BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

FRIDAY TEMPORARY SERVICES, INC.,

RESPONDENT.

DOCKET NO. OSHANC 93-2651
OSHA INSPECTION NO. 18465138
CSHO ID NO.

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 13th day of September, 1994, in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Hugh M. Wilson, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell and Jane Gilchrist, Associate Attorneys General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

James W. Williams, Attorney at Law, of Roberts, Stevens & Cogburn, P.A., Asheville, North Carolina for Respondent.

ISSUES PRESENTED

1. Is the Respondent an employer, for purposes of the Occupational Safety & Health Act, of the temporary employees that it provided to a roofing company?

2. If the answer to 1 is yes, did the Complainant meet its burden of proving by a preponderance of the evidence that the Respondent committed a serious violation of 29 CFR 1926.500(g)(6)(ii), for failure to assure that its employees had been trained and instructed in built-up roofing work as specified in 29 CFR 1926.500(g)(6)(ii)(a) through (f)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.500 (g)(6)(ii) which provides that, "the employer shall assure that employees engaged in built-up roofing work have been trained and instructed in the following areas:

(a) The nature of fall hazards in the work area near a roof edge;

(b) The function, use, and operation of the MSS (Motion Stopping System), warning line, and safety monitoring systems to be used;

(c) The correct procedures for erecting, maintaining, and disassembling the systems to be used;

(d) The role of each employee in the safety monitoring system when this system is used;

(e) The limitations on the use of mechanical equipment; and

(f) The correct procedures for the handling and storage of equipment and materials.

2. N.C. Gen. Stat. 95-127(18), which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists..."

Having reviewed and considered the record and the briefs of the parties and of Amicus Curiae, and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby VACATES and REVERSES the decision of the hearing examiner, and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10).

4. The Respondent Friday Temporary Services, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. From December 19, 1992 through January 21, 1993, Compliance Officers Bill Best and John H. Francis investigated a worksite located at the Westinghouse Electric Corporation facilities at 22 Heywood Road in Arden, North Carolina as a result of an accident in which Roger Mack Brown, III, an employee of Respondent, was killed.

6. Roger Mack Brown, III was employed by Respondent, Friday Temporary Services, Inc. and was contracted out as a laborer to G. M. Kassem, Inc. of McKees Rock, Pennsylvania, the roofing contractor on the job.

7. As a result of that inspection, Complainant on March 19, 1993 issued a citation for one serious violation of 29 CFR 1926.500(g)(6)(ii) which was contained in Citation No. 1, Item 1(a) with an assessed penalty of $4,200.00, and an abatement date of March 25, 1993.

8. The alleged violation of 29 CFR 1926.500(g)(6)(ii) contained in Citation 1, Item 1(a) was as follows:

> The employer did not assure that employees engaged in built-up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet had been trained and instructed in the areas specified in 29 CFR 1926.500(g)(6)(ii) (a) through (f):
>
> > (a) roof of facility, employees were exposed to falling from a 30 foot elevation and were not trained to deal with the hazards of falling and/or fall prevention.

9. The Respondent timely exercised its right to contest the violations and penalties (N.C. Gen. Stat §§95-129, 95-137). The notice of contest was timely filed with the Safety and Health Review Board of North Carolina on March 30, 1993.

10. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

11. The Respondent's Statement of Employer's/Respondent's Position was filed on April 12, 1993 contesting the violation, proposed penalty and abatement date.

12. A hearing was scheduled and held on October 21, 1993 before the Honorable Charles R. Brewer. At the hearing the Respondent stipulated that if the Respondent was found to have violated the Act then the penalty was correctly calculated.

13. At the hearing the Respondent admitted and the Board finds as a fact that Respondent was the common law employer of Roger Mack Brown, the deceased in this case and the Board further finds that the Respondent was the employer of all of the employees that it contracted out as labor to work at the Westinghouse facility.

14. At the hearing the Respondent stipulated that the issue to be decided in the case was whether there was such an employer-employee relationship between Friday Temporary Services and the employees that were on the site so as to require Friday to provide training or assure that the employees had been provided training.

15. On December 10, 1993 the National Association of Temporary Services, Inc and the North Carolina Association of Temporary Services filed a Petition for Leave to Intervene and an Amicus Curiae brief in support of Respondent. On December 17, 1993, Judge Brewer issued an order granting the petition to intervene for the limited purpose of filing an amicus curiae brief in support of the Respondent.

16. In due course the Complainant, Respondent and Amicus all filed briefs with Judge Brewer and on February 16, 1994, Judge Brewer issued an Order dismissing the citation and the assessed penalties.

17. The Complainant timely filed an appeal with the Review Board on April 4, 1994 objecting to and excepting to most of the findings of fact, all of the conclusions of law and the Order of the hearing examiner dismissing Citation Number One.

18. On August 8, 1994 the National Association of Temporary Services, Inc and the North Carolina Association of Temporary Services filed a Motion for Leave to File an Amicus Curiae brief in support of Respondent.

19. On September 13, 1994, the issues on appeal were heard by the full Review Board.

20. At the September 13, 1994 hearing, the Motion of Amicus Curiae to file a brief was allowed.

21. The Respondent stipulated and the Board finds that Friday Temporary Services paid the wages, withheld the taxes and paid the worker's compensation premiums of the employees that it contracted out as labor to Kassem Roofing. (T p 123).

22. All three of the employees who testified at the Hearing, Timothy Lominac, Randy Smith and Philippes Dargon considered Friday Temporary Service to be their employer. (T pp. 114, 143, 151).

23. Friday had the ability to hire, fire and modify the employment conditions. (T p. 13).

24. Friday maintained control over its employees by putting restrictions on the types of jobs its employees could perform and by prohibiting them from using power tools. Kassem had to get permission from Friday to use the employees on the roofing job. Friday could take its employees off a particular job and assign the employees to another job.

25. Within the restrictions placed on the employees by Friday, Kassem did have supervisory control over the employees while they were on the roofing job. (T pp. 124, 126, Ex. 6).

26. The Respondent did not provide training to its employees regarding the hazards of built-up roofing work; regarding the function, use, and operation of the MSS (Motion Stopping System), warning line, and safety monitoring systems to be used; regarding the correct procedures for erecting, maintaining, and disassembling the systems to be used; regarding the role of each employee in the safety monitoring system when this system is used; regarding the limitations on the use of mechanical equipment and the correct procedures for the handling and storage of equipment and materials; nor did it inquire to determine whether Kassem or any of the worksite employers were providing such training.

27. Respondent did nothing to assure that its employees were provided training in the hazards of built up roofing work, or regarding the function, use, and operation of the MSS (Motion Stopping System), warning line, and safety monitoring systems to be used; regarding the correct procedures for erecting, maintaining, and disassembling the systems to be used; regarding the role of each employee in the safety monitoring system when this system is used; regarding the limitations on the use of mechanical equipment and the correct procedures for the handling and storage of equipment and materials;.

28. Neither Kassem nor Westinghouse provided training to Respondent's employees in the hazards of built-up roofing work, or the use of MSS or warning line.

29. The hazard created the possibility of an accident.

30. The substantially probable result of such an accident would be that an untrained worker would fall from a roof resulting in serious physical injuries such as multiple fractures or death.

31. Respondent's employees were exposed to the hazard.

32. Respondent knew or with the exercise of reasonable diligence could have known that it had taken no action to make sure that its employees were provided training by any employer on the worksite in the hazards which are the subject of this citation.

33. Respondent, with the exercise of reasonable diligence, could have known that its employees were not provided training by any employer on the worksite in the hazards which are the subject of this citation.

34. The Respondent stipulated, and the Board finds as fact that the penalty of $4,200.00 was properly calculated and appropriate for this violation of 29 CFR 1976.500(g)(6)(ii).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Respondent is the employer, within the meaning of N.C.Gen. Stat. 95-137(10), of the employees it contracted to the worksite which was the subject of the inspection in this case.

4. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1926.500(g)(6)(ii) by its failure to assure that its employees engaged in built-up roofing work had been trained and instructed as specified in 29 CFR 1926.500(g)(6)(ii)(a) through (f).

5. The penalty of $4,200.00 was properly calculated and appropriate for this violation of 29 CFR 1926.500(g)(6)(ii).

DISCUSSION

The question of whether the Respondent is an employer for purposes of the OSH Act is a mixed question of fact and law; to the extent that it is a matter of statutory interpretation, it is a question of law. See, Brooks v. McWhirter, 303 N.C. 573 (1981); accord, Brennan v. Gilles & Cotting, Inc., 1974-1975 OSHD 22,677 (4th Circuit 1974) The scope of review for errors of law is a de novo review. "Courts ascertain legislative intent from the policy objectives behind the statute's passage, and the consequences which would follow from a construction one way or another." Electric Supply Co. v. Swain Electrical Co., 328 N.C. 651 (1991).

For initial guidance, we look at the scope and purposes of the federal Occupational Safety and Health Act, from which our state plan derives. The published regulations, at 29 CFR 1975.3, quote the Act in explaining the extent of coverage of the Act as follows:

> .....(b) Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources *** (Occupational Safety And Health Act (Public Law 91-596) Section 2(b)).

Review of the legislative history reveals that almost every amendment or other proposal which would have resulted in any employee being left outside the protections of the Act was rejected. (See, inter alia, Cong. Rec., vol. 116, p. H-11899, Dec. 17, 1970). The limited exemptions are for employees of the federal or state governmental subdivisions, for employees covered under other federal laws, and for domestic workers. From the history, it is clear that Congress intended the OSH Act to cover all employers who have employees, and are within the reach of the commerce clause.

In passing the North Carolina OSH Act, the General Assembly expressed its purpose in identical language, but rooted in the exercise of "its powers", rather than the commerce clause. N.C. Gen. Stat. 95-126(a)(2). The North Carolina OSH Act defines "employer" as follows, in N.C.Gen Stat. 95-127 (10):

> The term "employer" means a person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers employed in the place of residence of his or her employer.

The state definition is broader than the federal one, in that it is not limited by the commerce clause and includes state and political subdivisions thereof within its coverage.

Unless some reason to the contrary appears, "it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted." Transportation Service v. County of Robeson, 283 N.C. 494, at 500 (1973) There is nothing in the statute or history to indicate a contrary intent, with respect to the definition of "employer."

Applying these principles to the case at bar, we must find that Friday Temporary Services is the employer of those employees it contracts to others, in that we can find no reason to conclude otherwise. The attorney for Friday Temporary Services stipulated that the Respondent was the common law employer of the employees it contracted to the roofing company:

> We'll stipulate to that and to the other employees that they have subpoenaed here from Friday Temporary Services, that they were common-law employees and that we paid them wages and withheld their taxes. We paid the Worker's Compensation premiums.

(T.p.123). The Respondent argues that we should construe the definition of "employer" in a manner so as to exclude them from coverage. We find no basis in the history or purpose of the Act to justify such an interpretation, and therefore decline to adopt the same. "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions or limitations not contained therein." Brooks v. House of Raeford Farms, Inc., 2 NCOSHD 412, 63 N.C.App. 106 (Ct. of App. 1983), aff'd on appeal, 2 NCOSHD 420, 310 N.C. 153 (Supreme Court 1984).

Our interpretation is consistent with the policy of the Act "to assure so far as possible every working man and woman in the state of North Carolina safe and healthful working conditions..." N.C.Gen. State. 95-126(b)(2). We conclude that the definition of employer should be interpreted broadly so as to give effect to this purpose. Absent a statutory exemption, a person or entity who pays wages or salary to its workers will be presumed to be an employer under the Act, regardless of whether others may also be considered employers of the same workers.

The Respondent has argued that the federal Review Commission and the state Review Board have held that the definition of "employer" is not determinative and that we should be guided instead by the "economic realities" test. There are several lines of cases applying a test of this name, with different interpretations of "employer" depending

upon the degree of control maintained over the employees. E. g., Brooks v. Hughes Roofing Services, Inc., 2 NCOSHD 1181 (1987); Brooks v. L P. Cox Company of Concord, Inc., 2 NCOSHD 836 (1986); Brooks v. Buckner Associates, 2 NCOSHD 1132 (1987); MLB Industries, Inc., 1984-1985 OSHD 35,507 (Review Commission 1985); Weicker Transfer and Storage Co., 1974-1975 OSHD 22,968 (Review Commission 1975).

We do not find any of these approaches helpful, but instead hold that in a joint employment situation, such as the temporary agency situation, both the agency and the contractor can be employers under the Act, particularly where, as here, the temporary agency was stipulated to be an employer, and was only cited for failure to comply with the minimal requirements of assuring that someone was training its employees. This decision regarding the applicability of the NCOSH Act to Friday does not address and is not to be construed as bearing in any way on the definition of employer for any other statute or purpose.

Having decided that the Respondent fits the definition of an employer for purposes of the Act, there is no need to look to the economic realities test. The next step is to see if temporary agencies have been exempted from coverage by the statute; they have not. The only statutory exemption from safety and health requirements granted to temporary service agencies is found in Article 22 of Chapter 95. N.C.Gen. Stat. 95-250 et seq. (Effective July 15, 1992). Pursuant to N.C.Gen. Stat. 95-251(a)(2) and 252 (b), employers who provide temporary services are not required to establish and implement a safety and health program or committee for its employees assigned to a client's worksite. The General Assembly knew how to specifically exempt temporary agencies from statutory provisions, and could have created an exemption for temporary service agencies from the requirements of Article 16, the OSH Act, which includes the OSH definitions, but it did not. We must conclude that it intended no such exemption.

We stated above that we were not required to look at the "economic realities test" to determine if the Respondent is an employer for purposes of the Act, and we decline to adopt that test in this case. However, even if we were to look at the "economic realities test", we would find that Respondent also falls within the category of employer subject to the Act. In a case involving "loaned employees" the Review Commission listed five factors to consider in determining who was the employer for purposes of the Act:

1. whom 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 and

5. who has the power to fire the employee or to modify the employee's employment conditions.

Del-Mont Construction Co., 1981 OSHD 31,387, at 31,389 (Rev. Commission 1981). Applying these five factors to the facts of this case, Friday Temporary Services would be an employer of the employees that it contracted to Kassem Roofing Company. It is manifest that, even if this test were to apply, the five factors indicate that Friday was the employer for purposes of the Act. (See findings of fact #21 through #25). Friday did share control of the employees with Kassem, which makes Friday and Kassem joint employers with both being subject to the provisions of the Act. As the court stated in Del-Mont, supra:

> The Secretary maintains that it would be totally inconsistent with the remedial purpose of the Act to permit an employer to send its employees into a potentially dangerous situation without providing, or at least insuring that the lessee would provide, safety equipment and safety instructions.

Del-Mont, supra, at 31,389. In response to Del-Mont's assertion that since it had no knowledge of the potential dangers, it should not be held accountable, the court stated:

> It is well-settled that under the Act an employer has a duty to anticipate the hazards to which its employees may be exposed and to take the steps necessary to prevent exposure to such hazards. (citations omitted).

Del-Mont, supra, at 31,390. Friday had a duty under the Act to "exercise reasonable diligence to discover the hazardous conditions" and then to take the steps necessary "toward protecting the safety and health of its employees". Del-Mont, supra, at 31,390. Regarding the citation before us that duty extended to at least making sufficient inquiry into hazards of the worksite and the training which was being provided for it employees by the on-site employer; here, there was no inquiry, and, in fact, no training.

The Commissioner of Labor determined in its discretion to cite the Respondent, Friday, with failure to assure training and not with failure to train. Although the Respondent, as an employer, is subject to all of the applicable provisions of the Act, the Commissioner is responsible for enforcement and may use his discretion in determining the violation to cite. In past cases, the Commissioner has charged temporary service agencies with failure to provide safety protections on a client's worksite. Brooks v. Asheville Temporary Services, 3 NCOSHD 726 (1990); Brooks v. Manpower of Guilford County, Inc. OSHANC NO. 90-1825 (unpublished settlement 1992); Brooks v. Manpower of Guilford County, Inc. OSHANC NO. 91-1984 (unpublished settlement 1992).

The Respondent and Amicus argue that to require it to satisfy the safety requirements of each and every worksite would place an unconscionable burden on the temporary agency. We disagree. In Brooks v. Asheville Temporary Services, 3 NCOSHD 726, (1990), the Hearing Examiner held the following:

> [Asheville Temporary Services] may not without appropriate training and instruction to its employees concerning the hazards and standards associated with the work to which they are assigned, and/or without adequately instructing its employees concerning the parameters of the work they can and cannot do at their assigned job, shift this responsibility to another employer who pays for the use of their services. This is especially true where Respondent assigns its employees to work in high hazardous jobs such as construction work. Id., at 728.

These principles apply just as well in this case.

In this case the Commissioner has chosen to cite for failure to assure training under 1926.500(g)(6)(ii). In its brief and again at oral argument, the Respondent has insisted that there is no difference between failure to train and failure to assure training. This is a misinterpretation of the regulation. There is a significant difference between providing training and assuring that someone else is providing training to employees. Compliance with the requirement of assuring training could conceivably consist of no more than making an inquiry of the client employer. Here, there was no training and no assurance of training by either the temporary service agency or the client roofing company. The testimony indicated that the Respondent did not even know whether its employees were being trained or not.

The Respondent has been charged with the least burdensome of the choices. His duty under 1926.500(g)(6)(ii) is to assure that the required training is provided. If he does not find that assurance, he has the options of withdrawing his employees from the worksite or providing the training himself. This standard is designed to provide alternative methods of protection for the employees without too narrowly proscribing the method to be followed. This is a minimal requirement designed to ensure that temporary agency employees, like other employees, do not go into potentially dangerous work situations without the proper training.

Requiring the temporary agency to assure training or to provide training will not add to confusion in the workplace or increase the hazard to the employees. To the contrary, it increases the likelihood that employees will be properly trained, and that they will not, literally, fall through the cracks. The same concept is frequently applied in the construction industry, where both the general contractor and the subcontractor are often cited for the same violation, since both are responsible for requiring that certain safety procedures be followed. See,

Brooks v. McDevitt & Street Company; B & B Contracting Co., Inc; and PPG Industries, Inc., 1 NCOSHD 1209 (1985); Brooks v. George W. Kane, Inc., 3 NCOSHD 307 (1989); Brooks v. Homeowners Carpet Warehouse, 1 NCOSHD 479 (1979); See, also, Brennan v. OSHRC (Underhill Const. Co.), 1974-1975 OSHD 23,161, 513 F. 2d 1032 (2nd Cir. 1975); Beatty Equip. Leasing, Inc. v. Secretary of Labor, 1978 OSHD 27,695, 577 F. 2d 534 (9th Cir. 1978). This dual responsibility provides twice the opportunity for compliance, and is reasonable, particularly in such traditionally hazardous occupations.

In the case before us, the Respondent provided no training and did not bother to inquire or determine whether the worksite employer was providing training. These omissions clearly constitute a failure to assure that training was being provided, such that the citation should be upheld.

The Respondent argues that under its contract with the roofing company, the roofing company was required to train the workers. It is well settled law that an employer may not contract away its responsibilities under the NCOSH Act. Commissioner v. BCF Piping, Inc., 5 NCOSHD 6, 109 N.C. App. 26 (Ct. of Appeals 1993). If the Respondent does attempt to impose by contract upon the client company the obligation to provide training, he does so at his own peril. It is within the Commissioner's power to require both the temporary agency and the client to provide the training. In this case the Commissioner has chosen to require the client agency to provide the training and the temporary agency to assure that the training is provided. This is certainly a reasonable requirement.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's February 16, 1994 Order in this cause is, **REVERSED**; the violation of 29 CFR 1926.500(g)(6)(ii) is **AFFIRMED** as a serious violation, and the Respondent is ordered to pay the penalty of $4,200.00.

This the 3rd day of April, 1996.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

HENRY M. WHITESIDES, MEMBER
DID NOT PARTICIPATE IN THE DECISION OF THIS CASE