



# COURT REVERSES OSHA RULING ON WILLFUL VIOLATIONS

by

Willis J. Goldsmith and Jacqueline M. Holmes

When exactly does an employer intentionally disregard or act with plain indifference to the requirements of the Occupational Safety and Health Act of 1970 (OSH Act), such that it can be subjected to the Act's substantially increased penalties for willful violations? The U.S. Court of Appeals for the District of Columbia Circuit recently answered that question in *Dayton Tire v. Secretary of Labor*, No. 10-1362 (2012), a case nearly twenty years in the making.

In 1994, then-Secretary of Labor Robert Reich took the unprecedented step of personally and publically serving Dayton Tire with a citation alleging over 100 willful violations of the OSH Act and proposing a penalty of approximately \$7.5 million dollars. The government also claimed that the Dayton Tire facility presented an "imminent danger" to employees, and obtained an injunction requiring Dayton to immediately correct the cited conditions or cease operations. Accompanied by a compliant press corps, Secretary Reich publicly accused Dayton Tire of deliberately operating unsafely despite "a series of deaths and maimings"—allegations that were never proven. In response, Dayton Tire closed its doors until the following day, when a federal judge dissolved the injunction. The same judge ultimately concluded, after a multi-day trial, that the government failed to prove its imminent danger allegations. *Reich v. Dayton Tire*, 853 F. Supp. 376 (W.D. Okla. 1994).

Dayton appealed the underlying OSHA citation to the Occupational Safety and Health Review Commission. The citation centered on the OSH Act's lockout/tagout standards, which "require[] employers to establish a program . . . for affixing appropriate lock devices or tagout devices to energy isolating devices" and to train employees on the "purpose and function of the program." 29 C.F.R. § 1910.147(a)(3)(i) & (c)(7)(i). The required level of training depends on the function of employees. The Act requires that "[a]uthorized employees," who perform service and maintenance on covered equipment, receive more training than "affected employees," who only operate covered equipment. *Id.* § 1910.147(b), (c)(7)(i)(A), (B).

The Secretary's citation alleged that Dayton Tire had willfully failed to train its employees to the authorized level, and had failed to develop lockout/tagout procedures for seven job tasks in its facility. Dayton Tire countered that its employees were only "affected employees" because it employed a separate company with separate employees (Ogden Allied) to perform its service and maintenance work. And even if incorrect, Dayton Tire contended that its good faith belief that its conduct complied with the Act foreclosed a willfulness finding.

Following an extended trial, the administrative law judge issued a 1997 opinion finding that Dayton Tire's "actions were consistent with a good faith belief and effort to comply with the LOTO [lockout/tagout] standard." But it nonetheless characterized 37 of the violations as willful because Dayton Tire's corporate

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**Willis J. Goldsmith** and **Jacqueline M. Holmes** are attorneys with the law firm Jones Day, and represented Dayton Tire both in the underlying administrative proceedings and in the D.C. Circuit.

parent, Bridgestone, had previously been cited under the LOTO standard at another facility. The ALJ thus assessed a \$518,000 penalty against Dayton Tire.

The parties cross-petitioned the Commission for review, and the Commission granted review in 1997. Thirteen years later, the Commission issued an opinion that dramatically altered the ALJ's decision. In addition to affirming all but one of the violations, the Commission recharacterized all of the sustained violations as willful. The Commission reached this conclusion by rejecting the ALJ's reliance on the Bridgestone citation, conducting an independent review of the thirteen-year-old record, and finding that "over a period of years, Dayton consciously disregarded the LOTO standard by operating . . . in a manner that was patently inconsistent with the requirements of the standard, and by failing to reexamine its violative practices despite receiving information and inquires that should have led it do so." Those findings led to a significantly increased penalty of nearly \$2 million.

Dayton Tire appealed to the D.C. Circuit, which vacated the Commission's willfulness finding. The court found that the "linchpin" of the Commission's determination—that Dayton Tire either knew it was non-compliant or was unwilling to investigate for fear of uncovering Dayton Tire's non-compliance—was "based more on speculation than evidence." The Commission attempted to support this finding with evidence that certain Dayton Tire employees had raised concerns about LOTO compliance; Dayton Tire was encouraged by its corporate parent to "revisit" its LOTO practices to ensure compliance; the death of an employee that Dayton Tire investigated and determined was not relevant to LOTO; and Dayton Tire's inaction in the face of contradictory views about LOTO requirements expressed by OSHA inspectors. None of this was sufficient for the court to find that Dayton Tire acted willfully because "it takes a lot to be plainly indifferent."

This was particularly so, according to the court, because the Commission ignored contradictory evidence of good faith, namely, that Dayton Tire's safety managers over the years determined that Ogden Allied employees, not Dayton Tire employees, performed all service and maintenance work. While Dayton Tire's analysis of the LOTO standards turned out to be incorrect, it did take steps to respond to the various events that the Commission pointed to in its effort to establish willfulness. Of particular note is that the court was unwilling to impugn the company's good faith merely because it had notice that OSHA disagreed with its position. This makes perfect sense, of course, because virtually every contested OSHA case arises because the employer and the Secretary of Labor disagree regarding the interpretation of an OSHA standard. If this disagreement were evidence of willfulness, then nearly every OSHA case would qualify as willful.

In addition to rejecting the Commission's overreaching and reaffirming the high standard that the Secretary of Labor must satisfy to establish willfulness, the D.C. Circuit's opinion is also notable in one additional respect. Along with challenging the willfulness finding, Dayton Tire argued that the court should vacate the Commission's decision on grounds of administrative delay. While the court "grudgingly" declined Dayton Tire's invitation, it sent a clear message to the Commission that its "excessive and deplorable" thirteen-year delay was unacceptable. According to the court, the "Commission does a disservice to both employers and employees when it fails to clarify health and safety standards promptly." And in a hint of sarcasm, the court remanded to the Commission to reassess Dayton Tire's level of culpability and the appropriate penalty, "trust[ing] [that] the Commission will act before the decade is out."

At the end of the day, the dual issues addressed by the D.C. Circuit should bring employers subject to the OSH Act greater clarity. Employers can move forward with confidence that their good faith construction of the Act's requirements—whether or not ultimately correct—will not subject them to willful violations. And, assuming the Commission takes the court's rebuke seriously, the decision should prompt it to act with greater efficiency in carrying out its duty to clarify health and safety standards in the future.