U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

September 12, 2019

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *R. Alexander Acosta, Secretary of Labor v. Angelica Textile Services, Inc.,*
Docket No. 18-2831,
Response to the Court's August 14, 2019 Order to Show Cause

Dear Ms. O'Hagan Wolfe:

The Acting Secretary of Labor (Secretary)[1] hereby submits this response to the Court's August 14, 2019 order to show cause explaining why the Secretary should not withdraw his petition for review, with leave to reinstate upon a showing of good cause, in light of respondent Angelica Textile Services, Inc.'s (Angelica) bankruptcy and cessation of business. The Court should proceed with its review of the Occupational Safety and Health Review Commission's (Commission) July 24, 2018 decision and order because changes in Angelica's business status many years after it violated the Occupational Safety and Health Act (OSH Act) do not moot the case. Irrespective of Angelica's post-violation actions or changes in status, the Secretary has an interest in ensuring that the Commission assesses a properly calculated penalty to address Angelica's repeated violations of OSHA's standards, as required by the OSH Act. To hold

[1] On July 12, 2019, R. Alexander Acosta resigned from his position as the Secretary of Labor. Patrick Pizzella now serves as the Acting Secretary of Labor. The Secretary requests that the Court amend the caption so that the petitioner is named as "Patrick Pizzella, Acting Secretary of Labor."

otherwise would contravene the language of the statute and undermine the purpose of OSH Act penalties, which is to deter all employers from committing future violations of the statute.

However, if the Court were to determine that post-violation events have mooted this case and that the Secretary's petition must be dismissed, the Court must also vacate the Commission's flawed and unreviewed decision and order to prevent it from standing as binding Commission precedent. In the July 24, 2018 decision and order, the Commission effectively rewrote the long-standing test for characterizing violations as "repeated" without acknowledging or explaining its departure from precedent. *See* Secretary's Brief, pp. 22-44. Characterizing violations as repeated is a critical piece of the OSH Act's scheme for deterring future violations, as it permits heightened penalties to be assessed to recalcitrant employers. The Commission's decision, if permitted to stand as precedent, would weaken the OSH Act's deterrent effect by preventing the Secretary from properly characterizing violations as repeated in future cases.

I. Background.

As discussed in the Secretary's January 28, 2019 brief, this case arises from a 2008 Occupational Safety and Health Administration (OSHA) inspection of Angelica's commercial laundry facility in Ballston Spa, New York. OSHA issued citations to Angelica on September 30, 2008, alleging numerous violations of OSHA standards and proposing penalties totaling $58,525. Angelica contested the citations to the Commission, where the matter was first heard by an administrative law judge (ALJ). The ALJ issued a decision on August 27, 2012, that affirmed some citation items and vacated others. The Secretary thereafter filed a petition for discretionary review requesting that the Commission review the ALJ's decision to vacate two of the citation items, which the Commission granted. Angelica actively participated in the Commission proceedings.

Nearly six years later, on July 24, 2018, the Commission issued the decision and order that is the subject of this appeal. In the decision and order, the Commission reversed the ALJ and affirmed both citation items, but determined that the Secretary had improperly characterized the violations as repeated. Re-characterizing the violations as serious (but not repeated),[2] the Commission assessed Angelica a single $7000 penalty for the two violations.[3] The Secretary's petition for review challenges the Commission's determination that Angelica's violations were not properly characterized as repeated, which caused the Commission to reduce the proposed penalty to $7000.

As explained in the Secretary's October 22, 2018 letter to the clerk, Angelica's counsel of record during the Commission proceedings, Mark A. Lies, II, Esq., of Seyfarth Shaw LLP, notified the Secretary's counsel on October 18, 2018, that, during the pendency of the Commission proceeding, Angelica filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code. Mr. Lies informed the Secretary's counsel that Angelica filed for bankruptcy on April 3, 2017, and provided the Secretary with a copy of an August 31, 2017 order of the U.S. Bankruptcy Court for the Southern District of New York that confirmed Angelica's Plan of Reorganization. The Secretary included a copy of that order as an attachment to his letter to the clerk.

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[2] A violation is serious when it results in a hazardous condition from which there is "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Commission must assess a penalty of some amount, but not more than $7000, for each serious violation. *Id.* at § 666(b). A heightened penalty of up to $70,000 may be assessed for a serious violation if, in committing the violation, the employer has "repeatedly violate[d]" the OSH Act (such that the violation should be characterized as repeated). *Id.* at § 660(a). This appeal concerns the Commission's misapplication and effective dismantling of the test for determining whether a violation should be characterized as repeated.

[3] In the citation that it issued Angelica, OSHA proposed $22,500 in total penalties for the two repeated violations at issue.

Mr. Lies subsequently filed his own letter to the clerk on December 3, 2018, in which he confirmed that he would not represent Angelica in this matter, and added:

> "The company was wound down in bankruptcy, and the claims against it were discharged. The OSHA citation and penalty that are the subject matter of the appeal were listed as a claim against the estate. The Area Office of the Occupational Safety and Health Administration was served with the bar date notice and did not assert a claim with the estate in conjunction with the bankruptcy notice. The facility that was the subject of the OSHA citations was shuttered and closed. No employees are exposed to any occupational safety and health hazards on account of the alleged hazards at issue in the citations. With these factors taken together, the Secretary's claim was discharged in bankruptcy and the citations have been mooted."[4]

Angelica has not appeared in this matter and is in default on the appeal. The Secretary filed his brief with the Court on January 28, 2019, explaining that the Commission erred by departing from its long-standing precedent to find that Angelica's violations were not properly

[4] The record on appeal neither confirms nor disproves these allegations because Angelica did not raise them during the Commission proceeding. *See* Fed. R. App. P. 16(a) (defining the record on appeal). Publicly-available news articles confirm that Angelica's Ballston Spa facility was permanently closed. *See, e.g.,* Maureen Werther, *Officials hope vacant building will be sold at auction*, The Saratogian (May 14, 2017), https://www.saratogian.com/news/officials-hope-vacant-building-will-be-sold-at-auction/article_a7576e22-eb1c-5f06-b8a0-c9bf469b63c0.html (last visited Sept. 9, 2019). Documents in the bankruptcy proceeding docket, *In re: Reid Corporation, et al., f/k/a Angelica Corporation*, 17-10870 (JLG), (Bankr. S.D.N.Y.), indicate that Angelica's assets were sold as a going concern in an asset purchase agreement, and that the wind-down disbursement process is on-going. The docket corroborates that the Secretary has not filed a proof of claim, but it does not follow that the Secretary's claim has been discharged: OSH Act penalties are not dischargeable in bankruptcy because they are a type of "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [are] not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7); *see U.S. v. WRW Corp.*, 986 F.2d 138, 144-45 (6th Cir. 1993) (analogous civil penalties assessed under the Mine Safety and Health Act were non-dischargeable under 11 U.S.C. § 523(a)(7)); *In re Tauscher*, 7 B.R. 918, 920 (Bankr. E.D. Wis. 1981) (civil penalties assessed for violation of the child labor provisions of the Fair Labor Standards Act were non-dischargeable under 11 U.S.C § 523(a)(7)). For such non-dischargeable debts, "failure to file a proof of claim before the bar date simply precludes a creditor from participating in the voting or distribution from the debtor's estate," and "neither the [bankruptcy] rules nor the bar order prevents a creditor holding a non-dischargeable debt who has not filed a proof of claim from collecting outside of bankruptcy." *Grynberg v. United States (In re Grynberg)*, 986 F.2d 367, 371 (10th Cir. 1993).

characterized as repeated, and failing to acknowledge or provide a reasoned explanation for that departure.

II. The Secretary's Claim for an Appropriate Penalty Based on a Proper Characterization of the Violations Has Not Been Mooted.

The Secretary's claim that the Commission failed to assess an appropriate penalty for Angelica's repeated violations of OSHA standards is not mooted by Angelica's post-violation cessation of business and bankruptcy. A case only becomes moot if the parties lack a "legally cognizable interest in the outcome," such that it is "impossible for a court to grant any effectual relief whatever to the prevailing party." *Chevron Corp. v. Donziger*, 833 F.3d 74, 124 (2d Cir. 2016) (citations omitted). Here, Angelica's post-violation actions and changes in status have no effect on the Secretary's claim for an appropriate penalty because the assessment of such a penalty is mandated by the statute and essential for the OSH Act to achieve its intended deterrent effect. For the same reason, it is immaterial whether the Secretary will be able to actually collect the assessed penalty. Even if the Secretary never collects the ultimate penalty, the Secretary has an interest in ensuring that the Commission assesses a properly calculated penalty to address Angelica's repeated violations.

Angelica's post-violation actions and changes in status cannot moot the Secretary's claim for an appropriate penalty because the purpose of such penalties is to dissuade *all* persons covered by the OSH Act from committing future violations. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980) ("[T]he fundamental objective of the Act [is] to *prevent* occupational deaths and injuries.") (emphasis added). "Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement," and "OSHA must [therefore] rely on the threat of money penalties to compel compliance by employers." *Reich v. OSHRC (Jacksonville Shipyards, Inc.)*, 102 F.3d 1200,

1203 (11th Cir. 1997) ("*Jacksonville Shipyards"*); *see also Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975) *aff'd*, 430 U.S. 442 (1977) (OSH Act penalties are designed to "inflict pocket book deterrence"); *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (same). An OSH Act penalty thus aims not just to punish the specific employer who committed a violation, but also to deter all similarly situated employers who might think it less costly to tolerate, rather than abate, workplace hazards. *Jacksonville Shipyards,* 102 F.3d at 1203; *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (enforcement of OSH Act penalty would have deterrent effect on employer's corporate parent "and employers in general"); *cf. Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993) (penalties imposed under the Clean Water Act seek "to deter future violations").

The OSH Act's language and design reflects Congress' intent for penalties to achieve a broad deterrent effect by consistently addressing the harm caused by employer violations. The OSH Act permits OSHA to issue a citation to an employer that "*has* violated" the statute, "describ[ing] with particularity the nature of the violation" and the provision "alleged to *have been* violated," 29 U.S.C. § 658(a) (emphasis added), and to propose a penalty for that violation. *Id.* at § 659(a). As this language evinces, OSH Act penalties "address past violations," and an employer's liability for a violation "attaches at the time the violation occurs." *Jacksonville Shipyards,* 102 F.3d at 1202; *cf. Yetiv v. U.S. Dept. of Housing and Urban Dev.*, 503 F.3d 1087, 1090 (9th Cir. 2007) ("liability for civil penalties attaches at the time of the violation"). When the employer commits a serious violation, the OSH Act demands that the Commission assess a penalty of some amount to the employer, *id.* at § 666(b), and permits a heightened penalty to be assessed if the violation is also "repeated" or "willful." *Id.* at § 666(a). By requiring the

Commission to *always* assess a penalty whenever an employer has committed a serious violation, the OSH Act reflects Congress' understanding that the statute will only achieve the intended deterrent effect if employers are confident that they will not suffer a competitive disadvantage by voluntarily complying with the statute. *See* S. Rep. No. 91-1282, 91st Cong. 2d Sess. 4 (1970) reprinted in Senate Comm. on Labor and Public Welfare, 92d Con. 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 144 ("[T]he fact is that many employers - particularly smaller ones - simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so."). The OSH Act cannot achieve its preventative purpose unless the harm caused by a serious violation is consistently addressed with an appropriate penalty.

Because of this statutory language and the deterrent purpose that it serves, a claim for an appropriate penalty to address an employer's serious and repeated violation of an OSHA standard cannot be mooted by the employer's post-violation actions or changes in status. *See Jacksonville Shipyards,* 102 F.3d at 1203 (given the language and purpose of the OSH Act, claim for penalty not moot where the employer ceased to operate, sold its assets, and released almost all of its employees during the Commission proceeding); *cf. Pan Am. Tanning*, 993 F.2d at 1020-21 (allowing a violator to escape liability due to post-complaint compliance "cannot be squared with th[e] mandatory language" in the Clean Water Act requiring issuance of a civil penalty to such violators, as it would "weaken the deterrent effect of the Act"). Even where (as is apparently the case here) a cited employer ceases to operate its business after a violation, a claim for injunctive relief (such as an order to abate a hazardous condition) may be moot, but a claim

for an appropriate penalty is not.[5] *Jacksonville Shipyards,* 102 F.3d at 1202 ("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," and as long as the cited employer was an "employer" under the OSH Act when the violation occurred, "it remains one for the proceedings to assess the penalties arising from the citations"); *Dayton Tire,* 671 F.3d at 1252 n.1, 1253-54 (where employer closed its facility and was subsumed by a corporate parent during the Commission proceeding, penalty was not moot because it "addresse[d] past violations" and was "based on the employer's status at the time of the violation"); *see also Martin v. OSHRC (CF&I Steel Corp.)*, 941 F.2d 1051, 1053-54 (10th Cir. 1991) (although employer filed for bankruptcy during the Commission proceeding, the Court had jurisdiction to review a Commission order assessing a monetary penalty); *cf. Laidlaw*, 528 U.S. at 196 (Stevens, J., concurring) (if an order to pay a civil penalty was valid when it was issued, "[n]o post-judgment conduct of respondent could retroactively invalidate that judgment").

Indeed, to allow a claim for an OSH Act penalty to be mooted by a cited employer's post-violation actions or changes in status would threaten the efficacy of the OSH Act's enforcement scheme. For example, employers could undercut the statute by viewing cessation of business as a viable alternative to paying substantial penalties. "Employers in violation of [the OSH Act]

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[5] In this way, a claim for an OSH Act penalty is like a claim for monetary damages. *See CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 622 (3d Cir. 2013) (claims for damages cannot "by definition" be moot because they "are retrospective in nature—they compensate for past harm"); *BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42, 44 n.1 (2d Cir. 2019) ("unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations") (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 77 (2013)); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Stevens, J., concurring) ("for purposes of mootness analysis, [civil penalties] should be equated with punitive damages rather than with injunctive or declaratory relief") (citation omitted).

could become complacent in the knowledge that future civil penalties could be avoided by ceasing operations" before the completion of often-lengthy Commission proceedings (and subsequent judicial review of Commission orders). *Jacksonville Shipyards,* 102 F.3d at 1203. Not only could employers "avoid a penalty by going out of business and, perhaps, then reincorporating under a different name," but employers "who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether." *Id.* Mooting penalties based on post-violation changes in circumstances would also give employers an incentive to engage in dilatory tactics and "delay litigation as long as possible," with the understanding that future changes in circumstances could nullify the penalty. *Id.*; *cf. Pan Am. Tanning*, 993 F.2d at 1021 (mooting suit for civil penalties based on post-complaint compliance would "encourage[e] defendants to use dilatory tactics in litigation"). Creating such perverse incentives would "greatly diminish the effectiveness of money penalties as a deterrence" to OSH Act violations. *Jacksonville Shipyards,* 102 F.3d at 1203.

In this case, the permanent closure of the Ballston Spa facility would moot an order for Angelica to abate the hazardous conditions that violated OSHA's standards, but does not moot the Secretary's claim that an appropriate penalty be assessed for Angelica's repeated violations. Angelica's liability for the penalty attached when it committed the violations in 2008, and because Angelica was an "employer" under the OSH Act when the violation occurred, "it remains one for the proceedings to assess the penalties arising from the citations."[6] *Jacksonville*

[6] Angelica's failure to appear in this proceeding also does not moot the case. Where (as here) an employer contests an OSHA citation and actively participates in the Commission's proceedings, but subsequently chooses not to respond to the Secretary's petition for review of the Commission's order, "there is a continuing case or controversy warranting judicial review." *Brennan v. OSHRC (Hanovia Lamp Div., Canrad Precision Indus.)*, 502 F.2d 946, 948 (3d Cir.

Shipyards, 102 F.3d at 1202. To permit Angelica's post-violation actions to moot the Secretary's claim for a penalty "would frustrate the purpose of [the OSH Act]," *id.* at 1203, and leave unaddressed the harm caused by its repeated non-compliance with OSHA standards.

For the same reason, whether the Secretary will be able to collect the assessed penalty does not affect the justiciability of the Secretary's claim in this Court. As noted *supra* p. 4 n.4, the Secretary's claim for an OSH Act penalty cannot be discharged in bankruptcy, *see* 11 U.S.C. § 523(a)(7); *WRW Corp*., 986 F.2d at 144-45, and exists irrespective of whether he files a proof of claim in that proceeding. *In re Grynberg*, 986 F.2d at 371. Even if it is unlikely that the Secretary will be able to collect the penalty in the future, "[t]he doubtful collectability of a judgment does not affect federal subject-matter jurisdiction," *Wells Fargo Equip. Fin., Inc. v. Titan Leasing, Inc.*, 768 F.3d 741, 742 (7th Cir. 2014); *see also Chafin v. Chafin*, 568 U.S. 165, 175-76 (2013) ("The fact that a defendant is insolvent does not moot a claim for damages."), and the Court can grant effectual relief to the Secretary by demanding that the Commission assesses a properly calculated penalty to address Angelica's repeated violations of OSHA standards, as required by section 17 of the OSH Act. Assessing an appropriate penalty, irrespective of Angelica's current status, is essential for the OSH Act to achieve its deterrent effect, including sending a message to employers that, if they violate OSHA's standards, they "should expect to

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1974); *accord Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 806 (3d Cir. 1985); *Brennan v. Smoke–Craft, Inc.*, 530 F.2d 843, 844 n.6 (9th Cir. 1976); *see also Brennan v. OSHRC (Santa Fe Trail Transp. Co.)*, 505 F.2d 869, 870-71 (10th Cir. 1974) (case not moot where an employer contested a citation, but did not participate during the Commission's review of the ALJ's decision or subsequent judicial review, because the employer did not withdraw its contest of the citation and thus retained "an interest in the controversy even though it is unwilling to do anything to protect that interest").

pay even when the Commission drags its feet."[7] *Dayton Tire*, 671 F.3d at 1254. The Court should therefore proceed with its review of the Commission's decision and order.

III. Should the Court Determine that the Case is Moot, it Must Vacate the Commission's Decision and Order.

If the Court were to determine that, contrary to the Secretary's arguments above, post-violation events have mooted the case and require the Court to dismiss the Secretary's petition, the Court must also vacate the Commission's decision below. *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (where "it becomes apparent that a case has become moot while an appeal is pending, the judgment below normally is vacated with directions to dismiss the complaint" in order to "avoid giving preclusive effect to a judgment never reviewed by an appellate court") (citations omitted); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) (the rule to vacate the unreviewed decision below when a case is mooted pending appeal is "at least equally applicable to unreviewed administrative orders"). This Court adheres to the duty to vacate below orders unless there is "a showing that the equities preponderate against vacatur," and "[i]n general," vacates below judgments "where the appellee has caused the case to become moot." *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 121-22 (2d Cir. 2001). Here, if the Court were to determine that the case is moot, it could only

[7] For this reason, the Court's suggestion in its August 14, 2019 order that the Secretary withdraw his petition with leave to reinstate should circumstances change in the future is not an acceptable alternative to judicial review. The consistent assessment of properly calculated penalties is essential for the OSH Act to effectively function, and the Secretary's interest in this case is for the Commission to assess such a penalty to address repeated violations of OSHA standards. No future change in circumstances will affect the necessity of the penalty or its value to the Secretary. Additionally, withdrawing the Secretary's petition would preserve the Commission's flawed decision as binding precedent that Commission ALJs would be obliged to follow in future cases. As discussed in the Secretary's brief, pp. 22-44, the Commission's decision arbitrarily reconfigured the long-standing test for characterizing violations as repeated, and if permitted to stand as Commission precedent, would frustrate the OSH Act's deterrent effect by preventing the Secretary from properly characterizing violations as repeated.

be as a result of Angelica's post-violation actions, and because it would be unjust for the Commission's flawed decision to stand as binding Commission precedent without judicial review, the equities would favor vacatur.

Respectfully,

/s/ Brian A. Broecker
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CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of September, 2019, the foregoing Response to the Court's August 14, 2019 Order to Show Cause was served on all registered counsel through the Court's CM/ECF filing system, and a paper copy was served via U.S. mail to:

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/s/ Brian A. Broecker

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