Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-2017**
	:	
CRS Emergency Vehicles, Inc.,	:	**EZ**
Respondent.	:	

Appearances:

Danielle Jaberg, Esquire
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Mr. C. Ray Smith
CRS Emergency Vehicles, Inc.
McAlester, Oklahoma
For Respondent *Pro Se*

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

DECISION AND ORDER

CRS Emergency Vehicles, Inc. (CRS), is a corporation engaged in upfitting, manufacturing, and supplying security and safety vehicles and equipment. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's facility in Pawhuska, Oklahoma, on August 19, 1998. As a result of this inspection, CRS was issued a timely notice contesting the citation and proposed penalties. A hearing was held pursuant to the EZ trial procedures in Tulsa, Oklahoma, on April 7, 1999. For the reasons that follow, Citation No. 1, item 1, is vacated, and no penalty is assessed. Citation No. 1, item 2, is affirmed and a penalty of $300 is assessed. Citation No. 1, item 3, is affirmed and a penalty of $200 is assessed.

Background

CRS Emergency Vehicles (CRS) upfits, produces and supplies security and safety vehicles and equipment to various governments within the United States and abroad. CRS has been

incorporated under the laws of Oklahoma since 1992 and is identified as a for-profit corporation. The name "CRS" is derived from the name of the company's president, Chief Executive Officer (CEO), and sole stockholder, C. Ray Smith. Though CRS has only been incorporated since 1992, the business of CRS, upfitting and producing security and safety vehicles, has been conducted in the form of a sole proprietorship and other named corporations under the direction of C. Ray Smith since 1966.

Until July 6, 1998, CRS operated its business in plants located in McAlester, Oklahoma, Eufaula, Oklahoma, and LaGrange, Georgia. On July 6, 1998, CRS consolidated its production and business activities and moved to Pawhuska, Osage County, Oklahoma. This location change presented no significant change in CRS's business operations.

CRS runs a "vertical operation"; *i.e.,* it manufactures and produces everything that goes on one of the vehicles it produces. Respondent maintains in-house fabrication, welding, electrical, cabinetry, upholstering and painting departments within its operation. These various departments ultimately produce finished security and safety vehicles.

Respondent contracts with various employment agencies to provide its skilled and unskilled workers, as well as supervisors, for economic reasons. These agencies bill CRS based on hours worked plus the agencies' service premium. They do the payroll and calculate withholding amounts. At any one time, up to twenty-five workers work at the CRS plant. Some workers at this facility have worked at CRS four to five years. At other CRS plants, workers averaged eleven years with respondent. Many supervisors who worked at CRS facilities rose through the ranks, learning the business from the ground up over a period of years.

C. Ray Smith, president, CEO and sole stockholder of CRS, owns all equipment used to upfit and produce the security and safety vehicles at respondent's plant. He has the final say over all decisions at CRS. Vehicles produced at this facility must meet his specifications to ensure a quality finished product. At the time of the inspection, all workers contacted by the OSHA compliance officer considered themselves employees of CRS.

Respondent's plant is located on the Reservation of the Osage Nation. The plant is owned by the Osage Nation and leased to CRS. C. Ray Smith is Osage and Cherokee. Respondent gives priority to Osage and other Native Americans in hiring workers at this plant. Prior to moving its operations to this site on the Osage Reservation, CRS operated plants outside dedicated tribal land. CRS is not owned or operated by the Osage Nation.

Discussion

Applicability of the Occupational Safety and Health Act to Respondent's Operations

Respondent argues that the Act does not apply to its operations since its president and CEO, C. Ray Smith, is Native American and the plant is owned by the Osage Tribal Trust and located on Osage tribal land.

It is well established that:

> . . . [A] "general statute" in terms applying to all persons includes Indians and their property interests." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)
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> . . . If a statute of general applicability is silent on the issue of its applicability to Indian tribes (as is the Act), it will not apply to them if:
>
> (1) The law touches "exclusive rights of self-governance in purely intramural matters;"
> (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or
> (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

Mashantucket Sand & Gravel, 17 BNA OSHC 1391, 1392, 1995-97 CCH OSHD ¶ 30,895, p. 43,000 (No. 93-1985), *rev'd*, 95 F. 3d 174 (applicability test followed) (2d Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F. 2d 1113, 1116 (9th Cir. 1985). *See U. S. Department of Labor v. OSHRC (Warm Springs Forest Products Industries, Inc.)*, 935 F.2d 182 (9th Cir. 1991).

Respondent does not argue, and nothing in the record suggests, that exceptions (2) or (3) apply to exempt respondent's operations from applicability of the provisions of the Occupational Safety and Health Act (Act). The Act does not abrogate any rights guaranteed by treaties, and there is nothing in the record suggesting that Congress intended the Act not to apply to Native Americans on their reservations.

Exception 1 addresses "exclusive rights of self-governance in purely intramural matters." Respondent is engaged in commercial activities involving the upfitting, manufacture and sale of security and safety vehicles to the United States Government, state and local governments and foreign governments around the world. It directly competes with non-Indian national and international companies.

While CRS is a corporation with a Native American CEO and president, and located in a plant owned by the Osage Nation on tribal land, its activities are clearly not intramural. The Osage Nation has made no attempt to regulate the safety and health of workers at CRS. Respondent is not owned by the tribe, and it is not subject to tribal supervision or scrutiny in its daily operations. Its products are sold worldwide to non-Indians. While CRS gives priority to Indians and other card-carrying Bureau of Indian Affairs (BIA) members, it employs workers who are non-Indian.

Statutory construction requires that exceptions to generally applicable statutes be narrowly construed. CRS failed to produce sufficient evidence to meet this exception. The Act applies to respondent's operations.

Employer/Employee Relationship

The Act defines an "employer" as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). This definition includes corporations such as respondent. CRS is a corporation incorporated in the State of Oklahoma. C. Ray Smith is the president, CEO and sole stockholder of CRS. Mr. Smith testified that CRS is a for-profit corporation. He stated that until last year, the company had shown a profit. All profits are reinvested into equipment and supplies. In uncontroverted testimony, he said he took no income or dividends from CRS. He further testified that his total family income came from his wife's paramedic and teaching salaries.

Mr. Smith explained that he operates CRS as a good deed. Notwithstanding the altruism of Mr. Smith, respondent is a "person" within the meaning of the Act.

CRS sells, supplies and ships safety vehicles and equipment throughout the United States and the world. It advertises its vehicles in national and international fire journals and trade publications. Respondent is clearly engaged in a business affecting interstate commerce.

Having determined that CRS is a person engaged in a business affecting interstate commerce, it is necessary to consider whether respondent has employees.

In *Rockwell International Corp.*, 17 BNA OSHC 1801 at 1804, 1995-97 CCH OSHD ¶ 31,150 at p. 43,532 (No. 93-54, 1996), the Commission addressed the question of whether the entity cited was the employer of the individuals performing the cited work. In that case, the Commission compared its considerations of the employment relationship to the test applied by the U. S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), as follows:

> The terms "employer" and "employee" are defined in section 3 of the Act, 29 U.S.C. § 652. Section 3(5) states: "The term 'employer' means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." Section 3(6) provides: "The term 'employee' means an employee of an employer who is employed in a business of his employer, which affects commerce." The Supreme Court has held that the term "employee" in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise. *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318 (1992). The Court noted that all aspects of the relationship are relevant, but that the central inquiry is:
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> > In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part

> of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
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> 503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (footnotes omitted)). The question of whether the entity cited was the employer of the individuals performing the cited activity has also been addressed by the Commission, which has considered a number of factors when making that determination, including :
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> 1) Whom do the workers consider to be their employer?
> 2) Who pays their wages?
> 3) Who has the responsibility to control the activities of 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 conditions 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?
>
> *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 (No. 87-214, 1989) (consolidated). Comparing the Commission's analysis and that of the Supreme Court, the Commission has noted that a number of the factors to be considered appear in both articulations and has found the two analyses to be consistent. *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1627-38, 1991-93 CCH OSHD ¶ 29,689, pp. 40,255-56 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994).
>
> The most important question under both the Commission's test and that articulated by the Supreme Court is whether the alleged employer has the right to control the work involved.

Applying the *Rockwell* and *Darden* tests, it is clear that CRS has the right to control the work performed at its Pawhuska facility. C. Ray Smith, president and CEO of CRS, maintains power and authority to exercise control over and modify the performance of duties of both skilled and unskilled plant workers. All products must meet his specifications. He inspects the final product and instructs workers to redo any work that does not meet his specifications. Workers' reliance on specific task-oriented instructions and specifications from CRS gives respondent ultimate control over the working environment of these individuals.

CRS provides all tools and equipment needed in respondent's production operations. Mr. Smith routinely grants permission for workers to take time off from work. Respondent is ultimately responsible for wages. The employment agency that directly pays the wages is merely a convenient conduit. It bills CRS for all hourly wages paid plus a service fee.

Workers contacted by the compliance officer during the inspection considered CRS their employer. Mr. Smith testified that many workers worked at CRS between four and eleven years, learning the business from the ground up and being promoted to supervisors. All work performed at CRS was done by these workers.

Respondent's sole stockholder, Mr. Smith, owned and controlled all equipment at this plant, including the saws that were the subject of the violations alleged by the Secretary. Mr. Smith testified that the assembled and operational saws had missing guards. He said that the guards were in a pile and were going to be put on the equipment. CRS, through Mr. Smith, created and controlled the violation and controlled the means of abatement. Respondent's control of all of the above-mentioned aspects of the working conditions is sufficient to meet the Commission and Supreme Court tests. CRS is the employer of these workers, and they are its employees for purposes of the Act.

Alleged Violations

The Secretary has the burden of proving the violation.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence, could have known of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1
Alleged Serious Violation of 29 C.F.R. § 1910.213(b)(3)

In Citation No. 1, item 1, the Secretary alleges that:

> Provisions were not made to prevent woodworking machine(s) from automatically restarting upon restoration of power after power failure:
>
> At the plant, the Delta 10" tilting arbor saw (used for wood working) was not equipped with a anti-restart device, exposing employees to unexpected start up of the saw.

During the inspection, someone other than OSHA's compliance officer tested the cited arbor saw to determine whether it was equipped with an anti-restart device. This was done at the direction of the compliance officer by turning on the saw, unplugging it, and then replugging it into the electrical outlet. The saw restarted when replugged. This one test resulted in the issuance of Citation No. 1, item 1. Based on this quick test, the inspector concluded that the saw could restart upon the restoration of power after a power failure. The saw was operational, and one employee had used the saw. The compliance officer, Mr. McCown, testified that observation of the saw did not reveal whether it was equipped with an internal anti-restart device. Respondent's president, Mr. Smith, tested the saw after the inspection and prior to hearing. He unplugged it while the saw was running and replugged it into the outlet. The saw did not restart. Mr. Smith testified that respondent had not modified the saw after the inspection. This test is consistent with Mr. Smith's understanding before the inspection that the saw would not restart when replugged. The discrepancy between the conditions at the time of the inspection and the post-inspection test by the respondent is unexplained. Respondent had a reasonable belief that the saw had an internal anti-restart device. This belief is sufficient to establish that respondent did not know and could not, with the exercise of reasonable diligence, know of the existence of such hazardous condition. The alleged violation of 29 C.F.R. § 1910.213(b)(3) is vacated.

Citation No. 1, Item 2
Alleged Serious Violation of 29 C.F.R. § 1910.213(c)(1)

In Citation No. 1, item 2, the Secretary alleges that:

> Circular handfed ripsaw(s) were not guarded by an automatically adjusting hood which completely enclosed that portion of the saw above the table and above the material being cut:

At the plant, the Delta tilting arbor table saw was missing the automatically adjusting hood guard for the saw blade.

It is undisputed that the standard applies to respondent's operation. Uncontroverted testimony of the compliance officer, Mr. McCown, established that two circular ripsaws had no hood guards during his inspection. The saws were plugged in and operational. At least one employee, the president's son, operated this machine. Mr. Smith told Mr. McCown during the inspection that the guards were somewhere in the plant but had not been reinstalled. The terms of the standard were violated; employees were exposed; and respondent knew of the violative conditions. If an injury occurred, it could be a cut or amputation. Respondent clearly violated 29 C.F.R. § 1910.213(c)(1), and that violation is serious.

Citation No. 1, Item 3
Alleged Serious Violation of 29 C.F.R. § 1910.213(h)(1)

In Citation No. 1, item 3, the Secretary alleges that:

The sides of the lower exposed portion of the blade of radial saw(s) were not guarded to the full diameter of the blade by a device that automatically adjusted itself to the thickness of the stock and remained in contact with the material being cut:

At the plant, the three radial arm saws in the plastic/wood working area were missing the lower blade guards, exposing employees to the hazard of laceration.

This standard clearly applies to respondent's operation. Mr. McCown testified that three radial saws at respondent's plant had top guards but no lower blade guards. Brad Smith, the president's son, operated these saws to cut wood components for the vehicles being manufactured. During the inspection, Mr. McCown found these saws hooked up, operational, and accessible for use. Mr. C. Ray Smith owned the saws and had overall responsibility for all operations in this plant. No evidence was presented at the hearing to suggest that respondent did not know the saws lacked lower guards. If an injury occurred, it could involve a cut or amputation. Respondent violated 29 C.F.R. § 1910.213(h)(1). The violation is serious.

Penalties

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the inspection, approximately nine employees were working at the CRS plant. Respondent is a small employer that has no more than twenty-five workers at this facility at any time. OSHA assessed the severity of the violation as moderate. Only one employee was determined to have actually used the saws listed in items 2 and 3. CRS has no history of previous violations. Respondent had no safety program established or enforced. The saws listed in item 2 had no guards. The saws in item 3 had top guards but no lower blade guards. Upon due consideration of these factors, penalties of $300 for item 2 and $200 for item 3 are appropriate.

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 ORDERED:

1. Citation No. 1, item 1, is vacated.

2. Citation No. 1, item 2, is affirmed as a serious violation and a penalty of $300 is assessed.

3. Citation No. 1, item 3, is affirmed as a serious violation and a penalty of $200 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: May 7, 1999