



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET NW
 4TH FLOOR
 WASHINGTON, DC 20006-1246

ETA
 OSM 202-634-4008
 FTS-202-634-4008

SECRETARY OF LABOR
 Complainant,

v.

MAGOR PLUMBING & HEATING COMPANY
 Respondent.

OSHRC DOCKET
 NO. 91-2227

**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 4, 1993. The decision of the Judge will become a final order of the Commission on March 8, 1993 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 February 24, 1993 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
 Occupational Safety and Health
 Review Commission
 1825 K St. N.W., Room 401
 Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
 Counsel for Regional Trial Litigation
 Office of the Solicitor, U.S. DOL
 Room S-1004
 200 Constitution Avenue, N.W.
 Washington, D.C. 20210

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
 Ray H. Darling, Jr.
 Executive Secretary

Date: February 4, 1993

DOCKET NO. 91-2227

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Leonard Maggiore
Magor Plumbing & Heating
52-10 108th Street
Corona, NY 11368

Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00102666823:02

himself as the pastor of the church and according to the compliance officer's own testimony, as the person "in charge of the work" (Tr. 10). The compliance office testified that during his initial conversation with Reverend Han, he asked him: "who were the contractors at the site?" and he was informed "they were Tsinil Masonry and Magor Plumbing" (Tr. 78). There is a written agreement between Reverend Han and Magor dated December 14, 1990, which called for the church to supply all the plumbing material, fixtures and equipment and for Magor to furnish the labor (Exh. C-1).

As the compliance officer proceeded to conduct an inspection of the site, he was accompanied by Reverend Han. On the ground floor level, they came across two men performing plumbing work. The compliance officer attempted to speak to the workers, but they did not speak or understand English. When Reverend Han undertook to help resolve the language problem, the compliance officer questioned the workers through the medium of the Reverend's interpretations (Tr. 11). Up to this point, the facts are essentially undisputed.

The point of divergence between the parties lies in the testimony concerning the employment status of the Korean workers. The compliance officer testified that the Reverend informed him that the workers were employed by Magor, that they had been working at the site for about four weeks doing "[e]ssentially a plumbing operation," and that the Reverend "was in charge of the operation [although] he wasn't too familiar with construction." The compliance officer stated further that the Reverend also told him that Mr. Maggiore, Magor's president, visited the site "once a week or so" to "see that they are doing the job right" (Tr. 12).

It is undisputed that upon completion of the OSHA inspection, Reverend Han gave the compliance officer a business card containing Magor's name and telephone number. Seven days after the inspection, on June 27, the compliance officer telephoned Magor's office and spoke to Mr. Maggiore concerning the conditions he found at the church during the OSHA inspection on June 20. According to the compliance officer, Mr. Maggiore stated that it was true the workers at the church were his employees, that they would be on the job two or 3 more weeks, and that he would see to it the conditions were corrected (Tr. 14 - 15).

Reverend Han testified that the church had been under construction since 1989, and that the work was being done "step by step" as the funds became available. The Reverend insisted that although he hired a general contractor for the project and entered into a written contract with Magor to provide the labor for the plumbing work, including the work observed by the compliance officer, the men doing the work were Korean church members performing voluntary services and were not employed by Magor (Tr. 26 - 28). The Reverend added that when the compliance officer arrived at the church and introduced himself as an OSHA representative he did not know what "OSHA" meant and assumed he was a New York building inspector. He became quite concerned about "legal problems" when the compliance officer continued to ask him questions and it was only after the compliance officer completed his physical inspection that he gave him Magor's business card (Tr. 32 - 35, 76). The Reverend flatly denied that he told the compliance officer the workers were employed by Magor (Tr. 40).

Leonard Maggiore testified that his initial contact with OSHA in this case occurred when the compliance officer telephoned him on June 27 to inform him of the violations found at the church site on June 20. Mr. Maggiore asserted that he did acknowledge to the compliance officer that the men at the church were Magor's employees; however, the admission was made "because they could have been my men" and not because he knew it to be actually so; having just recently finished a job at another church, he confused the two projects. He stated further that with respect to the church in question, he did the plumbing work periodically within a three-month period until April 1991 and thereafter he performed several "inspections." When he had done the work at the church he had only two other persons on the job, both of whom were of Irish descent, and during June 1991 he had only two persons on his payroll and none was Korean or oriental (Tr. 41 - 60).

In her posthearing brief the Secretary maintains that "the uncontroverted facts" show that Magor was the employer of the workingmen at the church during the time of the OSHA inspection in June 1991. The Secretary also characterizes the compliance officer's testimony as "undisputed" when he stated that the Reverend "told him the employees said that their employer was Magor Plumbing." This argument completely ignores or overlooks the Reverend's clear denial of that testimony (Tr. 40).

The Secretary also contends that the testimony of Leonard Maggiore should be discredited because of the "convoluted, contradictory story [he told] of why he had originally acknowledged to the compliance officer that the employees were his employees and that he would have the violations corrected." Secretary's brief at 2. The Secretary is correct in describing his testimony as convoluted; however, the convoluted manner in which Maggiore testified is undoubtedly a peculiar but natural way of speaking and it was displayed in an unvarying pattern throughout his testimony. The Secretary refers to two examples where Maggiore gave conflicting testimony: at one point he testified that he had confused the compliance officer's telephone discussion with another job he had "just finished." On the other hand, he testified that he had no employees during the month of June 1991 except for two office workers (Tr. 69 - 71).

At another point, Maggiore testified that he did not know that the church members were doing plumbing work at the church site (Tr. 75). The Secretary claims that contrary testimony was elicited by Maggiore himself when he questioned the Reverend as to when he first informed Maggiore that some plumbing work was being done by church members (Tr. 29 - 30):

- Q First question, did you notify me about your working there?
- A Yes, first time -- before, about two days I call you.
- Q Yes.
- A Our church members coming to the -- volunteer working, we go would you like check for us, but you answered to me saying that that day impossible because your workers working on other place.
- Q All right. Now, the second question I ask you.
- A Yes.
- Q Did I make all the inspections before I -- for the underground and for the roughing with the inspector and the --
- A Yes.
- Q All right. And I have one question after that. Around let's say June, July I made

the final inspection for the outside tanks
for the septic tanks?

A Yes.

Q Okay. And the work was completed
before?

A Yes.

The Secretary makes the following argument:

No explanation was provided as to what the “two days” were before. This conflict as to what and when Mr. Maggiore knew about the work and his involvement was further clouded by his testimony that although his men stopped working at the church in April, 1991, he made an inspection in May and “...a few inspections afterwards.” The unanswered question is what was he inspecting, if not the ongoing work being done under his contract.

It must be said that it is somewhat difficult at times to follow the testimony of both Reverend Han and Maggiore. In the Reverend’s case the difficulty stems from his limited ability to speak English, and , as previously mentioned, in Maggiore’s case, the problem lies in his convoluted manner of discourse. With respect to the question of whether Magor had anyone on its payroll in June, at first blush there seems to be more than one inconsistency in Maggiore’s testimony but on close reading of the transcript, some of the inconsistency vanishes. Maggiore initially testified that he had only two persons on his payroll in June, both of whom handled administrative duties (Tr. 57 - 58). On another occasion, he stated that he did not have anyone working in June (Tr. 69). However, this testimony was given immediately after being questioned about persons on the payroll in June “working at jobs” (Tr. 68). Maggiore subsequently clarified the matter by repeating his earlier testimony as to having two administrative workers on the payroll. This information was confirmed by Magor’s payroll records (Tr. 70 - 71).

One further question remains regarding Magor’s June payroll, and that is the other church job it had “just finished” and the Reverend’s testimony concerning Magor’s “workers working on other place.” The record is not clear as to whether the witnesses were referring

to June or some earlier month. In her brief, at 3, the Secretary acknowledges the obscurity that pervades this testimony, and offers the following answer to the puzzle:

Mr. Maggiore's statements and actions are more consistent with those of an employer who is directing work, but is either not placing the workers on its payroll or is paying them "off the books".

If the Secretary's answer is correct, it would resolve the problem of "the other [work] place," but not the Bayside church, the subject of the citations.

With respect to Maggiore's testimony as to the inspections he made of the work done at the Bayside church in May and "...a few inspections afterwards" (Tr. 47), the Secretary asks: "The unanswered question is what was he inspecting, if not the ongoing work being done under his contract[?]." Secretary's brief at 3. The answer appears during the Reverend's direct examination by Maggiore (at Tr. 29 - 30), relevant portions of which are quoted above. Apparently Maggiore performed inspections for the Reverend relating to the sewer work which was the responsibility of the church according to Magor's written contract (Exh. C-1).

In *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1978 CCH OSHD ¶ 22,829 (No. 14801, 1978), the Commission adopted an "economic realities test" to determine whether an employment relationship exists. The test applies the following factors:

- (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 hire, fire 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?

To be worthy of credit, evidence must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe. In other words, credible testimony is that which meets the test of plausibility. *Indiana Metal Products v. N.L.R.B.*, 442 F.2d 46, 52 (7th Cir. 1971).

Given the extraordinary manner in which the church construction project was being pursued, the testimony of both the Reverend and Maggiore are worthy of belief. The record evidence establishes nothing more than that there was a written contract between Reverend Han and Magor that required Magor to provide the labor for certain specified plumbing work; that the plumbing tasks were performed at irregular intervals as the church funds became available; that some of the plumbing work was done by volunteer members of the church; and that in addition to doing certain plumbing under the written contract, Magor performed some inspection or consulting services in connection with the church's plumbing project.

Applying the "economic realities test," the Secretary has failed to prove that an employment relationship existed between Magor and the workmen who were at the church site at the time of the OSHA inspection in June 1991. Based upon the foregoing findings and conclusions, it is

ORDERED that the citations issued on August 6, 1991, are vacated.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: January 27, 1993
Boston, Massachusetts