17] Because we conclude that the substantial continuity test, as applied here, is met, we do not reach the Secretary's alternative argument that S&W II is the "alter ego" of Walter Jensen. Likewise, we do not reach her contention that S&W II is the successor to S&W I under the "mere continuation" test as developed under the law of New Hampshire, the state where S&W II was incorporated.

(consolidated).[18] Accordingly, we conclude that this violation is properly characterized as repeated.[19]

CONCLUSIONS OF LAW

We conclude that S&W II willfully violated 29 C.F.R. § 1926.501(b)(11) and repeatedly violated 29 C.F.R. § 1926.503(a)(2).[20]

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[18] S&W II argues that the Secretary failed to follow her "three year policy" in the Field Inspection Reference Manual ("FIRM") by relying on the company's July 10, 1995 violation of § 1926.503(a)(2) to classify the current violation as repeat. It is well-settled that the FIRM does not create substantive rights and is not binding on the Commission. *E.g.*, *Hackensack*, 20 BNA OSHC 1387, 1392, 2002-04 CCH OSHD ¶ 32, 690, p. 51,558 (No. 97-0755, 2003). Moreover, S&W II misunderstands the Secretary's policy which, as the Secretary explained in her brief, provides that a violation may be characterized as repeat if the citation is issued within three years of a final order against the employer for a violation of the same standard. The order affirming S&W II's July 10, 1995 violation of § 1926.503(a)(2) became final on May 13, 1998, less than three years before OSHA issued its April 20, 2000 citation here.

[19] Commissioner Thompson considers the "substantial continuity" concepts developed in *Burns*, *supra*, *Fall River*, *supra*, and *Wiley*, *supra*, to be inapposite to the purposes of the OSH Act, since overall they define the scope of the continuing obligations of a successor toward a majority union under the National Labor Relations Act. Still, he agrees to apply under these circumstances the violation history of S&W I for the purpose of characterizing as "repeat" the fall protection violation of S&W II. He would reach that conclusion by holding that under the term "employer" in section 3(5) of the Act, common law master-servant principles apply, including the "alter ego" doctrine, which is reflected in the federal common law. Commissioner Thompson would apply that doctrine here to disregard (or "pierce") the corporate veil of S&W II and affirm the judge's application in this case of the following equitable factors: "[A] corporate entity may be disregarded where there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and where, if the acts are treated as those of the corporation alone, an inequitable result will follow." *See* 18 Am. Jur. 2d *Corporations* § 45 (2004). The Commission has the authority to apply this common law equitable remedy to examine the violation history of a predecessor because denial to the Commission of veil piercing authority in appropriate circumstances would not be consistent with *United States v. Bestfoods*, 524 U.S. 51 (1998), which states: "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." Id at 63 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). Moreover, Commissioner Thompson sees no reason to depart from Commission precedent in *Eric K. Ho*, 20 BNA OSHC 1361, 1366-69 & n.6 (No. 98-1645, 2003) (consolidated cases), *aff'd*, 401 F. 3d 355 (5th Cir. 2005), that the Commission has authority to pierce the corporate veil to achieve a just and equitable remedy.

[20] It appears that the judge's decision contains a typographical error in paragraph 4 of the Conclusions of Law, where it refers to the provision cited in Citation 2, Item 1 as "29 C.F.R. § 1926(a)(2)" rather than 29 C.F.R. § 1926.503(a)(2). We correct this typographical error at this time.

ORDER

We affirm Willful Citation 1, Item 1 and assess a penalty of $7,000, and affirm Repeat Citation 2, Item 1, and assess a penalty of $3,750.[21]

SO ORDERED.

_/s/_____
Thomasina V. Rogers
Chairman

_/s/_____
Horace A. Thompson III
Commissioner

_/s/_____
Cynthia L. Attwood
Commissioner

Dated: November 18, 2010

[21] The penalty amounts are undisputed on review.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SHARON AND WALTER CONSTRUCTION CORPORATION, Respondent.	: : : : : : : : : :	DOCKET No. 00-1402

APPEARANCES:

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For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background, Procedural History and Jurisdiction

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq*. ("the Act"). At all times relevant to this proceeding, Respondent Sharon and Walter Construction Corporation ("S&W Corporation") operated a general contracting business, which performed roofing, siding, carpentry, masonry, snow plowing and painting. In its Answer, S&W Corporation admits that it is an employer engaged in a business affecting commerce, and I so

find. Accordingly, I hold that the Commission has jurisdiction over the subject matter and the parties within the meaning of section 3(5) of the Act.

This case arose as a result of an accident which occurred at one of S&W Corporation's work sites at a building located on Clark Street in Pittsfield, New Hampshire. On April 20, 2001, an employee of S&W Corporation fell off the metal pitched roof of the building. Neither Robert H. Bell III, the employee, nor Paul Noyes, another worker who was assisting Bell on the roof, were protected by any means of fall protection.

Following the resulting OSHA inspection, the Secretary issued one citation for a willful violation of 29 C.F.R. §1926.501(b)(1), and one citation for a repeat violation of 29 C.F.R. §1926.503(a)(2) to S&W Corporation.[1] The citation for the repeat violation is based on a prior final order entered against Walter Jensen, d/b/a S&W Construction, ("S&W") and Walter Jensen, individually. This case thus presents an issue not yet determined by the Commission, that is, whether, and under what circumstances, a prior final order may be imputed against an alleged successor corporation for the purpose of classifying a later violation as repeat. The hearing in the instant case was conducted from April 10, 2001 to April 12, 2001. No affected employees sought to assert party status. Both parties have submitted post-hearing briefs.

Whether the Exposed Workmen were Employees of S&W Corporation

As a preliminary matter, I reject S&W Corporation's contention that Bell and Noyes were independent contractors, and that it therefore had no employees exposed to the alleged violation. To determine whether an employer-employee relationship exists for the purposes of the Act, it is necessary to look to the general principles of agency law. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992). A fundamental inquiry on this issue is whether the putative employer retained the right to control the manner and means by which the job was performed. *Id.*[2] Under First Circuit

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[1] The Secretary initially sought a penalty of $28,000 for the willful violation and $5,000 for the repeated violation. The Secretary later reduced the penalties sought to $7,000 and $3,750, respectively, based on the size of the employer. (Tr. 45-52, Ex. C-10).

[2] Other considerations include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying

precedent, the assumption of entrepreneurial risk or reward by a putative employee is a prominent factor in this inquiry. *Labor Relations Div. of Constr. Indus. of Mass. v Teamsters Local 379*, 156 F.3d 13 (1st. Cir, 1998).

The evidence demonstrates that Bell and Noyes incurred no entrepreneurial risk or reward through their work for S&W Corporation. Their salaries were fixed and constant, (Bell received $150 a day, and Noyes received $75.00 a day), and if they finished an assignment early, they were not free to leave and still receive their pay. (Tr.150-151, 157, 242-243). Other than the liability insurance policy Bell obtained at the direction of Walter Jensen, S&W Corporation's owner and president, Bell incurred no other work related expenses. Bell testified that he never had his own business and, other than his own tool belt, he did not supply any of the materials or tools for the work he performed for S&W Corporation. If there were items he had to purchase, such as screws or nails, Jensen reimbursed him, and Jensen also paid for the gas in the S&W Corporation van Bell drove. (Tr. 31-32, 145-146, 151-152, 166-167). Similarly, Noyes provided no materials or tools for the job, and incurred no work related expenses. (Tr. 244).

A number of other facts show that Jensen controlled the manner in which Bell and Noyes performed their work. Bell told Stephen Rook, the investigating OSHA compliance officer, ("CO"), that he was under the direction and control of Jensen throughout the entire day. (Tr. 127). Bell was required to report to the shop every morning at 6:30 a.m. to receive his daily assignment, which could include sweeping, cleaning equipment, or operating a snow plow, in addition to roofing work. Once Bell finished a job, he was required to return to the shop, where Jensen would give him another job or task. (Tr. 158-159, 165-167, 368-369). Both Bell and Noyes believed that they could be fired or could quit at anytime. (Tr. 156, 165, 244). Of significance, after Bell's accident, Jensen put Noyes to work at a different job site. (Tr. 242-244). If, as S&W Corporation asserts, Noyes were a subcontractor Bell retained to assist with the roofing work at the subject site, Jensen would not have had the authority to send Noyes to a different job following Bell's accident.

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assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Timothy Victory,* 18 BNA OSHC1023, 1026 (No. 93-3359, 1997) *citing Vergona Crane,* 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992*)*.

It is also probative that, when Bell returned to work for S&W Corporation, he did not sign the S&W Corporation's "sub-contractor's disclaimer form," (which identifies Bell as a "self-employed individual"), until March 17, 2000, even though he commenced work on March 13, 2000. (Tr. 155, Ex. R-13, p.5). While this may appear inconsequential because of the apparently insignificant time period between the two dates, the fact that S&W Corporation employed Bell and put him to work without having the signed disclaimer form is inconsistent with S&W Corporation's argument that an independent contractor relationship was formed. It also lends credence to Bell's assertion that he signed the form only because he was told he would otherwise not get paid. (Tr. 151).

Contrary to S&W Corporation's assertion, the facts that Bell signed the disclaimer form, purchased a general liability insurance policy at Jensen's insistence, and was treated as an independent contractor for tax purposes, do not necessarily signify that an independent contractor relationship was created. A business association containing most, if not all, of the indicia of an employer/employee relationship is not transformed into an independent contractor relationship simply by these expedients. Rather, the substance of the relationship is controlling over the form. *See Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637-1638 (No. 88-2012, 1992). Further, S&W Corporation appeared to ignore the fabricated form of the relationship as it issued salary checks to "Robert Bell" rather than to "BOB Construction," a name devised by the insurance broker who sold Bell his liability policy and in which name the liability policy was issued. (Tr. 154-155). Finally, it is undisputed that Noyes never signed such a disclaimer form and purchased no liability policy.[3]

In support of its contention, S&W Corporation notes that Bell himself defined the terms of his employment when, following the accident, he told the emergency room personnel that he was an independent contractor. Bell does not deny that he made this statement. He did, however, explain that when he told the emergency room personnel that he worked for S&W Corporation, they "got

[3] During the hearing, Jensen testified that Noyes was not an employee, and that he did not authorize Bell to retain Noyes on behalf of S&W Corporation (Tr. 378-379). Bell, however, testified that Jensen told him to retain a laborer from a temporary agency, and gave Bell the money to pay the laborer. (Tr. 170-171). I observed Jensen's demeanor during the hearing. In addition, I have considered the evidence that Noyes' salary did not come out of Bell's daily salary, and that Jensen is not without a strong interest in portraying Noyes as an independent contractor. I find Jensen's testimony on this issue unbelievable. In any case, Jensen did not deny that he put Noyes to work at another site after the accident. (Tr. 380).

back" to him and told him that S&W Corporation was not "covering" him. Bell also explained that he believed he was supposed to say he was an independent contractor. (Tr. 197). I observed Bell's demeanor on the stand and found him to be a credible witness on this issue. I also found his explanation understandable. In any event, his statement is not dispositive, especially when compared with the weight of evidence supporting a finding that Bell was an employee.

S&W Corporation also notes that, during Bell's first term of employment with the company, from 1996 to 1998, Bell's liability carrier paid for the costs of damage incurred from a fire which occurred at a job site Bell was involved with in 1998. (Tr. 187-189, 362-363).[4] There is, however, no support in the record for S&W Corporation's assertion that Bell's carrier investigated the fire and made a determination that Bell was indeed an independent contractor. The evidence revealed only that there was a claim, and that it was paid through a liability policy Bell obtained only because Jensen directed him to do so. (Tr. 198-188).This is insufficient to support a legal conclusion that Bell was an independent contractor at the time. In any case, while events which occurred during an earlier term of employment may be some evidence of the nature of a later relationship, they are not dispositive here, especially since the second term occurred almost two years after the first, and S&W Corporation submitted no evidence to show that Bell, rather than Jensen, controlled the manner and means by which Bell performed his work during this earlier term of employment. Indeed, S&W Corporation admits that Bell was initially hired in 1996 as an employee and not an independent contractor. (Tr. 331-332). It is true that Bell signed a disclaimer form two years into his first term of employment, but, other than Jensen's assertion that Bell did not perform roofing work until he signed the form, there is no evidence that the terms of their working relationship changed in any way after he signed the form. In fact, Bell testified that there was no change.[5] (Tr.183, 332, Ex. R-13).

In an effort to rebut the evidence showing that Bell and Noyes were employees, S&W Corporation called to the stand Rodney Sargent and Justin Murphy, two witnesses who identified themselves as independent contractors and who have performed work for S&W Corporation. Sargent

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[4] Bell left S&W Corporation's employ after the fire, and did not return until March, 2000. (Tr. 147-151).

[5] It cannot be ignored that Jensen sent Bell to the broker who arranged for Bell's liability coverage. (Tr. 147-148).

testified that he has worked on hundreds of jobs for Jensen and was paid a flat rate of $300 per day, plus $200 per day for each subcontractor he hired. Sargent also testified that he used his own tools and other equipment, but conceded that when he was missing a tool or piece of equipment, he borrowed it from Jensen. (Tr. 511-512, 515-517). Sargent further testified that he kept his own hours and paid his own taxes and insurance premiums, when he did work for S&W Corporation. (Tr. 519). Murphy testified that he performed contracting work for 15 or more clients, including S&W Corporation, since he started his own business in the area in June, 2000, and that he, too, owned his own tools and equipment. (Tr. 536-538, 541-542). Murphy also testified that his fees varied; sometimes he was paid by the square foot, sometimes he was paid by the day, and sometimes he was paid a flat rate for the whole job. (Tr. 538). Even if paid by the day, however, he earned the same amount regardless of what time he left the job. (Tr. 542-543).

S&W Corporation argues that the terms of its business relationships with Sargent and Murphy were representative of the manner in which it retained all of its laborers and roofing workers, including Bell and Noyes. I am not persuaded by this argument. However one wishes to classify the relationships that S&W Corporation maintained with Sargent and Murphy, it is clear that the terms of those relationships were not the same, nor even similar to the employment relationship S&W Corporation had with Bell and Noyes. Unlike Bell and Noyes, Sargent and Murphy used their own equipment, kept their own hours, and incurred a potential for a loss. Additionally, through the course of his inspection, CO Rook discovered evidence showing that S&W Corporation hired other employees under terms similar to those under which Bell and Noyes were employed, indicating that Sargent and Murphy's terms were not in fact representative of S&W Corporation's work force. (Tr. 97-101).

S&W Corporation further contends that the testimony of Sargent and Murphy, along with testimony from Darren Brown, the police officer who investigated the accident and who also performed contracting work in the area, represent common industry practice in the area. (Tr. 284-285, 299, Resp. Brief, pp. 3-4). S&W Corporation may very well be correct that these three witnesses performed their contracting work in accordance with common industry practice in the area. It does not necessarily follow, however, that Bell and Noyes were therefore independent contractors. Indeed, the testimony elicited from Sargent and Murphy served to emphasize the differences between the two

types of business relationships, and confirms that Bell and Noyes were employees, rather than independent contractors. S&W Corporation's contention is accordingly rejected.[6]

The Alleged Willful Violation *- 29 C.F.R. § 1926.501(b)(11)*

Citation 1, Item 1 alleges a willful violation of 29 C.F.R.§ 1926.501(b)(11). The cited standard requires the use of guardrail systems with toeboards, safety net systems, or personal fall arrest systems where employees are on a steep roof with unprotected sides and edges of 6 feet (1.8 m) or more above a lower level. For purposes of the standard, a "steep roof" is a roof with "a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. §1926.500(b). During the OSHA investigation, CO Rook took measurements of the roof and determined that the slope of the roof was 5.5 in 12, vertical to horizontal, showing that the roof had a "steep slope" as that term is defined in the standard. (Tr. 32-33). S&W Corporation submitted no proof to contradict this evidence. The parties stipulated that Bell was working on a roof with unprotected sides on April 20, 2000, that he was not protected from falling by a guardrail system, a safety net or a personal fall arrest system, and that the roof was more than 6 feet above the lower level. (Ex. ALJ 1). Also, the Secretary asserts, and S&W Corporation does not dispute, that Noyes was on the roof with Bell on that day without the appropriate fall protection, and that that neither worker used fall protection while on the roof on the Monday or Tuesday before the accident. (Tr.172). The evidence thus demonstrates that the standard applies, that its terms were violated, and that S&W Corporation employees were exposed to the hazard of a fall. This hazard was exacerbated by the fact that the metal roof was slippery from the prior day's rainfall. (Tr. 173-174).

The evidence also demonstrates that S&W Corporation had actual knowledge of the violation. Jensen admitted that he saw Bell and Noyes on the roof without fall protection on the morning of the accident. (Tr. 338-339). Jensen was also present at the site on the Monday and Tuesday before the accident and saw Bell on the roof on both days without fall protection. (Tr. 172, 337). Jensen's actual

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[6] Even if Bell and Noyes had been independent contractors, S&W Corporation might still be liable for the alleged violations. Under Commission precedent and the multi-employer work site doctrine, a general contractor has a duty, whenever reasonable, to prevent or detect and abate violations, based on its supervisory authority or control over the work site. *McDevitt Street Bovis Corp.*,19 BNA OSHC 1108 (No. 97-1918, 2000). Jensen exerted the type of control contemplated by this doctrine at the subject site.

knowledge may be imputed to S&W Corporation, as he was the president and owner, and managed S&W Corporation on a daily basis (Tr. 318-320). The Secretary thus established a prima facie violation of the standard.[7]

S&W Corporation argues that the failure of Bell and Noyes to use safety harnesses amounted to unpreventable employee misconduct. S&W Corporation has not meet its burden of proving this defense.[8] First, there was no evidence that S&W Corporation had any rule regarding the use of fall protection when necessary. Second, there was no evidence that S&W Corporation communicated fall protection requirements to its employees, and, as is discussed below, Jensen admitted that he had not trained any of his employees in the use of fall protection for the previous two years. (Tr. 399). Third, S&W Corporation did not prove that it took reasonable steps to discover violations or to enforce the asserted requirement to use fall protection.

In fact, the only effort Jensen arguably made to abate the hazard on the day of the accident is disputed. Jensen claims that he told Bell to use a personal fall arrest harness on the morning of the accident. Bell does not deny that the two had a conversation that morning, but denies that Jensen said anything about a harness or safety protection, even after Bell purportedly said that the roof was slippery and that he did not trust it. (Tr. 176-177, 338-339, 376).[9] Neither witness appeared to speak with complete veracity. It is unnecessary, however to make a credibility finding on this issue. Even if Jensen's version were true, it is clear that an insufficient effort to abate the hazard was made. Jensen did not threaten discipline, indicate that he would dock Bell's pay, threaten not to use Bell in the

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[7] For the basic elements of the Secretary's prima facie 5(a)(2) case, see *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

[8] It is well settled that, in order to establish the defense of unpreventable employee misconduct, an employer must prove that it has "(a) established work rules designed to prevent the violations, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations, and (d) effectively enforced the rules when violations were discovered." *Jensen Constr.Co.*,7 BNA OSHC 1477, 1479 (No.76-1538, 1979).

[9] Noyes, who was at the job site when this conversation occurred and is no longer working for Jensen, recalled overhearing Bell tell Jensen that the roof is slippery, and overheard Jensen tell Bell that the job had to get done by the next day. (Tr. 251-252).

future if he did not use a safety harness on the roof, or even attempt to determine if any safety harnesses were available on site. (Tr. 342). Indeed, the more reliable evidence demonstrates that there was no safety harness or other means of fall protection on site, or in the S&W truck, and this fact was confirmed by the police officer who arrived at the scene shortly after the accident. (Tr. 175, 250, 283, 287-289). This citation item is affirmed.

The Secretary has classified this violation as willful. A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. A focal point for this determination centers on the employer's state of mind at the time of the violation. A heightened awareness of the illegality of the conduct, coupled with a failure to correct or eliminate a known hazard, will establish the requisite scienter for the imputation of a willful violation. *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-753, 2000).

The required "heightened awareness" is amply demonstrated in this case. In May of 1995, S&W, then an unincorporated business owned and run by Jensen, was inspected by OSHA at two different job sites. These inspections resulted in the issuance of two citations which alleged violations of 29 C.F.R. §1926.501(b)(11). (Tr. 312-317, Ex. C-14, Ex.C-13, Ex. C-5).[10] These citations were affirmed on April 6, 1998, and the Commission judge who heard and decided the case made a finding of fact that Jensen, personally, was apprised of the standard's requirements during a closing conference following the earlier of the two OSHA inspections. (Ex. C-5). The evidence also demonstrates that, in 1996, almost one year after S &W Corporation was incorporated, it was cited for a violation of 29 C.F.R. §1926.451(a)(4), for failing to provide standard guardrails and toeboards at the open sides and ends of platforms located more than 10 feet above the ground. (Tr. 318, Ex. C-11).[11] Despite this heightened awareness, Jensen allowed Bell and Noyes to perform work on the metal roof at the subject site without fall protection for three days. Further, even if believed, Jensen's alleged direction to Bell to use a harness is, without any further action to assure its use, insufficient to change the classification of this violation.

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[10] S&W filed a petition for bankruptcy in the 1990's and was dissolved in 1995. (Tr. 316, Ex. R-7). S&W Corporation was formed on July 12, 1995. (Ex. R-10).

[11] The August 2, 1996 citation was ultimately settled. (Ex. R-9)

S&W Corporation contends that Jensen did not act willfully because he, in good faith, believed that Bell was an independent contractor. If Jensen were under this impression in good faith, S&W Corporation's contention might have more merit. Jensen is not, however, an unsophisticated businessman. He has been in the roofing business since at least 1969, and, in the mid-1990's, he owned several other businesses, including a limited liability company, a taxi cab company, a roofing company and a realty company. (Tr. 313, 352-353). He has a history of prior OSHA citations, a number of which occurred during the latter part of the existence of S&W, shortly before Jensen commenced bankruptcy proceedings. (Tr. 353). Further, the fact that Jensen required Bell to sign the disclaimer form in 1998, while S&W was in the midst of litigating an OSHA citation, raises a reasonable inference that Jensen was motivated, at least in part, to avoid OSHA liability. In addition, the testimony of Sargent and Murphy make it clear that Jensen knew very well how to create a true independent contractor relationship, when necessary. Based on these factors, as well as the evasive manner Jensen responded to the Secretary's questioning on this issue during trial, I find that Jensen did not have a good faith belief that Bell and Noyes were anything but employees of S&W Corporation on the day of the accident.[12] This citation is properly classified as willful.

The Secretary proposed a penalty of $7,000 for this citation item. (Tr. 45). In arriving at that figure, CO Rook took into consideration the gravity of the violation and the probability and severity of injury. The violation was given a high severity, based on the serious nature of permanent disability or death which would occur if a worker were to fall off the roof, and a greater probability due to the on-site circumstances, that is, that the roof was metal and was slick from the prior day's rainfall. The gravity-based penalty was initially $70,000, but S&W Corporation received an 80 percent adjustment for size, and a 10 percent adjustment for history. No adjustment was made for good faith due to the willful classification. I find that CO Rook's gravity and severity analysis was appropriate. The

[12] S&W Corporation asserts that it is "free to select any of the myriad ways of doing business that best suits its needs as long as it is legal." As a general proposition, Respondent is correct. Motivation, however, is not irrevelant, and an employer is not free to create business forms or associations to avoid application of the labor laws. *See eg CEK Indus. Mechanical Contractors v NLRB,* 921 F.2d 350 (1st. Cir. 1990), where the First Circuit determined that it was appropriate to consider antiunion animus as a major factor in determining the alter ego status of a parallel coproration formed for the purpose of avoiding NLRA obligations.

reduction for size was also appropriate, given that there was no evidence relating to the actual size of Jensen's company, beyond Bell, Noyes, and the admitted other four employees. (Tr. 318). The 10 percent reduction based on history was also appropriate. The proposed penalty of $7,000 is assessed.

The Alleged Repeat Violation *-29 C.F.R. §1926.503(a)(2)*

Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. §1926.503(a)(2).[13] CO Rook proposed this item because, on questioning Bell and Noyes, it became apparent that neither had knowledge of fall protection techniques, usage and assembly, and because Jensen said that he did not train his subcontractors. (Tr. 47-48). In this regard, Jensen testified that none of his employees performed roofing work, and that, therefore, he has trained no employees in roofing safety within the last two years. (Tr. 399). As set out above, however, the evidence demonstrates that two workers who performed roofing work for Jensen were in fact employees and not independent contractors. Consequently, at least as to Bell and Noyes, Jensen had a duty to provide appropriate fall safety training.

Bell testified that he never attended any safety meetings while working for S&W Corporation, that he never attended any classes for working safely on the roof, and that he was never taught how to install or maintain a guard rail system. He also testified that he was not trained in the use of harnesses or perimeter nets and that he was never advised of OSHA's fall protection standards by anyone at S&W Corporation. (Tr 146-147, 150-151, 180-181, 194-195). Jensen, on the other hand, testified that Bell attended regular safety meetings in 1996 and that, during this first term of employment, Bell had installed guardrails and was observed wearing personal fall arrest body harness systems. (Tr. 358). Jensen also testified that S&W Corporation had conducted safety meetings every Friday and every morning, at least as of September, 1996, and that he had spoken personally to everybody about staging and the use of harnesses. Jensen said that he sometimes saw Bell in the office

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[13] The cited standard requires an employer to:

> ...assure that each employee has been trained, as necessary, by a competent person qualified in the following areas: (i) The nature of fall hazards in the work area; (ii) The correct procedures for erecting, maintaining, disassembling and inspecting the fall protection systems to be used; (iii) The use and operation of guardrail systems, personal fall arrest systems, safety net systems...

with another employee, Mike Foyer, when they were discussing safety, and that Scott Haggart, a fire fighter, paramedic and police officer Jensen hired for the purpose of creating an OSHA compliant company, was at times also present during these meetings. (Tr. 223, 358, 398).[14] S&W Corporation offered no affirmative proof, however, that Bell was ever trained in the use of OSHA-compliant fall protection systems. Furthermore, even if S&W Corporation's argument, that Bell nonetheless knew how to use such systems during his first term of employment were true, there is no proof that Bell was retrained following the January, 1998 amendment of the standard relating to acceptable fall arrest systems.[15] In any event, it is undisputed that no fall protection training was provided at any time to Noyes. (Tr. 256-258, 268).

I find that the standard applies, its terms were violated, and that Bell and Noyes were both exposed to the cited hazard. In addition, because S&W Corporation had a duty to train these employees, and because Jensen was well aware of the requirements of the standard due to earlier citations involving this and a related standard, I find that S&W Corporation had knowledge of the violation. This citation item is affirmed.

This violation has been classified as repeat. A violation is repeated if at the time it occurred, the same employer had a Commission final order against it for a substantially similar violation. *Potlach Corp*., 7 BNA OSHC 1061, 1064 (No. 16183, 1979). It is not disputed that a violation of 29 CFR §1926.503(a)(2) was found against S&W as well as Walter Jensen, individually, on April 6, 1998, and that it became a final order on May 13, 1998. (Tr. 50, Ex. C-5)[16] At issue is whether, for

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[14] Haggart testified that he worked part time in an "on and off" basis for S&W Corporation from around January, 1996 to May, 1997. The services he provided involved obtaining HAZCOM forms, which he filled in, attending some safety meetings, and forwarding a book, pamphlets and a video he obtained from OSHA to S&W Corporation. He did not know how S&W Corporation used the book, pamphlets and video, and he performed no work for S&W Corporation after May, 1997. (Tr. 222-230)

[15] 29 C.F.R.§1026.502(d) contains the criteria for acceptable personal fall arrest systems, and, effective January 1, 1998, was amended to provide that "body belts are not acceptable as part of a personal fall arrest system." *Id*.

[16] The citation on which the May 13, 1998 final order was based was issued in May of 1995. (Tr. 49) This violation was itself a repeat violation, based on a May, 1992 citation for noncompliance of 29 CFR§1926.21(b)(2). (Ex. C-5)

the purposes of classifying a violation as repeat, a final order against a sole proprietorship and its owner, individually, may be imputed to a subsequently-formed corporation. The Secretary contends that S&W Corporation is so closely identified with S&W that the prior final order issued against the latter may be imputed to the former.

The Commission has not yet addressed the issue of whether, and under what circumstances, a violation found against one company may be imputed to a successor company for classification purposes. As the Secretary points out, however, two different legal theories - successor liability and the alter ego doctrines - lend support to the conclusion that, in this case, it is appropriate to charge S&W Corporation with the history of the prior final order.[17] In this regard, developing federal case law inquires into whether, on the facts of the particular case, a corporate form should be disregarded to avoid frustrating the purpose of a federal law. *Brotherhood of Locomotive Engrs v Springfield Terminal Ry Co,*. 210 F.3d 18 (1st Cir. 2000).

It is important to clarify that the issue is not whether to impute a new liability where none existed, but what classification is appropriate for an affirmed violation. Nonetheless, the doctrine of successor liability is instructive to the extent it holds that, in certain circumstances, a successor corporation should be held accountable for the actions of a predecessor company. The Supreme Court addressed this doctrine in an NLRB case involving a claim of unfair labor practices. *Fall River Dyeing & Finishing Corp v. NLRB*, 107 U.S. 2225 (1987). *See also NLRB v Burns Int'l Sec. Serv. Corp.*, 406 U.S. 272 (1972). In *Fall River*, the Court upheld the NLRB's determination that there was substantial continuity between the predecessor and successor corporations, where the functions of the employees and the business of the employer did not change, the employees continued to work under the direction of the same supervisors, and the successor corporation had purchased most of its predecessor's real property, machinery and equipment, even though the continuing company terminated production of one major type of product. *Id*. In affirming the NLRB's application of the successor employer test, the Court noted that the doctrine requires an inquiry into a totality of the circumstances. *Id* at 2237. There is also persuasive authority that the doctrine of successorship applies in OSHA cases. *See H.M.S. Direct Mail Serv.*, 752 F. Supp. 573 (W.D.N.Y. 1990), where the court

[17] S&W Corporation's argument that the Secretary's failure to initially plead successorship is rejected. Both parties were aware of this issue and tried it fully.

determined that the doctrine applies in an action pursuant to section 11(c) of the Act for wrongful discharge of an employee who had asserted his rights under OSHA. *Id* [18]

The following facts are pertinent to this inquiry. Walter Jensen was the sole owner of S&W, which he was in charge of running. He is also the president and sole shareholder of S&W Corporation, which he is also in charge of running. (Tr. 312-317, 320). S&W Corporation is in the same business as S&W, and, in fact, continued performance on a parking lot sweeping contract S&W had had with Bradley's since 1993. (Tr. 312-314, 319-329, 349-350).[19] Following S&W's dissolution in 1995, Jensen purchased some of its assets during a bankruptcy sale, including four trucks, ladders, staging, staging planks, wooden brackets, skill saws, a bench saw, and various hand tools. (Tr. 321-322, 347, 407-408).[20] S&W Corporation began operating only six weeks after S&W ceased operations. Further, S&W Corporation has the same office address and telephone number as did S&W, and operates in the same georgaphical area. (Tr. 323, 352, 412-413 448-449).

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[18] At least one commission judge has used the NLRB test in the context of determining classification of a penalty. *See Trinity Indus.*, 1990 OSAHRC LEXIS 251, (No. 88-2691, 1990), *aff'd on other grounds* 15 BNA OSHC 1481 (1992). While it is not clear whether the Commission would adopt the test in these circumstances, some guidance is given in *Joel Yandell*,18 BNA OSHC 1623 (No. 94-3080, 1999). In finding that the Secretary had jursidiction to issue a citation to an employer who had ceased doing business after the violation but before issuance of the citation, the Commission considered that an employer might change its status to avoid the consequences of the Act. *Id.* at 1626. The Commission also considered the potential that a future violation may be characterized as "repeat" based on a prior order entered against an employer who ceased doing business following the entry of the prior order, but then reestablished itself and repeated the violation. *Id.* at 1629, fn 9. It is unclear, however, whether the Commission intended to address only the situation where the employer reestablishes the same business entity. When addressing the imputation of a prior order solely for the purposes of finding a repeated violation, the Commission referred to a sitation in which the "individual (or entity) *resumes* business," and did not address, for that purpose, a change in corporate status or business form. *Id.* at 1628, (emphasis supplied).

[19] Jensen testified that S&W performed general contracting, carpentry, painting, siding, snow plowing, and "some" roofing, and that S&W Corporation is a general contracting business which performs some snow plowing, siding, carpentry, roofing and masonry. (Tr. 312-314, 319-320).

[20] The fact that these assets were purchased at a bankruptcy sale rather than directly from the predecessor corporation does not change the result contained herein. Where there are other indicia of continuity, the manner in which a successor obtains a predecessor's assets is not determinative of this issue. *Fall River Dyeing & Finishing Corp. Supra,* at 2236, fn 10.

There is also some evidence that S&W Corporation retained, in one form or another, S&W's work force. CO Rook testified that he observed the same employees at an S&W Corporation job site he inspected in 1996, as he had at an S&W job site he inspected in 1995, and, while they were not identified by name, OSHA Area Director David May testified that a comparison of the records from 1995 inspections of S&W and later inspections of S&W Corporation indicate a continuity of work force. (Tr. 66, 448). Jensen testified that there may have been one or two S&W Corporation employees who had worked for S&W, but he was careful to indicate that he was referring only to those workers he defined as "employees." Jensen did testify that 30 past employees are now independent contractors, and S&W Corporation's post-hearing brief admits that Jensen regularly does business with these subcontractors. (Tr. 352, 400-401, S&W Corporation's brief, p.7). Furthermore, both Murphy and Sargent testified to having performed work for Jensen both before and after the incorporation of S&W Corporation. (Tr. 510-512, 534). These factors, along with those listed above, support the conclusion that there is substantial continuity between S&W and S&W Corporation such that it is appropriate to use the prior final order as a basis for finding S&W Corporation in repeated violation of the same standard.

The Secretary's alternative argument, that S&W Corporation is the alter ego of S&W, is similarly persuasive. According to First Circuit precedent, the alter ego doctrine says that "in certain situations one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws." *NLRB v. Hosptial San Rafael Corp.*, 42 F.3d 45 (1st Cir. 1994), ("*San Rafael*"). Thus, obligations of one business entity may be enforced against another. *See CEK Indus. Mechanical Contractors v. NLRB*, 921 F.3d 350 (1st Cir. 1990). On this issue, the NLRB and the courts consider the similarity between the old and new companies in management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *San Rafael, supra.* While the Commission has not applied the alter ego doctrine under the precise facts of this case, it has found that, where two ongoing companies share a common work site and have interrelated and integrated operations, and have other indicia of mutual identity, the purposes of the Act are best served if the two companies are treated as one. *Advance Specialty Co.*,3 BNA OSHC 2072 (No. 2279, 1976).

The facts of this case demonstrate that S&W Corporation has the same management, business

purposes, ownership, supervision and operation as did S&W. S&W Corporation also acquired some of S&W's machinery, and assumed performance on the parking lot sweeping contract. Additionally, there is evidence that Jensen himself treated the two business entities as interchangeable. Despite the dissolution of S&W, Jensen used checks from an S&W account to pay OSHA fines incurred by S&W Corporation, and on March 10, 1999, four years after S&W's dissolution, Jensen's application with the State of New Hampshire for a trade name identified S&W, not S&W Corporation, as the business concern, and gives April, 1969 - the date S&W was formed - as the formation date. (Tr. 329-331, 414-415).

This citation item is affirmed as a "repeat" violation. The Secretary has proposed a penalty of $3,750.00 for this item. In proposing this penalty, the Secretary took into account the factors set forth in section 17 of the Act, including the fact that the prior final order on which the repeat violation was based was itself a repeat violation. (Tr. 49-53, Ex. C-5). The Secretary's analysis was appropriate. Accordingly, the proposed penalty is assessed.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertienent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter of this case.

3. Respondent was in violation of 29 C.F.R. §1926.501(b)(1), as alleged in Citation 1, Item 1. This violation was willful, and a penalty of $7,000 is appropriate therefore.

4. Respondent was in violation of 29 C.F.R. §1926(a)(2), as alleged in Citation 2, Item 1. This violation was repeat, and a penalty of $3,750 is appropriate therefore.

ORDER

1. Citation 1, Item 1 is AFFIRMED. A penalty of $7,000 is assessed.

2. Citation 2, Item 1, is AFFIRMED. A penalty of $3,750 is assessed.

/s/

MICHAEL H. SCHOENFELD
Administrative Law Judge

Dated: August 6, 2001
Washington, DC