



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.

BRADLEY VILLERS D/B/A
SHANNON MARIE HARVESTERS,
Respondent.

OSHRC DOCKET
NO. 92-2259

**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 October 8, 1993. The decision of the Judge will become a final order of the Commission on November 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 October 28, 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
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Petitioning parties shall also mail a copy to:

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Room S4004
200 Constitution Avenue, N.W.
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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) 606-5400.

FOR THE COMMISSION

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

Date: October 8, 1993

DOCKET NO. 92-2259

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SECRETARY OF LABOR,
Complainant,

v.
BRADLEY VILLERS d/b/a
SHANNON MARIE HARVESTERS,
Respondent.

OSHRC DOCKET
NO. 92-2259

APPEARANCES:

For the Complainant:

Cathy L. Barnes, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington

For the Respondent:

John R. Crickman, Esq., Friday Harbor, Washington

Before: **Administrative Law Judge Benjamin R. Loye**

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").

On June 24, 1992, a Compliance Officer (CO) with the Occupational Safety and Health Administration (OSHA) conducted an inspection of the vessel, "Shannon Marie," where the crew was engaged in the harvesting of sea cucumbers (Tr. 12-13). As a result, Respondent, Bradley Villers, d/b/a Shannon Marie Harvesters (Villers), was issued one "serious" citation containing six items, and one "other than serious" citation containing five items alleging violations of the Act.

By filing a timely notice of contest, Villers brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On June 15, 1993, a hearing was held in Seattle, Washington.

The parties have submitted briefs on the contested issues and the matter is ready for decision.

Issues

As a threshold matter, Villers raises two jurisdictional arguments.

Villers first claims that his operation is exempted from OSHA jurisdiction by virtue of §4(b)(1) of the Act, which excludes working conditions regulated by other Federal agencies. Villers maintains that his workplace is governed by Coast Guard regulations.

Villers also maintains that he has no employees and so is not an employer for purposes of the Act.

§4(b)(1) Jurisdiction

In order to establish a §4(b)(1) exemption, it must be shown that an agency other than OSHA has the statutory authority to regulate the health and safety of certain workers, and that the other agency exercised its statutory authority in such manner as to exempt the cited working conditions. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1992 CCH OSHD ¶29,758 (Nos. 89- 1017, 89-1192, 1992). The burden of proving that another agency has so exercised its authority is on the employer claiming the §4(b)(1) exemption. *Idaho Travertine Corp.*, 3 BNA OSHC 1535, 1975 CCH OSHD ¶20,013 (No. 1134, 1975).

At the hearing Commander Larry Lockwood, Chief of the Vessel Inspection Department, Coast Guard Marine Safety Office, Puget Sound, testified as to the reach of Title 46, Shipping, and Title 33, Navigation regulations, which the Coast Guard enforces (Tr. 97-98). Commander Lockwood stated that the Coast Guard regulates "inspected" vehicles from plan review through construction; systems and operations are also regulated (Tr. 99-100). Lockwood stated that fishing vessels are not "inspected" vessels, and that while the Coast Guard may board a fishing vessel

suspected of carrying contraband, or of violating navigational rules,¹ their operations are not regulated by the Coast Guard (Tr. 100, 102, 129-30).

Specifically, Lockwood testified that the Shannon Marie is registered with the Coast Guard as a commercial vessel of more than five net tons, but is an “uninspected” vessel, whose operations are not regulated by the Coast Guard (Tr. 102-08, 121).

Respondent introduced no evidence of any Coast Guard regulations governing its sea harvesting operations.

Discussion

The record fails to establish that the Coast Guard has promulgated any regulations governing the working conditions cited by OSHA in this case. To the contrary, Commander Lockwood testified that the Coast Guard does not regulate the operations of any fishing vessel. The Commission has held that considerable weight is to be given to the agency’s representations regarding their regulation of particular working conditions. *Alaska Trawl Fisheries, supra.* at 1703.

It is clear from the evidence that the Coast Guard has not exercised its statutory authority to regulate the conditions cited in this matter, and that the sea harvesting operation aboard the “Shannon Marie” is not exempted from OSHA regulations under §4(b)(1) of the Act.

Employment Relationship

In May of 1992, Bradley Villers, George Villers, Mark Baron, Larry Eldred and Mark Kozier entered into a “Partnership Agreement,” and formed “Shannon Marie Harvesters” for the stated purpose of engaging in sea harvesting (Exh. C-1). Villers testified at trial that the agreement’s purpose was to allow the crew of the “Shannon Marie” to continue diving the way they always had, without having to

¹ The “Shannon Marie” was boarded by the Coast Guard on July 3, 1992, and a “boarding report” was issued regarding evidence of violations of navigational rules at 46 CFR 28.115 (ring life buoys) and 33 USC 2027 (Alfa flag height). (Tr. 135-38; Exh R1-a through R1-c).

comply with OSHA regulations (Tr. 173, 181, 185). The agreement was drawn up by a lawyer hired by George Villers after discussions with his son (Tr. 173-74). The other partners did not retain counsel, or negotiate the document's contents (Tr. 206, 223).

Under the terms of the agreement, Bradley Villers contributed \$1,000.00, and owned 99.6% of the partnership; all other partners contributed \$100.00, and owned a .1% share. The agreement names Bradley Villers as the managing partner, and allots all accruals to capital and equipment purchased by the partnership to him (Exh. C-1). There were, however, no such accruals during the existence of the partnership (Tr. 211).

Personal dive gear was provided by the divers (Tr. 178). All other equipment belonged to the vessel owner (Tr. 178).

At the hearing, Villers testified that he was named managing partner because someone had to be "in charge," and his father, George Villers, the boat owner, was collecting disability payments, and wished to conceal the fact that he was working (Tr. 170, 185, 209). However, Villers stated that his duties were that of a diver and tender on the "Shannon Marie," as were those of Mark Baron and Mark Kozier (Tr. 170-71, *see also*, testimony of Mark Baron, Tr. 229). He, Villers, stated that his only additional duties consisted of preparing the business' tax returns following his father's death in April 1993 (Tr. 206, 213-14).

Mark Baron testified that he worked "free lance," and that his relationship with the Villers' was not a "hire or fire type situation" (Tr. 226). The partnership agreement stated that new partners were to be added by agreement of a majority (Exh. C-1). Baron also stated that daily decisions about dive sites were made jointly, although the crew relied on George Villers' expertise (Tr. 230-31).

Divers receive 50% of the gross receipts from their own harvest (Tr. 175, 181). The other 50% of receipts went to the boat owner, George Villers,² who also was the boat operator (Tr. 171, 175-76, 182, 219). Operating costs, mortgage fees on the boat, and the linetender's share, 10% of the gross, were paid by George Villers out of the boat share (Tr. 179, 182, 193, 221). George Villers maintained the records for the business (Tr. 214-215).

Each day's sea cucumber harvest is sold on one "fish ticket" in the name of Shannon Marie Harvesters (Tr. 238). Baron testified that only 65 to 70 permit holders are allowed to harvest cucumbers and sea urchins in the State of Washington, and that the permit holders must own a fishing vessel (Tr. 246). Only permit holders or crew who have applied for an "additional operator" card may sell the product (Tr. 247). George Villers held the Washington entry permit and collected payment for the harvest (Tr. 180, 243, 246).

Upon the departure of Baron, Eldred or Kozier, Shannon Marie Harvesters would continue as an entity, taking on other crew members (Tr. 179). However, the partnership would have terminated upon the departure of the George Villers, who owned and controlled the boat (Tr. 178).³

Discussion

The Commission has held, that in determining whether an employment relationship exists for purposes of the Act, the Commission has primarily relied upon its determination of "who has control over the work environment such that abatement

² During the OSHA inspection, George Villers told CO Spargo that the boat share went to Bradley Villers (Tr. 52, 56, 250). The undersigned, however, finds testimony that George Villers was attempting to conceal his income from Federal officials convincing (Tr. 186-87, 210). The boat now is owned by Villers mother, and the boat share goes to her (Tr. 178, 194).

³ Bradley Villers testified that since George Villers' death, the continuation of Shannon Marie Harvesters is dependent upon his continued involvement in the business (Tr. 178).

of hazards can be obtained.” *Secretary of Labor v. Loomis Cabinet Company*, 15 BNA OSHC 1635, 1638, 1992 CCH OSHD ¶29,689 (No. 88-2012, 1992).

The Commission has considered a number of factors when determining the relationship between an alleged employer and his workers, including:

- 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 fire, hire, 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 worker's wages established?

Id. at 1637.

The undersigned finds that the record contains insufficient evidence, under the criteria set forth in *Loomis, supra*, to find that Bradley Villers was a “person . . . who has employees” within the meaning of §3(5) of the Act.

The only indicia of control proven by Complainant was Villers’ disproportional contribution of \$1,000.00, and ownership of 99.6% of the partnership of Shannon Marie Harvesters. The partnership agreement, however, did not reflect the economic realities of the business at the time of the inspection.

Bradley Villers had no duties pertaining to, and received no monies or capital from the partnership. The other workers did not consider him their employer; he did not pay their wages or determine their pay; there is no evidence that he had the power to hire or fire. Villers exerted no more control over the daily operations of the “Shannon Marie” than did the other divers on the crew; he had no proprietary interest in, and exercised no control over the “Shannon Marie” or its equipment. Villers did not hold the permits necessary to carry on the harvesting business.

The Secretary has not shown that Bradley Villers was an employer subject to the Act, that is, that Villers exerted control over the operations of Shannon Marie

Harvesters such that he could obtain abatement of the cited hazards. In the absence of a jurisdictional showing, it is unnecessary to reach the merits of the individual citations, and the above captioned case is dismissed.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

ORDER

1. Serious Citation 1, items 1 through 6, and other than serious Citation 2, items 1 through 5, are VACATED.



Benjamin R. Loya
Judge, OSHRC

Dated: October 1, 1993