

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. KELLOGG, BROWN & ROOT, Respondent.	OSHRC DOCKET NO. 00-1452
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APPEARANCES:

For the Complainant:

Beverlei E. Colston, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Merritt B. Chastain III, Esq., Vinson & Elkins, Houston, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Kellogg, Brown & Root (KBR), at all times relevant to this action maintained a place of business at Occidental Chemical, Ingleside, Texas, where it was engaged in maintenance. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 17, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of KBR's Occidental work site. As a result of that inspection, KBR was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest KBR brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing an alleged violation of §1910.335(b)(2) was dismissed, leaving a single alleged violation of §1910.303(h)(2) in dispute. On October 11, 2000, a hearing was held in Corpus Christi, Texas. The parties have submitted briefs on the matter remaining at issue and this case is ready for disposition.

Background

Pursuant to an ongoing contract, Respondent KBR performs routine maintenance at Occidental's Ingleside plant (Tr. 149). KBR does not have enough personnel on site to handle maintenance on the site during turnarounds; during those periods, Occidental brings in temporary labor as needed (Tr. 34, 149). During the May turnaround, Bay, Ltd. provided Occidental with 50 temporary laborers (Tr. 150), including Felix Eric Rios, a journeyman electrician, and Jacob Molina, an electrical helper (Tr. 35, 68, 85, 207, 226).

Carlos Wayne Ligon, an I&E step-up, or acting, supervisor for Occidental (Tr. 168-69), testified that on May 15, 1999, his supervisor, Ken Bull, assigned him to oversee the dusting and vacuuming of the first four of eight adjoining switch gear cabinets (Tr. 170-71; Exh. C-1 through C-9). Ligon believed that Bull had previously instructed the cleaning crew, which consisted of Juan Rodriguez, Adan Adame, Lonny Rodriguez, Eric Rios and Jacob Molina, in the procedures to follow during the cleaning. Ligon admitted he was not present, and had no first hand knowledge about that meeting (Tr. 113-14, 171, 191; Exh. C-11). Ligon testified that, with the cleaning crew, he and Mark Patterson, a KBR air conditioning technician, proceeded to the appropriate breakers and completed lockout/tagout procedures, locking out the energy sources for the equipment the crew was going to be working on (Tr. 133-34, 159, 171-72, 181). Each employee associated with the job placed their locks on the breakers (Tr. 36-37).

Ligon stated that all the members of the crew were aware that only the first four switch gear cabinets were de-energized, and that the adjacent bank of switch gear was hot (Tr. 173, 199; *See*, concurring testimony of Eric Rios, Tr. 218-19). Ligon testified that the crew was instructed not to get into the energized cabinets (Tr. 186). OSHA Compliance Officer (CO) Don Jones confirmed that everyone he talked to had been involved in the discussion about the four cabinets they would be cleaning; all the employees were aware that they were not to enter the other four energized cabinets (Tr. 38).

Ligon testified that he had other jobs to supervise, and that he left the cleaning crew after the lockout/tagout procedures were completed (Tr. 173). Ligon testified that he left the crew under the direction of Juan Rodriguez; Ligon believed Occidental had stepped up, *i.e.* temporarily promoted, Rodriguez to leadman for the duration of the turnaround (Tr. 174-75, 205). Ligon testified that he was ultimately responsible for all the electrical work that took place that day, however, and that he returned to check on Rodriguez' progress several times throughout the day (Tr. 178, 182).

Juan Rodriguez, a journeyman electrician, testified that Ken Bull and Felix Charles, from Occidental, assigned him to the cleaning crew for the air switches (Tr. 100, 119). Rodriguez stated that he was never assigned to work as leadman at the Occidental site and was not acting in a supervisory capacity on May 15, 2000 (Tr. 98, 123). On that date Charles told Rodriguez that Wayne Ligon would be taking over as supervisor after he left the site (Tr. 100-01). Rodriguez signed an Electrical Safe Work permit provided by Charles, under “electrician’s signature” (Tr. 101, 143-44; Exh. C-10, R-2). Rodriguez accompanied Charles, Ligon and Mark Patterson as they locked out the four breakers required to isolate the switch gear cabinets to be cleaned (Tr. 102). Rodriguez confirmed that Adame, Molina, and Rios were also present during the lock out, and placed their locks on the circuit breakers (Tr. 103). The crew proceeded to the work site, where the switch gear cabinets were located. The first four cabinets were open, front and back (Tr. 111, 140; Exh. C-13). Rodriguez, using a hot stick, checked the four cabinets for low voltage (Tr. 112; Exh. C-13). Rodriguez testified that he showed the other three men the cabinets to be cleaned, and gave them the materials they would need to dry clean the cabinets (Tr. 105). He stated that he did not specifically tell the men how to clean the cabinets, as it was a simple job that anyone could do (Tr. 105-06, 108). Rodriguez never considered whether or not the remaining four cabinets were locked (Tr. 111).

Rodriguez testified that by lunch the crew had cleaned three of the four cabinets (Tr. 112). The crew closed, but did not latch the three completed cabinets when they left for lunch (Tr. 112). The fourth cabinet was left partially open (Tr. 113). When Juan Rodriguez returned from lunch, he saw Lonny Rodriguez vacuuming the front of the cabinet, while Rios worked in back (Tr. 113-14). Rodriguez did not see Molina (Tr. 113, 130).

Molina testified that after lunch he approached Rodriguez, who told him to get started on the “other” cabinet (Tr. 76). Molina testified that he did not recall being told which cabinets they would be working in, or being told not to open any of the cabinet doors, and did not realize that only the first four cabinets had been de-energized (Tr. 73, 78, 86-87). Molina opened the back of the energized fifth cabinet, which was not locked (Tr. 39-40, 45), and was shocked and severely injured (Tr. 44, 117).

During his inspection of the site following the accident, CO Jones found that the front doors on the second bank of switch gear cannot be opened without the use of keys, and a series of steps that engage an interlock, de-energizing the cabinet (Tr. 39). The backs of the cabinets are labeled to denote the presence of high voltage, but are not locked (Tr. 40). The front and back doors of the cabinets have a uniform appearance; nothing on the either door indicates whether those doors are locked or not (Exh. C-1 through C-5). It is undisputed that no one from KBR had prior experience with the cited switch

gear cabinets (Tr. 59, 154-55). There is no evidence that anyone from KBR, outside the cleaning crew, had ever viewed the cabinets (Tr. 166). KBR's safety manager, John Estes, performs periodic safety audits and inspections at the Occidental site, but testified that he never had occasion to inspect the switch gear (Tr. 149, 155).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1910.303(h)(2): Entrances to buildings, rooms, or enclosures containing exposed live parts or exposed conductors operating at over 600 volts, nominal, were not kept locked or under the observation of a qualified person at all times:

At this plant, the front and back doors of Switchgear #6, which consists of the Series P-5000 Air Interrupter Switch Equipment and the WFS Load Interrupter Switches, were not kept locked or under the observation of a qualified person at all times.

The cited standard provides:

. . . The entrances to all buildings, rooms, or enclosures containing exposed live parts or exposed conductors operating at over 600 volts, nominal, shall be kept locked or shall be under the observation of a qualified person at all times.

This case involves joint employers, working on a single job site. As a threshold matter, it must be determined whether, under these particular circumstances, KBR can be considered an employer under the Act, so as to be held responsible for the safety of its employees. *See, MLB Industries, Inc.*, 12 BNA OSHC 1525, 1984-85 CCH OSHD ¶27,408 (No. 83-231, 1985). In the past, the Commission has primarily relied upon its determination of who has control over the work environment such that abatement of hazards can be obtained. The central inquiry is whether the alleged employer controls the workplace, *i.e.*, has it the right to control the manner and means by which the product is accomplished. *See, Abbonizio Contractors Inc.* 16 BNA OSHC 2125, 1994 CCH OSHD ¶30,615 (No. 91-2929, 1994); *MLB Industries, Inc., supra.*

Facts

It is undisputed that Occidental Chemical controls the subject work site, and created the hazard which is the subject of this citation (Tr. 50, 52, 56). CO Brown stated that anyone seeking to alter Occidental's equipment in any way would be subject to sanctions (Tr. 56, 155). Occidental admits it is responsible for preparing its equipment to ensure its safety before maintenance begins (Tr. 170).

KBR, pursuant to a maintenance contract, loans its employees to Occidental Chemical (Tr. 149). It is also undisputed that, on a day to day basis, KBR's electrical personnel report directly to, and

receive their instructions from Occidental's supervisors in accordance with their contract and Occidental's safe work procedures (Tr. 150-51; Exh. R-3). KBR personnel can only perform electrical work under the supervision of an Occidental supervisor (Tr. 119, 150-51, 159, 170, 176, 190; Exh. R-3). KBR provides no supervision for its electrical technicians at the Occidental site (Tr. 119, 150); all supervision is supplied by Occidental (Tr. 158). Occidental's Ken Bull chose the May 15, 2000 cleaning crew from I&E technicians on site, utilizing both KBR and Bay employees (Tr. 193). KBR had no input into the crew composition (Tr. 193).

Though both Jacob Molina and Eric Rios testified that on May 15, 2000, their job foreman, Adan Adame, Jr., asked them if they wanted to work for Brown and Root (Tr. 69, 208), neither Molina nor Rios was specifically told who was going to be in charge that day (Tr. 71, 84, 219). Both Molina and Rios understood that Occidental would tell Juan Rodriguez what needed to be done, and that Juan would relay that information to them; both assumed Rodriguez was the foreman in charge (Tr. 71-72, 79, 210, 217). However, Rios stated that the cleaning job was a team effort, with Rodriguez participating as one of the crew (Tr. 221).

Juan Rodriguez testified that he was not assigned to work as leadman on May 15, 2000 or on any other job at the Occidental site (Tr. 98, 123). He had no authority to direct the crew, or to discipline them (Tr. 124). He was not familiar with Occidental's I&E step-up program, and had never heard the term before (Tr. 99). According to Rodriguez he had merely been selected to pull the hot-work permits for this job because of his seniority at the site (Tr. 99, 110, 121).¹ KBR's representative, John Estes, stated that Rodriguez did not hold any kind of supervisory position (Tr. 156). Any "stepped up" authority Occidental may have conferred on Rodriguez was not sanctioned by or communicated to KBR (Tr. 164). KBR had no opportunity, or responsibility to provide appropriate training. As far as KBR was concerned, Rodriguez remained a technician, without any supervisory status (Tr. 157).

Rodriguez believed that Occidental's I&E supervisor, Wayne Ligon, was in charge of the cleaning job (Tr. 125, 132). Rodriguez stated that the crew would go to Ligon if they needed cleaning equipment (Tr. 126). Ligon had sole authority to reassign crew members, and did, in fact, remove Adan Adame to another project during the course of the cleaning job (Tr. 109-10, 126).

¹ Eric Rios confirmed that there was some confusion over whether representatives from both KBR and Bay needed to sign the hot work permit; Both Rios and Rodriguez testified that an Occidental representative told them it would be all right if all the electricians worked under a single permit signed by Rodriguez (Tr. 99, 211).

Ligon did not know whether Rodriguez had been specifically assigned to supervise this job; Ligon relied solely on the white stripe on the side of Rodriguez's hat, which indicated that he had been stepped up (Tr. 174, 184, 195). In any event, Ligon stated, KBR leadmen are not in charge of safety; they are not in charge of the lockout; they merely lead the people performing the work (176-78).

Discussion

The Commission has held that the major indicia of control include 1) who is responsible for controlling the employees' day to day activities; 2) who has the power to control the employee; 3) who has the power to modify the employee's employment conditions. *MLB Industries, Inc., supra*, at 1528. The evidence establishes that, in this case, all the major indicia show that Occidental, not KBR, was the controlling employer during the May 15, 2000 maintenance of its switch gear.

As noted above, only Occidental had the power to assign work to its contract electricians. Occidental decided when and how the work would be accomplished, and by whom. Although all employees participated in lockout/tagout procedures, Occidental was solely responsible for preparing its equipment, and ensuring its safety before allowing its contract employees to work on it. Occidental was responsible for the provision of all supervision on the site. Specifically, Occidental was responsible for ensuring that the cited equipment was either locked out or under adequate observation.

The Secretary's case is founded on her position that Juan Rodriguez was designated, and acted, as a supervisor during the cleaning job. It is clear, however, that KBR never intended Rodriguez to take responsibility for the cleaning crew's safety. In fact, neither KBR, nor Rodriguez himself, was aware that he had been delegated any such responsibilities. KBR was not provided an opportunity to inspect the job site for possible hazards to which a crew under its putative supervision might be exposed, nor was it given the opportunity to provide Rodriguez with additional training that might qualify him to identify and/or eliminate hazards to which the crew might be exposed. It would be unfair, on this record, to recognize Occidental's unilateral promotion of an unqualified KBR employee to supervisory status, thereby allowing Occidental to divest themselves of their responsibility for the adequate supervision of its contract employees, and exposing KBR to liability for any harm that might befall those employees.

This judge finds that, for the limited purpose of deciding the citation before us,² Occidental was the employer of the crew assigned to clean their switch gears. Because neither the work site conditions,

² KBR remains responsible for providing adequate safety training and instruction to the contract workers it employs, or for ensuring their safety to the extent that it does exercise control over their working conditions.

nor the adequate supervision of KBR and/or Bay employees were under KBR's control, it cannot be held responsible for the cited violation. The citation is, therefore, vacated.

ORDER

1. Serious citation 1, item 1, alleging violation of §1910.303(h)(2) is VACATED.
2. Serious citation 1, item 2, alleging violation of §1910.335(b)(2) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: January 29, 2001

