

Tenth Circuit Limits OSHA's Ability to Issue Repeat Citations

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Under the Tenth Circuit Court of Appeals' decision in *Sec'y of Labor v. Wynnewood Refining Co., LLC*, a successor company of an employer may avoid repeat citations that are based on prior violations by the employer, by striving to improve safety in the workplace at the successor company.¹ In *Wynnewood*, the Court affirmed the Occupational Safety and Health Review Commission's (the "Commission") decision finding no substantial continuity between an employer's successor entity and an older entity to justify a repeat citation at the successor entity based upon prior violations at the older entity.

In 2012, Wynnewood Refining Co., LLC was cited for several repeat violations of the Process Safety Management standard when a refinery boiler exploded and killed two employees. An administrative law judge (the "ALJ") reclassified several citations from repeat to serious. The ALJ found that the violations occurred under Wynnewood, Inc., and not Wynwood LLC, a new company formed in 2011 after Wynnewood, LLC's parent company acquired all the stock in Wynnewood, Inc's parent company.

On appeal, the Commission upheld the violations but agreed with the ALJ's reclassification of citations from repeat to serious finding no substantial continuity between the two Wynnewood entities. In making this determination, the Commission applied the following 3-prong substantial continuity test:

- (1) the nature of the business, including the continuity in the type of business, products or services offered, and customers served to determine whether the activities associated with the business and such safety and health considerations have changed;
- (2) the jobs and working conditions because of their close correlation with particular safety and health hazards; and
- (3) the continuity of personnel, with particular focus on those who control safety and health decisions because such decisions relate directly to the extent to which the employer complies with the Occupational Safety and Health Act.

The Commission found that while the first two factors supported a finding of substantial continuity between the two Wynnewood entities, the third factor did not. Specifically, the Commission found that substantial evidence as to the third factor demonstrated that "changeover in ownership resulted in changes in management practices, procedures, and culture significant enough to break the chain of liability stemming from Wynnewood Inc.'s previous actions." Significantly, the Commission found that the management at the new Wynnewood entity "took an increased role in day-to-day operations at the refinery" and "focuse[d] on improving safety, health, and the proper implementation of [the PSM standard]," resulting in a "safety culture shift." Based on this analysis, the Commission found no substantial continuity between the two Wynnewood entities.

On appeal, the Tenth Circuit held that the Commission correctly applied the substantial continuity test and also found that evidence in the record adequately supported the Commission's finding of lack of substantial continuity. The Court noted Commission's findings that new management-controlled safety-related decisions, which directly resulted in significant changes in the new successor entity's safety policies. Among other things, the new management raised the level of the safety programs, hired two new safety personnel, and improved access to funds for safety. Thus, the Court affirmed the Commission's finding of no substantial continuity between the two Wynnewood entities to justify repeat citations.

Takeaway: *Wynnewood* is a good decision for employers because it properly recognizes that a successor entity may not be penalized for a predecessor's history of safety violations where the successor entity has taken substantial steps towards improving the workplace safety at the successor entity. Under this case, it would be prudent for employers forming a new entity to revisit the safety policies to be applied to the new entity and explore and implement ways to improve the safety environment at the new entity. Such an approach may benefit the successor entities in defending against repeat citations that are based upon prior violations at the employer entity.

¹ No. 19-9533 (Oct. 27, 2020).