SECRETARY OF LABOR Complainant, v. BROOKS WELL SERVICING, INC., Respondent.	OSHRC Docket Nos. 99-0849

DECISION

Before: RAILTON, Chairman; STEPHENS, Commissioner.

BY THE COMMISSION:

Following a blowout and explosion which killed seven people at an oil and gas well in Bryceland, Louisiana, the Occupational Safety and Health Administration (OSHA) investigated the incident and issued a citation to Brooks Well Servicing, Inc. (Brooks) alleging that Brooks had committed two serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Brooks contested that citation, and a hearing was held before Administrative Law Judge Stephen J. Simko, Jr., whose decision has been directed for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j). For the reasons below, we affirm the judge's decision in part, and we reverse in part.[1]

[1] Because we have decided the case on the basis of the record and submitted briefs before us, we deny Brooks' motion for oral argument.

Background

The Bryceland oil and gas well was owned by Sonat Exploration Co. (Sonat), which had hired Brooks to perform well servicing. Sonat hired another company, Cudd Pressure Control (Cudd), to perform a specialized procedure called "snubbing." Snubbing is a technique for servicing an active well that involves inserting tubing or pipes down the well while controlling the well's pressure to prevent fluid from escaping.

Cudd brought its snubbing rig to the wellsite on a truck and began setting it up on October 21, 1998, three days before the blowout occurred. Setting up the snubbing rig involved first fitting high-pressure valves called "frac valves" to the top of the wellhead to isolate the snubbing equipment from the wellbore. Next, a "stack" or "tree" of valves called blowout preventers ("the BOP stack") was assembled and fastened on top of the frac valves. Then, the snubbing rig was placed on top of the BOP stack and bolted in place. The snubbing rig, which stood approximately 17 feet high, had two platforms: an upper one, known as the "basket," and a lower one about ten feet below. When the snubbing rig was in place on top of the BOP stack, the floor of the basket was approximately 26 feet above the ground, and the guardrails around the basket were about thirty feet from the ground.

On October 24, 1998, two Brooks employees were in the basket assisting three Cudd employees with the snubbing operation. Shortly after noon, the well blew out and ignited, burning for two days. The record does not reveal the cause of the blowout or the explosion, but the pipes being inserted, known as the "completion string," apparently encountered too much resistance and began to buckle. One person was taken from the site and died later. The remains of six other people were recovered from the ground near the base of the structure. All five people who had been in the basket died.

The citation

OSHA's citation alleged that Brooks committed two serious violations. One of these charges was withdrawn at the beginning of the hearing. The remaining charge, which is before us on review, alleged in the alternative that Brooks had violated either the standard at 29 C.F.R. § 1910.36(b)(1),[2] or section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1)[3] by failing to provide adequate means of egress from the snubbing rig to permit prompt escape in an emergency. The judge found that the standard applied to the cited conditions and affirmed a serious violation. For the reasons set out below, although we agree with the judge that the cited standard governs the working conditions cited, we reverse his finding of a violation.

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[2] That standard provides:

> **§ 1910.36 General requirements.**
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> (b) *Fundamental requirements.* (1) Every building or structure, new or old, designed for human occupancy shall be provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency. The design of exits and other safeguards shall be such that reliance for safety to life in case of fire or other emergency will not depend solely on any single safeguard; additional safeguards shall be provided for life safety in case any single safeguard is ineffective due to some human or mechanical failure.

[3] Section 5(a)(1) provides:

> Each employer –
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

Applicability

On review, Brooks argues that the snubbing rig used at the Bryceland well was a "mobile structure" within the meaning of section 1910.36(a)[4] and therefore exempt from the egress requirements of the cited standard. As the party claiming the benefit of this exemption, Brooks has the burden of proving that the snubbing rig was, in fact, a "mobile structure." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194, 2000 CCH OSHD ¶ 32,134, p. 48,420 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Armstrong Steel Erect., Inc.*, 17 BNA OSHC 1385, 1389, 1995-97 CCH OSHD ¶ 30,909, p. 43,032 (No. 92-262, 1995); *Article II Gun Shop*, 16 BNA OSHC 2035, 2039, 1993-95 CCH OSHD ¶ 30,563, p. 42,302 (No. 91-2146, 1994) (consolidated). Contrary to Brooks' contention, we therefore find that the judge did not err in placing the burden of proving that the cited standard does not apply on the company. The judge also correctly stated that exceptions are to be narrowly construed. *Southern Pacific Transp. Co.*, 2 BNA OSHC 1313, 1314, 1974-75 CCH OSHD ¶ 19,054, pp. 22,785-86 (No. 1348, 1975), *aff'd*, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977).

We agree with the judge that Brooks failed to carry its burden to prove that the standard does not apply to its snubbing rig operations.[5] Although Brooks makes general assertions about the mobile nature of snubbing units and states facts that it claims are

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[4] That standard provides:

> **§ 1910.36 General requirements.**
> (a) *Application.* This subpart contains general fundamental requirements essential to providing a safe means of egress from fire and like emergencies. Nothing in this subpart shall be construed to prohibit a better type of building construction, more exits, or otherwise safer conditions than the minimum requirements specified in this subpart. Exits from vehicles, vessels, or other mobile structures are not covered by this subpart.

[5] Because we have found that the cited standard applies to the conditions in question, section 5(a)(1) of the Act cannot apply. *Brisk Waterproofing Co.*, 1 BNA OSHC 1263, 1264, 1973-74 CCH OSHD ¶ 16,345, p. 21,261 (No. 1046, 1973). *See also Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196, 1199 (5th Cir. 1997). We therefore vacate the alternative allegation that Brooks violated section 5(a)(1).

"well known and common sense in the snubbing industry," it failed to introduce sufficient evidence to support its claim that the snubbing rig used here falls into the category of "vehicles, vessels, or other mobile structures…not covered by this subpart."[6]

Brooks' primary argument is that the Bryceland snubbing rig was similar to the well servicing or "workover" rigs that the Secretary exempted from the cited standard's requirements in a 1978 directive. Program Directive # 100-67, Directive Number STD 1-2.1. The directive was issued subsequent to two decisions by Commission administrative law judges in which workover rigs – described as telescoping derricks that remain permanently attached to trucks – were found to be mobile structures and thus exempted from the standard's egress requirements.[7] In the directive, OSHA stated that the standards in Subpart E – Means of Egress of 29 C.F.R. Part 1910 "shall not be applied to workover rigs because they are mobile structures and parts of vehicles within the exemption set forth in 29 C.F.R. 1910.36(a)." The directive also instructed compliance officers to cite inadequate egress from workover rigs under section 5(a)(1) of the Act.

The Secretary points out that in *Fred Wilson Drilling Co.*, 6 BNA OSHC 1942, 1978 CCH OSHD ¶ 23,021 (digest) (No. 77-3578, 1978) (ALJ), *aff'd in pertinent part*,

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[6] Without making a motion to re-open the record, Brooks has attached materials to its brief on review that are not part of the record. Even if we were to treat Brooks' attachment as tantamount to such a motion, we would deny it. The Commission must base its decision on the record compiled by the parties before the administrative law judge. *National Realty & Constr.*, 489 F.2d 1257, 1267 (D.C. Cir. 1973); *Wyman-Gordon Co.*, 15 BNA OSHC 1433, 1452-53, 1991-93 CCH OSHD ¶ 29,550, p. 39,943 (No. 84-785, 1991). Therefore, a party must place into the record all evidence relevant to its case or object on the record if prevented from doing so. *Caterpillar, Inc.*, 17 BNA OSHC 1505, 1507, 1995-97 CCH OSHD ¶ 30,971, p. 43,154 (No. 94-345, 1996). The time to introduce evidence is at the hearing, not on review. *Anoplate Corp.*, 12 BNA OSHC 1678, 1683 n.6, 1986-87 CCH OSHD ¶ 27,519, p. 35,681-82 n.6 (No. 80-4109, 1986). Thus, we do not rely on any materials not contained in the record in deciding this case.

[7] *See Fairbanks Well Service, Inc.*, 5 BNA OSHC 1873, 1977-78 CCH OSHD ¶ 21,740 (digest) (No. 76-4297, 1977) (ALJ); *Parker Well Service, Inc.*, 5 BNA OSHC 1847, 1977-78 CCH OSHD ¶ 21,741 (digest) (No. 76-4302, 1977) (ALJ).

624 F.2d 38 (5th Cir. 1980), a third type of rig known as a well-drilling rig was not considered a mobile structure and, therefore, was subject to the requirements of the cited standard. In *Fred Wilson*, the well-drilling rig was transported from wellsite to wellsite by truck, then removed from the truck and assembled for use. Thus, in determining whether Brooks has established that the snubbing rig used at the Bryceland well was exempt from the cited standard's requirements, we must consider whether the snubbing rig was more like the mobile workover rig exempted from the standard's coverage by OSHA's 1978 directive or more like the well-drilling rig in *Fred Wilson* that failed to qualify for the "mobile" exemption.

On the record here, we are unable to conclude that the Bryceland snubbing rig was more comparable to the mobile workover rig than the well-drilling rig. All three types of rigs are transported to the worksite by truck. However, the mobile workover rig discussed in the Secretary's directive remained attached to the truck during use; thus, remained "mobile." In contrast, the snubbing rig at issue here and the well-drilling rig in *Fred Wilson* were both removed from their means of transport before use and required assembly over a two-day and several-day period, respectively, before each could be used to perform the task for which it was designed. Accordingly, we find that Brooks has not carried its burden of establishing that the snubbing rig was a "mobile structure" and, therefore, exempt from the cited standard's requirements.

Were the terms of the standard met?

The record establishes that there were a number of possible means of egress from the snubbing rig. The normal means of access to the snubbing basket was a ladder attached to the snubbing rig.[8] Another ladder located about two feet from the basket was attached to Brooks' well servicing rig, which was used to assist the snubbing rig. To reach the servicing rig's ladder, an employee had to unhook two chains on the railing of the basket and step across to the ladder. Brooks' expert testified that employees did this

[8] Although the judge found it was unclear whether this ladder extended all the way to the ground, we find that it must have since it was shown to be the way employees accessed the basket from the ground.

"routinely" and that it was not dangerous because the ladder extended out enough to allow an employee to take hold of it before stepping across the opening onto the ladder.

According to Sonat's representative who was in charge of the wellsite, there were also three or four ropes tied to the railings of the snubbing basket the day before the explosion.[9] One of the compliance officers stated that a number of employees told him that ropes had been attached to the basket for escape, but neither he nor the other inspector found any physical evidence of the ropes. That is not surprising, as the first compliance officer did not arrive at the site until four days after the explosion. By that time, both the snubbing rig and the BOP stack had been removed from the wellhead and placed on a flatbed truck. The other compliance officer, who arrived two days after that,

[9] Sonat's on-site representative made these statements in a deposition taken after the hearing. At the deposition, he was uncertain about some of the details because his recollection had faded with time. However, he had been more definite in a sworn statement given to OSHA during the investigation, stating that there were three, possibly four, escape ropes that were secured to the basket like rappel ropes used in mountain climbing and which hung straight down. Brooks offered the Sonat representative's sworn statement to OSHA into evidence at the hearing, but the Secretary objected on the ground that the statement was hearsay. In his decision, the judge sustained that objection and Brooks challenged his ruling in its petition for review. Although the issue was not specified in the briefing notice, the Commission may still consider the issue on review. *Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1802-03, 1986-87 CCH OSHD ¶ 27,576, pp. 35,824-25 (No. 83-308, 1986).

We conclude that the sworn statement should have been admitted. Under the Federal Rules of Evidence, applicable to Commission proceedings under Rule 71 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.71, hearsay is admissible under certain conditions. *See* Rule 802, *et seq*. As the Commission has recognized, the problem with hearsay is that the objecting party has no opportunity to cross-examine the declarant. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993-95 CCH OSHD ¶ 30,034, p. 41,185 (No. 88-1720, 1993). However, that problem did not arise here since it was OSHA, the objecting party, which conducted the examination of the witness to compile the statement to which it was objecting. We further note that the Sonat representative's statement was taken under oath as part of OSHA's investigation and transcribed by a court reporter. In addition, both compliance officers and the Secretary's expert were present and able to ask questions.

admitted that the fire had burned for two days, that the heat was "pretty intense," and that, "[i]t would be expected" that the ropes would be consumed in the fire.

Finally, there were two "geronimo" escape ropes attached to the derrick on Brooks' well servicing rig adjacent to the snubbing rig. Those ropes passed about three feet above the guardrails on the snubbing basket and were staked at an angle to the ground below. The judge correctly noted that the record does not establish the exact angle of these ropes. We find, however, that the record does show that the normal industry practice is to stake them at approximately a two-to-one angle. In other words, if the ropes passed three feet above the railings, the stakes would be approximately 66 feet from the ground directly below the railings. Because there is no evidence that the normal practice was not followed here, it is reasonable to conclude that the two geronimo escape ropes were staked approximately 66 feet away.[10]

The judge found that because the record did not show affirmatively that the ropes were in place on the day of the explosion, Brooks had not proved that they were present at the time of the explosion. We reverse this finding. We conclude that the judge

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[10] In a deposition taken after the hearing, Cudd's well operator on the day prior to the blowout and explosion testified that on the day before these events, there were two inch-and-a-quarter or inch-and-a-half rope lines running from the derrick to the ground, where they were staked off. One line ran over the right side of the snubbing basket; the other ran over the left side. There were no slides or pulleys on the ropes. The well operator had also given a statement to OSHA during its investigation in which he stated that there were two geronimo lines attached to the workover rig mast, one on each side. He stated that the lines did not have a trolley and because a person would have to slide down them using hands and feet, they were for emergency use only.

Brooks offered into evidence the well operator's statement to OSHA, but again the Secretary objected on the ground that it was hearsay. The objection was sustained, and the well operator was deposed after the hearing. Although his statement to OSHA was not sworn before a court reporter, as was the statement of Sonat's representative, it was part of OSHA's report of its investigation. There is nothing to indicate that the statement lacks trustworthiness, and it therefore may have been admissible under Rule 803(8)(C) of the Federal Rules of Evidence. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 220-22 (5th Cir. 1980).

improperly placed the burden of proving the ropes were in place on the day of the explosion on Brooks. It is well established that the Secretary has the burden of proving that the terms of the cited standard were not met. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1993-95 CCH OSHD ¶ 30,445 (No. 91-2524, 1994). The record clearly establishes that the ropes were in place on the day before the explosion. Once a condition has been shown to exist, it is presumed to continue unless there is evidence to the contrary. *Central Pac. Ry. v. Alameda County*, 248 U.S. 463, 468 (1932). *See also Hermitage Concrete Pipe Co.*, 10 BNA OSHC 1517, 1520, 1982 CCH OSHD ¶ 25,975, pp. 32,574-75 (No. 4678, 1982) (realistic estimate of probabilities suggests workplace conditions remain the same). Absent evidence that any of the ropes had been removed before the explosion, we find that a preponderance of the evidence shows they were still in place at that time.

In addition, the judge found that, even if the ropes were in place, Brooks had not provided adequate emergency egress as required by the cited standard. He faulted both ladders because they were obstructed: the one on the basket by a gate that swung inward and the one on the servicing rig by the two railing chains.[11] The judge also criticized the use of the ladder on Brooks' servicing rig as a means of egress because it exposed employees to a fall of thirty feet. In addition, he found that the ladders were not adequate as emergency egress because they would have conveyed employees straight down into the blowout and the burning gas.

Similarly, the judge found that the ropes hanging from the guardrails around the snubbing basket would not provide adequate emergency egress because: employees had to climb over the guardrails to use them; they did not convey employees away from the danger; and employees using them were exposed to a thirty-foot fall. He also stated that

[11] We do not consider either of these obstructions to be as significant as the judge found because they would have slowed an employee's escape only momentarily. Further, we note that both were likely in place to satisfy the Act's fall protection requirements.

he could not determine whether the geronimo ropes conveyed employees away from the danger because: there was no evidence as to the angle of the ropes; the ropes did not have seats, slings, or a mechanism to control descent; and they exposed employees to the danger of falling.

We reverse the judge and find that the Secretary failed to establish that Brooks did not comply with the terms of the standard. The Secretary alleges that Brooks did not comply with the requirements of section 1910.36(b)(1) that "[e]very building or structure, new or old, designed for human occupancy shall be provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency." Because the phrase "exits sufficient to permit the prompt escape" does not state with specificity what an employer must do to comply with the standard, we apply the well-established principle that a broadly-worded regulation may be given meaning in a particular situation by reference to objective criteria, including the knowledge and perception of reasonable persons knowledgeable about the industry. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993-95 CCH OSHD ¶ 30,045, p. 41,233 (No. 88-1250, 1993) (citing *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974)), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1993). Under Commission precedent, the Secretary can prove a violation of a broadly-worded standard by showing that a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazardous condition requiring the use of protective measures. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992). The Commission has held that evidence as to current industry practice is relevant but is not dispositive. *Baker Tank Co.*, 17 BNA OSHC 1177, 1179, 1993-95 CCH OSHD ¶ 30,734, p. 42,683 (No. 90-1786-S, 1995).

Because this case arose in Louisiana and Brooks' main office is in Texas, this case can be appealed to the United States Court of Appeals for the Fifth Circuit. *See* sections 11(a) & (b) of the Act, 29 U.S.C. §§ 660(a) & (b). When the law of the circuit to which a case would likely be appealed differs from the Commission's case law, we apply the law

of that circuit, here, the Fifth Circuit. *Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104 n.7, 2003 CCH OSHD ¶ 32,656, p. 51,319 n.7 (No. 00-1077, 2003), *pet. for rev. filed*, No. 03-2791 (3d Cir. June 19, 2003). The Fifth Circuit's reasonable person test differs from that of the Commission in one significant respect. While Commission precedent holds that industry custom and practice are useful points of reference but are not controlling, *S & H Riggers & Erectors*, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), *rev'd*, 659 F.2d 1273 (5th Cir. 1981), the Fifth Circuit has stated that, when a reasonable person test is used to determine what is required under a general standard, there should be a close identification between the projected behavior of the reasonable person and the customary practice of employers in the industry. *B & B Insulation v. OSHRC*, 583 F.2d 1364, 1370 (5th Cir. 1978). The court has also stated that in the absence of a clear articulation of the circumstances in which industry practice is not controlling, due process requires proof either that: (1) the employer failed to provide protective equipment customarily required in its industry; or (2) that it had actual knowledge that such protection was required under the circumstances of the case. *S & H Riggers & Erectors v. OSHRC*, 659 F.2d 1273, 1275 (5th Cir. 1981). We therefore must first determine the practice of the relevant industry with respect to emergency escape; then, whether Brooks' conduct satisfied that practice.

Brooks' expert witness testified that the oil well snubbing industry, which he identified as the relevant industry here,[12] is responsible for providing for safety in

[12] The Secretary failed to introduce rebuttal evidence on this point and, therefore, did not establish that a broader definition of the relevant industry should be applied – e.g., the oil well servicing industry, the oil and gas well drilling industry, or any other possible combination of drilling or well servicing operations. Although the Secretary did introduce some evidence of emergency egress means used on oil well drilling rigs, she did not establish that practices used by the oil and gas well drilling industry are relevant to this case or should have been recognized by the snubbing industry. We note that such rigs are usually between 150-200 feet high as compared to the 17-foot high rig used here.

snubbing operations, including emergency means of egress when problems requiring the use of emergency egress arise. According to Brooks' expert, the snubbing industry uses the type of escape ropes and geronimo lines provided here as the means of emergency escape.

The Secretary's expert testified only that industry practice is to rely on the snubbing company to satisfy safety requirements on a snubbing rig and that, here, the snubbing company, Cudd, had placed the two geronimo ropes on the derrick. There is nothing in the record to establish that it is the practice of the snubbing industry to use enclosed slides[13] or that the industry has recognized a need for enclosed slides or any other measures beyond the five or six ropes that were in place here. Although the judge found the ladders to be unsatisfactory means of emergency egress, the record indicates that they constitute one of the means of escape used by employees in the snubbing industry as a whole. While the record shows that drilling rigs use wire ropes or cables that have pulleys or slides to facilitate escape, there is nothing in this record to show that the snubbing industry does the same.

Based on our review of the record, we find that the means of egress provided at the Bryceland well comported with industry practice. An employer's duty under this standard is determined by reference to the custom and practice of its industry. Accordingly, we find that Brooks satisfied the requirement within that context even though the precautions taken did not prevent the catastrophe here.[14]

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[13] The compliance officer opined that adequate emergency egress required at least two emergency slides enclosed by heat resistant material. He was not, however, an expert and had never seen such slides. The Secretary's expert witness testified that such slides have been used for drilling rigs, but he, too, had never seen such a slide. Furthermore, he did not know of any company who made a slide of that kind. Brooks' expert, however, testified based upon personal knowledge and familiarity with the three largest snubbing companies that none of them use a slide of the kind described by the compliance officer.

[14] The judge's conclusion that the means of escape provided here were inadequate appears to have been based in part on the fact that the employees did not escape on the day of the blowout. The standard, however, requires only that a structure be provided with exits sufficient to permit prompt escape. The Act does not make the employer a guarantor of employee safety, *General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC*, 599 F.2d

Conclusion

For the foregoing reasons, we find that section 1910.36(b)(1) applies to the cited conditions but that the Secretary failed to show that the means of escape used here were inadequate within the context of industry practice. Accordingly, we vacate the citation.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: August 26, 2003

453, 458 (1st Cir. 1979) (section 5(a)(1) violation alleged), and the occurrence of a hazardous situation is not, *per se*, proof of a violation, *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973).

Because we have little evidence about what occurred just before the blowout, we cannot know with certainty what happened that day. For example, we know that all the decedents were found on the ground near the wellhead, but we do not know how they got there. Brooks' expert testified that there is normally ample warning of a blowout to enable everyone to escape, but we are unable to make any determination as to why that did not happen here. We also have no indication of how quickly the explosion occurred after the initial blowout. Without evidence that Brooks had knowledge that the ropes and ladders provided in accordance with industry practice were not adequate to permit escape, we cannot find a violation. *Cotter & Co. v. OSHRC*, 598 F.2d 911, 914-15 (5th Cir. 1979). *See also S & H. Riggers & Erectors*, 659 F.2d at 1278.