

ORAL ARGUMENT REQUESTED

Nos. 19-9533 & 19-9578 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECRETARY OF LABOR,	:	WYNNEWOOD REFINING CO., LLC,
	:	
CROSS-PETITIONER/RESPONDENT,	:	PETITIONER/CROSS-RESPONDENT,
	:	
v.	:	v.
	:	
WYNNEWOOD REFINING CO., LLC,	:	SECRETARY OF LABOR,
	:	
PETITIONER/CROSS-RESPONDENT,	:	CROSS-PETITIONER/RESPONDENT,
	:	
and	:	and
	:	
OCCUPATIONAL SAFETY AND	:	OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION,	:	HEALTH REVIEW COMMISSION,
	:	
RESPONDENT.	:	RESPONDENT.

ON PETITIONS FOR REVIEW OF A FINAL ORDER OF THE OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION, OSHRC NOS. 13-0791 and 13-
0644

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GLOSSARY

CVR	CVR Energy, Inc.
OSH Act	Occupational Safety and Health Act
Wynnewood Company	Wynnewood Refining Company
Wynnewood LLC	Wynnewood Refining Company, LLC

INTRODUCTION

In his opening brief, the Secretary of Labor showed that the Occupational Safety and Health Review Commission (Commission) misinterpreted the substantial continuity test for determining successor liability in two respects. First, it erroneously determined that if there is a lack of substantial continuity with regard to any individual factor—here, continuity of personnel—the employer cannot be deemed a successor employer. Second, in determining that there was a lack of substantial continuity of personnel, the Commission relied on irrelevant factors.

In response, Wynnewood Refining Co., LLC (Wynnewood LLC) argues: (1) substantial evidence supports the Commission’s application of the substantial continuity test; (2) the test for successor liability under the Occupational Safety and Health Act (OSH Act) is limited to preventing manipulation to evade a repeat characterization; (3) there was insufficient continuity of personnel because there was only an overlap of low-level supervisors. None of Wynnewood LLC’s arguments has merit.

I. Wynnewood LLC’s Substantial Evidence Argument Ignores the Secretary’s Claims of Legal Error and Rests on an Improper Revision of the Substantial Continuity Test and the Commission Decision.

The Secretary showed that the Commission committed legal error in determining that, if the personnel factor did not weigh in favor of a successorship finding, Wynnewood LLC could not be found to be a successor to Wynnewood Refining Company (Wynnewood Co.). Response and Opening Brief for the Secretary of Labor (Op. Br.) 58-63. In response, Wynnewood LLC claims that (1) this case involves only a review of the Commission’s factual findings; (2) the Commission correctly determined that continuity of safety personnel “is the most important factor in every . . . case” involving successor liability; and (3) there was “insufficient continuity of safety personnel and working conditions” to support a successorship finding. Response and Reply Brief for Wynnewood Refining Company LLC (Wynnewood Br.) 13-20. None of these arguments has merit.

As support for its claim that this case involves only a review of the Commission’s factual findings, Wynnewood LLC cites case law noting that the successorship inquiry is “primarily factual” and asserts that the parties “do not dispute that OSHRC used the correct legal test for

successorship.” Wynnewood Br. 13. But an inquiry that is “primarily factual” still must adhere to the applicable legal test for conducting that inquiry. *See Mountain Side Mobile Estates Partnership v. Secretary of Housing & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995) (court reviews de novo questions of law such as the “failure to apply the correct legal standard or to provide . . . a sufficient basis to determine that appropriate legal principles have been followed”); *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 93 (3d Cir. 2011) (court has “plenary review over the District Court’s choice and interpretation of legal precepts” used in determining successor liability) (internal quotation marks omitted); *see also Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1206-08 (D.C. Cir. 2018) (court reviews de novo agency’s construction of common law test for joint employer).

Moreover, the Secretary does not agree the Commission applied the correct legal test. Instead, the Secretary has argued that the Commission improperly modified the substantial continuity test by requiring every relevant factor to support a finding of successorship. Op. Br. 58-62. Similarly, the determination of what facts are relevant to a particular factor is a legal rather than a factual determination, and

therefore considering irrelevant factors to support a finding is legal error. *See Browning-Ferris Indus.*, 911 F.3d at 1219-21 (Board's consideration of matters not relevant to common law test required remand); *Gonzales v. Police Dep't, City of San Jose, Cal.*, 901 F.2d 758, 761-62 (9th Cir. 1990) (reliance on irrelevant evidence is legal error). As a result, Wynnewood LLC's claim that the dispute between the parties is factual rather than legal fails.

Wynnewood LLC's claim that the Commission determined that continuity of safety personnel "is the most important factor" under the substantial continuity test is also misguided. This claim rests on the Commission's statement that "the Commission recognized in *Sharon & Walter [Construction, Inc.]*, 23 BNA OSHC 1286 (No. 00-1402, 2010) the particular importance of continuity of personnel, stating that the same 'control over decision-making in both companies . . . weighs heavily in favor of'" a finding the new entity to be a successor to the prior entity. Comm'n Dec 13; Wynnewood Br. 17-18. But the evidence in *Sharon & Walter* on continuity of safety personnel was one-sided; continuity was complete rather than merely substantial. 23 BNA OSHC at 1295-96. As a result, that the evidence on continuity of personnel in that case

weighed heavily in favor of successorship cannot reasonably be understood as opining on the relative weight of that factor compared to the other factors.¹

In any event, even if the Commission established a hierarchy among factors, it still impermissibly modified the substantial continuity test. As the Secretary has explained, the substantial continuity test requires the factfinder to consider all the relevant factors against each other (when they do not all point in the same direction) to determine whether the new entity is continuing, without substantial change, the

¹ Indeed, in discussing why it was adopting the three factors it did as the guideposts to the successorship inquiry, the Commission noted that the category of the nature of the business was an “appropriate” one, the category of jobs and working conditions was “*especially* relevant under the [OSH] Act,” and that continuity of personnel was “certainly relevant.” 23 BNA OSHC at 1295 (emphasis added). To the extent that the *Sharon & Walter* decision reflects a hierarchy among the three factors, it establishes that the category of jobs and working conditions is the most important factor. Here, the Commission found that the jobs and working conditions were the “same” for Wynnewood Co. and Wynnewood LLC. Comm’n Dec. 13.

Moreover, in adopting these factors, the Commission noted the substantial continuity test enabled it “to fully assess the nature and extent of the distinctions and similarities between a successor and predecessor.” *Sharon & Walter Constr.*, 23 BNA OSHC at 1294; *see also id.* at 1296 (concluding that employer was a successor considering the “totality of the circumstances”). A fair reading of *Sharon & Walter* does not support the claim that it determined that continuity of safety personnel was the most important factor.

predecessor's business operations. Op. Br. 58-63. The Secretary advocated for this test in the proceedings below, and on discretionary review argued that the ALJ erred in giving dispositive weight to the continuity of personnel factor. Brief for the Secretary of Labor 35-44, Record on Appeal Volume (ROA Vol.) 20. The Commission erred in rejecting, without explanation, the Secretary's view that all three factors must be weighed against each other rather than considered in isolation. *See Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 74-75 (2d Cir. 2012) (noting Secretary's primary role for developing single employer test and that he can use litigation before the Commission to implement that role).

The Commission, moreover, did not even acknowledge that it was deviating from the Secretary's test or explain why that test was inappropriate under the OSH Act. Instead, it simply required the Secretary to show substantial continuity with regard to each of the three factors it deemed relevant to whether Wynnewood LLC was a successor to Wynnewood Co. Comm'n Dec. 13-15. That approach, however, does not reflect the proper application of the relevant factors, and therefore does not support the Commission's conclusion that

Wynnewood LLC was not a successor.² *See Mountain Side Mobile Estates Partnership*, 56 F.3d at 1250; *Einhorn*, 632 F.3d at 93-100; *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 294 (9th Cir. 1987)(absence of one factor is not fatal to claim of successorship); *NLRB v. Ideal Laundry Corp.*, 422 F.2d 801, 802-03 (10th Cir. 1970) (upholding successor finding even though there was a change in ownership, a “complete change in the officers of the corporation, and substantial changes in the supervisory group,” and changes in twenty-five to forty percent of the equipment).

In an attempt to bolster the Commission’s conclusion, Wynnewood LLC claims that the change in ownership brought about changes in the jobs and working conditions in the plant, in addition to changes in safety personnel. Wynnewood Br. 16-20. The Commission (and ALJ), however, expressly found that the working conditions were the “same” for both Wynnewood LLC and Wynnewood Co. Comm’n Dec. 13.

² To be clear, the Secretary is not arguing that the evidence on one factor can never outweigh the evidence on the other two factors. Instead, he is arguing that in determining whether the employer is continuing without substantial change the predecessor’s business operations, the Commission must evaluate all of the evidence and explain why evidence in favor of one factor outweighs evidence pointing in the opposite direction.

Wynnewood LLC does not attempt to show that this finding is not supported by substantial evidence. Nor does Wynnewood LLC argue that the Commission erred in considering CVR Energy, Inc.'s capital investment in new equipment and alleged new commitment to safety under the safety personnel factor rather than the working conditions factor. Accordingly, Wynnewood LLC fails to support its claim that the role played by the new corporate parent resulted in any substantial change in the refinery's business operations.³ Op. Br. 63-72.

³ To the extent the Court agrees with Wynnewood LLC's implicit argument that the Commission should have considered the capital investment and changed safety culture under the jobs and working conditions factor, at a minimum a remand would be required. Wynnewood LLC does not explain why this evidence outweighs the other evidence leading the Commission (and ALJ) to conclude that the jobs and working conditions were the "same" for both Wynnewood Co. and Wynnewood LLC. Nor does it explain why this evidence can be doubly counted, for both the working conditions and personnel factors. Removing this evidence from consideration under the personnel factor would necessarily change the weight of the evidence the Commission relied on to find that the personnel factor did not favor a successorship finding. For the reasons stated in the Secretary's Opening Brief, the Secretary believes that the record compels a conclusion that Wynnewood LLC is a successor regardless of which factor is the most appropriate for consideration of the evidence on the capital investment and changed safety culture. *See* Op. Br. 58-71; *see also Ideal Laundry Corp.*, 422 F.2d at 802-03.

II. Successor Liability Under the OSH Act Is Not Limited to Preventing Manipulation to Avoid a Repeat Characterization.

Wynnewood LLC claims that successor liability under the OSH Act is limited to preventing an employer from manipulating its legal identity to avoid a repeat characterization. Wynnewood Br. 20-22. Wynnewood LLC is mistaken.

Wynnewood LLC gleans this limitation on successor liability from three aspects of the Commission's decision in *Sharon & Walter*. First, in *Sharon & Walter* the predecessor was a sole proprietor and the successor was a corporation wholly owned by the sole proprietor who was also its sole officer, and the successor continued to provide essentially the same construction services as had the predecessor. Wynnewood Br. 20 (citing *Sharon & Walter*, 23 BNA OSHC at 1288, 1295). Second, the Commission noted the potential for an employer to manipulate its legal identity for the purpose of avoiding a repeat characterization if the successorship doctrine were not applicable to the OSH Act. Wynnewood Br. 21 (citing *Sharon & Walter*, 23 BNA OSHC at 1293). And third, the Commission noted that successor liability was

limited to “appropriate circumstances.”⁴ Wynnewood Br. 20-21 (citing *Sharon & Walter*, 23 BNA OSHC at 1293).

These aspects of the *Sharon & Walter* decision do not support limiting successor liability solely to employers who manipulate their legal identity to avoid a repeat characterization. Contrary to Wynnewood LLC’s argument (Wynnewood Br. 20-21), the Commission in *Sharon & Walter* did not approve of successor liability under the OSH Act because of the “unique” facts before it. It adopted successor liability because the term “employer” in the OSH Act is most reasonably interpreted as including successors. *Sharon & Walter Constr.*, 23 BNA OSHC at 1292-94. And it adopted the substantial continuity test, as the Secretary argued it should, because the test allows the Commission “to fully assess the nature and extent of the distinctions and similarities between a successor and predecessor.” *Id.* at 1294. Neither the broad definition of employer nor the factors *Sharon & Walter* articulated for

⁴ Wynnewood LLC also relies on three cases subsequent to *Sharon & Walter* that it claims involved alter ego situations. Wynnewood Br. 23-24. But nothing in these cases limits the successorship doctrine to alter-ego type situations. And contrary to Wynnewood LLC’s assertion, Wynnewood Br. 21, it was the ALJ in this case and not the Commission in *Sharon & Walter* that characterized the potential for manipulation of legal identities as a “primary concern.” ALJ Dec. 43.

the substantial continuity test depends on a showing of manipulative intent by the employer. *Id.* at 1292-94.

Similarly, the Commission's reference to the potential for manipulation without the availability of successor liability does not support limiting successor liability to employers who manipulate their legal identity to avoid a repeat characterization. To be sure, the prevention of similar manipulation is also one of the reasons courts have adopted a totality of the circumstances test to construe other statutes as encompassing successor employers. *See Indiana Elec. Workers Pension Benefit Fund v. ManWeb Servs., Inc.*, 884 F.3d 770, 776 (7th Cir. 2018) ("Successor liability extends throughout federal employment law to protect federal statutory policies from corporate artifice"). Nonetheless, courts recognize that the test does not distinguish between entities that continue the business operations of their predecessors for legitimate reasons from those who seek to manipulate their legal identity. *E.g., Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170-87 (1973) (upholding successor liability on purchaser unconnected to seller); *see also Stardyne, Inc. v. NLRB*, 41

F.3d 141, 146-52 (3d Cir. 1994) (upholding test for alter ego liability that did not require proof of an intent to evade the law).

Accordingly, the “appropriate circumstances” for attributing a predecessor’s citation history to a successor is when the totality of the circumstances show that the successor “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); *Sharon & Walter*, 23 BNA at 1294, 1296 (citing *Fall River Dyeing & Finishing Corp.*). The Commission provided no legal basis for rejecting the Secretary’s view that the test is not limited solely to preventing manipulation of legal identities for evasive purposes. *Supra* pp. 5-6; Brief for the Secretary of Labor 42-43, ROA Vol. 20. Wynnewood LLC’s suggestion that the Commission limited the test to preventing manipulation therefore further supports the Secretary’s argument that the Commission misapplied the test as a matter of law.

III. Wynnewood LLC Mischaracterizes the Evidence and the Secretary's Argument on the Continuity of Personnel Responsible for Safety at the Wynnewood Refinery.

The Secretary showed that the Commission committed two additional errors in applying the personnel factor of the substantial continuity test: First, it improperly considered two CVR executives to be personnel of Wynnewood LLC. Op. Br. 67. Second, it failed to recognize that, even if these two executives were properly viewed as Wynnewood LLC personnel, there nevertheless was a substantial continuity of safety personnel because four refinery supervisors and several zone 2 supervisors who continued with Wynnewood LLC made the relevant safety decisions on a day-to-day basis at the refinery. Op. Br. 67-71. Wynnewood LLC counters with assertions that the Secretary argues that “it is inappropriate to consider at all the changes in management at the corporate parent” and relies on the continuity of “low-level supervisors.” Wynnewood Br. 19.

The Secretary never argued that no consideration can be given to changes in management at the corporate parent. Op. Br. 58-72. He only argued that such changes are not properly considered in determining the continuity of safety personnel between Wynnewood Co.

and Wynnewood LLC, and that, even if they were, there was still sufficient continuity of safety personnel to support a finding of successorship. Op. Br. 67-71.

As for Wynnewood LLC's "low-level supervisors" argument, the Secretary relied on the continuity of the two relevant entities' Vice President, Operations Manager, Safety Manager, and PSM Coordinator (in addition to the several overlapping zone 2 supervisors). Op. Br. 63-69. Wynnewood LLC does not explain why it considers these four supervisors to be "low-level supervisors." In any event, the Secretary's showing of substantial, even though not complete, continuity of safety personnel has not been rebutted by the label Wynnewood LLC attaches to those refinery-wide supervisors who continued with the new owner or by Wynnewood LLC's reliance on the role of the CVR executives.

Compare Op. Br. 63-69 *with* Wynnewood Br. 16-20.

IV. Wynnewood LLC's Other Arguments Are Irrelevant and Without Merit.

Wynnewood LLC also argues that it cannot be found to be the same employer as Wynnewood Co. under an alter ego theory.

Wynnewood Br. 22-24. But the Secretary has never suggested that

Wynnewood LLC is liable as an alter ego of Wynnewood Co., so this argument is irrelevant.

Wynnewood LLC also claims that finding it a successor would discourage mobility of capital “contrary to the U.S. economic interest in encouraging transactions like CVR’s acquisition.” Wynnewood Br. 24-26. As support for this argument, Wynnewood LLC relies principally on Supreme Court cases holding that a purchaser of a business was not bound by the terms of the seller’s collective bargaining agreement. Wynnewood Br. 24-25 (relying on *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972) and *Howard Johnson Co. v. Detroit Local Joint Exec. Bd*, 417 U.S. 249 (1974)). It also relies on Chairman MacDougall’s restatement of the general rule for a purchasing company’s liability for the seller’s obligations.⁵ Wynnewood Br. 25. Wynnewood LLC claims that the no-successor-liability principle of these cases is applicable because there was no “evidence that the possibility of

⁵ Wynnewood LLC attributes the restatement of the general rule to the full Commission, but the decision identifies only Chairman MacDougall as relying on the quoted general rule. Comm’n Dec. 15 n.14. In any event, reliance on the general rule is misplaced for the reasons stated below.

repeat liability was contemplated as part of the price of [CVR's] acquisition.”⁶ Wynnewood Br. 25. Wynnewood LLC's argument is unfounded.

There is no basis for Wynnewood LLC's attempt to equate the ramifications of a holding that a successor is bound by the terms of a predecessor's collective bargaining agreement with a holding that a successor is chargeable with a repeat citation based on the predecessor's citation history. The former implicates voluntary restrictions the predecessor contractually imposed on itself affecting a wide range of activities a successor might believe need to be changed to successfully operate the business. *E.g., NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-88 (1972) (noting potential successor's desire to “make changes in corporate structure, composition of the labor force, work location,

⁶ As Wynnewood LLC's phrasing suggests, there is also no evidence that this possibility was *not* contemplated as part of the price of CVR's acquisition. *See* Exhibit C-16 at 55, ROA Vol. 2 (CVR annual report noting it “may not have identified all risks associated with the Wynnewood acquisition” and its indemnification rights may not fully protect it). But the more important point is that there is no legal basis for requiring evidence on this matter to resolve the successorship inquiry.

task assignment, and nature of supervision”).⁷ The latter affects only a potentially higher penalty for the successor’s subsequent failure to obey the law. *Sharon & Walter*, 23 BNA OSHC at 1296 n.16.

Wynnewood LLC also relies upon Commissioner MacDougall’s quotation from *Golden State Bottling Co.*, 414 U.S. at 182 n.5, as to a successor’s limited liability under corporate law.⁸ But Wynnewood LLC takes the general rule quotation out of context. In the next three sentences of the quoted footnote, the Court makes clear that the limitations imposed by corporate law have not been carried forward in the labor law doctrine of successorship:

⁷ See also *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 255, 261, 262-63 n.9 (1974) (citing this portion of *Burns* and noting that the Court was not determining whether purported successor was a successor for other purposes).

⁸ The part of the sentence quoted by the Chairman MacDougall and Wynnewood LLC states:

[T]he general rule of corporate liability is that, when a corporation sells all of its assets to another, the latter is not responsible for the seller’s debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability.

The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined [by the general rule of corporate liability]. Successorship has been found where the new employer purchases a part or all of the assets of the predecessor, and where the entire business is purchased by the new employer. The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the employing industry, the public policies underlying the doctrine will be served by its broad application.

Golden State Bottling Co., 414 U.S. at 182 n.5 (citations, alteration, and internal quotation marks omitted). As this passage, as well as the result in *Golden State Bottling*, makes clear, the substantial continuity test is broader than the general rule on which Wynnewood LLC and Commissioner MacDougall rely.⁹ Wynnewood LLC thus fails to show that proper application of the substantial continuity test would impair the free flow of capital.

Moreover, Wynnewood LLC fails to consider the economic benefits Congress intended to achieve with the OSH Act, and therefore ignores the economic benefits of a broad application of the successorship

⁹ The Court affirmed an order finding a bona fide purchaser of a business, unconnected with the predecessor, to be a successor and liable for reinstatement with backpay of an employee unlawfully discharged by the predecessor. *Golden State Bottling Co.*, 414 U.S. at 170-87.

doctrine under the OSH Act. Congress enacted the OSH Act based on its finding that occupational illness and injuries “impose a substantial burden upon . . . interstate commerce.” 29 U.S.C. § 651(a). And the OSH Act’s graduated penalty structure is an important component of the Act’s attempt to prevent those burdensome illnesses and injuries. *See id.* § 666(a)-(c) (OSH Act’s penalty scheme for willful, repeat, serious, and other-than-serious violations); *see also Interstate Erectors, Inc. v. OSHRC*, 74 F.3d 223, 230 (10th Cir. 1996) (rejecting claim that penalty was excessive because prior penalties did not deter management personnel from repeating prior violations). The successor’s exposure to an increased penalty for committing a violation substantially similar to its predecessor’s violation provides an important incentive to prevent those violations, and the resulting likelihood of economically burdensome injuries. *See Sharon & Walter*, 23 BNA OSHC at 1293, 1296 n.16.

CONCLUSION

For the reasons stated above and in the Secretary’s opening brief, the Court should grant the Secretary’s petition for review and remand with instructions that Wynnewood LLC is a successor to Wynnewood

Company and to determine whether the five violations cited as repeat are substantially similar to Wynnewood Company's prior violations.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that with respect to the foregoing Reply Brief for the Secretary of Labor:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5
- (2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus program, Microsoft Virus

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I, Ronald Gottlieb, certify that on this 7th day of February, 2020, I filed the Reply Brief for the Secretary of Labor by using the Court's ECF system and the ECF system served the document on counsel of record.

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