



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
TAJ MAHAL CONTRACTING/ :
GEN CONSTRUCTION COMPANY, :
 :
Respondent. :

OSHRC DOCKET NO. 03-1088

Appearances: Jennifer Marciano, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Keith Dague
U.S. Compliance Systems
Tallmadge, Ohio
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER ON REMAND

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On May 17, 2004, I issued a decision and order in the above-referenced case, in which I granted the Secretary’s motion to dismiss as untimely the notice of contest (“NOC”) of Respondent, Taj Mahal Contracting/Gen Construction Company. In its remand order dated October 25, 2004, the Commission upheld my finding that Respondent had not shown that the late filing was due to excusable neglect pursuant to Federal Rule of Civil Procedure 60(b)(1). However, as to my finding that Respondent had not shown that it was wrongfully cited, the Commission remanded this matter to me for further proceedings to determine whether, in fact, the Commission had jurisdiction in this case. Specifically, the Commission directed me “to make a

further determination as to credibility of the Respondent's owner and [to afford] the Secretary the opportunity to offer evidence through the testimony of the investigating compliance officer who had personal knowledge as to circumstances witnessed at the jobsite that relate to jurisdiction over the Respondent."

Background

The Occupational Safety and Health Administration ("OSHA") inspected a work site located at 227 Haven Avenue in New York, New York on April 1, 2003. During his inspection, the OSHA compliance officer ("CO") saw employees at the site and conditions that he determined were violations of OSHA's construction standards. The CO spoke with Supiquel Islam, who identified himself as the president of Taj Mahal Construction Company ("Taj Mahal"), the employer at the site. As a result of the inspection, OSHA on April 14, 2003 issued a Citation and Notification of Penalty ("Citation") alleging various violations of the OSHA construction standards; the Citation was sent by certified mail to Mr. Islam's attention at the business address the CO had been given.¹ On April 21, 2003, the Citation was delivered and "M. Akkas" signed for it. On May 1, 2003, Mohammed Akkas called the OSHA area office and spoke to Antonio Pietroluongo, the assistant area director ("AAD").² Mr. Akkas told the AAD that he had never worked at the Haven Avenue site, that the name and company shown on the Citation were not his, and that he was unaware of who had worked at the site. The AAD advised Mr. Akkas to come to his office and bring any documentation that would substantiate his claim and that he would look into the matter; the AAD also advised Mr. Akkas of the 15-day filing requirement for submitting an NOC and told him he was still within the 15-day contest period.³ Despite the advice of the AAD, Mr. Akkas neither went to the OSHA office to present documentation nor filed an NOC by the required date of May 12, 2003; however, he did file an NOC letter with the OSHA area office

¹That address was 1311 Newkirk Avenue, Brooklyn, New York 11226.

²The information in this section is based on the testimony of the AAD, the OSHA representative who testified at the first two hearings in this matter.

³Following his meeting with Mr. Akkas, the AAD had the OSHA CO return to the site to find out what he could about who had been working at the site; according to the AAD, the CO spoke to the "super" of the building, who told him that there was no written contract for the job but that Taj Mahal was the name of the company that had performed the work. (Tr. 13-14).

on May 15, 2003, in which he repeated his claim that he did not work at the New Haven site and had no connection with Mr. Islam or Taj Mahal. The OSHA area office wrote to Mr. Akkas on June 3, 2003, and informed him that because his NOC had not been filed within the required 15 days, he should send an NOC to the Commission. On June 16, 2003, Mr. Akkas sent another NOC letter to the Commission; in that letter, he reiterated that he had no connection with the work site or Mr. Islam, and he also stated that the NOC he had sent to OSHA had been tardy due to illness.⁴ The Secretary filed her motion to dismiss the NOC on August 29, 2003. (Tr. 4-15; 26-28, 33; C-1, C-3-5).

Discussion

In the first hearing in this matter, held on January 21, 2004, Mr. Akkas stated that he had not met with the AAD because he had been ill; he also indicated that he had had the documents to prove his claim. (Tr. 15-16). I accordingly held the hearing in abeyance and instructed Mr. Akkas to provide the AAD with everything he requested in order to resolve this matter. (16-19). On February 2, 2004, Mr. Akkas provided documentation to the AAD through his representative.⁵ However, at the reconvened hearing on February 26, 2004, the AAD testified that he had not been given what he had requested and that what he received was not helpful in resolving the matter. (Tr. 48-50).

In my decision issued on May 17, 2004, I pointed out the foregoing circumstances. I further pointed out that there was other evidence that was not supportive of Respondent's claim. In particular, I noted that the names of the two businesses involved were very similar and that, while the zip codes were different, the street addresses were essentially the same. I also noted the AAD's testimony that OSHA had faxed an abatement letter to the fax number the CO had obtained during the inspection and that the receipt of that fax had prompted Mr. Akkas to call on May 1, 2003. (Tr. 25-26, 32). Finally, I noted that Mr. Akkas had indicated at the hearing on January 21, 2004, that the AAD had asked him for his social security number on May 1, 2003, and that he believed, but was not sure, that he had given

⁴Along with the NOC letter to the Commission, Mr. Akkas sent a copy of his business license; the license showed his business name as "Taj Mahal Contracting Gen Construction Co" and his business address as 1311-15 Newkirk Avenue, Brooklyn, New York 11230.

⁵The cover letter Respondent's representative sent with the documents states on page 2 that: "Information on the payroll is not available. Mr. Akkas has no employees and any work not performed by Mr. Akkas is subcontracted."

the AAD that number; at the hearing on February 26, 2004, however, Mr. Akkas was positive he had given his social security number to the AAD on May 1, 2003 and that that was the only thing the AAD had requested. (Tr. 15-16, 39-44). The AAD, on the other hand, was adamant that he never requested social security numbers in his position with OSHA and that he would never accept a social security number as a means of deleting a citation; he was also adamant that he had asked Mr. Akkas to bring in documents that would prove that the cited business was not Mr. Akkas' company. (Tr. 46-48, 51). Based on the evidence, I concluded that Respondent had not shown it was wrongfully cited.

In its remand order, the Commission observed that it is the Secretary's burden to establish jurisdiction. The Commission also observed that my determination with respect to jurisdiction was based largely on hearsay, *i.e.*, the testimony of the AAD about what the CO learned during his inspection. Finally, the Commission observed that I had not made an explicit finding in regard to the credibility of Respondent's owner, Mr. Akkas. The Commission thus remanded this matter to me to resolve these issues, as set out *supra*.

The third hearing in this matter took place on December 2, 2004. At that hearing, Anthony Campos, the CO who conducted the inspection, testified that after observing an employee exposed to a hazard, he found three other employees having lunch; they told him that Taj Mahal was the company they worked for and that their boss was Supiquel Islam.⁶ The employees gave the CO the number for Mr. Islam, and, when the CO phoned him, Mr. Islam told the CO that he was the president of the company, but not the owner, and that he would need to contact the company accountant to find out who owned Taj Mahal. When the CO phoned the accountant, the accountant was somewhat evasive but told him that Mohammed Akkas was the owner.⁷ CO Campos further testified that when he returned to the site on May 1, 2003, as the AAD had directed him to do, the job was completed. He met with the superintendent of the building, who said there was no contract for the work and that the

⁶The CO initially testified that the employees identified the company as "Taj Mahal Contracting." He then agreed, however, that he "may have made a mistake on that," in that the Citation was issued to "Taj Mahal Construction Co." In addition, although the transcript reflects that the CO identified Mr. Islam's first name as "Sukakrow," I conclude this was simply an error in the transcript, due to the name "Supiquel Islam" appearing on the Citation. (Tr. 62, 80-81).

⁷The CO testified that the accountant's last name was Fozzi, Fazio or Fazzi. He further testified that the accountant's office was also on Newkirk Avenue. (Tr. 67, 76).

company was paid in cash; however, he also said Taj Mahal had done the work, and he handed the CO a card that showed the company name as “Taj Mahal Contracting (General Construction).”⁸ The CO said he himself never spoke to Mr. Akkas and that after his second visit to the site he had no further involvement in the case. He also said he believed his investigation showed that it was the company of Mr. Akkas at the site, particularly in light of what the accountant told him. (Tr. 61-81).

Mr. Akkas also appeared at the December 2, 2004 hearing. He testified that after his phone conversation with the AAD, he went to the Haven Avenue site to try to find out who had worked there.⁹ The building superintendent knew nothing about OSHA visiting the site, but he did indicate he knew who had been doing the work; he asked Mr. Akkas for a number so that he could call and give him the name, once he learned it, whereupon Mr. Akkas gave the superintendent his card. Mr. Akkas further testified that he had an accountant who did his taxes and that while he knew his first name was Nasid he did not know his last name; Mr. Akkas did not know why the accountant, if it was the same one, would have identified him and spoken about him to the CO as he did. Mr. Akkas stated that his company had been in business for four years, that it was a sole proprietorship, and that he had never had any employees; he also stated that he either did the jobs himself or contracted them out. Mr. Akkas did not know of another business with a name and address similar to his, and he repeated his assertion that he had done no work at the subject site. (Tr. 83-95).

I observed the demeanor of the CO on the witness stand, including his facial expressions and body language, and I found him to be a sincere and credible witness. Moreover, his testimony was consistent with that of the AAD at the two previous hearings. I also observed the demeanor of Mr. Akkas as he testified, and I found him to be less than forthright in this matter. His lack of candor is best illustrated by his statements about leaving his card at the site. According to his testimony, Mr. Akkas went to the site and spoke to the building superintendent, who knew nothing about OSHA having been there; however, the superintendent did know who had been working at the site, and he

⁸The card, C-1, shows no address, but it does show both a telephone number and a cell phone number; in addition, above the phone numbers, the card states: “Please call Akkas.” The CO did not recall if the number on C-1 was the same one he had used to call Mr. Islam. (Tr. 72).

⁹While Mr. Akkas was somewhat equivocal about when he went to the site, his testimony as a whole indicates it was after his call to the AAD but before the first hearing. (Tr. 83-90).

asked Mr. Akkas to give him a number so that he could call him after finding out the name of the company, upon which Mr. Akkas gave him his business card. As noted above, Mr. Akkas' testimony indicates that he went to the site after his call to the AAD but before the first hearing. (Tr. 83-90). The record shows that the call took place on May 1, 2003, and that following the call, and on that same day, the CO went to the site pursuant to the AAD's instructions. The record also shows that when the CO asked about who had done the work, the superintendent told him that it was "Taj Mahal" and gave him Mr. Akkas' business card. (Tr. 64-65, 68-71, 74). Thus, Mr. Akkas would have had to have gone to the site right after his conversation with the AAD, and before the CO's arrival, in order for the superintendent to have had the card when the CO talked to him. Further, that the superintendent simply gave the card to the CO without saying anything about Mr. Akkas leaving it with him that day persuades me that Mr. Akkas' version of the events is not truthful. Finally, as the Secretary's counsel pointed out at the hearing, despite Mr. Akkas' claim that he left his card at the site before the first two hearings, he never mentioned it until the CO testified about it at the third hearing. (Tr. 89-90).

In deciding this matter, I have noted Mr. Akkas' testimony that his company was a sole proprietorship, that he had never had any employees, and that he either did the jobs himself or contracted them out; I have also noted his testimony that he never performed any work at the Haven Avenue site. (Tr. 91-95). Regardless, based upon the evidence of record, and in light of my credibility findings with respect to both the CO and Mr. Akkas, I conclude that the Secretary has demonstrated that Respondent was the employer at the site. The Secretary has therefore met her burden of showing the Commission's jurisdiction in this matter.

In view of the foregoing, and pursuant to the Commission's remand order, the Citation is AFFIRMED in all respects.

SO ORDERED.

/s/

Irving Sommer
Chief Judge

Dated: March 4, 2005
Washington, D.C.