SECRETARY OF LABOR, Complainant, v. KENNY NILES, d/b/a KENNY NILES CONSTRUCTION & TRUCKING COMPANY, Respondent.	OSHRC Docket No. 94-1406

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

The issue before us in this case is whether Administrative Law Judge Benjamin R. Loye erred in granting the motion for summary judgment filed by Kenny Niles, d/b/a Kenny Niles Construction & Trucking Company ("Niles Company"). Judge Loye correctly concluded that Niles Company was entitled to summary judgment dismissing the citations against it under the 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. 92-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997)("*Jacksonville"*). However, for the reasons stated herein, we conclude that the Commission decided *Jacksonville* wrongly. We therefore reverse the judge, deny the motion for summary judgment, and remand this case for further proceedings.

I. Basis of Mootness Claim

At the time of the alleged violations at issue in this case, Kenny Niles operated the Niles Company as a single proprietorship with an office and principal place of business in Columbia, Missouri. The construction portion of his business, which employed nine or ten workers, engaged in sewer and water line excavation and installation. On November 23, 1993, these construction employees were excavating a trench at a worksite in Columbia when the trench caved in, injuring one of them. As a result, the Occupational Safety and Health Administration ("OSHA") conducted an inspection and investigation and issued citations alleging two willful and nine serious violations of trenching and other standards.[1] OSHA also proposed penalties totaling $67,250.

Almost fourteen months after it contested these charges, Niles Company filed a motion for summary judgment, seeking the dismissal of all citation items and proposed penalties on the grounds that this "action is moot and [the Secretary] lacks appropriate jurisdiction." As the legal basis for its motion, Niles Company cited the *Jacksonville* decision, in which the Commission held that an administrative enforcement proceeding under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the OSHAct"), is

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[1]The alleged serious violations were based on noncompliance with: 29 C.F.R. § 1926.20(a) (allowing employees to work in hazardous trench); § 1926.21(b)(2)(failure to instruct employees in the recognition and avoidance of unsafe trenching conditions); § 1926.50(c) (failure to have a qualified first-aid provider at the worksite); § 1926.59(e)(1)(failure to develop, implement and maintain a hazard communication program for the worksite); § 1926.59(g)(1)(failure to have material safety data sheets for hazardous chemicals used at the worksite); § 1926.59(h)(failure to provide information and training on hazardous chemicals); § 1926.651(c)(2)(failure to provide safe means of egress from trench); § 1926.651(j)(2)(failure to keep excavated materials at least two feet from trench edge); and § 1926.651(k)(1)(failure to inspect trench and adjacent area). OSHA also alleged willful violations of 29 C.F.R. § 1926.28(a)(failure to ensure wearing of hardhats by employees exposed to materials falling into trench) and § 1926.652(a)(1)(inadequate sloping of trench where sloping relied on as means of protection against cave-ins).

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. For its factual basis, Niles Company relied on an affidavit signed by Kenny Niles, in which he averred that, as of June 1, 1995, he had "permanently closed down" his "excavation business" by (1) laying off all of the employees who had performed that type of work, (2) selling "the majority" of the equipment used in that work, and (3) entering into a contract in which he promised to sell the remainder of his excavation equipment and not to re-enter the excavation business within the Columbia, Missouri area during the two-year period following execution of the contract. The Secretary objected to summary judgment, however, arguing that this case was distinguishable from *Jacksonville* because Niles still had employees working for his trucking business and was therefore still an "employer" within the meaning of the Act.

Over the next few months, Niles Company filed a supplemental motion for summary judgment, as well as a series of three supplemental affidavits, each executed by Kenny Niles. In these affidavits, Niles averred that, on August 15, 1995, he had also shut down "the trucking division of the...[Niles Company]" and that, as a result of that closure, he no longer operated any business or had any employees. He further claimed that his sole proprietorship would "never be resumed." Shortly after the Secretary's counsel conceded, during a telephone conference call, that the Secretary had no evidence to contradict Kenny Niles' assertions, Judge Loye issued his order granting summary judgment and dismissing this case "in accordance with the Commission's holding" in *Jacksonville*.

Before us, the Secretary has abandoned any claim that the instant case can be distinguished from *Jacksonville*, arguing only that *Jacksonville* was wrongly decided and that it should be overruled. We therefore confine our review of this case to the narrow issue presented to us by the parties for resolution.

II. Jacksonville Revisited

While the Commission normally considers itself bound to follow its own precedent, it has not hesitated to overrule that precedent when further deliberations have led it to conclude that an earlier case was wrongly decided, particularly when the federal appellate courts[2] have expressly rejected the Commission's initial position during the interim between Commission decisions. *E.g.*, *Acrom Constr. Services*, 15 BNA OSHC 1123, 1125, 1991-93 CCH OSHD ¶ 29,393, p. 39,563 (No. 88-2291, 1991); *Bratton Corp.*, 14 BNA OSHC 1893, 1896, 1987-90 CCH OSHD ¶ 29,152, pp. 38,991-92 (No. 83-0132, 1990). *Cf. Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765 (1944)("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' ").

As the Commission noted in *Jacksonville*, the issue before it in that case, *i.e.*, whether a proceeding under the Act "is rendered moot if during the course of the proceeding the employer permanently discontinues its business operations," was "an issue of first impression." 16 BNA OSHC at 2053-54, 1993-95 CCH OSHD at p. 42,228. Yet, while it took roughly 24 years for the first such case to reach the Commission, less than three years after the issuance of the *Jacksonville* decision, *four more cases* have come before the

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[2]Sections 11(a) & (b) of the OSHAct, 29 U.S.C. §§ 660(a) & (b), confer jurisdiction on the United States circuit courts of appeals to review Commission decisions. Unlike the Commission, however, which has nationwide jurisdiction, each of these federal courts has jurisdiction only within its own judicial circuit. The Commission is therefore bound to follow an appellate court decision only within the circuit in which that case arose, and it must independently determine whether it is going to continue to follow its own precedent or instead follow the conflicting views of the appellate court in cases arising outside of that circuit. *See, e.g.*, *S & H Riggers & Erectors, Inc.*, 7 BNA OSHC 1260, 1264-65, 1979 CCH OSHD ¶ 23,480, p. 28,437 (No. 15855, 1979), *rev'd*, 659 F.2d 1273 (5th Cir. 1981).

Commission in which this identical issue has been raised.[3] During those same three years, the *Jacksonville* decision itself has been reviewed and reversed by the U.S. Court of Appeals for the Eleventh Circuit in a well-reasoned and authoritative decision. Under these circumstances, we fully agree with the Secretary that it is both necessary and appropriate for us to reconsider the Commission's decision in *Jacksonville*.[4]

In *Jacksonville*, the Commission majority cited two U.S. Supreme Court decisions for the proposition that, "[w]hile voluntary cessation of allegedly violative conduct does not make the case moot, mootness can arise if all effects of the alleged violation have been eliminated and if there is no reasonable expectation that the violation will recur." 16 BNA OSHC at 2054, 1993-95 CCH OSHD at p. 42,229, *citing County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383 (1979); and *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897 (1953). The Commission viewed its own holding, *i.e.*, "that a proceeding may properly be considered moot where the employer has effectively corrected the alleged violations by terminating its employees and where there is no reasonable

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[3]The *Jacksonville* issue is also currently pending before the Commission in *Meridian Contrac., Inc.*, OSHRC Docket No. 94-0719; *Meridian Contrac., Inc.*, OSHRC Docket No. 94-1305; and *Continental Roof Sys., Inc.*, OSHRC Docket No. 95-1716.

[4]One of the matters on which the Commission and the Eleventh Circuit court disagreed concerned the potential effect of the Commission's *Jacksonville* decision on other employers. In its decision, the Commission majority stated that they were unaware "of any case in the Act's history" where it had even been alleged that the employer had "made any business decision in order to avoid...OSHA citations and proposed penalties." 16 BNA OSHC at 2055 n.3, 1993-95 CCH OSHD at p. 42,230 n.3. "Therefore," they continued, "we do not believe that a finding of mootness here would encourage employers to go out of business to avoid OSHA citations and penalties...." *Id.* The reviewing court, however, in accord with Chairman Weisberg's dissent, expressed its "worry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name." 102 F.3d at 1203. The Commission's experience since the *Jacksonville* decision may suggest that the court's concern was warranted. *See supra* note 3.

likelihood that the employer will resume the employment relationship," 16 BNA OSHC at 2055,1993-95 CCH OSHD at p. 42,229, as a logical extension of this broader principle.

On review of that decision, however, the Eleventh Circuit court pointed out that the legal test cited by the Commission majority is applicable only to claims for "injunctive relief" and that the "[c]ourts have traditionally treated monetary relief claims differently than injunctive relief claims for the purpose of mootness challenges." 102 F.3d at 1202. As an example, the court cited its prior decision in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) ("*Tyson Foods*"), which involved a suit for both injunctive relief and civil penalties under the Clean Water Act, based on the defendant corporation's violations of permit limitations on the discharge of pollutants. The evidence in that case showed that the defendant was no longer violating the Act and also that "the allegedly wrongful behavior could not reasonably be expected to recur." The court accordingly held that the action for injunctive relief had been rendered moot. 897 F.2d at 1135. "However," it continued, "the mooting of injunctive relief will *not* moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed." *Id.* (emphasis added). In other suits arising under the Clean Water Act, federal appellate courts in at least three other circuits have reached this same conclusion, *i.e.*, that evidence establishing that the defendant has ceased violating the Act and that there is no reasonable expectation that the violations will recur is sufficient to render the claim for injunctive relief moot, but it does *not* render the claim for civil penalties moot. *Natural Resources Defense Council v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 502-03 (3d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1019-21 (2d Cir. 1993); *Chesapeake Bay Foundation, Inc.v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696-97 (4th Cir. 1989)("*Gwaltney*"). *Cf. United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980) ("[P]ursuant to the district court's compliance order, Rayonier has installed pollution control equipment provisionally satisfactory to the EPA.

Despite Rayonier's compliance, the appeal is not moot because the district court has determined liability and retained jurisdiction to ascertain civil penalties...."). On the other hand, we are unaware of *any* federal court decision reaching the opposite conclusion. *See Jacksonville*, 102 F.3d at 1202 n.2 (concession of counsel during oral argument that his legal research had not uncovered any case holding that "a money claim" had "become moot as a result of the defendant's own acts").

Like the Eleventh Circuit Court of Appeals, we view these Clean Water Act cases as being closely analogous to administrative enforcement actions under the OSHAct. In a typical section 10(c) employer-notice-of-contest proceeding, such as the instant case, the Secretary files a complaint seeking both injunctive relief (in the form of abatement orders) and the assessment of civil penalties. Similarly, the Clean Water Act cases cited above involved actions for both injunctive relief and civil penalties. The fact that the cases were initiated by non-governmental organizations acting as "private attorneys general" is of no consequence. In each case, the suit was brought for the purpose of enforcing federal law, and the civil penalties at issue were not sought for the purpose of compensating the citizen plaintiffs, but instead were to be "paid into the United States Treasury." *See Tyson Foods*, 897 F.2d at 1131 n.5. We therefore agree with the Eleventh Circuit court that the Clean Water Act cases cited above provide strong support for its *Jacksonville* decision.[5]

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[5]We reject Niles Company's argument that the Clean Water Act cases are inapplicable to this case because the employers in each of those cases remained in business and were therefore free to resume their violative conduct. In each of the cases cited above, the court expressly found that there was no reasonable expectation that the alleged violation would recur and accordingly held that the plaintiff's claim for injunctive relief was moot under the Supreme Court's test in *County of Los Angeles v. Davis*. *See supra*. On this record, we have no basis on which to conclude that an employer that eliminates a violative condition by implementing engineering controls to bring its levels of effluent discharge within permissible limits, such as the employer in *Tyson Foods*, is any more or any less likely to resume its violative conduct in the future than an employer that eliminates its violative conduct by going out of

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Additional support is provided by the federal court cases, including U.S. Supreme Court cases, holding that circumstances mooting a claim for injunctive relief do not render a claim for *damages* moot and that a live case or controversy continues even where the claim for injunctive relief was clearly the principle cause of action, while the surviving claim for damages involves relatively minor amounts. *See*, *e.g.*, *Ellis v. Bhd. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 441-42, 104 S.Ct. 1883, 1889 (1984)("The amount at issue is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the ligitation, the case is not moot"); *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951 (1969); *O'Connor v. City and County of Denver*, 894 F.2d 1210,1215-16 (10th Cir. 1990); *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974). Niles Company argues that such decisions have no bearing here because they "deal with remedies for the benefit of *individual* employees," while the OSHAct contains no such "make whole" remedies benefitting individual employees. We disagree with this profferred distinction. The *rationale* underlying the damages cases cited above is the *same* rationale used in the penalty cases cited above. In essence, neither an action for damages nor an action for civil penalties can be rendered moot by evidence that an employer is no longer violating the Act and unlikely to repeat its violations because damages actions and civil penalty actions are both based on *past* employer conduct. *Compare Gwaltney*, 890 F.2d at 696 ("Under the Clean Water Act,....the initiation of § 1319 actions by the government can be based on wholly past violations, so that a suit seeking penalties is intrinsically incapable of being rendered moot by the polluter's corrective actions") *with Taxpayers for Animas-LaPlata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1479 (10th Cir. 1984) ("Indeed, by definition claims for past damages cannot be deemed moot"). *See also*,

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[5](...continued)
business.

Gwaltney, 890 F.2d at 696-97 (court characterizes past violations as "the only possible basis for assessing a penalty").

Jacksonville notwithstanding, the Commission has similarly recognized, in its pre-*Jacksonville* decisions, that its jurisdiction over contested citations and proposed penalties does *not* depend on the presence of a "live controversy" over injunctive relief, meaning, in the context of the OSHAct, a dispute over proposed abatement orders. For example, the Commission has held that the post-citation abatement of an alleged violation does not deprive it of the authority to rule on the merits of that alleged violation:

> Abatement following the issuance of a citation neither negates nor excuses an employer's failure to comply with the Act. It is therefore appropriate to affirm a citation even though an employer abates a violative condition during the course of litigation....

Whirlpool Corp., 8 BNA OSHC 2248, 2249, 1980 CCH OSHD ¶ 24,957, p. 30,793 (No. 9224, 1980), *rev'd and remanded on other grounds*, 645 F.2d 1096 (D.C. Cir. 1981).[6] *Cf. GAF Corp.*, 9 BNA OSHC 1451, 1454 n.13, 1981 CCH OSHD ¶ 25, 281, p. 31,244 n.13

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[6]After holding in *Whirlpool Corp.* that post-citation abatement is not grounds for vacating a citation, the Commission further held that it could nevertheless take post-citation abatement into account, specifically, in determining an appropriate penalty. 8 BNA OSHC at 2249 n.3, 1980 CCH OSHD p. 30,793 n.3 ("Prompt correction of a cited hazardous condition is essentially an indication of good faith and may be considered in penalty assessment under section 17(j) of the Act, 29 U.S.C. § 666(i)"). Similarly, the Eleventh Circuit court in *Jacksonville* noted that, while an employer's cessation of business does not render a civil penalty claim moot, it *may* have a bearing on the *amount* of the penalty that should be assessed. 102 F.3d at 1203 n.4 ("We do not rule out today that JSI's having ceased to do business might be important to the amount of penalties; the appropriate amount is for the Commission to set."). Here, it would be premature for us to discuss either penalty amounts or penalty factors at this stage of the proceeding, particularly in the absence of any arguments from the parties on such issues. However, like the appellate court in *Jacksonville,* we leave open the possibility that an employer's post-citation cessation of business may be deemed a relevant consideration in evaluating the "size" of the employer and thus in determining an appropriate penalty amount.

(No. 77-1811, 1981)("[S]ubsequent closure of a plant does not negate a violation that occurred while the plant was in operation"). In addition, the Commission has pointed out that the OSHAct expressly authorizes a type of employer-initiated contest proceeding where abatement from the outset is beyond the scope of Commission review, *i.e.*, a proceeding initiated by an employer notice of contest that is deliberately restricted to the proposed penalties. *See Connecticut Aerosols, Inc.*, 8 BNA OSHC 1052, 1980 CCH OSHD ¶ 24,257 (No. 78-0025, 1980); *Florida East Coast Properties*, 1 BNA OSHC 1532, 1973-74 CCH OSHD ¶ 17,272 (No. 2354, 1974). *See also*, sections 10(a) & (c) of the Act, 29 U.S.C. §§ 659(a) & (c).

Like the Eleventh Circuit court that reviewed the Commission's decision in *Jacksonville*, we conclude that that decision is contrary to law; we therefore "do not [find it necessary to] rely much on OSHA-related policy considerations in deciding this case," but nevertheless "think our decision is consistent with the policies that OSHA was enacted to advance." 102 F.3d at 1203.[7] In any event, we conclude that the ongoing argument over whether the assessment of penalties against such employers serves any purpose largely misses the point.[8] So long as the Secretary continues to seek the assessment of penalties, and

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[7] In particular, we agree with the court that the rule of law announced by the Commission in *Jacksonville*, *i.e.*, that an employer is entitled to a dismissal of the contested citations and penalties if it terminates its existing business operations and states its intent not to resume those operations, has the potential to "greatly diminish the effectiveness of money penalties as a deterrence." 102 F.3d at 1203. *See supra* note 4.

[8]Chairman Weisberg disagrees with the analysis that leads Commissioner Montoya to her premature conclusion "that the assessment of a penalty [here,] where there are no longer employees for the OSH Act to protect would be punitive, and therefore exceed the civil remedial authority of the OSH Act." In reaching this conclusion, prior to the development on remand of a complete record (both evidence and arguments) on what penalties, if any, would be "appropriate" in this case, Commissioner Montoya relies heavily on the U.S. Supreme Court's decision in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), (continued...)

the employer continues to defend against them, it cannot be said that "the issues presented [in the case] are no longer 'live' or [that] the parties lack a legally cognizable interest in the

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and the Commission's decision in *S.A. Healy Co.*, 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719 (No. 89-1508, 1995), *rev'd*, 96 F.3d 906 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997)(No. 96-1299). In Chairman Weisberg's opinion, however, his colleague's reliance on *Halper* and *Healy* as support for restricting the judge's authority to assess penalties against the Niles Company is totally misplaced since *Halper* and *Healy* both involved the specific issue of whether the assessment of civil penalties against a party that has *already been criminally prosecuted and penalized for the same conduct* violates the double jeopardy clause of the Fifth Amendment, while there is not even a potential double jeopardy issue in the instant case. *See Halper*, 490 U.S. at 450, 109 S.Ct. at 1903 ("Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has *not* been punished for the same conduct, *even if the civil sanction imposed is punitive*. In such a case, the Double Jeopardy Clause simply is not implicated")(emphasis added). The Chairman further concludes that Commissioner Montoya's reliance on *Trinity Industries v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994) is equally misplaced since the instant case has nothing whatsoever to do with the exclusionary rule. (The Chairman notes that the only Constitutional argument missing from his colleague's analysis is a claim that assessing penalties against the Niles Company would constitute cruel and unusual punishment under the Eighth Amendment). Commissioner Montoya's reliance on *Trinity Industries* leads her to the unusual conclusion that the judge on remand in this case, while precluded from assessing any penalties, should consider entering abatement orders against the Niles Company. Under virtually identical circumstances, the United States Court of Appeals for the Eleventh Circuit reached the exact opposite conclusion, *i.e.*, that while the Secretary's request for the entry of abatement orders was moot, his penalty proposals remained at issue before the Commission. *Reich v. O.S.H.R.C. (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200 (11th Cir. 1997). In Chairman Weisberg's view, the argument advanced by his colleague in this case has already been rejected implicitly by the court in *Jacksonville Shipyards*.

Commissioner Guttman notes that in light of the instant remand, and absent the benefit of focused argument on the questions by the parties, it would be premature to address the questions raised by Commissioner Montoya at this time. Should these questions be raised on remand, the Commission would have the opportunity to consider them based on such further analyses as may be provided by the Administrative Law Judge and the parties.

outcome." *Powell v. McCormack,* 395 U.S. at 496, 89 S.Ct. at 1950-51. Under these circumstances, it is error to dismiss a case on the ground that it is "moot," as the federal court cases cited above make clear.

III. Order

For the reasons indicated, we overrule *Jacksonville* and hold that an action seeking the assessment of penalties for OSHAct violations is *not* rendered moot by the fact that the cited employer no longer has any employees, even if that cited employer can demonstrate that there is "no reasonable likelihood" that it will resume the employment relationship. Based on this holding, we reverse the judge's decision below, deny Niles Company's motion for summary judgment, and remand this case to Judge Loye for further proceedings consistent with this decision.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: April 15, 1997

MONTOYA, Commissioner, concurring in part and dissenting in part:

While I concur in the majority's decision to deny the motion of Kenny Niles, d/b/a Kenny Niles Construction & Trucking Company ("Niles Company") for summary judgment, I do not agree that penalties can be assessed for the alleged violations.

Relying on the Commission's decision in *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053, 1993-95 CCH OSHD ¶ 30,539 (No. 92-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997), the Niles Company argued that the Secretary's enforcement action was rendered moot when Mr. Niles "permanently closed down" his excavation business. In *Jacksonville*, the Commission observed that:

> When it established the Act, Congress recognized that employers have the primary control over the work environment. *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1088 (7th Cir. 1975). Accordingly, the obligation to provide a safe and healthful workplace and to comply with OSHA standards is placed on the employer, and a business organization must comply with the Act so long as it is an employer having employees as those terms are defined in the Act. Section 3(5) and 3(6), 29 U.S.C. § 652(5) and (6). *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1636 n.2, 1991-93 CCH OSHD ¶ 29,689, p. 40,254 n.2 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 (No. 87-214, 1989).

16 BNA OSHC at 2054, 1993-95 CCH OSHD at p. 42,222. Since liability under the OSH Act is premised on the existence of a business enterprise having an employment relationship with those whom the Act is intended to protect, the Commission concluded that "a proceeding may properly be considered moot where the employer has effectively corrected the alleged violations by terminating its employees and where there is no reasonable likelihood that the employer will resume the employment relationship." *Id.* at 2055, 1993-95 CCH OSHD at p. 42,229.

I have reassessed the position that I took in *Jacksonville* and no longer believe that the winding up of an employer's business affairs renders an OSHA enforcement proceeding moot in its entirety. I now conclude that the Secretary is entitled to a hearing on the merits

of the citations. However, giving particular consideration to the later decision in *S.A. Healy Co.*, 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719 (No. 89-1508, 1995), *rev'd on other grounds*, 96 F.3d 906 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299), I find that the assessment of a penalty where there are no longer employees for the OSH Act to protect would be punitive, and therefore would exceed the civil remedial authority of the OSH Act.[9]

S.A. Healy had been fined for criminal violations of the OSH Act under 29 U.S.C. § 666(e), and the Commission was asked to decide whether "instance-by-instance" civil penalties subsequently sought by the Secretary for the same violations would be punitive, and therefore prohibited by the double jeopardy clause. The Secretary argued that all penalties assessed under section 17 of the OSH Act, 29 U.S.C. § 666, must be treated as nonpunitive, since the Act has the overarching remedial purpose of promoting safety. Reviewing the law relating to civil remedial legislation, the Commission first noted *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), in which the Supreme Court said that a punitive sanction is one that satisfies certain criteria, including but not limited to whether it serves "the traditional aims of punishment," that is, "deterrence and retribution." *Id.* at 168-69. The courts historically have deferred to Congress if a statute plainly states that its penalty provisions are civil in nature. In *United States v. Ward*, 448 U.S. 242, 249 (1980), however, the Supreme Court said that the deference normally accorded the intent and determination of Congress to establish a civil penalty is not conclusive, and an ostensibly

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[9]The Commission issued its decision in *S.A. Healy Co.*, 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719, *rev'd*, 96 F.3d 906 (7th Cir. 1996) (No. 89-1508, 1995), *petition for cert. filed*, U.S.L.W. 3587 (U.S. Feb.13, 1997) (No.96-1299) several months after its decision in *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053, 1993-95 CCH OSHD ¶ 30,539 (No. 92-0888, 1994), *rev'd*, 102 F.3d 1200 (11th Cir. 1997). As a result, the issue of whether the penalties sought were punitive was not raised before the Commission in *Jacksonville.* Furthermore, it does not appear from the circuit court's decision that any such argument was made on appeal.

civil penalty can be found to have in fact a punitive character. The Commission gave particular attention to the more recent decision in *United States v. Halper*, 490 U.S. 435 (1989), in which the Court recognized that "a civil sanction may constitute punishment under some circumstances." 490 U.S. at 443. The primary factor to be taken into account under the *Halper* test is whether the sanction is deterrent or retributive in character, rather than remedial. *Id.* at 448. *See also Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("[r]etribution and deterrence are not legitimate nonpunitive governmental objectives"). The Commission concluded that there is a potential for OSH Act penalties to be punitive. 17 BNA OSHC at 1154, 1993-95 CCH OSHD at p. 42,642. The U.S. Court of Appeals for the Seventh Circuit agreed, but decided "that potential has been realized," and set the penalties assessed by the Commission aside. 96 F.3d at 912.

The Commission has always recognized that the overriding goal of any penalty assessment is to achieve the objectives of the OSH Act. In *Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065, 1971-73 CCH OSHD ¶ 15,277, p. 20,370 (No. 881, 1972) the Commission held that no penalty should be assessed if in the circumstances compliance with the Act could be assured without a penalty assessment. In *Trinity Indus.*, 15 BNA OSHC 1481, 1991-93 CCH OSHD ¶ 29,582 (No. 88-2691, 1992), the Commission concluded that an employer who had substantially eliminated a hazard by the time of the inspection and whose failure to entirely correct the condition was the result of difficulties it encountered, rather than lack of diligence, was entitled to substantial credit for good faith "in order to encourage a large employer to protect its employees and to cooperate with the Federal occupational safety and health program, by taking voluntary measures to abate . . . hazards." *Id.* at 1489, 1991-93 CCH OSHD at p. 40,039. The Commission reaffirmed this principle in *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929, 1994 CCH OSHD ¶ 30,516, p. 42,189 (No. 91-0414, 1994), where we stated: "The purpose of a penalty is to achieve a safe workplace, and penalty assessments . . . are keyed to the amount an employer appears

to require before it will comply" (citing *D & S Grading Co. v. Secretary of Labor*, 899 F.2d 1145 (11th Cir. 1990) and *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978)).

There seems to be no question that the ostensibly civil penalties provided for under the OSH Act can become punitive in character when they exceed the amount necessary to effectuate the purposes of the OSH Act. Here, the record establishes that the employer has ceased all operations, and there are no longer any employees for the OSH Act to protect. Following *Healy*, and the cases cited in support of *Healy,* the only purposes that assessment of a penalty against the Niles Company penalty could achieve are retribution against Mr. Niles or the general deterrence of other employers. Since the Commission and the courts have said that either of these purposes must be considered punitive, then the assessment of any penalty against Mr. Niles or the Niles Company would exceed the civil remedial authority of the OSH Act.

In determining whether the exclusionary rule applies in Commission proceedings to improperly obtained evidence, the U.S. Court of Appeals for the Sixth Circuit held that "the exclusionary rule applies where the object is to assess penalties against the employer for past violations of OSHA regulations," but not "for purposes of correcting violations of occupational safety and health standards." *Trinity Industries v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994). *See also Smith Steel Casting v. Brock,* 800 F.2d 1329, 1334 (5th Cir. 1896). As these circuit courts would allow orders of abatement, but not penalties, when evidence is improperly obtained, I think an analogous result is proper here. Though an order of abatement may serve no immediate purpose, the Secretary would have an order on file to enforce should Mr. Niles resume any business in which employees are exposed to the hazards addressed by the standards cited here.[10]

[10]The Secretary could presumably use an order requiring Mr. Niles to abate these violations to support the characterization of any future violations by Mr. Niles as willful or repeated. Section 17(a) of the OSH Act, 29 U.S.C. § 666(a). I would assume that the Secretary could also use such an order to support a citation for failure to abate these violations. Section 17(d) of the OSH Act, 29 U.S.C. § 666(d).

/s/
Velma Montoya
Commissioner

Dated: April 15, 1997