United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR, Complainant, v. JUDLAU CONTRACTING, INC., Respondent.	OSHRC DOCKET No. 16-1809
SECRETARY OF LABOR, Complainant, v. OMEGA DEMOLITION CORP., Respondent.	OSHRC DOCKET No. 16-1861

ORDER GRANTING SECRETARY'S MOTION TO CONSOLIDATE

The Secretary has filed a motion to consolidate the above captioned cases, and the respondent in each case has filed a written opposition to the motion. Argument on the motion was heard in a telephone conference conducted on June 2, 2017, in which Mark Ishu appeared for the Secretary, Mark Lies appeared for the Judlau Contracting, Inc. (Judlau), and Jeffrey Scolaro and Lisa Roccanova appeared for the Respondent Omega Demolition Corp. (Omega). I informed the parties during the telephone conference that the Secretary's motion would be granted in that the matters would be joined for subsequent prehearing proceedings and for

hearing, but that I intended to issue separate stand-alone decisions for each docket number. This order formalizes that stated ruling.

Background

The Secretary issued separate single item citations to each respondent alleging that each violated of 29 C.F.R. § 1926.858(d) incident to the collapse of a bridge on April 5, 2016, in the course of a highway bridge demolition and rebuilding project for which Judlau served as the general contractor and Omega was a subcontractor. According to the Secretary's motion, the bridge collapse injured four Omega employees, one fatally.

The cited standard in both cases, § 1926.856(d), is contained in subpart T, "Demolition," of part 1926, and provides as follows: "Any structural member being dismembered shall not be overstressed."

The description of the alleged violation of § 1926.858(d) in the citation issued to Judlau provides as follows: "On or about April 5, 2016, at the I-90/Touhy Ave. Project, subcontractor employees were exposed to struck-by hazards where structural steel members were overstressed resulting in collapse."

The description of the alleged violation in the citation issued to Omega is identical to the one issued to Judlau, except that it does not contain the adjective "subcontractor" in identifying exposed employees.[1]

The Secretary's motion states that the citation against Judlau was issued "under the theory that Judlau was the general contractor overseeing the work and, therefore, was also

[1] The citation issued to Judlau classified the alleged violation as "serious," with a proposed penalty of $12,471.

The citation issued to Omega classified the alleged violation as "willful," with a proposed penalty of $124,709. The Secretary's subsequent formal complaint filed pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), against Omega alleged in the alternative that the alleged violation constituted a "serious" violation.

responsible for the same violation [as Omega] under the OSHA's Multi-Employer Citation Policy." During the telephone conference on June 2, 2017, counsel for the Secretary indicated that by the time of hearing the Secretary's theory of Judlau's responsibility might not necessarily be limited to that of "controlling employer" theory.

The Secretary seeks consolidation of the two cases on the assertion that "judicial economy and justice require" that the two matters be "tried together." The Secretary asserts that in order to meet his burden of proof at trial he would intend to present the testimony of the same fact witnesses as to both Judlau and Omega, including employees of both, and employees of the crane operator at the construction site, as well as "the engineers involved." The motion also states that "the Secretary likely will retain the same expert witness to testify" in both cases.

Discussion

Commission Rule 9 permits consolidation "where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act require." 29 C.F.R. § 2200.9. The analogue to Commission Rule 9 in the Federal Rules of Civil Procedure is Fed. R. Civ. P. 42(a), which provides in part that "[i]f actions before the court involve common questions of law or fact, the court may … join for hearing or trial any or all matters at issue in the actions." In considering whether to consolidate matters under Rule 42(a), "[t]he critical question … [is] whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), *on reh'g*, 712 F.2d 899 (4th Cir. 1983); *accord Nat'l*

Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Reserve Sys., 770 F.Supp.2d 283, 286 (D.D.C. 2011).

"Consolidation is particularly appropriate when the actions are likely to involve substantially the same witnesses and arise from the same series of events or facts." *Nat'l Ass'n of Mortg. Brokers* at 286 (internal quotation marks and citation omitted). "The fact that a defendant may be involved in one case and not the other is not sufficient to avoid consolidation," and a tribunal may order consolidation even if the parties are opposed. *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978, 989 (5th Cir. 1983) (construing Fed. R. Civ. P. 42(a)).

Commission judges routinely consolidate for hearing two separate matters that have arisen out of a single event at a construction site, in which one respondent was the general contractor for the construction project and the other respondent was a subcontractor. After consolidating such matters for hearing, Commission judges commonly issue separate stand-alone decisions as to each respondent. *See, e.g., E.C. Concrete, Inc.*, 24 BNA OSHC 1913 (No. 12-2082, 2013) (ALJ) (finding the subcontractor on a construction project was not responsible for a condition that violated § 1926.501(c)(3) and that resulted in injury to the subcontractor's employees), and *Manhattan Constr. "Fla.," Inc.*, 24 BNA OSHC 1919 (No. 12-2083, 2013) (ALJ) (finding construction manager for a construction project had "controlling employer" status but nevertheless was not responsible for same violative condition for which the subcontractor in *E.C. Concrete* had been cited).

Judlau opposes consolidation, asserting that it will be prejudiced in that consolidation will require Judlau "to address legal issues and facts that are outside of its control," and will "align [Judlau] with a potentially adverse party … against whom [Judlau] may have its own

claims." Judlau argues that consolidation "raises the specter of a three-sided trial, with the three parties raising conflicting or contradictory objections to evidence and the supporting legal authorities during the trial," that could result in a trial record "replete with prejudicial and erroneous evidence." Judlau argues that consolidation of the cases would result in there being "two separate mini-hearings" on the separate violations alleged against the two companies, and would not promote judicial economy.

Judlau argues further that the two matters are not appropriate for consolidation under Rule 9 because they do not involve common questions of law or fact in that (1) Judlau and Omega are unrelated employers with no common employees, (2) "the tasks conducted by [Judlau] and Omega at the worksite are fundamentally different," (3) the different classifications of the separate violations alleged against the two respondents require evidence as to the state of mind of Omega, but not that of the Judlau, and (4) Judlau has affirmative defenses that are not available to Omega.

Omega in its written opposition to the Secretary's motion generally endorses the arguments advanced by Judlau in its written submission except for those aspects that suggest Omega is responsible as cited by the Secretary.

First, I reject the assertion that the two matters do not involve common questions of law and fact. The Respondents do not challenge the accuracy of the Secretary's representation that he expects to present the same fact and opinion witnesses to meet his burden of proof as to both of them. And there is no dispute that the Secretary seeks to hold both Omega and Judlau responsible for the same alleged violative condition under the same safety standard, upon descriptions of alleged violations whose verbiage is identical except for the added word "subcontractor" in the citation against Judlau. While there are certainly aspects of the

Secretary's cases against each respondent that do not pertain to the other—such as the willful classification alleged against Omega and the controlling employer theory of liability sought to be imposed on Judlau—a complete identity of issues of law and fact between consolidated cases is not necessary for the cases to involve common questions of law and fact as contemplated by Rule 9. *E.g., Manhattan Constr.* and *E.C. Concrete* (involving a three-day consolidated hearing that adjudicated not only the single common alleged violation as to both the construction manager and the subcontractor, but also adjudicated four other violations for which only the subcontractor was alleged to have been responsible).

I reject the assertion that by hearing the cases together, either Judlau or Omega will be deemed to be "aligned" with the other (unless, of course, they expressly declare that they do wish to be aligned as to any particular issue or position). *See N.Y. v. Microsoft Corp.*, 209 F. Supp. 2d 132, 147 (D.D.C. 2002) (noting that consolidation under Fed. R. Civ. P. 42(a) "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another").

I reject further the contention that either Judlau or Omega is likely to sustain any legal prejudice by the receipt of certain evidence that may be relevant only to the matter involving the other respondent. Triers of fact are often called upon to assess evidence that is not relevant to every party before them. Nothing has been presented in connection with this motion that reasonably supports the argument that the trier of fact here (or any subsequent reviewing authority) will have any difficulty distinguishing what evidence is relevant to one respondent but not to the other.

While the consolidated hearing most likely will be longer in duration than either individual case heard separately, I reject the suggestion that the duration of the consolidated

hearing would approach the combined durations of two separate unconsolidated hearings. The increased burden on Judlau and Omega in the form of additional time and expense of a marginally longer consolidated hearing and wider prehearing discovery is outweighed by the substantial benefits of (1) a complete and unitary evidentiary record regarding a single event at a construction site, (2) the judicial economy that results from a reduction of the time needed to complete the hearing than if the matters were heard separately, and (3) the convenience of the witnesses who will be called to testify only one time rather than twice.

ORDER

IT IS THEREFORE ORDERED that the Secretary's motion to consolidate is granted and the matters are joined for all prehearing proceedings and for hearing. The undersigned intends to issue separate stand-alone dispositive decisions pertaining to each docket number.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: June 9, 2017