BNA, INC.

# OCCUPATIONAL SAFETY & HEALTH

BNA Employee-Owned Since 1947

VOL. 41, NO. 9 193-197 REPORTER MARCH 3, 2011

ENFORCEMENT

REPEAT CITATIONS

The Occupational Safety and Health Review Commission has enabled the Secretary of Labor to cite employers as ''repeat'' offenders based upon their corporate predecessors' violations of the Occupational Safety and Health Act. The authors of this article analyze the Commission's Nov. 18 decision in *Sharon & Walter Construction Inc.* and reach unsettling conclusions. They say the decision creates obstacles to the sale and purchase of corporate assets, furthers the Secretary's already-aggressive enforcement agenda, and evidences a greater trend toward the increased imposition of shared corporate liability.

## OSHA Blurs Corporate Distinctions to Expand Liability for 'Repeat' Citations

BY BARUCH A. FELLNER AND DANIEL P. RATHBUN

The Secretary of Labor may now cite employers as ''repeat'' offenders based upon their corporate predecessors' violations of the Occupational Safety and Health Act (''OSH Act''); so held the Occupational Safety and Health Review Commission in *Sharon & Walter Construction Inc.*[1] Although presenting this holding as a logical extension of existing doctrine, the Commission has in fact taken a dramatic departure from the policies of the Act and the reasoning of prior holdings. *Sharon & Walter* reflects a continuing shift in favor of the Secretary's aggressive enforcement agenda by expanding ''repeat'' liability, creating unnecessary obstacles to the sale and purchase of corporate assets, and signaling a greater trend toward the increased imposition of shared corporate liability.

[1] *See* No. 00-1402, 2010 WL 4792625, 23 OSHC 1286; decided Nov. 18, 2010).

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*The opinions expressed here do not represent those of BNA, which welcomes other points of view.*

### A. Repeat Citations and the *Sharon & Walter* Decision.

Section 17 of the OSH Act allows the Secretary of Labor to levy heightened penalties against ''any employer'' who ''repeatedly'' violates the Act (compare the $7,000 maximum penalty for a first time violation with the $70,000 maximum penalty for a repeat citation). A ''repeat'' citation is appropriate if ''at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.''[2] The uncontroversial premise of ''re-

[2] *See Potlatch Corp.*, 7 OSHC 1061 (1979).

 ISSN 0095-3237

peat'' citations is that employers have an increased obligation to correct workplace hazards ''once alerted [of their presence] by a citation and final order;'' that employers who ''permit violations of the same standard to occur several times'' are especially culpable and deserving of heightened penalties.[3]

In *Sharon & Walter*, the Commission considered the Secretary's first-ever attempt to cite a company for ''repeat'' violations based upon its (legally distinct) corporate predecessor's ''substantially similar'' violations. The companies in question had both violated 29 C.F.R. § 1926.503(a)(2) by failing to establish a ''training program'' for construction employees who ''might be exposed to fall hazards.'' The predecessor (''S&W I'') committed two violations of this standard before going out of business in 1995.[4] The successor (''S&W II'') sprang up six weeks later when the former ''sole owner and supervisor'' of S&W I bought that company's assets, formed another similar construction company, and became its ''president, sole shareholder, and supervisor.''[5] When S&W II committed another violation of the fall protection regulation in 2001, the Secretary cited it as a ''repeat'' violator, finding that S&W I and S&W II were the same ''employer.''[6] The Commission held that this characterization could stand in ''appropriate circumstances.''[7]

**Defining 'Appropriate Circumstances.'** The Commission defined these ''appropriate circumstances'' by loosely appropriating the National Labor Relations Board's test for determining when an employer must bargain with the union chosen by his corporate predecessor's employees.[8] To justify the novel application of this test in Section 17 contexts, the Commission noted that courts and administrative tribunals had already used it to effectuate the purposes of *other* labor statutes—including Title VII of the Civil Rights Act, the Mine Safety and Health Act, and the Family and Medical Leave Act—and, in one instance, to enforce the whistleblower provision of the OSH Act (Section 11(c)).[9] The Commission ostensibly relied upon the version of this test that the Supreme Court approved of in *Fall River Dyeing & Finishing Corp. v. NLRB* (482 U.S. 27 (1987)). And it articulated the *Fall River* test as focusing on the question of ''substantial continuity'' from three perspectives: continuity in ''the nature of the business,'' continuity in ''jobs and working conditions,'' and continuity in ''the personnel who specifically control decisions related to safety and health.''[10]

**Commission Finds 'Substantial Continuity.'** Applying this test to the facts of *Sharon and Walter*, the Commission easily found ''substantial continuity'' and upheld the Secretary's ''repeat'' citation against S&W II. With respect to the ''nature of the business,'' the Commission determined that S&W I and S&W II were ''essentially the same'' because both companies performed ''the same type of work,'' served customers in the same geographic area, and used the same office space, among other things.[11] With respect to ''jobs and working conditions,'' the Commission found it ''most noteworthy'' that ''employees in both entities performed roofing work and faced the same attendant fall hazards.''[12] *Id.* With respect to personnel, the Commission found it important that the same person had ''control over decision-making in both companies, including that related to employee safety and health.''[13]

The Commission also considered two factors from *MacMillan*, an influential Sixth Circuit case that applied the NLRB's concept of successor liability in the context of Title VII: (a) whether the employer had notice of the claim against its predecessor, and (b) whether the predecessor could provide relief.[14] Without clarifying the significance of notice (it treated the issue in a single footnote), the Commission found that S&W II had notice of S&W I's violations because ''both entities had the same president.''[15] The Commission found that S&W I's ability to provide relief was irrelevant because ''the cited violation was committed by the successor, not the predecessor.''[16]

## B. 'Substantial Continuity' Test Departs From Purpose of Section 17, Misapplies Case Law on Successor Liability

As articulated by the Commission in *Sharon & Walter*, the ''substantial continuity'' test represents a departure from the purposes of Section 17 and a misapplication of the existing case law. The ''alter ego'' doctrine provides a fairer, better-tailored means of extending ''repeat'' liability to appropriate successor employers.

First, the ''substantial continuity'' test is poorly suited to further the purpose of Section 17 because it deemphasizes the importance of notice and does not ensure that repeat citations are correctly imposed. As noted above, the theory of ''repeat'' citations is that employers who knowingly ''permit violations of the same standard to occur several times'' are especially culpable.[17] ''Repeat'' violators deserve higher penalties because their prior knowledge of a similar violation requiring similar abatement actions reflects a higher level of misconduct. But by the same token, a successor that is genuinely unaware of its predecessor's relevant prior violations is hardly automatically culpable such that the

[3] *See Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333 (10th Cir. 1982).
[4] *See Sharon & Walter*, at *11 n.18.
[5] *Id.* at *1-2, 10.
[6] *Id.* at *8.
[7] *Id.*
[8] *Id.* at *9.
[9] *Id.*
[10] *See Sharon & Walter*, at *10.
[11] *Id.*
[12] The Secretary had inspected S&W II because an employee fell from a roof.
[13] Although noting that the NLRB's test typically considers ''whether the same supervisors oversee the same employees,'' the Commission declined to consider this issue because ''workplace hazards depend more on the nature of the work, equipment, and safety-related decisions . . . than on how workers are paired with [supervisors].'' *Id.* at *11. Contrary to the Commission, we believe the pairing of individual workers and supervisors has a potentially large impact on employees' exposure to hazards, since such pairings will affect the adequacy of supervision and the likelihood of employee misconduct, among other things. *Id.*
[14] *Id.* at *11 n.16.
[15] *Id.*
[16] *Id.*
[17] *See Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333 (10th Cir. 1982).

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added penalty of a ''repeat'' citation is necessary or appropriate.[18] By focusing on ''continuity'' rather than notice (recall that the Commission only dealt with notice in a single footnote), *Sharon & Walter*'s holding indicts successor employers who did not know and could not correct the misconduct of predecessor employers.[19]

**Constitutional Questions.** This raises fundamental constitutional questions since ''a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential due process of law.''[20] And without regard to whether a successor has notice, the ''substantial continuity'' test does not ensure that the appropriate party is penalized. If a successor is able to deduct the risk of a ''repeat'' penalty from its predecessor's sale price or to receive indemnification for that risk, then the predecessor is unfairly over-penalized for a single violation and the successor can sidestep a penalty that he rightfully deserves.

The Commission's use of ''substantial continuity'' to police ''repeat'' liability is also inappropriate because the cases that the Commission relies upon to establish this test are concerned, not with the issue of employer culpability, but with the preservation of basic employee rights. In *Fall River*, for example, the successor employer refused to bargain with the union chosen by his predecessor's employees despite continuing to employ a majority of those employees and having clear notice of the union's majority support.[21] The NLRB required the successor to bargain with the union because doing so was necessary to prevent him from using reincorporation to nullify his employees' right to organize.[22] Similarly, in *H.M.S. Direct Mail Service*, the successor employer refused to provide restitution to an employee that his predecessor had discharged in violation of Section 11(c) of the OSH Act.[23] The Court required the successor to provide restitution because doing so was necessary to prevent him from decoupling a right from its remedy.[24] The other cases that the Commission relies upon are thematically analogous to *Fall River* and *H.M.S. Direct Mail Service*.[25]

**An Issue of Notice, Not Employee Rights.** It made sense to inquire about ''substantial continuity'' in the above cases because, from an employee-rights perspective, continuity in the nature and conditions of work affects whether an employee can reasonably expect continuity in the nature and enforcement of his or her rights.[26] Most importantly, continuity of the very issues at stake—making an employee whole for discriminatory conduct, and the effectuation of bargaining rights—bridged the gap between predecessor and successor employers. But there is absolutely no question about the continuity of employee rights in a Section 17 case like *Sharon & Walter*. Instead, since the successor already has a baseline obligation to protect employees from the hazards at issue, the only question is whether the successor employer is extra culpable and deserves higher-than-usual penalties. This question cannot be approached from an employee-rights perspective because the OSH Act does not give employees a *right* to the application of ''repeat'' (as opposed to ''serious'' or ''non-serious'') penalties. The appropriate inquiry should focus on notice, not rights, and the OSH Act's general purpose of ''assur[ing] . . . safe and healthful working conditions'' is inapposite because, by the Commission's acknowledgement, the ''substantial continuity'' test ''require[s] an analysis based on 'the facts of each case and the *particular legal obligation* which is at issue.' ''[27] (italics added)

Without regard to the appropriateness of its application, moreover, the Commission's ''substantial continuity'' test represents a fundamentally inaccurate interpretation of the case law on successor liability. While *Fall River* focused on ''substantial continuity,''[28], courts typically consider a ''multiplicity of factors'' in determining whether to hold an employer liable for its predecessor's actions.[29] Although ''substantial continuity'' is often recognized as the most important of these factors[30], no single factor or group of factors is determinative[31] Instead, these factors are meant to assist the court in deciding whether it would be ''equitable'' to impose successor liability considering: ''1) the defendant's in-

[18] Indeed, federal OSHA's general policy of applying repeat citations on a ''nationwide'' scale is suspect from a perspective of notice and fairness—imagine, for example, a construction employer who faces ''repeat'' penalties for a leaky forklift at a facility in New York because of a prior violation concerning a leaky forklift at a facility in Idaho. *See* OSHA Field Operations Manual, § 6-16. California's state plan uses a much fairer and more notice-oriented policy for the application of ''repeat'' citations. Under Section 334 of the California Code of Regulations, an employer with ''fixed establishments (e.g. factories, terminals, [and] stores)'' can only receive ''repeat'' citations for violations occurring at the same ''fixed establishment.'' *See* 8 C.C.R. § 334(d)(1).

[19] Corporate continuity does not necessarily track notice. Among other things, it may reflect legal imperatives or incidental overlaps in the two companies' structures and policies.

[20] *See Connally v. Gen'l Constr. Co*., 269 U.S. 385, 391 (1926).

[21] *See Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 33-34.

[22] *Id.* at 39-41.

[23] *See Dole v. H.M.S. Direct Mail Service Inc.*, 752 F. Supp. 573, (W.D.N.Y. 1990).

[24] *Id.* at 580-81.

[25] *See Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006)(requiring a successor to recognize employees' entitlement to FMLA sick leave accumulated under its predecessor); *Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974)(requiring a successor to remedy his predecessor's actions in discriminating against an employee in violation of Title VII); *Prince v. Kids Ark Learning Center, LLC*, 622 F.3d 992 (8th Cir. 2010)(same); *Terco, Inc. v Federal Coal Mine Safety and Health Review Commission*, 838 F.2d 236 (6th Cir. 1987)(requiring a successor to remedy his predecessor's actions in discharging employees in violation of the Mine Safety and Health Act).

[26] *See Fall River*, at 43-44.

[27] *See Sharon & Walter* at *9 (quoting *Howard Johnson Co., Inc. v. Detroit Local Joint Bd. Hotel and Rest. Employees*, 417 U.S. 249, 263 n.9 (1974)).

[28] *See Fall River*, at 43

[29] *See MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

[30] *Id.* at 1089.

[31] *Id.*; *see also Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 551-52 (6th Cir. 2006).

terest, 2) the plaintiff's interest, and 3) federal policy embodied in the relevant statutes.''[32]

**Not a Stand-Alone Test.** By ignoring this nuance and applying ''substantial continuity'' as a stand-alone test, *Sharon and Walter* avoids a fuller (and fairer) consideration of the relevant equitable concerns. In Section 17 cases, the ''plaintiff's interest'' (i.e., the Secretary's interest) is aligned with the purpose of the statutory provision: to identify particularly culpable employers and apply an extra measure of deterrence.[33] The employer's competing interest, which the Commission has neglected to balance in any ostensible way, is to engage in corporate transactions without artificial government intrusion, maintain flexibility in the way that it operates a predecessor's assets, and avoid being subjected to increased penalties without notice.

The Commission's strained application of successorship doctrine is an especially difficult fit since, as Commissioner Thompson noted, the ''alter ego'' doctrine provides a much better means of defining the circumstances when successor employers are deserving of ''repeat'' citations.[34] Under prevailing case law, two corporations are liable as ''alter egos'' when they function as ''mere business conduits'' for a single ''controlling entity.''[35] Like piercing the corporate veil, ''alter ego'' doctrine is meant ''to prevent the corporate structure from being used to disguise fraud or illegality or to otherwise create an injustice.''[36] Unlike the ''substantial continuity'' test, ''alter ego'' doctrine focuses on the narrow, deterrence-based purpose of Section 17 while recognizing that some employers have a legitimate interest in ''continuity'' and that, in the absence of a compelling reason, ''the corporate form . . . is not lightly disregarded.''[37]

The ''alter ego'' doctrine was well-suited to *Sharon & Walter* because the Commission was openly motivated to penalize the cited employers' ''controlling entity.'' If the employers' president-in-common could avoid ''repeat'' citations, the Commission reasoned, then he could take an ''almost free bite'' by virtue of reincorporation.[38] In the language of the case law, the Commission felt that allowing S&W II to start with a clean slate would have ''create[d] an injustice'' by ignoring that company's notice and culpability for S&W I's prior violations.[39] Given such a close fit between the interests of the Commission and the purposes of the ''alter ego'' doctrine, the Commission's application of much-farther-afield ''substantial continuity'' concepts was a violation of the black letter principle that adjudicatory bodies should rule as narrowly as possible on the legal issues in front of them and avoid opining on matters they ''need not have reached.''[40] The Commission's overreaching has some troubling implications, as we discuss below.

## C. 'Substantial Liability' Test Has Immediate Implications for Asset Transfers, Suggests Trend Toward Expansion of 'Repeat' Liability.

It is difficult to predict the full impact of the Commission's new ''substantial continuity'' test because its immediate application to the facts of *Sharon & Walter* is relatively uncontroversial. However, the test has immediate negative implications for the transfer of corporate assets and likely signals a sustained trend toward the increased imposition of shared corporate liability.

On the facts of *Sharon & Walter*, there is no question that the successor had notice and culpability such that a ''repeat'' citation was appropriate—as Judge Schoenfeld noted, S&W II used S&W I's office space, tools, and checks (among other things) and completed its already-begun contracts; their shared president treated them ''as interchangeable.''[41] The ''alter ego'' doctrine would have yielded the same result, and it is possible (although not probable) that the Commission did not intend for the ''substantial continuity'' test to apply very broadly. Indeed, the Commission has used ''alter ego'' doctrine to allocate corporate responsibility in the past.[42] And in *Loretto-Oswego Residential Health Care Facility*, decided after *Sharon & Walter*, the Commission used a veil-piercing analysis to find that three affiliated health-care entities were *not* a single employer for ''repeat'' citation purposes.[43] Although these entities had the same president, CEO, and CFO, the Commission rejected the Secretary's ''same employer'' characterization because there was ''little or no interaction among the affiliates'' and they did not ''handle safety matters as one company.''[44] This decision shows that the Commission will not apply ''substantial continuity'' in all shared liability contexts and that there is some outside boundary on the Secretary's ability to premise ''repeat'' citations upon the actions of a company's predecessors or affiliates.

**Negative Implications for Transactions.** Yet, the mere announcement that ''substantial continuity'' makes successors liable for repeat violations has immediate, negative implications for corporate transactions such as asset or stock sales. Potential successors, eager to avoid hefty ''repeat'' citations, will conduct more thorough diligence to catalogue past violations and will attempt to pass the risk of future violations to their predecessors in the form of price reductions. This trend will be particularly widespread since, under existing case law, it is not entirely clear that an employer needs to acquire *all* of his predecessor's assets in order to face successor li-

[32] *See Cobb*, at 552; *MacMillan*, at 1089-91.

[33] To the extent that the Secretary's expansion of ''repeat'' liability is premised on a desire to affirmatively *punish* employers, as opposed to merely ensuring the abatement of workplace hazards, she is working at cross-purposes with the Act. *See F.A. Gray, Inc.*, 12 OSHR 1311, 1985 WL 44840, at *2 (OSHRC) (''Because the purpose of the Act is not to punish infractions, but to prevent safety and health hazards in the workplace, unpreventable infractions of safety regulations by employees are not violations of the Act by an employer.'').

[34] *See Sharon & Walter*, at *11 n. 19.

[35] *See Eric K. Ho*, 20 OSHC 1361, 2003 WL 22232014 at *7 (OSHRC).

[36] *Id.* at *9; *see also Sharon & Walter*, at *11 n.19.

[37] *See Eric K. Ho*, at *7.

[38] *See Sharon & Walter*, at *8.

[39] *See Eric K. Ho*, at *9.

[40] *See, e.g., Ferron v. Echostar Satellite, LLC*, 2010 WL 5395716 (6th Cir. 2010) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)).

[41] *See Sharon & Walter*, 2001 WL 36283883, at *10 (OSHRC ALJ).

[42] *See Eric K. Ho*, 20 BNA OSHC 1361, 2003 WL 22232014 at *7 (OSHRC).

[43] *See Loretto-Oswego Residential Health Care Facility*, 2011 WL 95330 (OSHRC Jan. 7, 2011).

[44] *Id.* at *2-3.

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ability.[45] Since ''substantial continuity'' is a vague touchstone for liability, the lessons of due diligence and the appropriate price deduction for prior violations (if any) may become a sticking point in negotiations. To the extent that the successor can shift the cost of repeat liability to its predecessor, the purposes of Section 17 are defeated and the wrong party is penalized, as mentioned above. To the extent that the successor *cannot* pass the cost of repeat liability, *Sharon & Walter* will yield other perverse results. The successor will be overincentivized to take costly and unnecessary precautions since notice is not required for liability. And since the case law gives successor employers the prerogative to *avoid* continuity-based liability by distinguishing their own businesses from their predecessors', the successor may structure his company in a way that makes bad business sense.[46] The Commission's imposition of these new burdens is ill-advised since they do not advance the purposes of the Act and since, in the present-day economic slowdown, they jeopardize job growth—especially where small businesses are involved.

**Trend Toward Shared Liability.** Further, *Sharon & Walter* may be part of a broader trend toward the increased imposition of shared corporate liability for safety and health violations. The Commission recently expanded the circumstances when OSHA may cite multiple employers for a single hazardous condition at a shared worksite in *Summit Contractors*.[47] As Commission Chair Thomasina Rogers confirmed in a recent interview with BNA's *Occupational Safety and Health Reporter*, decisions like these show a deliberate expansive intent. ''Piercing the veil is going to be the theme for this year,'' and *Sharon & Walter* was the first in a line of expected decisions under the ''corporate veil umbrella.'' (40 OSHR 1032, 12/16/10)

The Commission's apparent anti-employer agenda dovetails with that of the most enforcement-minded prosecutor in OSHA's history. Notwithstanding the possible dampening effect of *Loretto-Oswego*, the Secretary will interpret *Sharon & Walter* as a green light for creating new ways to expand ''repeat'' liability since she is avowedly committed to ''regulation by shaming.''[48] Since the Secretary's test for the application of ''willful'' penalties is similar to her test for the application of ''repeat'' penalties, moreover, the expansion of ''repeat'' liability could easily result in an expansion of ''willful'' liability.[49] The prospect of the Secretary and Commission sharing a unified agenda is a sobering one for employers: the ''neutral arbiter'' of the Secretary's aggressive enforcement agenda is becoming more and more of a rubber stamp.[50] Those who challenge the Secretary's citations will undoubtedly face increasingly protracted court battles dependent upon appellate review.

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[45] *See Cobb*, at 550.

[46] *See Fall River*, at 40-41.

[47] *See* Fellner and Rathbun, ''Multi-Employer Policy Raises Questions About Scope of Employers' Liability,'' 40 OSHR 859, 10/14/10.

[48] *See* David Michaels, ''OSHA at Forty: New Challenges and New Directions'' (July 19, 2010); 40 OSHR 675, 8/12/10.

[49] A willful violation is one committed ''with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *See Spirit Homes, Inc.*, 20 OSHC 1629. Like ''repeat'' violations, ''willful'' violations carry a maximum penalty of $70,000. *See* Occupational Safety and Health Act, § 17(a).

[50] *See Cuyahoga Valley Railway Co. v. United Transportation Union*, 474 US 3, 7 (1985).