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Case Study: Solis V. Loretto-Oswego Health Care

Law360, New York (September 14, 2012, 12:53 PM ET) -- Among Occupational Safety and Health Administration citations, a "repeat" citation is potentially a very big hit, with a penalty of up to $70,000. OSHA has been aggressive in issuing these citations, but recently, the United States Court of Appeals for the Second Circuit cut back significantly on what will qualify as "repeat" where the previous violation was that of an affiliated company.

The Occupational Safety and Health Review Commission has traditionally looked for a combination of three factors when determining whether to uphold a repeat citation that the OSHA has issued to a company based on a previous violation by an affiliate of that company: a common worksite, a common president or management and close interrelations and integration of operations.[1]

In a petition for review of an OSHRC decision to the Second Circuit, OSHA challenged OSHRC's use of this three-factor test and advocated for the use of a four-factor test that has been used under the National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA).

On Aug. 13, 2012, the Second Circuit declined to adopt the four-factor test and upheld OSHRC's decision under the three-factor test to vacate repeat citations that OSHA issued to the Loretto-Oswego Residential Health Care Facility, located in Oswego, New York.[2] The case was Solis v. Loretto-Oswego Residential Health Care Facility.

While the three-factor test is being upheld for the time being, the court noted that OSHA "has many avenues" by which it may alter OSHRC's approach to repeat violations and affiliated companies in the future. As a result, companies facing possible repeat citations based on corporate affiliation should be aware of the factors OSHA might consider under the four-factor test.

Background

Section 17(a) of the Occupational Safety and Health Act of 1970, as amended, authorizes OSHA to assess a civil penalty of up to $70,000 to "[a]ny employer who ... repeatedly violates the requirements of section 5" or a standard under section 6 of the OSH Act.[3]

OSHA has summarized the elements for a repeat violation in its Field Operations Manual, which provides that “[a]n employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard and the citation has become a final order of the Review Commission.”[4]

Essentially, OSHA must establish: the same employer, an OSHRC final order at the time of the alleged violation and substantial similarity of the violated requirement.

OSHA also identifies a time element for the previous citation. The 2009 Field Operations Manual provided that the new citation must have been issued within three years of the previous citation or within three years of the final abatement date, whichever is later.[5] In 2010, OSHA extended those three-year periods to five years.[6]

The Field Operations Manual does not discuss whether affiliated companies can be considered a single employer for purposes of a repeat citation**.** In Secretary of Labor v. Advance Specialty Co. (1976), OSHRC set forth the three-factor test that it would follow with respect to affiliated companies:

"It is well settled that corporate entities may be disregarded in order to effectuate a clear legislative purpose .... We find, therefore, that when, as here, two companies share a common worksite such that the employees of both have access to the same hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the Act are best effectuated by the two being treated as one.[7]"

OSHRC has looked to the three factors set forth in Advance Specialty Co. ever since.[8]

Facts and Prior Decisions

In 2002, OSHA issued five citations to Loretto-Oswego. These citations were issued in response to two inspections that had been conducted at the facility and alleged violations of various general industry standards. OSHA classified two of the citations as repeat violations and made this classification based on previous violations that had been found at two affiliated facilities: Loretto-Rest Residential Health Care Facility in Syracuse, N.Y. and Loretto-Utica Residential Health Care Facility in Utica, N.Y.

The parent company, Loretto Management Company (LMC), was located at the same address as Loretto-Rest. Loretto-Oswego disputed OSHA’s characterization of the citations as repeat violations on the basis that it was a separate corporation from its affiliates.

In 2003, Administrative Law Judge Schoenfeld determined that Loretto-Oswego, Loretto-Rest and Loretto-Utica were a single employer and affirmed OSHA’s classification of the violations as repeat violations. In reaching this determination, Schoenfeld looked at each of the factors articulated in Advance Specialty Co. and determined that they were present.

With respect to the first factor, Schoenfeld concluded that even though the affiliated entities had three different physical addresses, they were nevertheless a common worksite because employees at each of the entities were exposed to similar hazards and because the parent company was co-located with Loretto-Rest.

With respect to the second factor, the judge concluded that the affiliates had a common president and management because the affiliates had a common president, chief executive officer and chief financial officer.

Finally, with respect to the third factor, Schoenfeld concluded that the affiliates were closely interrelated and integrated because employees with the parent company had the authority to settle citations, the affiliates participated in monthly meetings, one of the affiliates operated a central food commissary, a common website posted job opportunities for the affiliates, all service and maintenance employees belonged to the same union and the same insurance agency handled all worker compensation claims. Loretto-Oswego appealed the judge's decision to OSHRC.

In 2011, OSHRC reversed Schoenfeld's decision and vacated the repea" citations. In reviewing Schoenfeld's decision, OSHRC analyzed the same factors to determine if there was a single employer but reached a different conclusion.

In particular, OSHRC rejected the judge's assessment that there was a common worksite because the working conditions were similar at the different locations; gave no weight to the fact that the parent company was co-located with Loretto-Rest; and found that there was little or no interaction between the affiliates. A more detailed discussion of the judge's decision and OSHRC's reversal is available at http://www.bdlaw.com/news-1047.html.

In response to OSHRC's reversal, OSHA filed a petition for review in the Second Circuit.

Second Circuit Decision

On review in the Second Circuit, OSHA challenged OSHRC's decision on two grounds. First, OSHA argued that the four-factor test used under other statutes (the NRLA, Title VII and ADA) should be used to determine whether the affiliates were a single employer. Second, OSHA argued that OSHRC erred in weighing the evidence under the three-factor test by rejecting certain factual findings made by the administrative law judge. The Second Circuit rejected both of these arguments.

The four-factor test that OSHA urged the Second Circuit to adopt looks at whether there are: interrelated operations, common management, centralized control of labor relations and common ownership. It differs from the test that OSHRC has used for decades by omitting the "common worksite" factor and dividing "common management" and "common ownership" factors into two separate factors. The court declined to consider whether this four-factor test should be applied, however, because OSHA did not argue in the proceedings below that the four-factor test should be applied and the three-factor test should be abandoned.

The court noted, however, that there were several avenues by which OSHA could alter OSHRC's approach to repeat violations and affiliated companies in the future. The court suggested that OSHA could challenge the three-factor test in future cases before the administrative law judges and OSHRC or could issue a regulation.

The court then addressed OSHRC's application of the three-factor test to Loretto-Oswego. OSHA contended that OSHRC overemphasized Loretto-Oswego's day-to-day control over administrative and safety matters and underemphasized the parent company's centralized control over administrative and safety matters. In addition, OSHA contended that OSHRC erred in weighing the evidence and rejecting certain factual findings by the administrative law judge in its application of the three-factor test. The court disagreed.

The court acknowledged that OSHRC may have weighed the evidence differently than Schoenfeld but found that it did not "emphasize day-to-day control or de-emphasize centralized control to an extent suggesting an error of law."

As to OSHA's more general contentions regarding the weighing of the evidence, the court found that OSHRC "did not act unreasonably" in finding that that the affiliates did not operate as a single employer. In support of this finding, the court explained:

"The record suggests, that at the time of Loretto-Oswego's inspection, LMC dictated only one aspect of the facility's safety policy, regarding bloodborne pathogen exposure. Loretto-Oswego, meanwhile, maintained a safety committee empowered to make the facility's own employee safety policy. It is surely relevant that Loretto-Oswego, in making its safety decisions, adopted targeted safety policies apparently employed by other Loretto affiliates, and that, in responding to the OSHA inspection, Loretto-Oswego sought assistance from LMC. Yet these decisions only gesture at concerted action on employee safety by Loretto-Oswego, on the one hand, and LMC, Loretto-Rest, or Loretto-Utica on the other. The record, meanwhile provides few examples of instances in which LMC or the affiliates directed Loretto-Oswego policy on other matters."

Finally, the court determined that OSHRC did not reject the administrative law judge's factual findings; it simply weighed them differently.

Based on the foregoing determinations, the Second Circuit denied OSHA's petition for review and "note[d] once more the numerous avenue available to the Secretary for seeking to modify the content of that test should she deem that appropriate."

Conclusion

Although the Second Circuit upheld OSHRC's application of the three-factor test in Loretto-Oswego, it left the door open for OSHA to use the four-factor test in the future by declining to offer an opinion on which test was appropriate and by noting that OSHA has other avenues by which to adopt the four-factor test.

As a result, companies facing possible repeat citations should be aware of the four-factor test and its implications. Under that test, the absence of a common worksite would have no bearing on the single employer determination, and common management and common ownership would be given much greater weight. This could result in a marked increase in repeat citations being issued to affiliated companies working out of separate facilities.

--By Mark Duvall and Jayni Lanham, Beveridge Diamond PC.

Mark Duvall is a principal in the Washington, D.C. office, and Jayni Lanham is an associate in the Baltimore, MD. office of Beveridge Diamond PC.

[1] See Loretto-Oswego Residential Health Care Facility, OSHRC Docket No. 02-1164 & 02-1174 (Rev. Comm'n 2011); C.T. Taylor Co., OSHRC Docket No. 94-3241 & 94-3327 (Rev. Comm'n 2003); Vergona Crane Co., OSHRC Docket No. 88-1745 (Rev. Comm'n 1992); Advance Specialty Co., OSHRC Docket No. 2279 (Rev. Comm'n 1976).

[2] Solis v. Loreto-Oswego Residential Health Care Facility, No. 11-888-ag (2d Cir. Aug. 13, 2012).

[3] 29 U.S.C. § 666(a) (emphasis added).

[4] OSHA Field Operations Manual, Directive Number CPL 02-00-148, Chap. 4, § VII.A.1 (Nov. 9, 2009) (emphasis omitted). This description tracks that of the leading OSHRC decision on "repeat" violations, Potlach Corp., OSHRC Docket No. 16183, 7 BNA OSHC 1061, 1063 (Rev. Comm'n 1979).

[5] OSHA Field Operations Manual, Chap. 4, § VII.E.1.a.

[6] OSHA Administrative Penalty Information Bulletin (undated, but posted July 2010), http://www.osha.gov/dep/administrative-penalty.html.

[7] Advance Specialty Co., OSHRC Docket No. 2279, 3 BNA OSHC 2072, 2075-75 (Rev. Comm'n 1976).

[8] Solis v. Loreto-Oswego Residential Health Care Facility, No. 11-888-ag, slip op. at 14-15 (2d Cir. Aug. 13, 2012). See also C.T. Taylor Co., OSHRC Docket No. 94-3241 & 94-3327 (Rev. Comm'n 2003); Vergona Crane Co., OSHRC Docket No. 88-1745 (Rev. Comm'n 1992); Advance Specialty Co., OSHRC Docket No. 2279 (Rev. Comm'n 1976).