

Review Commission Says 'No' to Enterprise-Wide PPE Assessment

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PRACTICES OSHA, Labor and Employment

Remember “Enterprise-Wide Relief?” This is the concept where OSHA maintains that common control and management is good enough to impose abatement on one facility even if an alleged infraction occurred at an entirely different facility. For example, the Secretary of Labor (SOL) brought a claim a few years ago against DeMoulas Supermarkets where the Secretary noted that while OSHA had only inspected **two** stores, it was aware of the company’s common management and control:

In addition to the Rindge Supermarket and the Concord Supermarket, Respondent owns and operates more than sixty (60) supermarkets and/or grocery stores in Massachusetts and New Hampshire (each, a ‘DeMoulas Store’). Respondent operates these supermarkets and/or grocery stores under the common control of its corporate executives, officers and management officials.¹

Thus, without stepping foot in those other stores, “upon information and belief,” similar infractions *must have* existed at them. For example, from the SOL’s Complaint in *DeMoulas*:

Upon information and belief, Respondent has failed to protect open-sided floors, platforms, and runways, as required by 29 C.F.R. §§ 1910.23(c)(1) and (c)(2) at DeMoulas Stores, in addition to those located in Rindge and Concord, thereby exposing employees to violative conditions that are similar at multiple locations. As alleged in Rindge Citation 2, Items 1a and 1b, and Concord Citation 2, Item 1, the Rindge and Concord Inspections revealed multiple instances where Respondent willfully failed to guard an open-sided floor, platform or runway. Further, information gathered during the Rindge and Concord Inspections revealed that employees at other DeMoulas Stores likely have been, and are, exposed to similar violative conditions.²

Accordingly, given evidence at *some* stores, it was not necessary for OSHA to actually personally visit every store of the 60 being combined for enterprise-wide relief purposes. This history regarding enterprise-wide relief should make for an interesting review of a recent and troubling decision issued against Wal-Mart.

On April 27, 2015, the Commission issued its decision in *Wal-Mart Distribution Center #6016*.³ In this last full Commission decision before Commissioner Thomasina Rogers’ term expired, the Commission (in a 2-1 decision) found that Wal-Mart violated Section 1910.132(d)(1)’s requirement to “assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of [PPE],” because, in part, the Wal-Mart Safety Director who testified that such an assessment had been done at one other location had not actually been to the distribution center in question. In other words, Wal-Mart could **not** rely on an **enterprise-wide** PPE assessment as corporate safety had not stepped foot in the distribution center at issue to conduct the assessment before OSHA conducted its inspection.

Of course, you could just as easily take the *DeMoulas* Complaint language and apply it to Wal-Mart: “Respondent operates these [Distribution Centers] under the common control of its corporate executives, officers and management officials.” While good enough for enforcing enterprise-wide relief, common control is somehow insufficient for conducting an enterprise-wide assessment under 1910.132(d)(1). Wal-Mart had completed the assessment at a similar distribution center in Searcy, Arkansas and, in turn, argued that within its **common control**, such an assessment would apply to the Distribution Center inspected in New Braunfels, Texas. However, the Commission found that common, corporate knowledge *here* was insufficient:

Specifically, Wal-Mart points to the Safety Director’s response to the question, ‘from your observations of both [the Searcy and New Braunfels] Distribution Centers, from your personal observations, are the order [filler] functions identical?’ He responded, ‘[y]es, they are,’ and indicated that the functions and job requirements identified in the citation are the same and involve the same equipment. But the Safety Director subsequently testified that he had not been to the New Braunfels Center *prior to the inspection*. We find, therefore, that he had not determined from personal observation that the conditions at New Braunfels were the same as those as Searcy as of the relevant period.”⁴

Moreover, despite the availability of PPE information enterprise-wide on its intranet, including to New Braunfels management, the Commission found that, “the record shows that Wal-Mart never verified the equivalency of conditions between the two facilities.” Of course, the same can be said in *DeMoulas* when evidence suggested enterprise-wide violations but OSHA had not verified that those violations actually existed at all 60 stores.

Commissioner MacDougall dissented, noting:

Despite Wal-Mart’s accurate assessment, the Secretary cites Wal-Mart for reaching this conclusion utilizing a global assessment to determine the appropriateness of PPE at the New Braunfels facility. However, there is nothing in the standard that requires each facility to conduct a site-specific, walk-through survey to determine if hazards are present. In addition, the Secretary has failed to show that Wal-Mart’s global assessment as applied to New Braunfels facility was unreasonable under the circumstances. Rather, I find it was a reasonable exercise of discretion based on Wal-Mart’s awareness of hazards in its workplace to select appropriate PPE for the work being performed at all its distribution centers, including the New Braunfels facility.⁵

The Commission’s decision has been appealed by Wal-Mart to the Fifth Circuit Court of Appeals and hopefully for the employer community Commissioner MacDougall’s reasoning will prevail given the significant burden this site-specific burden will impose on employers with numerous stand-alone facilities. If not, an employer cannot rely on any non-site-specific assessment to establish 1910.132(d)(1) compliance unless the employer can verify that conditions at the non-site-specific assessment are equivalent to the site at issue.

¹ DOCKET NOS. 11-2870 & 11-2871, *Sec’y of Labor v. DeMoulas Super Markets, Inc. d/b/a Market Basket*.

² *Id.*

³ *Sec’y of Labor v. Wal-Mart Distrib. Ctr. #6016*, OSHRC No. 08-1292, 4/27/2015.

⁴ *Id.*

⁵ *Id.*