



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

GALASSO TRUCKING & RIGGING, INC.,

Respondent.

OSHRC DOCKET NO. 16-1410

ORDER

Before the undersigned is Respondent, Galasso Trucking & Rigging, Inc., with their May 15, 2017 Amended Motion to Compel Bay Crane Service, Inc. (Bay Crane) to comply with the subpoena for documents served on Bay Crane on April 20, 2017 (April 20 Subpoena). Respondent argues that Bay Crane has refused to respond to said subpoena. Respondent seeks an order compelling compliance and any other relief necessary to prevent Respondent from being prejudiced by Bay Crane's unwillingness to provide documents related to Respondent's investigation and defense of the citations in the above captioned matter. The instant matter relates to OSHA citations issued to Respondent related to the operation of Bay Crane equipment on February 5, 2016 at Respondent's worksite at 60 Hudson Street, New York, NY.

In a letter, dated May 17, 2017, to the undersigned, counsel for Bay Crane requested an extension, until May 25, 2017, to respond to Respondent's Amended Motion to Compel. Attached to Bay Crane's request was a copy of the April 27, 2017 response Bay Crane had forwarded to Respondent's counsel, which asserted that under Commission Rule 2200.57 (c), the

subpoena was improper as overly broad, impermissibly burdensome, unnecessary, unduly expensive, and time-consuming.¹

On May 17, 2017, counsel for the Complainant also filed a letter with the undersigned stating that the scope of Respondent's April 20 Subpoena request lacked proportionality in light of the subject matter of the two items contained in OSHA's citation to Respondent. Complainant's counsel agreed with Bay Crane's position that the subpoenaed documents appeared to be irrelevant to the issues in the OSHA case and may be more appropriate in related tort litigation.

On May 25, 2017, counsel for Bay Crane filed with the undersigned its response to the Amended Motion to Compel (Response) and sought revocation of said subpoena (Motion to Quash). Attached to the Response were a number of Exhibits, including the above-referenced April 27, 2017 response from Bay Crane to Respondent's counsel. In its Response, Bay Crane asserts that the subpoena does not relate to any matter under "investigation" or "in question" arising from the OSHA citations at issue in the instant matter that resulted from the operation of the crane on February 5, 2016, and that the documents sought are not relevant or material to the

¹ The relevant Rule reads:

29 C.F.R. § 2200.57 (c) **Revocation or modification of subpoenas.** Any person served with a subpoena, whether ad testificandum or duces tecum, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

OSHA investigation. Bay Crane further argues that the document requests are overly broad and unduly burdensome.

The OSHA citations allege that the crane's operator failed to adjust operations to account for wind or snow, and failed to follow the manufacturer's procedures with respect to the boom angle for the crane.² On February 5, 2016, the LE 1300 Crane that Respondent rented from Bay Crane for its worksite at 60 Hudson Street, New York, New York, collapsed as it was being lowered. Respondent asserts that Bay Crane dispatched the operator of the crane, Kevin Reilly, as well as several other individuals, such as Steven Mazzacco, the oiler of the subject crane, and others who were involved in the set-up, repair, and operation of the crane. (Amended Motion to Compel, p. 2).

In its Response, Bay Crane asserts its position that it did not employ anyone for the purpose of operating the crane at the cited Respondent's worksite on or about February 4 through February 5, 2016. (Response, Ex. G, p. 2). In support of its position, Bay Crane attached several documents, including sworn statements from Kevin Reilly and Steve Mazzacco asserting their employment by Respondent on February 4 through February 5, 2017. (Response, Ex. D).

On May 31, 2017, Respondent filed a Reply to Bay Crane's Response. Respondent reiterated the argument that its subpoena was directly relevant to the contested issues before the

² Citation 1 Item 1a alleges a violation of 29 C.F.R. § 1926.1400(f), the employer did not have any procedures or policy to ensure that the specific provisions of Subpart CC were being met when engaged in activities such as but not limited to, operating the craned in accordance with the manufacturers regarding wind, ice and snow. Employees were thereby exposed to hazards associated with crane failure.

Citation 1 Item b alleges a violation of 29 C.F.R. §1926. 1417(n) the operator and competent person did not adjust the operations to address wind and snow.

Citation 1 Item 2 alleges a violation of 29 C.F.R. § 1926.1417(a) alleges the manufacturers procedures were not followed because the boom angle was lowered below 75 degrees to 69.4 degrees.

Review Commission, i.e., the issue of who employed the crane operator and oiler for the subject site and whether the operator had the requisite knowledge, training, and experience to operate the crane.

Respondent disputes OSHA's assertion that Mr. Reilly is its employee. Only an "employer" may be cited for a violation of the Occupational Safety and Health Act (The Act), 29 U.S.C. §§ 651-78. The responsibility for OSHA violations rests with the employer who owns the business in which they occurred or with a person who, based on a commonality of economic interests with the business owner, has the ability to control that business. The Act imposes a duty on an "employer" to provide for the on-the-job safety and health of its "employees." Here, the issue is whether Respondent, Galasso, exercised control over all facets of Mr. Reilly's work on the cited jobsite.

The Supreme Court presumes Congress meant the agency law definition of "employee" in the Act, unless Congress clearly indicated otherwise. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (*Darden*). The burden of proving that Galasso is the employer of the identified individuals lies with the Secretary. *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated). The Commission relies on the common law agency doctrine and multifactor common law test set forth in *Darden*, for determining who is an "employee" under the Act³. All incidents of the employment relationship must be assessed

³ Under the Commission's test regarding who has control over the work environment such that abatement of the hazards can be obtained they have noted:

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

and weighed with no one factor being decisive. *Darden*, at 319. In *Darden*, the Court considered primarily “the hiring party's right to control the manner and means by which the product is accomplished.” *Id.* at 323.

Also somewhat helpful in resolving employment questions is the “economic realities test” reiterated in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). This test emphasizes the substance over the form of the employment relationship. The central inquiry “is the question of whether the alleged employer controls the workplace.” *Id.* at 1638.

I have examined the subpoenaed requests under the criteria set forth in Commission Rule 57(c), and Fed. R. Civ. P. 26(b)(1), both of which mandate that proportionality be a component of the scope of discovery. I find that said requests are overly broad and not proportional to the “employer”-“employee” issue. The record reveals that pertinent information can be found through other means, i.e., the documents Bay Crane has already provided in response to OSHA’s February 16, 2016 subpoena request, the OSHA inspection file, and to questioning at depositions. Furthermore, Respondent has assented to the fact that Requests 2 and 16 are duplicative of the requests OSHA made in its subpoena served on Bay Crane on February 16, 2016. (Response, Ex. G, p. 2).

I have examined the remaining twenty-three (23) Requests. Galasso has asserted the requested documents do not go beyond the scope of OSHA’s investigation because OSHA’s case

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. *Vergona Crane Co., Inc.*, 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992) (quoting *Darden* at 323-24).

rests on its ability to show that the crane operator was an employee of Galasso at the time of accident and that Galasso failed to provide appropriate instruction to the crane operator. Galasso asserts that at least eight (8) of its Requests relate to OSHA's investigation of whether the operator of the crane had the knowledge, training, and experience to operate the crane; and twelve (12) of its Requests speak directly to Bay Crane's relationship, control, and supervision of the crane operator, Kevin Reilly, and oiler, Steve Mazzacco, during the 60 Hudson Street project. (Response, Ex. D - Galasso May 4, 2017 letter to Bay Crane).

I find that these Requests cover a myriad of issues unrelated to the instant matter. The threshold issue in the instant matter is whether or not Galasso was the employer of any exposed employee within the meaning of the Act. The key factor in determining whether a party is an employer under the Act is whether it had the right to control the work involved on the subject jobsite. *See Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994) citing *Vergona Crane Co.*, 15 BNA OSHC at 1784. I find that the subpoenaed documents are not proportional to this issue and will be of no relevance. They are also overly broad and unduly burdensome, and amount to a "fishing expedition" which has the potential to lead to tangential issues.⁴ *See also Henry v. Morgan's Hotel Grp., Inc.*, No. 15-cv-1789, 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016), (noting the scope of discovery from third parties is also limited by

⁴ As pointed out by Bay Crane :

[T]he Subpoena demands records regarding various Bay Crane personnel who were not at the site on February 5, 2016, and dating back to in some instances to May 2015 through April 2016, seeking information regarding other (wholly irrelevant) projects where Bay Crane rented one or more cranes, information relating to operators of the cranes on those other projects, and communications with various individuals and entities on these unrelated and irrelevant projects during unrelated and irrelevant time periods. *See* Exhibit B, ¶¶ 1, 3-4, 13-15, 17-25.

(Response 7)

proportionality). It is Galasso's position that Bay Crane trained Mr. Reilly, not Galasso, to operate its crane, and that Mr. Reilly was under Bay Crane's ultimate supervision and control on the site. I find that the allegations in the citation define the inquiry. The Supreme Court's *Darden* formulation on the "employer"- "employee" criteria along with the "economic realities" test are instructive and provide the legal framework for the issues presented in the instant matter – what control Galasso exercised over the work environment on or about February 5, 2016. In view of the above, I hereby modify the subpoena request as follows:

1. Produce all documents relating to any direction or control over the work performed by Kevin Reilly and Steve Mazzacco at the subject site⁵ on or about February 5, 2016.

2. Produce all documents relating to any wages or benefits provided to Kevin Reilly and Steve Mazzacco for work performed at the subject site covering the period of time they operated the crane on or about February 5, 2016.

3. Produce all documents relating to the equipment owned by Bay Crane and operated by Kevin Reilly and Steve Mazzacco at the subject site on or about February 5, 2016.

4. Produce all documents relating to Bay Crane's supervision, control, or direction over the operation of the LR 1300 Crane for the period of time it was being rented to Respondent for work performed on the site as of February 5, 2016

5. Produce all documents that relate to Bay Crane's authority to control some aspect of the work performed at the subject site on or about February 5, 2016.

I find Bay Crane's April 27, 2017 response to Respondent sufficiently responsive to Respondent's April 20 Subpoena in view of my findings. I further find that the instant matter is not bound by the Supreme Court of New York discovery schedule referenced by Bay Crane in its Response. The OSH Act is designed to protect the occupational safety and health of employees

⁵ The term "site" means the worksite at 60 Hudson Street, New York, NY.

working in industries affecting interstate commerce. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 445 (1977). To enforce the OSH Act, OSHA inspects workplaces and issues citations to employers that violate occupational safety and health standards promulgated under the OSH Act.⁶ 29 U.S.C. §§ 654(a), 657(a), 658, 659(a). Employers may contest the Secretary’s citations before the Commission, an independent adjudicatory agency, which resolves the dispute and issues a final order affirming, modifying, or vacating the citation, and any proposed penalty, or directing other appropriate relief. *Id.* §§ 659(c), 661. Additionally, no state law may impair the enforcement of federal regulations promulgated under a grant of Federal power. *Kimball Office Furniture*, 4 BNA OSHRC 1276, 1279(No. 9438-P, 1976) (Cleary, C., concurring).

Accordingly, Bay Crane is hereby ordered to comply with the above-mentioned modification within 7 days of the issuance of this order.

Accordingly, Respondent’s Amended Motion to Compel is DENIED. Bay Crane’s Motion to Quash the subpoena is deemed Moot in view of the aforementioned modifications.

SO ORDERED.

Dated: June 1, 2017
Washington, D.C.

/s/ _____
Covette Rooney
Chief Judge, OSHRC

⁶ The Secretary has delegated the bulk of his responsibilities under the OSH Act to the Assistant Secretary who directs OSHA. 77 Fed. Reg. 3912 (Jan. 25, 2012). This petition uses the terms “Secretary” and “OSHA” interchangeably.