Skills Resource Training Center

SAFETY AND HEALTH

Employer (RCW 49.17.020(3))

Leased employees

In leased employment situations, whether the lessor or the lessee should be cited depends on the economic realities of the workplace. Both employers cannot be cited unless they each have substantial control over the workers and the work environment. The employer, for purposes of a WISHA citation, is the employer with control over the work site. ***….In re Skills Resource Training Center,* BIIA Dec., 95 W253 (1997)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SKILLS RESOURCE TRAINING CENTER	**)**	**DOCKET NO. 95 W253**
	)	
CITATION & NOTICE NO. 115336588	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Skills Resource Training Center, by
Jeff Krug, President and Chief Executive Officer

Employees of Skills Resource Training Center,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lisa Daeley Kelley and Aaron K. Owada, Assistants

On July 28, 1995, the alleged employer, Skills Resource Training Center (SRTC), filed its Notice of Appeal with the Board of Industrial Insurance Appeals from a Corrective Notice of Redetermination issued by the Department of Labor and Industries on July 24, 1995. That notice affirmed the following violations and penalties from the Department's April 6, 1995 Citation and Notice: Item 1-1a, a serious violation of WAC 296-24-95609(7)(a)(i), with an assessed penalty of $525; Item 1-1b, a serious violation of WAC 296-24-95609(7)(b)(ii), with no penalty; Item 1-2, a serious violation of WAC 296-24-68203(4)(c), with a penalty of $700; Item 2-1, a general violation of WAC 296-24-045(6), with no penalty; and, Item 2-2, a general violation of WAC 296-24-060(2), with no penalty. **VACATED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on January 3, 1997, that vacated the July 24, 1995 Corrective Notice of Redetermination.

The Board has reviewed the evidentiary rulings in the record of proceedings. We believe our industrial appeals judge erred in admitting Exhibit 6. The Department's objection to the admission of this document, Department of Revenue Policy Memorandum 90-1, is hereby sustained. This document is hearsay. Our judge likewise erred by taking testimony on June 14, 1996, from Jeff Krug regarding the Department of Revenue's policies concerning whether SRTC was an employer. The Department's objections to reopening Mr. Krug's direct testimony are sustained. Testimony from Mr. Krug regarding these policies was hearsay. Mr. Krug's testimony concerned the quarterly reports SRTC, or its corporate predecessor, filed with the Department of Revenue. This testimony, and Exhibit 6, is also irrelevant, since no showing was made that the statutory provisions that define an employer for tax purposes should have any bearing on a decision regarding when an entity is an employer under the Washington Industrial Safety and Health Act (WISHA). Accordingly, the testimony of Mr. Krug taken on June 14, 1996, is stricken in its entirety.

With the exceptions noted above, no other prejudicial errors were made and all remaining evidentiary rulings are affirmed.

We note that both our industrial appeals judge and the parties employed incorrect citation form when referring to federal authorities in their written documents. Westlaw citations, rather than citations to the relevant reporters, were used to identify these cases. We remind both the parties and our judges that Westlaw citations are not acceptable identification for cases referred to in written documents. Cases should be identified by specifying the official reporter in which the case can be found. Citations to federal cases discussing safety and health matters should refer to the applicable federal court reporter, or to either the Occupational Safety and Health Cases or the Occupational Safety and Health Decisions reporters.

DECISION

This appeal raises novel questions of law: when should an employer who hires employees and leases them to a second entity be considered the workers' employer under WISHA? Additionally, when can both the lessor and lessee be cited for WISHA violations, and when can only one entity be cited? We hold that in leased employment situations, whether the lessor or the lessee should be cited for WISHA violations depends on the economic realities of who controls the workplace. Both employers cannot be cited unless they both have substantial control over the workers and the work environment involved in the violations.

Joint employer work sites, therefore, must be distinguished from multi-employer sites. The latter generally involve construction sites where employees of several sub-contractors work at the same location under the direction of a general contractor. At construction sites, both the general contractor and the sub-contractor who controls the affected employees' work site can be properly cited for WISHA violations, even though the employee has only one employer (the sub-contractor). A joint employer work site, such as presented by this case, is one where two employers share responsibility for the same employees. Joint employment situations generally involve leased or temporary employees. Dual WISHA citations for violations at joint employment work sites are inappropriate unless both the lessor and lessee employers can be found to actually control the work force.

That is definitely the situation in this appeal. SRTC should not have been cited for any WISHA violations because it did not control the work site where the violations occurred. Agri-Sales, the company that leased employees from SRTC, is the only employer who could properly be cited for the violations involved in this appeal.

We base this conclusion on the following uncontroverted facts. In March 1995, Agri-Sales was a small irrigation company in Moses Lake that provided products and services to growers (it has since gone into bankruptcy and is now defunct). At that time, SRTC was a company that

provided workers to employers through a variety of employee leasing arrangements.[1] In early 1994, these two companies entered into a contract under which SRTC agreed to hire all of Agri-Sales' employees (including the owners and managers) and to lease them back to Agri-Sales. Agri-Sales continued to exercise primary control over its workplace. Not only did all Agri-Sales employees continue to work at the same jobsite, but Agri-Sales retained the right to hire, fire, and control the workers employed in its plant. Agri-Sales' managers and officers determined what work the employees would perform and set employee salaries and benefits. Agri-Sales owned the plant and the equipment at the jobsite. In essence, SRTC operated as a human resources department for Agri-Sales. SRTC handled all the administrative paper work normally handled by a human resources department of a larger firm: it administered the payroll; paid taxes and industrial insurance assessments; and handled workers compensation, unemployment insurance claims, and wage garnishments.

In March 1995, Jeffrey Krause, a Department safety inspector, inspected the Agri-Sales work site. Mr. Krause noted that oxygen and gas cylinders were not stored properly. Additionally, flex cord (i.e., extension cord), had been improperly spliced and was being used to connect a permanent overhead light fixture. Finally, Mr. Krause learned the employees at the work site had not held required safety meetings and not enough employees had received mandated first aid training. As a result of this inspection, both SRTC and Agri-Sales were cited for two serious and two general violations of WISHA. SRTC was assessed total penalties of $1,225 for the serious violations. Although SRTC admitted all the citations were appropriate, it filed this appeal because it contended it was not an employer under WISHA.

Our industrial appeals judge vacated the Corrective Notice of Redetermination (CNR) that is the subject of this appeal. He determined SRTC had not exercised sufficient control over the

[1] In April 1996 SRTC became a new company, SRTC Franchising. In its new incarnation, SRTC is apparently not as

Agri-Sales work site to be considered an employer under a recent decision of the Washington Supreme Court, *Stute v. P.B.M.C. , Inc.*, 114 Wn.2d 454 (1990). Our industrial appeals judge based his decision on the statutes the Supreme Court considered in this decision, that concern an employer's duty to provide a safe workplace to its employees. However, the *Stute* decision, that concerned a personal injury suit filed against a general contractor by a sub-contractor's employee (for injuries resulting from an accident at a construction site), is not relevant to this case.

This appeal, concerning a joint employer work site, must be decided based upon a determination of when an entity is considered an employer under WISHA. While we believe the Proposed Decision and Order reached the correct result, we granted review to correctly state the rationale for vacating the CNR. Additionally, we wish to clarify when dual citations are appropriate in joint employer settings.

Our starting point is the language of the relevant statute, RCW 49.17.020(3). This statute defines employer as follows:

> [A]ny person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons. . ..

There are no Washington appellate cases that discuss the first portion of this statute (concerning entities that employ employees). This is the definition that concerns us in this appeal: the workers at the Agri-Sales workplace were clearly employees, rather than contract workers. After all, SRTC issued these employees' paychecks and incurred tax liability as an employer with the Department based on this payroll.

In *Stute*, the Supreme Court determined a general contractor could be held liable for injuries sustained by one of its sub-contractors' employees. This result is founded on the second portion of

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directly involved in leasing employees to companies. Its current business was described as franchising geographic

this statute, under which certain contractors are considered employers of their contract labor force. RCW 49.17.060 requires employers (including contractors in multi-employer work sites who fit WISHA's definition of an employer) to maintain a safe workplace. *Stute*, *supra*, at 457, and 462-463. The court in *Stute* determined general contractors at construction cites can be liable for their sub-contractors' safety violations. It implicitly authorized dual WISHA citations in these multi-employer work sites.

Since *Stute*, several other appellate cases have considered the liability of general contractors for workplace hazards. *See, e.g., Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125 (1991). However, these decisions are not relevant. Not only do they concern entities that are employers based on the second portion of RCW 49.17.020(3), regarding contract labor, but they also deal with safety problems in multi-employer work sites.

This appeal, by contrast, concerns a joint employer work site. The workers at the Agri-Sales plant were on SRTC's payroll, but were working under the direction of Agri-Sales personnel. Either entity, or both, could ostensibly be considered their employer under the first portion of this statute.

Since the statutory language is broad and essentially tautological (an employer is an entity that employs employees), we turned to federal cases that interpreted similar provisions of the U.S. Occupational Safety and Health Act (OSHA) for further guidance. Under OSHA, an employer is "a person engaged in a business affecting commerce who has employees." 29 USC 652(5). A "person" is broadly defined to include any type of individual or business organization. 29 USC 652(4). OSHA's broad designation of entities that can be considered employers is essentially the same as WISHA's definition. Since both the federal and Washington statutes contain similar definitions of employers, and federal cases (unlike Washington cases) have addressed which

territories to companies involved in employee leasing.

employer in a joint employer work site can be properly cited for safety violations, we considered federal precedents in reaching our decisions.

The federal courts and the Occupational Safety and Health Commission (OSHC) have ruled an "economic realities" test should be used in joint employment situations to determine which employer should be issued an OSHA citation. We believe this is the test that should be applied in Washington state. In short, resolving whether Agri-Sales or SRTC employs the workers at the Agri-Sales plant is based on a determination of which employer controls the workplace. The "economic realities" test is used "to determine whether an employment relationship exists between employees and an alleged employer." *Secretary of Labor v. Union Drilling*, 16 OSHC 1741, at 1742 (1994). The test requires an analysis of:

> 1) who the workers consider their employer;
> 2) who pays the workers' wages;
> 3) who has the responsibility to control the workers;
> 4) whether the alleged employer has the power to control the workers;
> 5) whether the alleged employer has the power to fire, hire, or modify the employment condition of the workers;
> 6) whether the workers' ability to increase their income depends on efficiency rather than initiative, judgment, and foresight; and
> 7) how the workers' wages are established.

Union Drilling, supra, at 1742. The key question under this test is whether the alleged employer has the right to control the work force. *Secretary of Labor v. Vergona Crane*, 15 OSHC 1782, 1784 (1992).

Our application of this test to the facts before us readily leads us to a determination that Agri-Sales was the sole entity that could be considered an employer of the workers at its plant. These workers continued to work under the supervision and control of Agri-Sales' personnel. Agri-Sales' officers and/or managers had the sole responsibility to determine who would be hired or fired, how much the workers would be paid, and controlled working assignments and conditions at the work site. Although SRTC issued the workers' paychecks, it did not have control of the work

site to be considered an employer under WISHA. Agri-Sales was the only entity who could be cited for the WISHA violations at its workplace.

Our decision is consistent with decisions issued by the Occupational Safety and Health Commission concerning similar fact situations. In two appeals concerning construction sites, the OSHC determined entities that supplied and paid employees were not their employers. In both cases, the entity that controlled the employees' work was held to be the sole employer that could be penalized for safety violations at the construction site. *Vergona Crane, supra, and Secretary of Labor v. MLB Industries, Inc.* 12 OSHC 1525 (1985). Vergona Crane leased its crane to a general contractor, the Polites Construction Co. Although the two employees who operated the crane were on Polites' payroll, this was found to be inconsequential since their activities at the workplace were controlled by Vergona Crane. The OSHC reached an identical result in its *MLB Industries* decision: the contractor who supervised the workers at the jobsite was found to be the sole employer of workers it leased from a second entity, who issued their paychecks. Using similar analysis, a lessor who provided and paid workers supplied to a gas drilling company was deemed not to be their employer. The lessee gas drilling company, who controlled the drilling operations in which these employees were engaged, was held to be their sole employer. *Secretary of Labor v. Union Drilling Co.*, 16 OSHC 1741 (1994).

In a case with facts fairly analogous to the one in this appeal, the OSHC held an employee leasing company could not be cited. A carnival owner (Murphy Enterprises) was issued a citation for violations occurring during the assembly of a ferris wheel. An employee leasing company, SBI, had hired all of Murphy's employees and had leased them back to Murphy Enterprises. SBI had no control over the workplace or the employees, and merely handled the payroll and other administrative tasks. The OSHC found Murphy was the sole employer who could be cited for OSHA violations. *Secretary of Labor v. Murphy Enterprises, dba Murphy Brothers Exposition,* 17

OSHC 1477 (1995). For safety violations involving temporary workers, the OSHC has also held that an employment agency that recruited and paid workers could not be considered their employer because it did not control their activities at the jobsite. *Secretary of Labor v. Manpower Temporary Services, Inc.*, 5 OSHC 1803 (1977).

In summary, in similar factual situations, the OSHC has held companies that pay employees (including employee lease-back situations) are not employers unless they control the jobsite and the employees' activities. Under these decisions, SRTC should not be considered an employer. Agri-Sales is the only entity that had sufficient control over the Moses Lake work site to be held liable for the WISHA violations found there.

We, therefore, vacate the CNR issued to SRTC on July 24, 1995. We note that in joint employer work sites, citations of both employers are appropriate only if they share substantial control over the work site. In this appeal, and in all other joint employer cases we found, dual citations were not appropriate because control over the work force was not shared. In employment situations involving leased or temporary workers, if a single employer retains control of the work site (based on an application of the "economic realities" test), that employer is the only one who should be issued WISHA citations.

FINDINGS OF FACT

1. On March 27, 1995, the Department of Labor and Industries received an investigation report from a safety inspector concerning a safety inspection held on March 15, 1995, at the premises of Agri-Sales, Inc., in Moses Lake, Washington. On April 6, 1995, the Department issued a Citation and Notice that assessed the following violations against Skills Resource Training Center, Inc., (SRTC),: Item 1-1a, a serious violation of WAC 296-24-95609(7)(a)(i), with a penalty of $525; Item 1-1b, a serious violation of WAC 296-24-95609(7)(b)(ii), with no penalty; Item 1-2, a serious violation of WAC 296-24-68203(4)(c), with a penalty of $700; Item 2-1, a general violation of WAC 296-24-045(6), with no penalty; and, Item 2-2, a general violation of WAC 296-24-060(2), with no penalty, for a total assessment of $1,225. SRTC received the Citation and Notice on June 21, 1995. On June 26, 1995, SRTC filed a Notice of Appeal from this citation with the Department.

On June 28, 1995, the Department issued its Notice of Reassumption of Jurisdiction. On July 24, 1995, the Department issued a Corrective Notice of Redetermination (CNR) that affirmed the Department's Citation and Notice in all respects. On July 28, 1995, SRTC filed its Notice of Appeal from the CNR with the Board of Industrial Insurance Appeals.

2. During March 1995, SRTC was a company that provided workers to employers through a variety of employee leasing arrangements. Agri-Sales was a small irrigation company located in Moses Lake, Washington. In early 1994, these two companies entered into a contract under which SRTC hired all of Agri-Sales' employees and leased them back to Agri-Sales.

3. From the time this contract was signed through and including March 1995, Agri-Sales exercised primary control over the work force and workplace conditions at the Agri-Sales plant. All Agri-Sales employees employed when the leasing contract was signed continued to work at the same jobsite. Agri-Sales retained the right to hire, fire, and control the workers employed in its plant. Agri-Sales' managers and officers determined what work the employees would perform and set employee salaries and benefits. SRTC operated as a human resources department for Agri-Sales. It administered the payroll; paid taxes and industrial insurance assessments; and handled workers' compensation and unemployment insurance claims, as well as wage garnishments.

4. On March 15, 1995, when a Department safety inspector conducted an inspection at the Agri-Sales work site, he correctly determined all the safety rules cited in the April 6, 1995 Citation and Notice, listed above in Finding No. 1, had been violated.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. On March 15, 1995, SRTC was not an employer, as defined in RCW 49.17.020(3), of the workers at the Agri-Sales workplace in Moses Lake, Washington.

3. On March 15, 1995, Agri-Sales was the sole employer of the workers employed at its work site in Moses Lake. As such, Agri-Sales is the only entity that could be properly cited for the WISHA violations found in its work site on that date.

4. Corrective Notice of Redetermination No. 115336588, issued to Skills Resource Training Center by the Department of Labor and Industries on July 24, 1995, is incorrect and is hereby vacated in its entirety.

It is so ORDERED.

Dated this 5th day of August, 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member