

Leveling the Playing Field: Clarifying OSHA's Burden for Proving Repeat Violations

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In July 2018, the Occupational Safety and Health Review Commission issued its decision in *Secretary of Labor v. Angelica Textile Services, Inc.*, providing employers guidance on rebutting repeat violations and clarifying the defenses that employers may have in combating repeat violations. No. 08-1774.

The Commission utilized the *Angelica* case to clarify *how* an employer can successfully rebut the “substantial similarity” element for proving a repeat violation. For a repeat violation to be characterized as such, there must be: “a Commission final order against the same employer for a *substantially similar* violation.” *Secretary of Labor v. Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Traditionally, OSHA asserted that the “substantial similarity” element was met merely by illustrating that the same type of equipment, process or regulation that was present in the current violation was also involved in a prior final citation. In *Angelica*, the Commission provided a means for employers for rebutting this standard for substantial similarity by a prima facie showing of “evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.* Thus, evidence of substantial similarity can be rebutted when employers demonstrate different conditions and hazards present between the original violation and the subsequent violation.

Additionally, the *Angelica* decision explained defenses that employers have to combat repeat violations. Specifically, the Commission noted that employers can defend repeat citations by illustrating the abatement actions they took after the issuance of the initial citation. In *Angelica*, the prior citation described “critical deficiencies” in the employer’s compliance program. The employer responded to the prior citation by actively addressing and eliminating similar hazards, which included developing a permit required confined space program, specific to the condition cited. The subsequent citation, while involving violations of the same standard, did not involve a comprehensive failure. Instead, the subsequent citation specifically addressed two individualized deficiencies in the employer’s adopted program. Thus, the employer’s procedures, combined with other evidence, including the Secretary’s prior acceptance of the employer’s abatement method, persuaded the Commission to find that the employer “took affirmative steps to achieve compliance and avoid similar violations in the future.” Thus, there was no basis for issuing a repeat violation.