

SECRETARY OF LABOR,

Complainant,

v.

JOHN MCCARTY, d/b/a INTERTRIBAL
TRADE,

Respondent.

OSHRC DOCKET NO. 96-1094

APPEARANCES:

For the Complainant:

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

For the Respondent:

Lori Bruner, Esq., SeaTac, 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").

Respondent, Intertribal Trade (ITT), is a fish buying business solely owned by John McCarty (Tr. 180-81). On February 10, 1996 a diver was killed while working off the *Wave Dancer*, a vessel also owned by John McCarty (Tr. 108-09). As a result of that accident, the Occupational Safety and Health Administration (OSHA) initiated an investigation of ITT. On August 12, 1996, ITT was issued citations alleging violations of the Act together with proposed penalties related to the February 10, 1996 accident. Respondent denies that it is an employer and maintains it is not, therefore, subject to the requirements of the Act. By filing a timely notice of contest ITT brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 3, 1997, a hearing was held in Port Angeles, Washington. The parties have submitted briefs on the issues and this matter is ready for disposition.

Coverage

Ginger McCarty, ITT's sales and contract manager (Tr. 179), testified that in the fall of 1995, ITT entered into an arrangement with members of the Makah tribe who were interested in obtaining diving equipment for a joint venture, harvesting sea urchins (Tr. 35-36, 181-82). McCarty testified that ITT obtained a no interest, no time line loan from High Tide Fish Company, which was used to purchase diving equipment and training for tribal members interested in taking up commercial diving (Tr. 39, 182, 185, 202). In return for ITT's sponsorship, the divers promised to sell their product exclusively to ITT for one year, so long as ITT paid as much as, or more than other fish buyers were offering (Tr. 36, 41, 182, 203). One of the divers, Theresa Akin (*nee* Sawyer), testified that she sold product to Olympic when they were paying more than ITT (Tr. 54). The divers agreed to pay 10% of all their dive proceeds to High Tide, through ITT, to pay back the equipment loan no matter who they sold to (Tr. 54, 183, 203-04, 222).

Under the arrangement with ITT, the divers could work off of any boat in the fleet (Tr. 36). Dell Hill worked from the SOONER with another of the divers, Don Davis (Tr. 41, 152). Wade Green, John McCarty's cousin, worked from the *Wave Dancer* with Theresa and Jerry Sawyer, McCarty's niece and her father (Tr. 24, 36, 52). Michael Akin, now Teresa Sawyer's husband, worked as a tender on the *Wave Dancer* (Tr. 68). Part of the ITT loan was used to outfit John McCarty's boat, the *Wave Dancer*, with a compressor and manifold lines (Tr. 212). John McCarty had no prior experience in commercial diving (Tr. 187).

Jim Sheffler, of High Tide, recommended that a Mr. Kehei Kim conduct the training for the divers (Tr. 186). Kim told the divers what equipment was required, and made the equipment purchases (Tr. 29-31, 187). Kim selected and purchased the compressor and manifolds for the *Wave Dancer* (Tr. 213). Kim was paid directly by High Tide (Tr. 187). The divers selected their own equipment, which would belong to them upon repayment of the loan (Tr. 35-37, 50). The loan from High Tide was never repaid; the diving equipment remains in the possession of the divers (Tr. 193).

Ginger McCarty testified that ITT buys fish from roughly 15 boats (Tr. 184). When the divers sell their product, approximately 10-15% of the proceeds go to the tender; 50% to the boat owner for use of the boat; the remainder goes to the diver (Tr. 42, 199).

Neither Ginger nor John McCarty considered the divers on the *Wave Dancer* or the SOONER their employees (Tr. 198). The skipper drives the boat; either John McCarty or Jerry Sawyer skippered the *Wave Dancer* (Tr. 70-71). The divers decide where to stop and dive (Tr. 59, 98, 223-24, 245). No one was in

charge of the operation as a whole (Tr. 71, 99). Theresa Akin testified that she was self-employed (Tr. 245).

Discussion

ITT maintains that it was not the employer of Jerry Sawyer, the diver killed in the February 10, 1996 accident. This judge agrees. The Commission has held that:

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; 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.

Vergona Crane Co., 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD ¶29,775, p. 40, 496-97 (No. 88-1745, 1992).

In this case, neither party considered the divers employees of either ITT or John McCarty. The divers were not paid by ITT or John McCarty. Although the divers sold their catch almost exclusively to ITT, they were free to sell to other fish buying companies if they were paying more. There is no evidence that ITT or McCarty provided any employee benefits or withheld employment taxes for the divers. McCarty owned the *Wave Dancer*, which the divers needed to get to the dive sites; there is no evidence, however, that John McCarty had any right to control the manner or means by which the divers performed their work, or to assign additional tasks to the divers. The divers chose when, where and with whom to work based on familial relationships. McCarty received a share of the harvest in payment for the diver's use of his boat.

The Secretary bases its argument largely upon the divers' exclusive sale¹ of their harvest to ITT. In this case, however, that arrangement was not an indicia of an employment relationship, but was, rather, the divers' consideration given to ITT in exchange for ITT's help in securing loans enabling them to purchase commercial diving equipment.

¹ The Secretary did not establish ITT's exclusive right to purchase the divers' harvest. Theresa Sawyer testified that her contract with ITT allowed her to sell her product to the highest bidder. None of the divers' contracts were introduced into evidence.

The Secretary failed to show, by a preponderance of the evidence that either John McCarty or ITT was the employer of the employees who are the subject of the above captioned action. The citation, therefore, must be VACATED.

ORDER

1. Citation 1, item 1, alleging violation of §1910.410(a)(1) and (2) is VACATED.
2. Citation 1, item 2, alleging violation of §1910.410(c)(1) and (2) is VACATED.
3. Citation 1, item 3, alleging violation of §1910.421(c)(3) is VACATED.
4. Citation 1, item 4, alleging violation of §1910.421(d)(9) is VACATED.
5. Citation 1, item 5, alleging violation of §1910.422(e) is VACATED.
6. Citation 1, item 6, alleging violation of §1910.423(d) is VACATED.
7. Citation 1, item 7 alleging violation of §1910.430(c)(2)(iii) is VACATED.
8. Citation 1, item 8, alleging violation of §1910.430(g)(1) is VACATED.
9. Citation 2, item 1, alleging violation of §1904.8 is VACATED.
10. Citation 2, item 2, alleging violation of §1910.420(a) is VACATED.
11. Citation 2, item 3, alleging violation of §1910.421(b) is VACATED.
12. Citation 2, item 3, alleging violation of §1910.430(a)(2) is VACATED.

Benjamin R. Loye
Judge, OSHRC

Dated: