BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

LAWRENCE CARTNER AND
RONALD W. CARTNER DBA
CARTNER GLASS SYSTEMS, INC.
and its successors,

RESPONDENT.

DOCKET NO. OSHANC 95-3208
OSHA INSPECTION NO. 125285726
CSHO ID NO. E6705

AMENDED ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 26th day of September, 1996, 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 Henry M. Whitesides, members of the North Carolina Safety and Health Review Board.

APPEARANCES

H. Allen Pell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Lynn O. Wenige, Attorney at Law, of Kennedy, Covington, Lobdell & Hickman, L.L.P. Charlotte, North Carolina for Respondent.

ISSUES PRESENTED

1. At the time of the inspection, was the respondent an employer, for purposes of the Occupational Safety & Health Act, of the two men he leased to (CFI)?

2. Did the complainant meet its burden of proof that these two employees were employees of CFI or the respondent at the time of the inspection?

3. Did the respondent meet its burden of proof that these two employees were leased to CFI and that respondent should not have been cited for a serious violation?

Having reviewed and considered the record and the briefs of the parties 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 Lawrence Cartner and Ronald W. Cartner dba Cartner Glass Systems, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

4. On November 28, 1994 compliance officer Arlene Edwards conducted a general scheduled inspection of a construction site known as the Net Edge Building on Kitts Creek Road in Research Triangle Park.

5 On the Net Edge project, Metric Constructors, Inc. was the general contractor and had a contract with Respondents for erection of the glass curtainwall. The respondents provided the curtainwall materials and sub-contracted with Curtainwall Erectors, Inc. (CEI) to provide labor for the installation of these materials.

6 At the time of the inspection, two employees, Mike McKay and Ron Grizzel were on the payroll of respondents but had been leased to CEI, a corporation owned by Jesse Oates. Pursuant to this lease arrangement, the hourly wage rate of these employees, plus benefit expense and a 10% administrative fee, which included workman's compensation insurance allowances, was billed to CEI by respondent for the use of these individuals in the erection of the glass curtainwall on the Net Edge project.

7. The respondent was cited for serious violations of 29 CFR 1926.451(e)(4) and (e)(10) for failure to completely plank a scaffold and failure to provide guardrails and toeboards on a scaffold that was more then ten feet in height and to which Mike McKay and Ron Grizzel were exposed. The respondent was also cited for a nonserious violation of 29 CFR 1926.200(h)(1) for failure to tag an arc welder as defective equipment.

8. CEI was cited for the same violations as the respondent, but did not contest and paid the violations.

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 February 13, 1995.

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

11. A hearing was scheduled and held on August 30, 1995 before the Honorable Richard M. Koch.

12. On December 1, 1995 the Honorable Richard M. Koch issued an order affirming Citation 1, Items 1a and 1b as serious violations of 29 CFR 1926.451(e)(4) and (e)(10), respectively with a grouped penalty of $525.00 and dismissing Citation 2, Item 1, the alleged nonserious violation of 29 CFR 1926.200(h)(1) for failure to tag an Arc welder as defective equipment.

13. The respondent timely filed an appeal with the Review Board on January 4, 1996 objecting to and excepting to most of the findings of fact and the conclusions of law and the order of the hearing examiner on the grounds that the two employees did not work for the respondent at the time of the inspection, but were on lease to CEI.

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 not the employer, within the meaning of N.C.Gen. Stat. 95-137(10), of Mike McKay and Ron Grizzel, the employees it leased to CEI.

ORDER

The Review Board hereby orders that the hearing examiner's December 1, 1995 order in this cause is, **REVERSED**; and the citation for the alleged violation of 29 CFR 1926.451(e)(4) and (e)(10) is hereby dismissed. The dismissal by the hearing examiner of the alleged nonserious violation of 29 CFR 1926.200(h)(1) for failure to tag an Arc welder as defective equipment is not affected by this order.

This the 12th day of February, 1997.

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KENNETH K. KISER, MEMBER

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HENRY M. WHITESIDES, MEMBER

Believing as I do that the disposition of this case is governed by the recent Board decision of Commissioner v. Friday Temporary Service, Inc., OSHANC No. 93-2651, slip op. (RB 1996) and the long standing policy of the Board that when there is controverted testimony, to defer to the findings of fact of the hearing examiner unless clearly implausible, Payne v. Associated Mechanical Contractors, 4 NCOSHD 699, 706 (RB 1993), affirmed, ____N.C. ____, 467 S.E.2d 398 (1996), I must respectfully dissent.

In Friday, supra, the Board stated:

> 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.
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> 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).
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> 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 . . . .

The Respondent paid the wages, paid workman's compensation, deducted taxes and paid retirement for Mike McKay and Ron Grizzel and under the law outlined in Friday, supra, Respondent is an employer of Mike McKay and Ron Grizzel notwithstanding that CEI may also be held to be their employer.

The Respondent in this case like the Respondent in Friday, supra. asks the Board to look to the "economics realities test" to find that Respondent is not an employer of the two "loaned" employees. The Board declined to follow the "economic reality test" in that case and I decline to follow it in this case. Even if the "economic reality test" were to be followed in this case, the Respondent would still be held to be an employer of Mike McKay and Ron Grizzel.

Further, the findings of the Hearing Examiner are to the effect that the Respondent is an employer of Mike McKay and Ron Grizzel. Since these findings are supported by substantial evidence and are not "clearly implausible", we should defer to them. See, Brooks v. Schloss Outdoor Advertising Co., 2 NCOSHD 552, at 558 et seq. (RB 1985) and the cases cited therein.

For these reasons, I vote to uphold the decision of the hearing examiner.

This the 12th day of February, 1997.

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ROBIN E. HUDSON, CHAIR