

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Lake County Sewer Company,

Respondent.

OSHRC Docket No. **07-1786**

Remand

Appearances:

Paul Spanos, Esquire, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio
For Complainant

John P. O'Donnell, Esquire, Lyons & O'Donnell Co., L.P.A., Painesville, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION ON REMAND

On May 10, 2007, the Occupational Safety and Health Administration (OSHA) conducted an inspection of an excavation that collapsed in Willowick, Ohio. The court held a hearing in this matter on May 7, 2008. On September 16, 2008, the court issued a decision determining, among other things, that the Secretary had properly cited Lake County Sewer company (Lake) as the employer of excavation workers Gary Brennan, Brooks Stanek, and Scott Kazsuk. On February 2, 2009, the Commission remanded this case to the court for additional findings regarding the employment relationship between Lake and the exposed workers. The parties have filed post-remand briefs. For the following reasons and for the reasons set forth in the original decision in this case, the court finds that Lake was the employer of Brennan, Stanek, and Kazsuk at the time of inspection that gave rise to this case.

Witnesses

Aside from OSHA compliance officer Joseph Schwartz, the witnesses at the hearing were Scott Kazsuk, Brooks Stanek, Gary Brennan, and Richard Marucci. Kazsuk and Stanek were excavation workers (Stanek was the worker injured when the excavation collapsed). Gary Brennan is an excavation worker and owner of Brennan Excavating, Inc. (BEI). Marucci is the chief operating officer of Lake.

On December 31, 2004, Lake and BEI entered into a subcontract agreement to excavate sewer laterals for a project Lake contracted to do for the City of Willowick. In May 2006, Lake put Brennan, Stanek, and Kazsuk on its payroll. At issue is whether Lake or BEI was the employer of Brennan, Kazsuk, and Stanek on May 10, 2007. Marucci contends BEI was the employer. Brennan counters that Lake was the employer. Marucci and Brennan each have a direct financial stake in the outcome of the case. The demeanor of both men at the hearing was observed. The testimony of each man reflects his bias. Each made self-serving statements designed to minimize his own authority on the site and to emphasize the control exercised by the other. Brennan knew Lake's counsel from his previous dealings with Lake, and had a contentious relationship with him at the hearing. Brennan was combative and sarcastic in his testimony. Marucci was evasive and vague in his answers. When questioned closely on specific topics, Marucci's responses were defensive and confusing.

In contrast, Kazsuk and Stanek were forthright and open when testifying. Their recollections are consistent with each other. They have no obvious financial stake in the determination of who their employer was. Their testimony is accorded greater weight than that of Brennan. Brennan is found to be credible to the extent that his testimony is consistent with the testimony of Stanek and Kazsuk, and the documentary evidence in the record. Marucci's testimony is found to lack credibility. His testimony was inconsistent with all other evidence relating to the issue of whether Respondent was the employer of the workers at the jobsite at issue.

Background

In April or May 2006, excavation worker Tom Stropki approached Marucci (Tr. 220). Marucci testified that he was told, "that Gary was ripping them off in overtime, and he was going to go to the Labor Department if we didn't get it taken care of, and he brought it to Gary's attention

a couple of times and it wasn't being taken care of on Gary's end" (Tr. 239). It is telling that Stropki felt comfortable approaching Marucci, the top officer of the contractor, with this problem.

Usually under these circumstances, it might be expected that a contractor would warn the subcontractor to comply with the law, or take legal action against it, or fire it and hire a complying subcontractor. Ohio is home to numerous excavating companies. Instead, Lake put the excavation workers, including Brennan, on its payroll. There is no evidence BEI suffered any repercussions for its failure to properly pay its workers, despite Marucci's testimony BEI's negligence jeopardized Lake's contract with the City. When Lake needed more work done in 2007, it contacted Brennan. Lake's actions in putting the workers on its payroll converted them to its own employees. Its subsequent treatment of the workers supports this finding.

Supervision

Brennan testified he worked as a supervisor for Lake on the site. As supervisor, it is not surprising Brennan exercised authority over the workers at the site. Brennan testified Marucci made daily visits to the site during which they discussed the project. Brennan stated "Marucci, would just come and check up every day, see how things are going and ask us if we needed anything" (Tr. 13). Although Stanek did not see Marucci on the site the day of the excavation collapse, he saw him earlier that week (the first day of work was Monday, May 7, and the collapse occurred Thursday, May 10). Stanek testified Marucci had the authority to tell him where to work and what safety precautions to take. Kazsuk stated he saw Marucci on the site periodically. When asked what role Marucci played, Kazsuk replied, "Gary had to go to him if there was any changes to be made" (Tr. 132). The testimony of Brennan, Stanek and Kazsuk is consistent that Marucci visited this jobsite regularly and demonstrated that Marucci actually supervised work on this jobsite. Marucci's contrary testimony that he never visited the job is not corroborated or supported by other evidence. I find his testimony lacking credibility as to whether he had authority to supervise work on this jobsite.

Hiring and Firing of Employees

Marucci flatly denied he could hire and fire employees working on the excavation. This self-serving statement is contradicted by the other workers on the jobsite. Brennan stated Marucci

told him to “grab Brooks [Stanek] and Scott [Kazsuk]” for the May 2007 job (Tr. 26). As supervisor, Brennan also had the authority to fire the workers, but he had no authority over Marucci. When asked if Marucci could fire Stanek and Kazsuk, Brennan responded, “Absolutely, and myself” (Tr. 75). Stanek stated Marucci could fire him from this job because, “It’s his company” (Tr. 96). Stanek also testified Marucci had authority to tell him where to work, what to do and what safety precautions to take.

Kazsuk’s testimony on this point was direct and unequivocal:

Q. What was your understanding of Mr. Marucci’s role on this project in May of ‘07?

Kazsuk: That it was basically his job, and we were working for him.

Q. Did Mr. Marucci have the authority to fire you?

Kazsuk: Oh, yes.

Q. Did he have the authority to tell you where to work?

Kazsuk: And what to do.

Q. Did he have the authority to tell you to make safety corrections?

Kazsuk: He had the authority to do whatever he wanted to do.

(Tr. 132)

I find the testimony of Brennan, Stanek, and Kazsuk consistent and convincing. Marucci’s testimony is unsupported by and inconsistent with other evidence, lacking in credibility, and is rejected. I find Marucci had authority to hire and fire workers on this jobsite.

Ownership of Tools and Equipment

– Gary Brennan owned the dump truck, the backhoe, and the tool van on the site. Lake owned the trenching equipment. Any new materials or equipment bought for the project were charged to Lake’s account. Stanek kept track of purchases and collected the receipts. He dropped the receipts off at Lake’s office for payment by Respondent. It was not unreasonable for Brennan and his crew to continue to use Brennan’s dump truck and other equipment after they were converted to Lake employees in May, 2006.

Lake maintained control and ownership of tools and equipment by purchasing new materials and equipment on its account. This included materials purchased by Stanek and other workers as well as materials and equipment delivered to the site by other companies for Respondent's use.

Previous Work for BEI

Stanek and Kzsuk were able to clearly differentiate between their time working for BEI and for Lake. Both stated they were working for Lake in May 2006 and May 2007. Stanek testified he worked for BEI in 2001 and 2002, and Brennan paid him in cash. Stanek began working for Lake in May 2006, when he first worked on sewer laterals. Kzsuk stated he first worked for BEI, "about eight years ago and worked for them for about three years" (Tr. 141).

Lake's Employment Policies

Lake makes two other assertions in support of its argument that it did not employ the excavation workers. First, Marucci testified Lake's employees were required to join the Teamsters union. Brennan, Kzsuk, and Stanek were not Teamsters. This establishes only that Lake failed to comply with its union contract, not that the workers could not be employees of Lake. Second, Marucci stated the excavation workers could not be Lake's employees because Lake does not do excavations. That statement is totally meaningless and without merit. Lake began doing excavations once it converted the workers to its employees by placing them on its payroll and exercising supervisory authority over them. Marucci's protestations to the contrary are rejected.

Payroll

In the original decision, the court analyzed the evidence showing the three workers were on Lake's payroll. In its brief on remand, Lake argues, [T]here was neither testimony, nor documentation offered by the Complainant which established that either Brennan, Stanek, or Kzsuk were on the payroll of LCS on May 9, 2007, or May 10, 2007" (Lake's brief p. 4). The court rejects this argument. Kzsuk testified regarding how he was paid for work in May, 2007 as follows:

Q. And, How were you paid for your work on this project?

Kzsuk: I got paid by check from Lake County Sewer.

Q. Please describe how you were paid and that type of thing?

Kazsuk: How I was paid? I went to pick up my check at Lake County Sewer. Q. Were there any unusual circumstances in terms of your being paid by Lake County Sewer?

Kazsuk: No, but I only worked there for one week.

Q. Did you have to sign for anything?

Kazsuk: Yes, I had to sign a paper before I could receive my check.

Q. What was the substance of that paper you had to sign.

Kazsuk: That it was for my 1099.

Q. And, do you know what a 1099 is?

Kazsuk: Yes, where I have to pay my income tax on it.

Q. Did you consider yourself an independent contractor on this job?

Kazsuk: Sublabor, I guess. I mean, to get my check, I had to sign whatever he asked. I needed my money.

Q. Say that again?

Kazsuk: I said I needed my check. I signed whatever he put in front of me to sign.

Q. Were you on Lake County's payroll?

Kazsuk: Just the one check.

Q. Did you receive a paycheck from any other company for your work in '07 on this project?

Kazsuk: No.

(Tr. 133-134)

The record establishes that Kazsuk was on Lake's payroll for May 2007. Lake forced him to sign a statement (Exh. R-4) and file a 1099 form to receive his check, but, as Kazsuk noted, he would have signed anything Lake required to get his money. He stated, "I didn't find out I was an independent contractor until I signed that to get my check" (Tr. 138).

In 2006, Respondent paid Stanek as an employee, not as an independent contractor. Marucci admitted at the hearing the project that ended in 2006 would extend into 2007. Respondent does not perform sewer work during the winter months. Marucci further admitted that he put Brennan, Stanek and another worker Tom Stropki, on Lake's payroll for this project in 2006.

The contract between Lake and the city of Willowick for sewer work was a continuing contract which was extended year to year. Extensions of the contract were done by written change orders. Marucci claimed Lake's original written subcontract with Brennan on this job was extended from 2005 through 2006 and into 2007. He admitted, however, the subcontract extensions were verbal, not written.

Marucci's behavior regarding control and payment of workers on this job, however, was inconsistent with his claim that Brennan was a subcontractor during 2006 and 2007. In May or June, 2006, Lake put Brennan, Stanek and Stropki on its payroll. It paid them as employees and listed them on certified payrolls as Lake's employees.

Testimony of Stanek, a careful review of his W-2 form for 2006, and other evidence illustrate that these workers were treated as employees of Lake and not employees of Brennan or as independent contractors.

Stanek's W-2 Form, Wage and Tax Statement (Exh. C-6), was prepared by Lake and filed with the Internal Revenue Service. On it, Respondent lists its own employer identification number and lists the name of the employer as Lake County Sewer Company, Inc. The individual named on the W-2 by Lake as an employee is Brooks E. Stanek. Stanek worked on this project as a laborer and filed a W-4 Form in 2006 listing Lake as his employer.

Stanek's W-2 Form for 2006 shows all wages earned as well as withholdings made by Lake for Federal, State and Local income taxes, Social Security taxes, and Medicare taxes. In 2006, Stanek was paid weekly by Lake by direct-deposit of wages into his account.

Stanek worked only four days in May, 2007, the beginning of the construction season in Ohio, when the accident occurred. Workers on this job had not yet been paid since the first work week had not been completed. To date, Stanek has not been paid for that work by Lake or any other entity. Stanek testified that he submitted the time for work done in May 2007. After the accident, when he got out of the hospital, he spoke to Marucci about getting paid for the time he worked. Marucci told Stanek that the only way he would get paid was if he signed a 1099 Form stating that he was an independent contractor. Stanek refused to sign as requested. His understanding was that it was going to be the same set up as the previous year with a direct-deposit of wages into his account with taxes withheld. Stanek believed he was to continue being paid as an employee of Lake in 2007, as he was in 2006. Stanek's testimony is consistent internally, and consistent with his W-2

Form, the certified payrolls and other credible evidence received at hearing. I find his testimony forthright, credible and convincing.

Stanek kept daily records for work done by the three workers on the job in May, 2007. He turned records into Respondent's office for payment by Lake. This was also done in 2006 and 2007. He clearly testified that he did not work for Brennan.

Respondent's Payroll Register (Exh. C-12) clearly shows Stanek was paid as an employee in 2006. Certified Payroll records show Brennan, Stanek, and Stropki as employees of Lake (Exhs. C-10, C-11). Respondent is listed as both the General/Prime Contractor and as the Employer. These certified payrolls were prepared by Respondent and submitted to the City of Willowick for payment. Brennan was not listed on these payrolls as a subcontractor.

I am unpersuaded by Marucci's attempt at the hearing to explain that the employees listed on the certified payrolls were not Lake's employees, but just employees on the project. He was asked at the hearing to explain the reason that Lake was listed on the certified payrolls as the prime contractor and the employer when, as he claimed, respondent was not the employer. His response was: "That's just how these forms are" (Tr. 252).

The certified payrolls are consistent with Lake's payroll register, Stanek's W-2 Forms and testimony, and all other evidence presented at hearing other than the testimony of Marucci. Marucci's testimony is inconsistent with records prepared and maintained by Lake prior to the accident. It is clear that the workers on this jobsite were considered to be and, in fact, were paid as employees of Lake and not as Brennan's employees or as independent contractors. Mr. Marucci's testimony is found to be unconvincing and rejected based on lack of credibility.

Worker's Compensation Benefits

Stanek filed a worker's compensation claim with the state of Ohio after his accident. The Industrial Commission of Ohio held a hearing on Stanek's claim on September 24, 2007, after Lake appealed an administrator's order finding Lake was Stanek's employer. The Industrial Commission found Lake was Stanek's employer:

The compelling evidence involving the employer/employee relationship are the payroll records involved in this claim. While the sewer company had some sort of a contractual relationship with Brennan, the relationship that the sewer company had with the claimant is that of employer/employee. The history between the two

indicate that the claimant received payroll checks from the employer and was not paid directly by Brennan. The pay that is being withheld is being withheld by the sewer company. Given that the history between the claimant and the sewer company is that the claimant would be on the payroll of the sewer company and perform services consistent with the business mission of the sewer company, the District Hearing Officer concludes that on 05/10/2007 there was an employer/employee relationship between the two parties. The claimant was an employee of the Lake County Sewer Company, Inc.

(Exh. C-9, p. 2)

The Industrial Commission's decision is consistent with the analysis and conclusions reached by the court in this decision and the original decision in this case. There, as here, Stanek was found to be on the payroll of Lake as an employee and performed services consistent with the business mission of Lake. In some worker's compensation cases, a prime contractor is held responsible for employees of subcontractors that do not have separate certificates of insurance for their employees. In this case, the Industrial Commission stated clearly that its decision was based on the direct employer/employee relationship between Lake and Stanek.

Conclusion

The preponderance of the evidence establishes Lake was the employer of Brennan, Stanek and Kazsuk. The testimony of Stanek and Kazsuk, who are deemed credible witnesses, is consistent with Brennan's statements regarding the employment relationship with Lake. Only Marucci contends he did not have the authority to supervise, or to hire and fire the excavation employees. When Brennan's erratic payment system was brought to his attention, Marucci did not fire BEI or take legal action; he, acting for Lake, took over the payroll. That action along with Marucci's exercise of control over all aspects of the work on this project converted Lake's relationship with these three workers to that of an employer/employee relationship.

Based on the level of authority Marucci exercised over the workers and the payroll history (including paychecks, tax forms, and worker's compensation), the court reiterates its finding that Lake was the employer of Brennan, Stanek, and Kazsuk on May 10, 2007.

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 Lake County Sewer Company is determined to be the employer of exposed workers on this jobsite.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: April 16, 2009