In the United States Court of Appeals for the Sixth Circuit

Martin Walsh, Secretary of Labor, United States Department of Labor Petitioner v. Dolgencorp, LLC, d/b/a Dollar General Store No. 12404, Respondent.	No. 22-3728

Dolgencorp, LLC's Answer to the Secretary of Labor's Petition for Summary Enforcement of a Final Order of the Occupational Safety and Health Review Commission

I. Background

A. Statement of the Case

1. On January 11, 2022, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") inspected a Dolgencorp, LLC, store in Seville, Ohio. OSHA Exhibit B.

2. On May 26, 2022, OSHA issued a citation to Dolgencorp alleging a "willful serious" violation. *Id.* The citation also stated that the violation had been "corrected during inspection." *Id.* See pages 2-3 below on this point.

3. On June 20, 2022, OSHA and the company reached an informal settlement agreement that required Dolgencorp to abate the alleged violations. OSHA Exhibit A.

4. On August 29, 2022, the Secretary filed a Petition for Summary Enforcement.

B. Material Omissions from the Secretary's Statement of Statutory Background

1. On page 3 of the Secretary's petition, the Secretary paraphrases section 9(a) of the OSH Act, 29 U.S.C. § 658(a), as stating that, "Citations must describe the nature of the violation(s) …." The Secretary omits a crucial phrase—that the citation must "describe *with particularity* the nature of the violation…." (Emphasis added.) As shown below, that phrase is important here.

2. The petition omits mention of an enforcement avenue in the OSH Act that closely parallels the enforcement avenue in this Court provided by OSH Act § 11(b)—the notification of failure to abate a final order of the Occupational Safety and Health Review Commission ("Commission" or "OSHRC") in OSH Act § 10(b). It also omits mention of the associated daily penalty provided by OSH Act § 17(d).

3. On page 4 of the petition, the Secretary cites the Third Circuit's decision in *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 386 (3d Cir. 1987), for the proposition that, under OSH Act 11(b), enforcement is "intended to be 'automatic.'" This Court in *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 321 (6th Cir. 1975), however, stated that entering an order of enforcement under OSH Act 11(b) "is a judicial, not ministerial, action" and that the court "will decide … whether summary enforcement should be granted."

C. Material Omissions from and Misleading Terminology in the Secretary's Statement of Factual Background

1. The Secretary does not mention that the citation issued to Dolgencorp contains a statement *by OSHA* that the sole violation was "Corrected During Inspection." Exhibit B. The citation states:

Date By Which Violation Must be Abated:	Corrected During Inspection

As a consequence of OSHA's statement, Dolgencorp was not required to certify under penalty of criminal prosecution (OSH Act § 17(g), 29 U.S.C. § 666(g)) that the cited violation has been abated. 29 C.F.R. § 1903.19(c)(2).

2. The petition's terminology obscures the identity of the employer cited, evidently to subtly pierce a corporate veil. The cited employer is Dolgencorp, LLC. It does business in Seville, Ohio, under the name Dollar General Store No. 12404. A different (albeit related) corporate entity, Dollar General Corp., has a one hundred percent ownership interest in Dolgencorp, LLC and is therefore often called its parent. The petition confusingly uses the term "Dollar General" to refer to both Dolgencorp, LLC and Dollar General Corp. Some cases mentioned in Exhibit G involved Dolgencorp, LLC but others state that the cited employer was Dollar General Corporation. Dollar General Corporation should not have been cited or included in the Secretary's exhibit. *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 724 (6th Cir. 2007) (general principle that parent not liable), *citing United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

3. On pages 4-5, the Secretary represents that Dolgencorp's parent "operates more than 18,000 retail stores in 46 states." On page 6, the Secretary states that, OSHA has issued "numerous" repeat and willful citations to Dollar General stores "nationwide." This is unfair, misleading, and legally irrelevant, even aside from the improper reference to Dolgencorp's parent. As this Court observed in *Caterpillar,*

Inc. v. Herman, 154 F.3d 400, 403 (7th Cir. 1998), "The larger the company, the more likely is a violation to be repeated, even if the larger company is just as careful as the smaller one"; repeated violations may "reflect simply the scale of a company's operations." *See also Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (employer should not be "disadvantaged merely for being large").

II. Argument: The OSH Act's Plain Language Requires That the Petition be Denied

The plain language of the OSH Act requires that the petition be denied. We show below that, inasmuch as the violative conditions alleged in the citation have been abated, the only order that this Court could issue would apply to conditions *not* described "with particularity" in the final order, contrary to OSH Act §§ 9(a), 10(b) and 17(d). We show below that the petition therefore does *not* seek an order enforcing the "final order of the Commission" under OSH Act § 11(b), 29 U.S.C. § 660(b), but an order requiring compliance in perpetuity with the OSH Act standards that were cited in the final order. We show below that that is not the purpose of OSH Act § 11(b), and that construing OSH Act § 11(b) otherwise would require this Court to hold the "equivalent to a trial leading to a judgment." *Reich v. Sea Sprite Boat Co.*, 64 F.3d 332, 333 (7th Cir. 1995). In sum, we show below that granting the petition would upend the enforcement and adjudication structure of the OSH Act and hold a sanction over Dolgencorp to no purpose.

Despite what the petition says, it does not in reality seek an order enforcing the "final order of the Commission." Under the OSH Act a "final order of the Commission" evolves directly from an OSHA citation (either uncontested or

affirmed[1]) that describes the violation "*with particularity.*" OSH Act § 9(a), 29 U.S.C. § 658(a) (emphasis added).[2] Dictionaries contemporaneous with the OSH Act define "particularity" as "[e]xactitude of detail, especially in description"[3] and "the detailed statement of particulars."[4] The analogous particularity requirement in FED.R.CIV.P. 9(b)[5] requires such detail as "the time" of an allegedly violative communication. *Smith v. Gen. Motors LLC*, 988 F.3d 873, 883 (6th Cir. 2021). The importance of particularity is especially great when an employer is accused or could be accused of a failure to abate a final order. *Marshall v. Harrison Lumber Co.*, 569 F.2d 1303 (5th Cir. 1978) (detailed discussion).[6]

It has thus been the rule since the earliest days of the OSH Act that, once abatement occurs, any substantially similar violation—or even a seemingly

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[1] OSH Act §§ 10(a), (b), 17(d); 29 U.S.C. §§ 659(a), (b), 666(d).

[2] OSH Act § 9(a), 29 U.S.C. § 658(a), states in part: "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation."

[3] *Particularity*, AMERICAN HERITAGE DICTIONARY 956 (1st ed. 1969) (sense 2, "Exactitude of detail, especially in description"). *See also Particularity*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1647 (1966) (sense 2.c, "attentiveness to detail **:** precise carefulness (as of description, statement, investigation) . . . ."; sense 2.d, "preciseness in . . . expression"); *Particularity*, RANDOM HOUSE DICTIONARY 1052 (1st ed. 1981) (sense 3, "detailed, minute, . . . as of description or statement").

[4] *Particularity,* BLACK'S LAW DICTIONARY (revised 4th ed. 1968).

[5] FED.R.CIV.P. 9(b) states that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

[6] Courts have drawn a distinction between the particularity needed to support failure-to-abate penalties and the particularity needed if a citation is being litigated. In addition to *Harrison,* see *Brock v. Dow Chemical U.S.A.,* 801 F.2d 926, 930 (7th Cir. 1986). That distinction is not at issue here.

identical violation—of the same standard arising thereafter would not be the same condition described by the Commission's final order (and thus would not be subject to failure-to-abate penalties) but would be a new, "repeated" violation. MARK ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW p. 541 (2022 ed.) (cited condition that "was abated but recurred" not violation of final order; new "repeated" violation); AM. BAR ASS'N, OCCUPATIONAL SAFETY AND HEALTH LAW 283 (G. Dale and K. Tracy, eds., 2018) (same); *Braswell Motor Freight Lines*, 5 BNA OSHC 1469, 1471 (OSHRC 1977)[7]; OSHA, Field Operations Manual, CPL 02-00-164, Ch. 4, § VII.F (April 14, 2020), *available at* <www.osha.gov/enforcement/directives/cpl-02-00-164>.[8] As this Court has stated, "The Act itself distinguishes between citations for past violations and proceedings following the employer's failure to correct violations once it has been cited." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1339 n.16 (6th Cir. 1978).

Inasmuch as the cited conditions no longer exist, what the petition in reality seeks is an obey-the-law injunction order (which is generally improper (*EEOC v. Wooster Brush Co. Emp. Relief Ass'n*, 727 F.2d 566, 576 (6th Cir. 1984); *Perez v.*

[7] *Braswell* states that a failure to abate "differs from a 'repeated' violation. The former applies if the violation continuously existed between the initial and follow-up inspections; the latter applies if the violation was corrected after the initial inspection but then recurred." The Commission there noted that OSHA stated this same view in its Field Operations Manual from the early 1970's.

[8] OSHA's current Field Operations Manual states: "F. *Repeated v. Failure to Abate*. A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (*i.e.*, the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later recurs, the subsequent occurrence is a repeated violation."

Ohio Bell Tel. Co., 655 F. App'x 404, 14 (6th Cir. 2016))) requiring compliance in perpetuity with those standards cited in the final order. And because the order could enjoin only future violations—that is, violations other than those described "with particularity" in the "final order of the Commission" (contrary to OSH Act §§ 9(a), 10(b) and 17(d))—it would not be authorized by OSH Act § 11(b), 29 U.S.C. § 660(b).

Worse, such an injunction would require this Court to assume a role far different from that contemplated by OSH Act § 11(b). Should an alleged new violation by Dolgencorp of a cited standard occur anywhere in the Sixth Circuit, from now until the end of time, this Court could not just impose additional penalties. It first would have to hold the "equivalent [of] a trial leading to a judgment." *Reich v. Sea Sprite Boat Co.*, 64 F.3d 332, 333 (7th Cir. 1995). Thus, should a store employee find and install a mechanism other than a barrel bolt that would lock a door from the outside but in his or her view be permissible under the standard, this Court would have to hold a trial (presumably after discovery) and adjudicate the lawfulness of that new condition in the first instance. It would have to determine whether *that* mechanism permits employees to "be able to open an exit route door from the inside at all times without keys, tools, or special knowledge." 29 C.F.R. § 1910.36(d)(1).[9] And because that particular condition would not have

[9] 29 C.F.R. § 1910.36(d)(1) states: "Employees must be able to open an exit route door from the inside at all times without keys, tools, or special knowledge. A device such as a panic bar that locks only from the outside is permitted on exit discharge doors." A panic bar is not required. 67 Fed. Reg. 67950, 67956 (Nov. 7, 2002).

been previously adjudicated to be violative, all normal defenses would presumably be available.[10]

Under this petition, this Court would thus be performing the work of the Review Commissioners, the officials intended by Congress to provide "expert resolutions of the issues involved." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 461 (1977).[11] That is not what section 11(b) contemplates. "The proceedings in the court of appeals are not at all equivalent to a trial leading to a judgment; our role is one of enforcement…." *Reich v. Sea Sprite Boat Co.*, 64 F.3d 332, 333 (7th Cir. 1995). Granting the petition would therefore upend the penalty and adjudication structure of the OSH Act.

The Secretary may argue that the above arguments draw in part upon provisions and concepts that concern failures to abate under OSH Act §§ 10(b) and 17(d), and not an enforcement petition under OSH Act § 11(b). The argument would be wrong because the two enforcement avenues draw upon the same statutory provisions. Both require a Commission "final order." Both draw upon the same daily failure-to-abate penalty provision, OSH Act § 17(d), 29 U.S.C. § 666(d). *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 416 (7th Cir. 1995) (looking to that provision for

[10] This Court has noted that to prove an OSHA violation, OSHA must show that "(1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence." *Carlisle Equip. Co. v. Sec'y of Labor*, 24 F.3d 790, 792–93 (6th Cir. 1994) (internal citation omitted).

[11] The Commission is an independent agency; it is not part of the U.S. Department of Labor. Its members are appointed by the President and confirmed by the Senate. OSH Act § 12(a); 29 U.S.C. § 661(a). It has a corps of administrative law judges. See OSH Act § 12(e); www.oshrc.gov/about/administrative-law-judges/).

the appropriate penalty to be assessed when enforcing an unabated Commission final order under OSH Act 11(b)). What would be different—and more formidable—is that this Court, unlike the Occupational Safety and Health Review Commission, has contempt power. But that does not mean that this Court should be adjudicating first-instance allegations of violation. Section 11(b) contemplates that this Court will punish the *continuation* of those violations described with particularity by an uncontested or adjudicated citation, and thus encompassed by a final order of the Commission—not new violations.

The Secretary may also claim that compliance with a final agency order does not moot a petition for enforcement. The argument would be beside the point, for Dolgencorp is not arguing that this controversy is moot under case law pertaining to the Article III jurisdiction of federal courts or the power of equity courts, as in *Acosta v. Sunfield, Inc.*, No. 18-2465 (6th Cir. July 17, 2018), an unpublished decision set out by the Secretary in Exhibit C. Dolgencorp's argument is different. It draws upon and is confined to the OSH Act. It also raises what appears to be a question of first impression in published OSH Act cases. The most recent such case, *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 416 (7th Cir. 1995), involved a condition that had *not* been abated. The same is true of *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 386 (3d Cir. 1987); and *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 320 (6th Cir. 1975), where this Court noted the lack of abatement. The question posed by this case is therefore apparently one of first impression.

Moreover, and with respect, the reasoning of the unpublished *Sunfield* case relied upon inapposite cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), such as *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567-68 (1950). Those cases are inapposite because, first, as shown above and as this Court has held, the structure of the OSH Act does not permit first-instance adjudication by a court of appeals of whether a condition is violative; it leaves that to the Commission. Under the NLRA, on the other hand, a court order of enforcement is the only means of enforcement; the NLRA grants the NLRB no authority to impose civil penalties, let alone for repeated violations. *That* is why the NLRB would have to "play hide-and-seek with those guilty of unfair labor practices." 339 U.S. at 568. By contrast, under the OSH Act, OSHA can seek and the Commission can impose ten-fold greater penalties for repeated violations without having to go back to a court.

The Secretary may also drag other red herrings across the Court's path. He may argue that the "OSH Act" does not require him to allege the continued existence of a cited condition to obtain an enforcement order. Whether that is true or not, it is irrelevant where the Secretary himself has stated that abatement of the cited condition has occurred. That statement means that the petition seeks an order that can never have any consequence.

Despite the petition's repeated use of "summary" or "summarily," issuance of the requested decree is not a ministerial function. In *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 321 (6th Cir. 1975), this Court stated that "[t]he panel will

decide whether the proposed order is final and unreviewable and whether summary enforcement *should* be granted." (Emphasis added.)

* * *

Dolgencorp should not be subjected in perpetuity to a court order, enforceable by contempt, unless it is clearly authorized by the OSH Act. The order sought here is not authorized by the OSH Act—and certainly not clearly authorized. The requested order should, therefore, not be issued.

III. Request for Oral Argument

Dolgencorp respectfully requests the opportunity to present oral argument.

IV. Conclusion

Accordingly, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on September 19, 2022, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that on September 19, 2022, I served the foregoing through the service effected by the ECF filing system and by electronic mail upon:

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☒ /s/ Arthur G. Sapper

Certificate of Compliance With FED.R.APP.P. 27(d)(2)(A) and 32(g)

I hereby certify that the foregoing complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(A) and 32(g) because it contains 2912 words (fewer than 5200 words).

☒ /s/ Arthur G. Sapper