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SECRETARY OF LABOR
Complainant,
v.
UNION DRILLING
Respondent.

OSHRC DOCKET
NO. 93-0154

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 9, 1994. The decision of the Judge will become a final order of the Commission on March 11, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 1, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 9, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0154

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. UNION DRILLING, Respondent.	OSHRC Docket No. 93-154

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Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On November 30, 1992, the Secretary issued Union Drilling (Union) two citations resulting from an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer Andrew Berestecky. Berestecky began his inspection on June 4, 1992, in response to a report of the deaths of two employees at a worksite in Hopwood, Pennsylvania, on June 2, 1992. Union contested the citations at a hearing held in Pittsburgh, Pennsylvania, on June 3 and 4, 1993.

At the beginning of the hearing, the Secretary moved to vacate items 1a and 1b of Citation No. 1 (Tr. 7-8). The Secretary's motion is granted. Remaining at issue are items alleging violations of a ladder standard, § 5(a)(1), and the hazard communication standard.

This case is complicated by the question of who was acting as the employer of the exposed employees for the purposes of the Occupational Safety and Health Act of 1970 (Act). CNG Transmission Corporation (CNG) and Union were cited with identical citations. It is necessary to delve into the relationship between CNG and Union in order to explain the dispute regarding whether either or both companies acted as an employer.

Background

In 1990 CNG began preparing an old gas field in Hopwood, Pennsylvania, for the underground storage of natural gas (Tr. 13, 57). CNG would hire one of several contractors it dealt with to redrill a well. After the redrilling was completed, the well would undergo a two-step "fracing" process in which the same operation is repeated twice. Fracing is performed by forcing a mixture of water, nitrogen, hydrochloric acid, sand, and other materials into the well so that the mixture fractures the rock strata and creates the storage area (Tr. 11-13, 46-48).[1]

In 1991 CNG hired Delta Drilling to redrill a well referred to as UW 103 (Tr. 17, 46). After Delta Drilling had redrilled UW 103, CNG hired Halliburton Services to perform the fracing (Tr. 12). Halliburton Services provided all of the chemicals used in the fracing process (Tr. 14). After the fracing liquid was pumped into the well under pressure, the well was capped. It was then necessary to recover the frac fluid in the "flow-back" operation. The frac fluid, which had been contained under pressure underground, was piped into a "flow-back" tank (also referred to as the "blow-back" tank). The flow-back tank contained a baffle to blunt the impact of the returning frac fluid mixed with sand under pressure (Tr. 49-51). The flow-back tank was partially open at the top (Exh. C-2). The frac fluid was

[1] Because much of the evidence relevant to Union's case was identical with that of CNG's case, the first portion of the hearing generated a transcript that was used in both cases. The transcript citations are found in the transcript labeled "CNG Transmission Corporation."

then piped into a nearby 500-barrel "frac" (or "wheely") tank (Exh. C-2; Tr. 21). The flow-back tank was leased from Whip Stock (Tr. 14). CNG leased the frac tank from Union (Tr. 54).

At the rear of the frac tank, the floor of the tank formed a 2- or 3-foot long step to accommodate the wheels underneath it (Exh. C-2, Photograph A). At the front of the frac tank was a "manhole" next to the foot of the ladder used to gain access to the top of the wheely tank. The manhole cover was posted with a sign written in English and Spanish. The English portion of the sign read (Exh. C-2, Photograph D):

DANGER
DO NOT ENTER
THIS TANK MAY CONTAIN
FATAL VAPORS

On top of the frac tank were two openings, a manhole cover used to enter the tank in order to clean it out, and a smaller opening (Tr. 69). The manhole was approximately 19 by 21 inches, and the smaller opening was 1 or 2 inches in diameter (Tr. 37, 268). A ladder descended from the top manhole into the frac tank (Exh. C-5; Tr. 74). The top manhole is above the elevated section of the tank's bottom. The smaller opening is above the lower section of the floor (Tr. 52).

On June 2, 1992, the second phase of the fracing process began at UW 103 (Tr. 254). The first phase had been completed the week before (Tr. 124). James Simons, a production specialist for CNG, coordinated the second phase of the fracing process at UW 103. He was not involved in the first phase (Tr. 11, 25).

Generally, CNG used its own people to perform the flow-back operation, but Simons explained CNG was "under such a heavy workload that year that [it] did not have the people, so [CNG] contracted outside help to do that work" (Tr. 18). Brian Sheppard, an engineer for CNG, called Arthur Dennis Chidester (Sheppard referred to him as "Dan"), a drilling superintendent for Union, in July 1991 (Tr. 327-328). Union had done some drilling for CNG in the past (Tr. 328). Sheppard told Chidester that CNG "needed personnel to help rig up the flow line and then monitor the flow back for the flow back operation" (Tr. 329).

Sheppard asked Chidester for a two-man crew. Chidester asked Sheppard if he would mind using two two-man crews so that the personnel could be rotated and the employees could keep their benefits active. Sheppard agreed to this arrangement (Tr. 330-331).

Union assigned Mike Phipps, A. Harley Doyle, George Burkhammer, Bob Davisson, and Herb Sias to the UW 103 site.[2] Davisson and Sias were on the day crew, and Phipps, Doyle and Burkhammer were on the night crew (Tr. 17). Prior to this assignment, neither Davisson nor Sias had ever done any flow-back work (Tr. 128, 171).

Sias testified that Davisson, who was his supervisor at Union, asked him if he wanted the assignment. Sias told him that he had never done flow-back work before. Davisson assured Sias that the crew they were relieving would tell them what to do when they arrived at the site (Tr. 171). When they arrived at UW 103, Union employees Doyle and Mike Phipps explained to Davisson and Sias that they had to monitor the tank gauges and measure the depth of the frac fluid in the frac tank every two hours (Tr. 172-173). One of the crew, whom Sias remembers as Doyle, told Sias and Davisson how they were measuring the frac fluid. He said that they were going into the tank through the top manhole. Davisson never went into the frac tank. He went down the ladder the first day (Tr. 126). Sias went down through the manhole once or twice (Tr. 173, 189-190) but then told Davisson, "I don't like the idea of going down in here" (Tr. 173). Sias and Davisson began measuring from the smaller opening by dropping the weighted end of a 16-foot steel tape measure to the floor of the tank (Tr. 127, 173). A fluid level gauge on the wheely tank was inoperable (Tr. 29, 34, 200). Having discovered this method of measuring the level of the frac fluid, Davisson and Sias demonstrated it to the night crew on June 2, 1992, and warned them not to go down into the wheely tank (Tr. 180-181).

Earlier that day, Simons and the Union crew detected a leak in the flow-back tank. Simons decided to reconfigure the piping and, between 5:00 p.m. and 5:30 p.m., directed

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[2] Apparently, the night crew for the first night of the fracing process consisted of Doyle and Phipps. The next night Doyle was paired with Burkhammer.

Davisson and Sias to bypass the flow-back tank and flow the liquid directly into the frac tank (Tr. 14, 63, 67).

The gas pressure which had escaped when the frac fluid was passing through the flow-back tank now flowed into the frac tank. Sias, who stood on top of the frac tank after the reconfiguration, stated that the frac tank began pulsating: "The tank was just–the sides [were] going in and out of it and the top the same way .... It was just moving back and forth, the metal on the sides of the tank. The top was just moving back and forth" (Tr. 162).

The new configuration also caused the liquid to foam up to the top of the frac tank (Tr. 133, 141-142). Sias and Davisson asked Simons to get some defoamer for the frac tank. Halliburton delivered several containers of the defoamer as Davisson and Sias were being relieved by Doyle and Burkhammer (Tr. 36, 141, 177).

Davisson and Sias reported to work on the morning of June 3, 1992, at 7:00 a.m. They saw no sign of Doyle and Burkhammer whom they were supposed to relieve (Tr. 145, 181). The manhole cover was open. The foam was still a foot or two from the top of the frac tank (Tr. 161, 181). The measuring tape had been stuck in the small opening on top of the tank. Sias and Davisson started pumping the frac fluid out of the frac tank to see if the missing men were in there. Eventually, the bodies of Doyle and Burkhammer were found at the bottom of the ladder inside the frac tank (Tr. 145, 200). The cause of death was later determined to be asphyxiation (Tr. 295).

Who Was the "Employer" for Purposes of the Act?

"Only an 'employer' may be cited for a violation of the Act." *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1992 CCH OSHD ¶ 29,775 (No. 88-1745, 1992). Section 3(5) of the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(4) of the Act defines a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Section 3(6) defines "employee" as "an employee of an employer who is employed in a business of his employees which affects commerce."

Both CNG and Union were cited as employers of the men monitoring the level of the frac fluid. Union, and to a lesser extent, CNG, argue that the other party is the employer for purposes of the Act. The Secretary argues that both parties are liable as employers under the Act. Review Commission case law establishes some guidelines for determining what constitutes an employer.

Last year the Commission reiterated its "economic realities test" formulated to determine whether an employment relationship exists between employees and the alleged employer. In *Loomis Cabinet Company*, 15 BNA OSHC 1635, 1637, 1992 CCH OSHD ¶ 29,775 (No. 88-2012, 1992), the Commission stated that it had "considered a number of factors" when making the determination, including:

1) Whom do the workers consider their employer?

2) Who pays the workers' wages?

3) Who has the responsibility to control the workers?

4) Does the alleged employer have the power to control the workers?

5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?

7) How are the workers' wages established?

Van Buren-Madawaska, 13 BNA OSHC at 2158, 1989 CCH OSHD at p. 37,780 (quoting *Griffin & Brand*, 6 BNA OSHC at 1703, 1978 CCH OSHD at pp. 27,600-01)."

In an earlier case, *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1985 CCH OSHD ¶ 27,408 at p. 35,570 (No. 83-231, 1985), the Commission emphasized that the primary factor to be considered in determining whether an employment relationship exists is control:

> The express purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To effectuate this purpose it is appropriate for the Commission, in considering whether an employment relationship exists, to place primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained.

In *Vergona*, also decided last year, the Commission addressed a recent Supreme Court decision which accorded with Commission precedent regarding the primacy of the issue of control in analyzing an employment relationship:

> The Supreme Court recently held that the term "employee" in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise. *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992). *See Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992). The Court noted that all aspects of the relationship are relevant, but that the central inquiry is as follows:
>
> > In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
>
> 112 S.Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (footnotes omitted)). Thus, the central inquiry under both tests is the question of whether the alleged employer has the right to control the work involved. *See Loomis*, 15 BNA OSHC at 1638.

Vergona Crane Co., 15 BNA OSHC at 1784.

In the present case, CNG contacted Union and requested the company to send over some employees to monitor the fracing process. After Union did so, its involvement with

the project, other than paying the employees' wages, essentially ended (Tr. 70-73). Chidester, Union's supervisor, testified that he assigned the employees to the project and stated, "I remained their supervisor as far as sending them out of the shop, and if I got a call telling me we needed them tomorrow or to have them there at 6:00 a.m. or whatever, I was their supervisor in that capacity" (Tr. 88). Chidester never visited the UW 103 worksite (Tr. 88-89).

Union supervisors were not present at the site, nor did they ever instruct the employees on what they were to do or how to do it. When Davisson asked Sias if he wanted to work on the UW 103 well, Sias stated, "I have never done that before." Davisson replied, "We will show you when you get there. The guy you are relieving will explain to you what you are doing and tell you what to do" (Tr. 171). The crew that Davisson and Sias relieved had been instructed by James Simons, CNG's production specialist, who testified, "I told them at what point we should be opening the valve up to begin process of the flow back, and we also discussed the measurements of the tank" (Tr. 19).

Sias testified that he considered CNG personnel to be the supervisors of the project. Simons gave the crew instructions on how to perform the work. Simons and another CNG supervisor, Dave Taylor, would ask to see the logbook that the employees kept. As Sias stated, "If we are drilling a well for a certain company, when the guy asks you to do something, you do what he tells you or you try to. We consider that's who we are working for" (Tr. 176).

Davisson and Sias were instructed by CNG to change the choke (Tr. 176-177): "They told us what size choke to put in. We knocked the line apart and put a choke in it." On June 2, 1992, when the flow-back tank was leaking, it was Simons who ordered Davisson and Sias to reconfigure the pipe so that the frac fluid flowed directly into the frac tank (Tr. 67, 177). When asked if it was necessary to call Union to request permission to allow the employees to reconfigure the pipe, Simons replied, "No" (Tr. 67).

Applying the Supreme Court's employment test cited in *Darden*, *supra*, it is apparent that CNG was an employer of the crews leased from Union for purposes of the Act. All of the witnesses testified that the flow-back operation did not require a highly skilled workforce. Davisson stated that he did not consider the work that he was asked to do difficult or

complicated (Tr. 146). Sias testified that the job he was asked to do did not require any special skills (Tr. 195). Simons went so far as to state, "We could pick two people off the street to handle this job" (Tr. 314). CNG was not relying on any particular expertise of the Union workers. The crews did not have to supply any special tools or equipment. The work was done at CNG's well site UW 103. CNG had the right to assign additional projects to the workers, as evidenced by the events of June 2, 1992, when Simons asked Davisson and Sias to assist him in realigning the pump so that fluid bypassed the flow-back tank and went directly into the wheely tank. CNG informed Union what time the workers were to report to the jobsite (Tr. 70-73). When the job was completed, CNG either told the employees on the site not to return or called Union, whichever was easier (Tr. 72). The flow-back operation is part of the regular business of CNG and, ordinarily, CNG used their own employees to flow back the wells during the fracing process (Tr. 18).

Under both the Supreme Court's and the Commission's formulations of their employment tests, in which the most significant factor is whether the alleged employer has the right to control the work involved, CNG was an employer of the employees leased from Union. CNG controlled the UW 103 well and controlled the employees' performance of their work. The only instructions and orders the employees received were from CNG personnel. CNG is an employer of the employees within the meaning of the Act.

The Secretary contends that Union was also an employer of the employees for purposes of the Act because Union continued to pay the employees and control their work assignments. In *MLB*, *supra*, the Commission held that, although who pays the employees' wages "has some bearing on the employment relationship, [it is] not directly related to the issue of control, and should normally be accorded less emphasis in determining the employment relationship under the Act." *MLB*, 1985 CCH OSHD at p. 35,510.

MLB is instructive on a number of points pertaining to the present case. In *MLB*, Crown was the owner of and general contractor at a construction site. MLB was a subcontractor completing some work for Crown. One day Dexter, the project engineer for Crown, contacted Bromley, the project manager for MLB, and "asked Bromley if he could supply manpower to remove sections of a floor at the 'IP' building." *MLB*, 1985 CCH at p. 35,508. Bromley assigned two MLB employees to go to the IP building. Dexter met them

there and showed them the sections of the concrete floor they were to remove. He told them how to chop out the sections, what tools to use, and what safety devices they were to wear. They were joined later by a third MLB employee. Subsequently, a section of the concrete floor where the third employee was standing gave way, and the employee fell to his death. *Id.*

The administrative law judge who heard the case found MLB was the employer of the three employees. The Commission reversed the judge's decision, holding that Crown, and not MLB, was the employer for purposes of liability:

> Analyzing this case from the standpoint of who had control over the employees and their activities, we conclude that Crown had both the responsibility and the power to control the employees' activities. Crown's control over the employees' activities was consistent with the arrangements made between Crown and MLB prior to the beginning of the work. In his request for workers, Dexter, Crown's project engineer, told Bromley, MLB's project engineer, that he would tell the workers what to do, would furnish the tools and would supervise the work.

Id. at p. 35,510.

The Commission's discussion of MLB's role is particularly applicable to the role of Union in the present case:

> In contrast to Crown's direct control over the employees' activities through Dexter's supervision, MLB's power to control the employees and to modify their working conditions was largely indirect or theoretical. Although MLB selected and contacted the employees about the job, there was no showing that MLB's initial contact with the employees had an impact upon how they performed their work or their safety.
>
> Although MLB may have had the authority to withdraw the laborers from the worksite, to fire them, and to assign other laborers to do the work, MLB was not performing any work at the IP building and did not take any role in determining how the concrete floor was to be removed. Further there is no indication that MLB knew of any circumstances that would have required it to take action with respect to the workers' employment, either for safety purposes or for any other reason. Therefore, MLB did not have sufficient control of the work environment or employee's activities to support a finding that it was an employer under the Act.

Id. at p. 35, 511.

Like MLB, Union's control of its employees working on the UW 103 project was "largely indirect or theoretical." Union took no part in determining what or how the work at the well was to be done. Other than assigning the workers to the project, Union had no involvement with the fracing process and no control over the work environment.

The Secretary's strongest argument against Union is that Union paid the employees' wages. As noted previously, however, who pays the employees' wages is of much less significance than who controls the work environment. Simons testified that the employees "were paid by Union Drilling. Union, in turn, would bill CNG for their time" (Tr. 71). The Commission addresses a similar situation in *MLB*:

> With respect to who paid the employees' wages, it is clear that, although the initial payment of the wages was made by MLB, Crown was billed and ultimately responsible for payment. MLB was merely serving as a "conduit for labor" for Crown, since MLB had a contract with the local union but Crown did not. MLB billed Crown for the employees' wages, their benefits, and a 10% markup for handling the payroll. Thus, while MLB technically paid the workers, it appears that it assumed this responsibility primarily as a matter of convenience and that it was Crown who actually was responsible for the cost. Accordingly, we do not consider MLB's payment of the employees to be significant in determining who was their employer.

Id. at p. 35,511.

Based upon the economic realities test formulated by the Commission and echoed by the Supreme Court in *Darden, supra*, it is concluded that Union was not an employer of the employees at issue for purposes of the Act. Union did not have the necessary control over either the work environment or the employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

That the Secretary's case against Union is dismissed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: January 31, 1994