



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR
Complainant,
v.
TIMOTHY VICTORY
Respondent.

Phone: (202) 606-5100
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OSHRC DOCKET
NO. 93-3359

**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 6, 1996. The decision of the Judge will become a final order of the Commission on March 7, 1996 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 26, 1996 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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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) 606-5400.

FOR THE COMMISSION

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

Date: February 6, 1996

DOCKET NO. 93-3359

NOTICE IS GIVEN TO THE FOLLOWING:

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Appearances:

Kevin Sullivan, Esq.
 Jerrold Solomon, Esq.
 Office of the Solicitor
 U. S. Department of Labor
 For Complainant

Leonard W. Langer, Esq.
 Portland, Maine
 For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Timothy Victory (Victory) was cited for serious violations of various commercial diving standards. Victory disputes the multi-item citation, claiming that no employment relationship existed between him and the persons who were aboard his boat engaged in harvesting sea urchins.

Because the OSH Act does not provide helpful guidance in resolving the employer - employee relationship question,¹ the Commission has adopted the “economic realities test” which 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 worker;
- (5) does the alleged employer have the power to fire, hire, or modify the employment conditions of workers;
- (6) does the workers’ ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and
- (7) how are the workers’ wages established.

Griffin & Brand of McAllen, Inc., 6 BNA OSHC 1702, 1703, 1978 CCH OSHD ¶ 22,829 (No. 14801, 1978).

Victory has been a commercial fisherman in Maine since January 1992 as a deckhand, dive tender and, after obtaining a scuba diving certificate in May 1993, a sea urchin diver (Tr. 355-56). He was the owner of a boat called the Last Chance which he used to conduct dive-tending operations. Before he himself began diving, Victory usually set out on the Last Chance with three divers, each of whom was responsible for providing and maintaining his own equipment and supplies; each diver’s catch was segregated, the proceeds upon sale of the catch being apportioned according to the amounts harvested by each diver (Tr. 356-57). According to the testimony of both Victory and the Secretary’s own witness, James Smith, the divers were free to sell their harvest to anyone they chose, and it was the practice that each diver received a share (in this case a 60% share) of his own catch and paid the remaining share (40%) to “the boat” (Tr. 113-15, 369-71).

¹Under the OSH Act, “[t]he term ‘employer’ means a person engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5). “The term ‘employee’ means an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(6).

Victory testified that when the divers chose to operate from his boat, they, in effect, “hired” his boat for a share of the catch inasmuch as it was the divers who determined when the boat left the dock, where to dive for the urchins, and when to return to the dock (Tr. 358-59). The Secretary failed to present any countervailing evidence that would cast serious doubt upon Victory’s version of the existing conditions.

The Secretary called two witnesses who participated in diving or related support operations with Victory: Clyde Peabody and the previously-mentioned James Smith. Smith testified that he was employed as a welder for General Electric Company for the past seven years, and that his first experience diving for urchins was on October 16, 1993, when he took part in the fishing excursion on the Last Chance. There were four persons aboard the boat that day: Victory, Smith, Matthew Rice and Clyde Peabody. Peabody operated the boat and the other three members did the diving (Tr. 111-122, 119). Smith unequivocally stated that he never considered Victory to be his employer. While both he and Rice relied on Victory to assess the quality of the urchins and to choose the spot for diving, it is clear that the reliance was due solely to Victory’s experience in urchin harvesting and not because of any sense of responsibility to submit to Victory’s control or authority (Tr. 115-19, 138-39). In fact, Smith testified that each time Victory dove to sample the waters for urchins, Victory returned to the boat to display his catch so that all three divers could agree as to the quality of the urchins that might be gathered in a particular area (Tr. 118).

Smith’s testimony, which emphatically undermines the Secretary’s case, substantially corroborates that of Victory on many key points. Smith was paid for his share of the catch by the buyer, and although he went along with Victory’s selection of the buyer, he was free to choose his own (Tr. 131-32). Smith’s description of his relationship with Victory and Rice on the Last Chance and the manner in which they operated, readily supports the conclusion that there was no employment relationship between Victory and the scuba divers who operated from his vessel (Tr. 123-24, 131-36).

The only person besides the divers aboard the Last Chance during the October 16 excursion was Clyde Peabody who had been involved in a wide range of fishing activity since 1971, which apparently is rather typical of the fishermen in the area who pursue their trade on a

variety of vessels (Tr. 269, 310-11). Peabody functioned as a tender on the Last Chance on four occasions; on October 16 he took on the additional task of steering the vessel. His responsibilities as a tender were to haul up the divers' catch and to keep an eye on the buoy lines (Tr. 278).

Peabody began his association with Victory and the Last Chance under the most casual circumstances. Peabody made it known to friends and relatives that he was looking for something to do while waiting for the scallop season to start. Word got to Victory who then contacted Peabody. The following testimony comprises the full extent of their business arrangement except for monetary compensation (Tr. 271):

Q Now, when Victory called you, do you recall the discussion he [sic] had?

A Well, the only thing I remember is he asked me if I wanted to go help him tend divers. If he dove, I'd help tend him. If he didn't dive a certain time, he'd tend the rope.

For his services on the Last Chance, Peabody apparently received a one-third share of the proceeds that were "paid to the boat" (Tr. 272). Although Peabody's testimony on this point was vague, it is noteworthy as a demonstration of Peabody's obvious lack of concern over financial details; he was satisfied to receive some portion of the money earned by the venture whatever the sum might be (Tr. 306).

Much of Peabody's testimony was consistent with that of Smith's; there was nothing that Victory did or said during the fishing activities on the Last Chance that would suggest that Victory was an employer or that he had the responsibility or the power to control anyone on the vessel evidencing an employer relationship (Tr. 292, 309). The Secretary points to Victory's acknowledgment that he would overrule the divers' decision to continue diving if foul weather posed a danger to the boat's safety, and pronounces it proof of control in an employment relationship. Secretary's brief at 14. It's no such thing. It merely demonstrates that Victory possessed the good common sense of a boat owner looking to protect his assets.

The Secretary has made much of the fact that "Victory obtained the divers through advertisements placed in the newspaper help wanted section..." He argues that "the fact that Victory did not advertise using the words, 'boat for hire,' makes his contention that the divers

hired the boat implausible.” Secretary’s brief at 12. This argument has no merit in light of the testimony of Victory and the Secretary’s own witness, James Smith.

Victory testified, in substance, that the purpose of the newspaper ad was to provide notice to interested parties that an opportunity was available for divers to operate from a boat, perhaps either the Nancy Ann, which was owned by Victory’s wife’s nephew, or the Last Chance. As a fisherman, Victory saw no practical reason to either place or phrase the ad in another way (Tr. 375, 429-30).

If the advertisement caused the reader to misunderstand what was actually being advertised, the matter was promptly clarified with a telephone call: James Smith stated on direct examination the he responded to the newspaper ad by phoning Victory (Tr. 113):

Q Now, can you tell me what you discussed with Tim Victory when you called him?

A We discussed -- I wanted to know how much it paid. I thought maybe it was a job where I’d be an employee. And he said that I would get sixty percent of my catch and forty percent of my catch would go to the boat

Q And was that satisfactory?

A Sounded good to me.

Smith pointedly testified later that he had consistently expressed the view that he never considered Victory to be his employer, and he did not consider his diving for urchins to be a “job” (Tr. 128, 138).

Of all those engaged in urchin harvesting aboard the Last Chance, Matthew Rice was the least experienced. He was a college student who received scuba certification training in the spring of 1993 after hearing about the opportunity for earning money from harvesting urchins. Rice telephoned Victory in response to a newspaper ad for “Sea Egging” divers (Exh. C-9). Victory informed Rice that a diving spot was available on the vessel Nancy Ann, owned by one Bradley Peabody. Although Rice joined the crew aboard the Nancy Ann on October 9, 1993, he did not engage in diving because he failed to bring all the necessary diving gear.

Rice's second opportunity to dive for urchins occurred on October 15 aboard the Last Chance. Again, because his diving equipment was missing an inflater hose, he decided not to dive that day, but, instead, he went along for the ride. On the following day, October 16, Rice joined the crew on the Last Chance. When he attempted his first dive, he experienced difficulty in submerging. He returned to the boat and borrowed some weights from Smith (Tr. 395-96). When he reentered the water, it soon became apparent that Rice was in trouble. Although Victory and Smith immediately took action to retrieve Rice, they were unable to save his life.

The Secretary's analysis of the economic realities test set out in his brief ignores or overlooks the testimony of the witnesses who actually participated in the urchin harvesting operations. Their harvesting activities are shown to be nothing more than an enterprise undertaken by several persons jointly to harvest urchins for their mutual benefit, in which they combined whatever their own equipment, skill and knowledge could be brought to bear upon the joint adventure, and in an agreement to share in proportion to their respective contributions in the resulting profits. That Victory owned the boat and was more experienced than the others in the adventure does not justify the Secretary's attempt to portray Victory as an employer under the OSH Act.

Based upon the foregoing findings and conclusions, it is ORDERED that the multi-item citation is vacated.



RICHARD DeBENEDETTO

Judge, OSHRC

Dated: January 31, 1996
Boston, Massachusetts