UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-2929
C. ABBONIZIO CONTRACTORS, INC.,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The only issue in this case is whether respondent C. Abbonizio Contractors, Inc. ("Abbonizio") is an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678) ("the Act").[1] The case concerns a dispute over whether Abbonizio, an excavation contractor, or Lehrer McGovern Bovis ("LMB"), the construction manager, employed workers who created an improperly sloped and unshored excavation in violation of 29 C.F.R. § 1926.652(a)(1). The parties stipulated that if Abbonizio is found to have been the employer, a serious violation of the standard occurred and that the proposed penalty of $875 is appropriate. For the reasons that follow, we find

[1] Section 3(5) of the Act, 29 U.S.C. § 652(5), defines "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(6) of the Act, 29 U.S.C. § 652(6), defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce."

that Abbonizio is an employer as defined by section 3(6) of the Act and that its employees created the excavation in question.

I.

Abbonizio was under contract with the New Jersey Sports and Exposition Authority ("NJSEA") to do site excavation, grading, and back fill at the New Jersey Aquarium construction project in Camden, New Jersey. LMB was the construction manager of the project. LMB prepared bid packages, made recommendations to NJSEA as to whom to award contracts, and coordinated the activities of the various contractors. When contractor Battaglia Electric ("Battaglia") asked LMB to arrange for a trench to be excavated so that it could install an electrical conduit, LMB notified Abbonizio. The two workers Abbonizio sent to perform the work along with its backhoe were employees it had hired to work on the project and to whom it paid wages. The excavation was not included in the original contract between NJSEA and Abbonizio, but was later added to the contract with a change order. After an OSHA compliance officer observed Battaglia's employees at the bottom of the improperly sloped and unshored trench during an inspection, OSHA issued a citation to Abbonizio for a violation of 29 C.F.R. § 1926.652(a)(1) alleging that Abbonizio's employees performed the excavation.

Following a hearing, Administrative Law Judge Richard W. Gordon issued a decision in which he held that the Secretary properly cited Abbonizio as the employer who controlled the employees that created the violative condition. He found that LMB did not lease or rent the equipment and manpower as Abbonizio contends and that the work was done as part of a change order to the original contract.[2]

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[2] The parties dispute whether a rental agreement existed between Abbonizio and LMB. The judge found that a rental agreement did not exist. We do not reach this issue because the existence of a rental agreement does not by itself transfer the lessor employer's duty to comply with the Act to the lessee company. *See, e.g. Frohlick Crane Serv., Inc. v. OSHRC,* 521 F.2d 628, 631 (10th Cir. 1975) (a private agreement between parties over who has exclusive control of employees cannot control the statute). There is nothing in the record to suggest that LMB accepted responsibility for compliance with the Act.

II.

The key factor in determining whether a party is an employer under the Act is whether it has the right to control the work involved. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD ¶ 29,775, p. 40,497 (No. 88-1745, 1992).[3] Abbonizio clearly had that right here. The trench work was performed as part of the construction project Abbonizio had contracted to perform excavations on, and became part of Abbonizio's contract with NJSEA through a change order.[4] When it was asked to excavate the trench, Abbonizio selected and sent employees to do the job. It had hired the employees, paid their wages and presumably could discipline or fire them. It also supplied the equipment. In the absence of another party accepting responsibility, Abbonizio was required

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[3] The Commission has also considered numerous other factors when making such a determination. *See, e.g., Van Buren-Madawaska*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 (No. 87-214, 1989)(consolidated). *See also Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1991-93 CCH OSHD ¶ 29,689 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994); *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1978 CCH OSHD ¶ 22,829 (No. 14801, 1978).

The Commission's test is consistent with that articulated by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992), that the term "employee" in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise. The court noted that the inquiry is as follows:

> 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.

Id. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (footnotes omitted).

[4] LMB's general superintendent James O'Neill testified that he told Abbonizio employee Steven Crane, who was then a foreman covering several projects, that the additional work that Abbonizio performed at the worksite, that included the cited trench, would become part of Abbonizio's contract with NJSEA through a change order to the contract. Crane testified that at the time the trench was dug, he believed it was done as part of a rental agreement between Abbonizio and LMB, but that in his current position as general superintendent for Abbonizio, he understood how the cited trench work could have become part of Abbonizio's contract with NJSEA through a change order.

to ensure that these employees complied with the cited standard. *Del-Mont Constr. Co.*, 9 BNA OSHC 1703, 1706, 1981 CCH OSHD ¶ 25,324, p. 31,390 (No. 76-4899, 1981). Although the workers in the trench at the time of the inspection were Battaglia's employees, and not Abbonizio's, an employer that creates or controls a hazardous condition is obligated to protect not only its own employees, but those of other employers as well. *Flint Engg. & Constr. Co.*, 15 BNA OSHC 2052, 2054, 1991-93 CCH OSHD ¶ 29,923, p. 40,853 (No. 90-2873, 1992). It was therefore the duty of Abbonizio, the employer of the workers who created the condition, to comply with the safety requirements set forth in the standards. *See Frohlick*, 521 F.2d at 631.

The minimal role played here by construction manager LMB provides no support for Abbonizio's claim that LMB should be considered the employer of the workers who dug the trench. The construction manager's job on this site was to coordinate activities. It was doing that here by requesting that Abbonizio excavate a trench. LMB and Battaglia only asked that the excavation be dug and supplied the dimensions to the employees that Abbonizio sent with its backhoe to dig the excavation. There is no evidence that they had any other connection with the employees. Battaglia and the construction manager were only relying on the expertise of the employees to create the trench, and had no control or right to control the work involved in performing the excavation. LMB did not furnish the supervision or the equipment, unlike the general contractor in *MLB Industries., Inc.*, 12 BNA OSHC 1525, 1984-85 CCH OSHD ¶ 27,408 (No.83-231, 1985), a case heavily relied on by Abbonizio. In that case, the Commission held that MLB was a "conduit for labor," and not an employer, because Crown, the general contractor, assumed responsibility for the employee's activities, had control of the worksite, and provided the supervision of the work. *Id.* at 1530, 1984-85 CCH OSHD at p. 35,512. There is no evidence that LMB assumed any of those responsibilities here. We therefore find that Abbonizio was the employer for purposes of the Act.

III.

For the reasons stated above, we affirm the judge's finding that Abbonizio is an employer. The parties have stipulated to the existence of a serious violation and to a

penalty of $875. We see no reason to disturb the stipulation. We therefore affirm a serious violation of 29 C.F.R. § 1926.652(a)(1) and assess a penalty of $875.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G Foulke Jr
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: December 1, 1994

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SECRETARY OF LABOR, Complainant, v. C. ALBONIZIO CONTRACTORS, INC., Respondent.	Docket No. 91-2929

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 1, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

December 1, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2929

NOTICE IS GIVEN TO THE FOLLOWING:

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Complainant,
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Respondent.

OSHRC DOCKET
NO. 91-2929

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 May 21, 1993. The decision of the Judge will become a final order of the Commission on June 21, 1993 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 June 10, 1993 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
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Petitioning parties shall also mail a copy to:

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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.

Date: May 21, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2929

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SECRETARY OF LABOR

Complainant,

v.

C. ABBONIZIO CONTRACTORS, INC.

Respondent.

OSHRC Docket No. 91-2929

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

James Sassaman,
Dir. of Safety, GBCA
Philadelphia, PA
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, U.S.C. §651, et seq., ("Act") to review citations issued by the Secretary pursuant to §9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to §10(a) of the Act.

On October 10, 1991, the Secretary issued a citation to Respondent alleging that one serious violation had occurred on September 12 1991, at the Aquarium construction worksite at Delaware and Federal Streets, in Camden, New Jersey. The Secretary proposed a total penalty of $875.00.

By filing a timely notice of contest, Respondent brought this proceeding before the Occupational Safety and Health Review Commission ("Commission"). A hearing was held in New York, New York on July 29, 1992. The violation and proposed penalty were stipulated. Accordingly, the only issue to be decided is whether the correct party was cited.

STIPULATED VIOLATION

Serious Citation 1, item 1, states:

29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

Aquarium Construction Site, Delaware and Federal Streets, Camden, N.J.-Company created hazard to employees of another contractor on site by digging an improperly sloped and/or unshored trench for installation of electrical conduit in the trench. Trench located south of Trout Bldg.- 8 ft. deep by 2 1/2 " wide at bottom. Approximate length 20 feet. West bank sheer.

SUMMARY AND EVALUATION OF THE EVIDENCE

Respondent, C.Abbonizio Contractors, ("Abbonizio"), contracted with the New Jersey Sports and Exposition Authority, ("NJSEA"), to perform excavation and back fill at the aquarium worksite. The Occupational Safety and Health Administration, ("OSHA"), cited Abbonizio for creating the violative excavation. Lehrer McGovern Bovis, ("LMB"), was NJSEA's project manager for the job. James O'Neill, the general superintendent for LMB, was responsible for coordinating the activities of various trade contractors on the site and verifying the completion of various activities of work. (Tr. 27).

The aquarium worksite was a 52 million dollar project. (Tr. 37). Mr. O'Neill testified that with a job of this magnitude it was common practice that items of work had to be

changed between the time that the contract was awarded and the time it was completed. (Tr. 37). Mr. O'Neill testified that a change order was entered into whereby LMB authorized Abbonizio to proceed with an excavation on a time and materials basis so that the electrical contractor could perform its work. (Tr. 40). LMB and Abbonizio therefore entered into a change order to the original contract on 9/10/91 to include the additional work. (Tr.43). It was part of this additional work that resulted in the OSHA violation. (Tr. 43).

By the terms of the change order, Abbonizio documented the labor and equipment used on a daily basis which needed to be verified by Mr. O'Neill. Confusion was created because the slips used said "rental agreement" on the backside. Abbonizio argued that there was a rental agreement between the parties as was evidenced by Jim O'Neill's signature upon these forms. Mr. O'Neill testified that by signing these documents he was merely verifying the equipment and labor used by Abbonizio to perform the excavation work that went beyond the scope of the trade contract. (Tr. 47, 48). He testified that these slips were extra work orders, which are daily tickets which delineate the size and type of equipment that applies the amount of hours worked. Thus, by signing he was attesting to the time, labor, and equipment used. The so-called "rental agreement" terms were listed on the back of the form. (Tr. 47). O'Neill testified that had he agreed to the rental agreement he would have initialled the backside, which is normal practice. (Tr. 99).

Mr. O'Neill testified that he objected to the use of the form earlier on in the job and discussed it at length with Abbonizio. The discussion came up because Abbonizio was trying to charge LMB for holiday pay as per the rental agreement. O'Neill testified that he told Abbonizio that this was not a rental situation. He notified Abbonizio to make another form,

but was assured that the term "rental agreement" did not mean anything. He testified that the parties made a mutual agreement that the form was only for authorization of time and material and that it was not a rental agreement: "So it was understood between me and the principals at Abbonizio that this was not a rental agreement that I was signing. It was their vehicle to document the equipment, and labor man hours. And, that's what I was doing, was authorizing that. We do not rent equipment." (Tr. 96).

The original contract entered into between the parties provided:

> §3. The contractor shall provide and furnish all labor, materials, tools, supplies, equipment, service, facilities, supervision, administration, and all the items required by the Contract Documents for the proper and complete performance and acceptance of the following work in strict accordance with the Contract Documents. (Ex. C-3).
>
> §8. Contractor acknowledges it has reviewed the Contract Documents and accepts them with full responsibility and liability for the performance thereof and neither owner nor construction manager shall have responsibility or liability for the performance of the work. (Ex. C-3).

The change order specifically incorporates all terms and conditions of the original contract. Thus, LMB was not "renting" the equipment, as argued by Abbonizio. Rather, Abbonizio contracted to complete the work with full liability as agreed to in the original contract.

Respondent contends that it was a mere "conduit for labor" for LMB as defined by *MLB Industries, Inc.*, 12 OSHC 1525, 1525 (Rev. Comm. 1985). Therefore, respondent claims that it was not the correct party cited. In *MLB Industries, Inc., supra*, Crown Zellerbach, (hereinafter "Crown"), was the owner and general contractor at a jobsite in South Glens Falls Mills, New York. *Id.* at 1525. The project manager for Crown contacted

the project manager for MLB and said that he had an "emergency" situation. *Id.* He asked the project manager for MLB if he could supply manpower to remove sections of a concrete floor at the "IP" building, which was located about one-quarter mile from the warehouse. *Id.* According to the project manager for MLB, Crown's project manager stated that he would tell the workers what to do, would furnish the tools needed, and would supervise the work. *Id.* MLB was not performing any work at the IP building and did not take any role in determining how the concrete floor was to be removed. *Id.* at 1529. That the employees did not have any reason to be at the IP building for MLB is significant because it illustrates that Crown was the actual employer on the emergency project.

The fact situation in this case is distinguishable from that of *MLB Industries, Inc.* Here, Abbonizio was not called upon to provide laborers for an emergency situation. Rather it was to perform the very excavation work for which it had been contracted in the first place. It is not as if LMB rented Abbonizio employees to perform excavation work at a different construction site where Abbonizio was not performing any work.

The Review Commission has considered a number of factors when making a determination as to who is the actual employer:

1) Who the employee considers to be his or her employer;
2) Who pays the employee's wages;
3) Who is responsible for controlling the employee's activities;
4) Who has the power as opposed to the responsibility to control the employee;
5) Who has the power to fire the employee or to modify the employee's employment conditions.

MLB Industries, Inc., 12 OSHC 1525, 1526-1527 (Rev. Comm. 1985). *See also Del-Mont Construction Co.*, 81 OSAHRC 35/E11, 9 BNA OSHC 1703, 1981 CCH OSHD ¶ 25,324 (No. 76-4899, 1981).

The *MLB* decision notes that the Commission has never considered any list of factors to be all inclusive, and that each situation must ultimately be examined on a case by case basis. *MLB Industries, Inc.*, at 1528. In our case, the two contracts signed by the parties are significant in determining the workers actual employer. In the original contract Abbonizio agreed to provide supervision, and assume liability; the second contract incorporates in all agreements from the first. Nonetheless, the above cited factors, taken together with the two contracts clearly demonstrate that Abbonizio was the creating employer, and not a mere conduit for labor.

1) Who the employee considers to be his or her employer?

The respondent offered the testimony of William M. Fredericks to support its position that he had been leased or rented out to LMB at the time he was involved in the creation of the violative excavation. He testified that he had been employed by Abbonizio as a laborer, but that he considered LMB to be his employer when he was on a rental to LMB. Mr. Fredericks testified that it was Mr. Crane, the Supervisor from Abbonizio who informed him that he was working pursuant to a rental agreement. (Tr. 123). However, in *MLB Industries, Inc.*, although one employee testified that he considered Crown and not LMB to be his employer for the work at the IP building, the court nonetheless found that Crown was in fact acting as his employer while on that job. *MLB Industries*, Inc., at 1526.

2) Who pays the employee's wages?

In the *MLB* case, MLB paid the three employees for their work at the IP building and sent Crown a bill for the work done. The amount billed not only included the employees' wages, but also payment of the employees' pension, welfare, taxes, and insurance,

as well as a 10% markup for handling the payroll. Basically, MLB extended the money for Crown and then Crown reimbursed MLB along with a service charge for the cost of having fronted the money. In this case there is no evidence to show that Abbonizio charged LMB a markup for handling the payroll. Mr. O'Neill also testified that Abbonizio was paid pursuant to the agreed upon rates. The rates did not change between the original contract and the subsequent arrangement. Therefore, if the original contract rates were all-inclusive (i.e, with respect to supervision, etc.), the subsequent rates should also be all-inclusive. If the subsequent work was not all inclusive the rates charged should have been lower to reflect the fact that supervision and liability were not included in the price. LMB paid Abbonizio for the time and material used to perform the work which was not within the scope of the original contract. When asked whether Abbonizio was paid for supervision, Mr. O'Neill testified: "In our base contract, we described what the work implies; what the work means...And work means that it includes all supervision, maintenance, all of the appurtenances. It's all inclusive; a lump sum hourly rate." (Tr. 92). Furthermore, Mr. Fredericks testified that Mr. O'neill "has nothing to do with my wages." (Tr. 129). These facts do not support the Respondent's contention that LMB was the employer of these leased employees.

3) Who is responsible for controlling the employee's activities?

In the present case, both O'Neill and Fredericks testified that O'neill never told Fredericks or any other Abbonizio employee the manner in which he was to perform his work. (Tr. 49). In fact, the original contract specifically states that "neither the owner not construction manager shall have the responsibility for the performance of the work." (Ex. C-3 p.1, §8). Mr. O'Neill testified that LMB never leases equipment because they are construction managers, not contractors. As managers, they contract out the various phases to people with the expertise, such as Abbonizio. The evidence in our case shows that Abbonizio was responsible for the management of it's employees.

4) Who has the power as opposed to the responsibility to control the employee?

Although Mr. Fredericks testified that Mr. Crane informed him that he was

in a rental situation, Mr. O'Neill testified that he told Abbonizio that LMB does not rent equipment. (Tr. 120, 90). Nothing in the record discloses any evidence that Mr. O'Neill had the power to control the employees. Although LMB was responsible for delineating the scope of the work to be completed, this was necessary since Abbonizio's work had to be coordinated with that of the electrical contractor. This explains why Abbonizio's employees were given the day's agenda in the morning from Mr. O'Neill. (Tr. 115). He testified "Since it was an ongoing process over a period of several days, the arrangement was made, Battaglia laid out the work, Abbonizio excavated the work--that Abbonizio excavated what was required in that given time period." (Tr. 71-72).

5) Who has the power to fire the employee or to modify the employee's employment conditions?

Mr. O'Neill never modified the employment conditions of the employees. He testified that Abbonizio was to perform an excavation pursuant to a change order in the contract. (Tr. 87). O'Neill assumed that Abbonizio would provide the necessary supervision, labor, and equipment to perform the specified task. (Tr. 89). Also, Mr. O'Neill's testimony reveals that he was not involved in choosing the individual employees from Abbonizio who would perform the work.

The evidence supports the conclusion that Abbonizio, and not LMB, was the employer who controlled the employees who created the violative condition at the aquarium worksite. There was no lease agreement between LMB and Abbonizio. The contractual obligations of the parties were clearly set out in the original contract and the change order. The contention that Abbonizio was the employer of the employees is further supported by applying the factors which the Review Commission considers in order to determine who is the actual employer. Therefore, the Secretary properly cited this Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

Serious Citation No. 1, item no. 1, is AFFIRMED and a penalty of $875.00 is ASSESSED.

RICHARD W. GORDON
Judge, OSHRC

Dated: May 14, 1993
Boston, Massachusetts