UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

TEAM AMERICA CORPORATION,
Respondent

Docket Nr. 97-1230
97-1626

Appearances
For Complainant:
Patrick L. DePace, Esq
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For Respondent:
William W. Johnston, Esq
Worthington, Ohio

Before:
JOHN H FRYE, III, Judge

DECISION AND ORDER

The responsibility for OSHA violations rests with the employer who owns the business in which they occurred or with a person who, based on a commonality of economic interests with the business owner, has the ability to control that business. The statutory and case law is

all to this effect. Here, OSHA seeks to depart from that principle based on the existence of an employer-employee relationship between a group of exposed employees and an employer that has no interest in and no knowledge of the business in which the exposure occurred, and on contract provisions that appear to give that employer the authority to control some aspects of that business.

TEAM America Corporation is a professional employer organization, that is, an organization that provides human resource services to small and medium sized businesses and becomes the administrative employer of its client=s workers. Professional employer organizations have found a market for payroll and similar services because these often prove too burdensome for small and mid-sized businesses. TEAM America entered into such an arrangement with Epro, Inc., a small ceramic tile manufacturer located at 156 East Broadway Street, Westerville, Ohio. In the words of a management official at Epro, Team America Abought@ Epro=s employees.

On June 20, 1997, OSHA began an inspection at Epro=s premises. As a result of this inspection, identical citations were issued to both Epro and TEAM America.[1] Epro abated the violations and settled the matter without a trial. TEAM America contested the citations and these proceedings resulted. TEAM America admits jurisdiction of the Commission. Its sole defense is that it is not responsible for these violations under the Occupational Safety and

[1] In Team America=s cases, one serious and one other-than-serious citation in Docket Number 97-1230 cover three alleged safety violations, and one serious citation in Docket Number 97-1626 covers alleged exposure to silica dust. The recommended penalties against Team America differed from those recommended against Epro because of the application of the adjustment factor for size.

Health Act. It does not contest the merits of the citations. I heard the case in Columbus, Ohio, on May 27, 1998.

The Secretary makes two arguments to support her position. First, as the employer of the exposed employees, the Secretary urges that TEAM America is liable for the alleged violations. The Secretary maintains that TEAM America has an obligation to provide a safe workplace for its employees regardless of the degree to which it controls the worksite. It is undisputed that all of the employees who worked at Epro at the time of the inspection were employees of TEAM America (Tr. 6-7, 16-18, 101-103). The contract between TEAM America and Epro provides that "[t]o the extent permitted by law, TEAM America shall be the employer of the employees." (GX 1). Therefore, the Secretary urges, to find that TEAM America is not liable for the alleged violations requires a determination that under certain circumstances an employer is not obligated to provide a safe workplace for its employees. Such a determination, she points out, would be contrary to the Act itself and many years of Court and Commission interpretation of the Act.

The difficulty with the Secretary's position is that it fails to recognize the realities of the relationships among TEAM America, Epro, and the exposed employees. There is no dispute that the business of TEAM America is leasing employees and not manufacturing ceramic tile. TEAM America has no interest in the business of Epro.[2] It functions solely as the

[2] Tr. 27-28, 111-13; Govt Ex 1, & B.

administrative employer, discharging payroll and similar responsibilities.[3] The Secretary and TEAM America stipulated that the latter A... was an employer employing employees in said business at the aforesaid workplace.@[4] >Said business= refers to Respondent's Abusiness as a lessor of personnel@,[5] and >the aforesaid workplace= refers to A156 East Broadway Street, Westerville, Ohio,@[6] the location of Epro=s factory.[7] Here the cited party, TEAM America, provided the services rendered by the affected workers in Epro=s workplace, using Epro=s machinery and equipment, and in furtherance of Epro=s business.

The Secretary assumes that the exposed employees are employed by TEAM America for purposes of the Act. However, ' 3(6) of the Act defines >employee= as A... an employee of an employer who is employed *in a business of his employer* ....@ (Emphasis added.) The manufacture of ceramic tile is not a business of TEAM America. Thus it appears that the exposed employees were not Aemployed in a business of [TEAM America],@ and consequently fall outside the sweep of the definition of >employee= in ' 3(6).

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[3] Tr. 9.

[4] Stipulation 4, JX 1.

[5] Stipulation 2, JX 1.

[6] Stipulation 3, JX 1

[7] Tr. 6, 8, 41, 42.

While the Secretary has cited numerous cases for the proposition that an employer has the obligation to provide his employees a safe working environment wherever they may be, none of those cases involved employees who were working in a business that was different from their employers= businesses. Indeed, all were engaged in performing work that was normally undertaken by their employers. And in one of them, *Dayton Tire & Rubber Company*, 2 OSHC 1528, 1529 (Rev. Com. 1975), the Commission reached a result that is consistent with the view that an employee is someone who is engaged in the business of his or her employer. Dayton had leased employees, and stood in the same place as Epro stands here. The citation charged that Dayton had not maintained certain required OSHA forms. Dayton argued that that responsibility rested with the lessor of the employees, who had maintained the forms. The Commission rejected that argument, holding that Dayton was the employer for purposes of recordkeeping, and that the company leasing the employees to Dayton was a mere agent furnishing personnel services. The Commission noted that, while Dayton might contract with the lessor to perform the function, it could not avoid the responsibility.[8]

The definition of employee as someone Aemployed in a business of his employer@ recognizes the economic reality that an employer is unlikely to be able to control the conduct of a business that it does not own, and will not be able to correct violations of OSHA standards occurring in that business. Thus the conclusion that the exposed employees in this case were not engaged in TEAM America=s business might well end this inquiry. However,

[8] Here, Epro maintained the OSHA 200 log. (Tr. 14.)

TEAM America=s response to the OSHA inspection, coupled with certain provisions of the contract between TEAM America and Epro, provide a reasonable basis on which to question whether TEAM America had a greater role than that of an agent providing personnel services. Consequently, it is necessary to look at the facts concerning the extent of TEAM America=s involvement in the supervision and control of the employees and Epro=s operations.

Scott Feil, the compliance officer, described the events that occurred when he arrived on Epro=s premises as follows:

> Q Do you recall when you first learned that Team America might be involved?
>
> A Upon arrival to the site was the first hint I had.
>
> Q And, do you recall who told you that?
>
> A I would say it would have been Ms. Brooks, Nancy Brooks, or Mr. Marteney. It happened very soon, whoever the first person I talked with discussed it because it was a relatively new situation and they wanted me to be immediately aware of it and they did. * * *
>
> Q Do you recall what you were told?
>
> A That the employees were not employees any longer of Epro, that -- I think the terminology that was used was that they bought the employees of Epro and that they received their pay checks from Team America and it was at that point that I determined very definitely that I needed to make contact with Team America and find out a little more about the situation.
>
> Q And, what did you do then?
>
> A Eventually I was able to speak with Kyle Seymore. * * * I explained to Mr. Seymore the purpose of the investigation, the nature of the visit. I discussed all the rights and responsibilities as they were related to a standard OSHA inspection, that we cover an opening conference as we do in any other inspection.

At that point one of the initial things I do is identify who is available to represent the employer, this employer being Team America and Mr. Seymore identified that either Ms. Brooks or Mr. Marteney or both could act in conjunction for the company in regards to the work place inspection.

At that time, as well, he intimated that this was not an unusual situation for them, that they were, in fact, the Team America reps in terms of safety on the site during that same phone conversation that was discussed.

Q Who was Kyle Seymore?

A His job title is like a service rep, an account rep. I don't recall the exact title. My understanding was that he serviced the Epro account is how it was presented to me.

Q He's an employee of Team America?

A He was a management employee of Team America.

Q How did you know to call him?

A I don't know that necessarily I placed the phone call. I don't believe I placed the phone call, I believe one of the Epro employees contacted Mr. Seymore and then they talked briefly and then I spoke with him and discussed the things I previously mentioned.

Q Did you tell him that Team America had the right to have somebody accompany you during your inspection?

A Yes, and it was at that point that he indicated that Ms. Brooks or Mr. Marteney, or both, could perform that function.

Q And, did they accompany you on your inspection?

A Yes, predominantly throughout the course of the inspection from the beginning to the end Mr. Marteney did that. Ms. Brooks was involved with various parts of it as well.

Q Did anybody else accompany you during the inspection?

A Mr. Seymore did arrive on site later that day on the first date on-site. We were into the walk-around portion of the inspection, it was -- I don't recall the amount of time that had elapsed from the phone call, it was fairly quickly, within a two hour period, I would estimate.

As I recall, he was not on-site during the second day where I performed the employee exposure monitoring where I was there for a full eight hour day basically.[9]

TEAM America=s response to Mr. Feil indicated that it had assumed at least some of the responsibility for safety at the Epro plant, and this justified the inference that it had the ability to exercise the control necessary to provide a safe workplace. This inference is further supported by provisions in the contract between TEAM America and Epro, which provides TEAM America with a variety of ways to control the activities of the workers at Epro. In particular, the Secretary relies on the following provisions of the contract between TEAM America and EPRO:

1. TEAM America has the exclusive right "[t]o supervise through TEAM America personnel or agents the employees' performance of their duties under criteria established by TEAM America" (Govt Ex 1, & 2.A.ii.);[10]

2. TEAM America may inspect the workplace (Govt Ex 1, & 6.D.);

3. TEAM America has the right "[t]o determine and control all other conditions incidental to employment of employees" (Govt Ex 1, & 2.A.xi.);

[9] *See* Tr. 42-45.

[10] The supervisors at the Epro worksite were employees of TEAM America (Tr. 12, 20, 22, 118). The Secretary maintains that TEAM America=s power to establish criteria gives it the authority and ability to assure a safe workplace at Epro.

4. TEAM America may designate an on-site supervisor who may "determine the procedures to be followed by employees regarding the time and performance of their duties" (Govt Ex 1, & 2.C.iii.); and

5. EPRO must "comply, at its expense, with any specific directives of TEAM America, TEAM America's workers compensation carrier or any governmental agency having jurisdiction over Health Laws" (Govt Ex 1, & 6.B.).

The testimony at the hearing indicated that TEAM America did not, in fact, unilaterally exercise any of these enumerated powers in the operational area. Ms. Edgar, the owner of Epro, testified that she had been told by TEAM America that they had safety consultants available and would assist Epro in developing a safety program. She indicated that no such services were provided. (Tr. 13, 21, 22.) She further testified that TEAM America provided no training, conducted no inspections, does not control Epro=s worksite, and did not maintain the OSHA 200 log. (Tr. 13-16, 31.) She indicated that, should Epro request it, TEAM America had the authority to discipline employees. (Tr. 15.)

Mr. Cash, testifying on behalf of TEAM America, pointed out that the contract specifically states that TEAM America does not undertake to control Epro=s business premises, and that it has no authority under the contract to correct violations of OSHA standards occurring on the premises. (Tr. 113, 115-16, 119.) He indicated that TEAM America could not refuse to allow employees to work in unsafe conditions, but that it could, if it became aware of a problem, tell a client to follow OSHA standards and could treat the client=s future failure to do so as a

breach of the contract justifying termination.[11] (Tr. 120.) The gist of Mr. Cash=s testimony was that, in exercising any of the enumerated contractual powers in the area of Epro=s operations, TEAM America would only act at the instance of Epro. (Tr. 121-26.)

Indeed, it is hard to imagine how the relationship between TEAM America and Epro could be otherwise. It is self-evident that no business owner would willingly relinquish control of the operation of his or her business to an organization that possessed no knowledge of that business. The realities of the relationship between TEAM America and Epro dictate the conclusion that TEAM America, if it wanted to preserve that relationship, would not venture into the area of Epro=s operations without an invitation.

The Secretary correctly points out that the Commission has held that in determining whether a company has an employment relationship with an individual, the key factor is control of the workplace. The Secretary cites several cases, two of which, *MLB Industries, Inc.*, 12 OSHC 1525 (Rev. Comm. 1985), and *Vergona Crane Co.*, 15 OSHC 1782 (Rev. Comm. 1992), are instructive.

MLB Industries, Inc., *supra*, supports the conclusion that the exposed employees were not employees of TEAM America for purposes of the Act. In that case, Crown Zellerbach was the owner of and general contractor for a construction project in upstate New York. MLB had entered into a contract with Crown Zellerbach to complete some work on a warehouse in connection with this project. MLB had a contract with the local union and thus access to union

[11] In *IBP v. Secretary,* 144 F.3d 861 (D.C. Cir. 1998), the court held that the power to terminate a contract was not, by itself, sufficient to give its holder the power to control the work.

labor, but Crown did not. Crown called on MLB to furnish laborers to it, representing that it had an emergency situation on its hands at a location one-quarter mile from MLB=s warehouse project and that it would take responsibility for furnishing tools and supervising the work. MLB obtained the laborers from the hiring hall and billed Crown for their wages and payroll costs, adding 10% markup to cover its costs.

The work involved the removal of six or seven sections of concrete flooring. In the course of the work, a floor collapsed, causing an employee to fall. OSHA cited MLB for failing to require the employees to use safety belts, and the citation was affirmed by the Administrative Law Judge. On appeal, the Commission reversed. After noting that A... Crown had the power to direct the employees= activities and to insure that the work was done safely,@ the Commission stated:

> In contrast to Crown=s direct control over the employees= activities ..., MLB=s power to control the employees and to modify their working conditions was largely indirect or theoretical. Although MLB selected and contacted the employees about the job, there was no showing that MLB=s initial contact with the employees had an impact upon how they performed their work or their safety. Although MLB may have had the authority to withdraw the laborers from the worksite, to fire them, and to assign other laborers to do the work, MLB was not performing any work at the [worksite] and did not take any role in determining how the concrete floor was to be removed. Further, there is no indication that MLB knew of any circumstances that would have required it to take action with respect to the workers= employment, either for safety purposes or for any other reason. Therefore, MLB did not have sufficient control of the work environment or employees= activities to support a finding that it was an employer under the Act.

12 OSHC at 1529 (footnote omitted). While the relationship between TEAM America and Epro differs slightly from that described above, TEAM America=s control over the work and work place is just as indirect or theoretical as MLB=s. *MLB Industries, Inc.* supports the

conclusion that TEAM America lacked sufficient control of the operational aspects of the work and work place to hold it responsibile for violations of OSHA standards.

Vergona Crane Co., supra, involved a situation in which Vergona had leased a crane to a construction company that had, at Vergona=s request, put the crane operator and oiler on its payroll. Vergona was cited for hazards to which the operator and oiler were exposed, and defended on the ground that these individuals were employees of the construction company. The Commission rejected this defense, noting that the right to control the work of the operator and oiler rested with Vergona, not the construction company. Similarly, here the right to control the work of the exposed employees remained with Epro, not their administrative employer, TEAM America.

CONCLUSIONS OF LAW

I conclude that the exposed employees were not employees of TEAM America within the definition of employee set out in ' 3(6) of the Occupational Safety and Health Act, and that because TEAM America lacked the ability to control the operational aspects of their work and their work place, TEAM America is not responsibile for violations of OSHA standards to which they may have been exposed.

ORDER

The citations filed against TEAM America are vacated.

JOHN H FRYE, III
Judge, OSHRC

Dated:

Washington, D.C.