SECRETARY OF LABOR, Complainant, v. CH2M HILL CENTRAL, INC., Respondent.	:	Docket No. 89-1712

DECISION

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

BY THE COMMISSION:

In this case, we revisit the question the Commission last considered in *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1867, 1991-93 CCH OSHD ¶ 29,828, p. 40,680 (No. 89-1300, 1992), *aff'd*, 3 F.3d 1 (1st Cir. 1993) ("*SGH*"): whether and under what circumstances the construction standards[1] are applicable to professionals such as architects and engineers having contracts to provide services at construction worksites.[2] In *SGH*, the Commission reaffirmed its long-standing precedent, originating in *Bechtel Pwr. Corp.*, 4 BNA OSHC 1005, 1975-76 CCH OSHD ¶ 20,503 (No. 5064, 1976), *aff'd per curiam*, 548 F.2d 248 (8th Cir. 1977), that employers engaged in such occupations are

[1]These occupational safety and health standards for construction, now codified in Part 1926 of Title 29, C.F.R., were promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

[2]The same question is presented in *Foit-Albert Associates, Architects & Engineers, P.C.*, No. 92-654 (April 21, 1997).

subject to Part 1926[3] only if by contract they possess the overall supervisory authority normally exercised by construction managers at a construction site or have demonstrated control over particular hazardous conditions.

In this case, we consider whether our precedent dictates the application of the construction standards to a consulting engineer, CH2M Hill Central, Inc. ("CH2M"), which has attributes of a construction manager in terms of its broad role in many aspects of a multi-billion dollar construction project, but where the contracts assign the trade contractors sole responsibility for construction means and methods and safety precautions and practices.

As discussed below, we find that, in the light of our precedent, the circumstances here bring CH2M within the scope of the construction standards. In particular, we find that where an engineering or architectural firm (1) possesses broad responsibilities in relation to construction activities, including both contractual and de facto authority relating directly to the work of the trade contractors, and (2) is directly and substantially engaged in activities that are integrally connected with safety issues, the construction standards will apply, notwithstanding contract language expressly disclaiming safety responsibility.

I. BACKGROUND

The Milwaukee Metropolitan Sewerage District ("MMSD") is a quasi-public regional agency responsible for sewage treatment and solid waste disposal for a 400-square-mile area consisting of Milwaukee and 26 adjacent communities. It contracted with CH2M to provide certain services in connection with its Water Pollution Abatement Project ("Project"). The MMSD initiated the Project because it was required under the Clean Water Act and court orders to eliminate discharges of untreated waste into the watershed, particularly Lake Michigan, during wet weather. The Project consisted of numerous tunnels, shafts, sewers, and other systems to collect and convey both storm drainage and sewerage to two wastewater

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[3]For a further discussion of the history of the promulgation of the construction standards and their exclusion of professional or administrative occupations, see *Cleveland Elec. Illuminating Co.*, 910 F.2d 1333, 1336 (6th Cir. 1990) and *Cardinal Indus.*, 828 F.2d 373, 377 (6th Cir. 1987).

treatment plants. At issue here is a portion of the tunnel part of the Project known as the crosstown collector ("CT"), one of several 10-foot-diameter sewers. In view of the size of the Project,[4] the MMSD contracted separately with general contractors for the construction of its major portions. S.A. Healy Company ("Healy") was hired to construct tunnel CT-7, Jay Dee Contractors, Inc. to construct CT-8, and J.F. Shea to construct CT-5/6. This case arises out of an inspection and investigation conducted by the Secretary following a methane gas explosion in which three employees of Healy died. Both Healy, a general contractor, and CH2M, which contracted with the MMSD to perform certain engineering and other services, were cited for numerous violations of construction standards based on allegations that the electrical equipment and circuits in the CT-7 tunnel were not approved for hazardous locations, that employees were not trained in the explosive and toxic gas hazards associated with tunnel construction, and that the ventilation in the tunnel was inadequate.[5]

II. FACTS

A. CH2M's Contractual Responsibility

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[4]The Project commenced in 1977. In 1987, the program cost was $1.7 billion; at the time of the hearing in 1992, the program had grown to approximately $2.2 billion.

[5]In addition to civil citations issued to Healy, both the company and its project manager, Patrick J. Doig, were also indicted for criminal violations under section 17(e) of the Act, 29 U.S.C. § 666(e). Healy was convicted following a jury trial. Charges against Doig were dismissed on the ground that liability under the Act extends only to employers. *United States v. Doig*, 950 F.2d 411 (7th Cir. 1991). The Commission rejected Healy's contention that the imposition of civil penalties would violate its constitutional right not to be held in double jeopardy, but that decision was reversed on appeal. *S.A. Healy Co.*, 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719 (No. 89-1508, 1995), *rev'd*, 96 F.3d 906 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

CH2M's contractual obligations are set forth in an interlocking series of documents. These consist of CH2M's Master Agreement with the MMSD, task orders, and the contract between the MMSD and Healy. We will now discuss these documents.

1. The Master Agreement

The overall scope of CH2M's duties are described in its Master Agreement with the MMSD and in two attachments to that agreement, Attachment A and Attachment G. Article 1 of the Master Agreement provides:

> The ENGINEER shall furnish the necessary personnel, materials, services, equipment, facilities (except as otherwise specified herein) and otherwise to do all things necessary for or incident to the performance of WORK as described in Attachment A for program management, planning, engineering, construction management, start-up management, and related services.

Attachment A provides that the specific responsibilities assigned to CH2M shall be set forth in "task orders," individual agreements for services on each discrete portion of the Project. Attachment G, entitled "General Services Available to the District," provides "a general but not limited description of" services for which the MMSD was *authorized* to contract with CH2M.[6]

Attachment G describes CH2M's potential services in terms of four major categories covering the overall progression of the Project from its inception to its completion: program management, program development, program implementation (divided into design and acceptance phases), and project implementation (divided into bidding and construction phases). Within the major categories, specific duties are set forth under several individual topics including "program management," "engineering," "planning and coordination," "construction management," and "technical services."

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[6]The introduction to Attachment G reads as follows:

> A general, but not limited, description of the services to be made available to the DISTRICT is contained within this Attachment G. This list of services is intended to be illustrative and does not obligate the DISTRICT to contract for any particular service listed.

Duties set forth under the program management category of Attachment G include the responsibility to "provide administrative support personnel, facilities, services, and supplies for the PROGRAM OFFICE," defined elsewhere in the Master Agreement as "a separate office established by the ENGINEER for the sole purpose of implementing the [construction] PROGRAM." A representative sampling of functions set forth in other sections of Attachment G includes (1) assisting the MMSD in issuing the contract documents for bidding; providing appropriate publicity and other pre-bid services; and analyzing the results, recommending the contract awards, and preparing the contracts themselves; (2) coordinating activities between the MMSD and other consultants; (3) identifying alternatives and conflicts in the work and recommending and implementing courses of action as directed by the MMSD; (4) projecting completion dates for elements of the program and scheduling all design and construction work; (5) providing engineering services including "explorations necessary for determining geologic, foundation, and/or construction conditions"; (6) interpreting plans and specifications, evaluating requests to deviate from them, and making periodic inspection visits to determine if the contractors' work was in accordance with the contract specifications; and (7) "develop[ing] a construction contract administration system to monitor and control each of the various contracts underway at a given time."

In sum, while not obligating the MMSD, the broad scope of potential services for which the MMSD reserved the right to contract through Attachment G indicates that the MMSD contemplated that CH2M would have a substantial range of involvement in the project as a whole.

2. The Task Order

The task order for services on CT-7 was designated Task Order 189 and is the only task order in the record. Although Task Order 189 does not include all of the individual services for which the MMSD was authorized to contract in Attachment G,[7] it provides for

[7]Services authorized in the Master Agreement but omitted from the task order include (continued...)

a broad range of services.[8] Thus, under the task order, CH2M was to advise the MMSD

[7](...continued)
energy and environmental impact analysis, quality control in the project design, and preparation of operation and maintenance manuals. Other functions authorized to be contracted to CH2M, specifically coordinating with utilities and governmental and other agencies, were retained by the MMSD in the task order. *See infra* note 8. These differences between the task order and the Master Agreement do not have any bearing on our disposition of the case.

[8]As CH2M points out, the task order provides that "[t]he level of effort of the ENGINEER represented in this Agreement is less than required to perform the generally accepted practice or [sic] standard engineering and management services during construction as the DISTRICT intends to share in the performance of such services." The accompanying list of specific services to be performed by the MMSD indicates that the MMSD was to act as the formal approving authority during the bid and award and construction phases ("provide legal and administrative review and approval of bids," "provide legal and administrative review and approval of the contract agreement, "approve or reject the ENGINEER's recommendations for resolution of claims, disputes, and/or deviations from the Contract Documents, "authorize preparation of Contract Modifications and provide administrative approval of Contract Modifications upon completion by the ENGINEER") and that the MMSD's role would include dealings with non-project entities such as governmental agencies and utility companies ("provide coordination with governmental agencies [and] with utilities," "coordinate the required inspections with the grant agencies," "transmit contract modifications to the grant agencies for approval"). In contrast, the tasks reserved to CH2M were broader in scope and directly involved hands-on oversight of the construction work. Compare Article II, sections 2-3 (architectural, engineering, and inspection services to be performed by CH2M) with Article III, section 1b-c (coordination,
(continued...)

during the preconstruction stage and prepare bid and award documents for the MMSD, "administer" the construction contracts, investigate and evaluate all disputes and contractor claims and requests for deviation from the contract documents, negotiate contract modifications with the contractors and prepare the appropriate contract language, monitor and review project schedules, inspect the work for conformance with contract documents and specifications, prepare and submit recommendations for acceptance of and payment for contractors' work by the MMSD, and provide certain geologic consulting services.

3. The MMSD-Healy Contract

Whereas Task Order 189 sets forth the specific functions CH2M was to perform on the CT-7 tunnel, the manner in which CH2M was to interact with the trade contractors is further addressed in a portion of Healy's contract with the MMSD entitled "General Conditions." These provide CH2M with certain authority to direct the work of the general contractor for the CT-7 tunnel, Healy. Section 13 of the General Conditions, entitled "Authority of the Engineer," provides:

> The Engineer shall be the Owner's representative during the construction period. His authority and responsibility shall be limited to the provisions set forth in these Contract Documents. The Engineer shall have the authority to reject defective work and materials whenever such rejection may be necessary to assure execution of the Contract in accordance with the intent of the Contract Documents.
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> The Engineer shall have the authority to interpret project schedule requirements and to establish the necessary priorities for resolving conflicts between Contractors, and to enforce such measures as may be necessary to maintain overall project schedules. It is the intent of this Article that there shall be no

[8](...continued)
review, and approval functions assigned to the MMSD).

> delays in the progress of the critical elements of the project work, and the decision of the Engineer as rendered shall be promptly observed.
>
> The Engineer may order minor changes in the work not involving extra cost or extension of time and not inconsistent with the purposes of the project.

Section 15 provides that the engineer, CH2M, shall have the authority to order that questioned work be examined, and the contractor "shall correct [any] defective work."

On the other hand CH2M's responsibility was not without limit. Section 14 of the General Conditions to Healy's contract provides that CH2M "shall not be responsible for construction means, methods, techniques, or procedures, or for safety precautions and programs in connection with the work." Similarly, CH2M "shall not be responsible for the Contractor's failure to execute the work in accordance with the Contract Documents."[9] Section 26 affirmatively states that the contractor "shall be solely responsible for all

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[9]Similar caveats appear in sections 4 and 5 of Attachment D to CH2M's Master Agreement, which provide, respectively, as follows:

> Visits to the construction site and observations made by the ENGINEER . . . shall not relieve a construction contractor of its responsibility for construction means, methods, techniques, sequences, and procedures necessary for coordinating and completing all portions of the work . . . and for all safety precautions incidental thereto.

> [C]onstruction management activities will not, however, cause the ENGINEER . . . to be responsible for those duties and responsibilities which belong to the construction contractors and which include, but are not limited to, the contractors' responsibility for the techniques and sequences of construction and the safety precautions incidental thereto and for performing the construction work in accordance with the construction contract documents.

construction means, methods, techniques, and procedures; and . . . shall provide adequate safety precautions." In accordance with section 20 of the General Conditions to Healy's contract, the right to order that work be stopped in the event of defects or nonconformance was reserved to the owner, that is, the MMSD, and not CH2M.

In sum, CH2M had broad and extensive contractual responsibility over a wide range of activities at the site from the pre-construction bid and contract award stage through to the final stage when the work was completed and accepted. It also had explicit authority to give directions to trade contractors with respect to compliance with contract specifications and scheduling of work; however, at the same time its responsibility over construction means and methods and safety issues was limited.

B. Project Organization

The Project itself was organized under the "program management" concept. In accordance with the provisions of the Master Agreement describing CH2M's responsibility to furnish staff and facilities for program management, CH2M established the Program Management Office ("PMO"), a consortium consisting of itself and several other engineering and consultant firms. There were two major structural components to the PMO. First, the PMO maintained a geotechnical office which helped develop the design specifications for the Project based on test borings and prepared geotechnical reports, which were incorporated as part of the contract between the MMSD and the general contractor for each major portion of the Project. The geotechnical office also advised the contractors regarding geologic conditions, including the occurrence of methane gas. The second component was the general management structure by which the Project was coordinated among the MMSD, the PMO, and the contractors. The PMO's Construction Division had a Director and Deputy Director. The next level of authority consisted of several Project Construction Managers, two of whom were assigned to the "conveyance" portion of the Project, which includes the CT tunnels. Each CT tunnel, CT-5/6, CT-7, and CT-8, was assigned its own Resident Engineer who reported to the Project Construction Managers. The Resident Engineers in turn supervised

a group of staff engineers and a group of inspectors. Day-to-day inspection services on the Project were conducted by each Resident Engineer and his staff, and communications between the contractor and the PMO and between the MMSD and the contractor including all claims for payment were handled through the Resident Engineer. Approval of a claim for payment could be made only by one of four Resident Contracting Officers appointed by the MMSD.[10]

[10]At the time of the accident, approximately 150 people worked in the PMO, but not all were employees of CH2M. The senior management of the PMO, such as Phil Santacroce, Project Construction Manager for the CT portion, and John Ramage, manager of the geotechnical office, as well as the head of the PMO, Henry Padgham, were all employees of CH2M, but the resident engineers for the CT-7 and CT-8 contracts were employees of other consulting firms which comprised the PMO. The record does not specifically indicate how many of the PMO personnel were actual CH2M employees. However, for purposes of the operation of the PMO, the engineering staff was supervised by and reported to Santacroce. One of the engineers in the geotechnical office, Barry Doyle, testified that he considered Ramage his supervisor even though Doyle was actually an employee of one of the other consulting firms.

C. Differing Site Condition Claims

Most of the record concerns CH2M's role in assisting the MMSD in Differing Site Condition ("DSC") claims. Under the DSC mechanism, a contractor can obtain reimbursement for additional costs incurred when it encounters conditions different than those set forth in the contract and the geotechnical report. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 479 (7th Cir. 1995). This mechanism could be invoked in two ways: the contractor could file a DSC claim directly with CH2M through the appropriate Resident Engineer, or the MMSD could instruct CH2M to determine whether the contractor was entitled to additional compensation. In either case, an inquiry would be directed to CH2M's geotechnical office if it involved the geology of the area. The Resident Contracting Officer would either disapprove or recommend to the MMSD the approval of a DSC claim based on an analysis and recommendations by CH2M. The decision whether or not to accept such a claim was entirely the responsibility of the MMSD. In the event a DSC was approved, CH2M would prepare a draft of the actual language of the contract modification. The Director of Construction for the MMSD was responsible for reviewing and approving for the MMSD any draft contract modification prepared by CH2M.

Soils in the Menomonee River Valley, where the Project was located, are generally known as gas-producing, and methane was encountered in early 1983 in a boring drilled near the alignment of the CT-7 tunnel. Methane also became an issue in the construction of the CT-8 tunnel, the first tunnel built. After Jay Dee detected methane when it drilled a test boring for CT-8 on April 30, 1987 and encountered the gas on December 2, 1987 during actual construction, it retained a consultant to investigate the methane concentrations. Based on the results, Jay Dee became concerned that methane might be present in greater concentrations than originally thought and consequently filed a DSC claim. Since no one disputed that the occurrence of methane qualified as a differing site condition, CH2M concluded that Jay Dee's claim had "merit," and James Meinholz, the MMSD's contracting

officer, approved the claim. The PMO and the geotechnical office in particular then began determining whether similar conditions existed in the other tunnels.

Following CH2M's investigation into the incidence of methane in the CT-8 tunnel, a meeting took place on February 17, 1988 among the following individuals who either worked for or were supervised by CH2M: Charles Kennedy, the PMO's Resident Engineer for the CT-7 tunnel; Phil Santacroce, Project Construction Manager for the CT portion; and John Ramage, manager of the geotechnical office. Also present was Patrick J. Doig, Healy's project manager. According to the minutes of this meeting, Ramage proposed four modifications to the construction contracts: increased ventilation in the tunnel, elimination of sources of ignition on machinery, provision of additional methane monitoring, and making personal safety equipment (self-rescuers approved by the Bureau of Mines) available to employees along with an evacuation plan. With respect to the tunnel machinery, the minutes state that "[a] directive will be issued requiring the contractor to comply with the requirements of OSHA relating to the explosion proofing of machinery. This is intended to apply primarily to the mining machine and the muck haulage equipment."

Because the MMSD had approved a DSC claim for Jay Dee, it was generally understood that approval would be a matter of course for the other contractors as well once the occurrence of methane in their tunnels was established. Indeed, Thomas Lutzenberger, the MMSD official responsible for reviewing and approving for the MMSD any draft contract modification prepared by CH2M, testified that he did not have the expertise to independently assess the need for such measures as control of ignition sources in the tunnel.[11]

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[11]It appears that Ramage, CH2M's employee and the head of the PMO's geotechnical office, utilized Lutzenberger as a liaison for reporting CH2M's conclusions and recommendations to the MMSD. Ramage was careful to inform Lutzenberger of any proposals by CH2M and to explain their intent and purpose. For example, Ramage kept Lutzenberger informed on a daily basis of the contract modification process, and Ramage supplied Lutzenberger with information from which Lutzenberger briefed the Commissioners of the

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In any event, on April 5, 1988, Barry Doyle, an engineer in the geotechnical office,[12] gave the CT-7 Resident Engineer, Kennedy, the proposed contract modifications for the CT-7 and CT-5/6 tunnels before the MMSD formally approved those modifications. Kennedy in turn informed Healy's project manager, Doig, that he "will be required to comply" with a revision to section 01016—the section addressing safety—of Healy's contract. The actual modification set forth Ramage's proposal with greater detail and specificity than the minutes of the meeting except for one inconsistency. Although the original proposal was directed toward only certain equipment, the modification as drafted required that *all* "electrical motors, accessories, and installations and electrical equipment in the shafts and tunnels" be brought into conformity with the OSHA electrical standards governing hazardous locations. On May 2 Doig requested that Kennedy clarify which specific parts of the tunnel equipment were subject to the contract modification. On May 9 Ramage, the geotechnical office manager, advised Kennedy that only electrical equipment "associated with" its tunnel boring machine was required to be approved for use in hazardous locations. He also noted that Healy's locomotives met "the intent of the specs" but stipulated that they must be equipped with methane monitors. Ramage suggested that Healy furnish certification from Lovat, the manufacturer of the boring machine, that the machine was satisfactory for use in a hazardous location. On June 6 Doig wrote to Kennedy regarding the status of Healy's implementation of the contract modification:

> Our estimate of the cost involved in complying with these changes is not yet complete. We believe, however, that we have largely complied with your requirements, with the exception of the main ventilation fan. A sufficiently large, explosion proof, 30 hp, fan is being ordered, but will take some time to

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MMSD regarding the significance of the methane occurrence.

[12]As previously indicated, *supra* note 10, Doyle viewed himself as under CH2M's supervision.

> deliver. In the meantime, alternative arrangements have been made, which we feel are intrinsically safe.
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> We give below an account of the situation in respect to the various areas of the changed specification. Please review and advise if further upgrading is necessary.

Finally, in addition to handling DSC claims for Jay Dee and Healy, CH2M also dealt with J.F. Shea, the contractor on the CT-5/6 tunnel. In contrast to Healy's tunnel boring apparatus, which had been built for use in hazardous locations, J.F. Shea's mining machine could not be brought into compliance with the electrical standards unless all its motors and electrical components were replaced. For this reason, J.F. Shea's project manager informed Kennedy that it could not meet the terms of the contract modification without both a substantial delay and a substantial cost increase. Ramage concluded that the Project could not be delayed to that extent and proposed alternatives to J.F. Shea that in his view would be equivalent to the contract modifications.

II. JUDGE'S DECISION

Administrative Law Judge Paul L. Brady held that the construction standards do not apply to CH2M. He relied on *SGH*, in which the Commission held that a design and consulting engineer was not subject to the construction standards, and on *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1991-93 CCH OSHD ¶ 29,829 (No. 88-1167, 1992), which held that the standards were applicable to a company hired by the building owner to provide management services during construction. The judge noted that *Kulka* relied on contractual language obligating the employer to "provide recommendations" to the owner "regarding the assignment of responsibilities for safety precautions and programs" and to ensure "that the requirements and assignment of responsibilities are included" in the contract with the trade contractors. The judge observed that the Commission construed this language as a "general contractual obligation to provide for the institution of safety measures and safety programs" and that the Commission had made a factual finding that the owner "depended upon Kulka to maintain safe working conditions at the site" and had in fact delegated authority over safety matters to Kulka. *Id.* at 1873, 1991-93 CCH OSHD at p. 40,686. The judge distinguished the contractual provision in *Kulka* from that in *SGH*,

which stated that "[t]he Engineer shall not have control or charge of, and shall not be responsible for, construction means, methods, techniques, sequences, or procedures, for safety precautions and programs in connection with the Work . . . ." 15 BNA OSHC at 1854, 1991-93 CCH OSHD at p. 40,667.

The judge concluded that the provisions of Attachment D to CH2M's contract with the MMSD as well as the General Conditions to Healy's contract indicating that the construction contractors retained responsibility for construction means and methods was similar to the corresponding clause in SGH's contract and distinguishable from the language defining the employer's duties in *Kulka*. The judge further concluded that the services CH2M had contracted to perform were characteristic of engineering services as discussed in *SGH*. The judge acknowledged that CH2M performed contract administration services, but reasoned that while such duties may be necessary to the completion of the construction contract, they do not create supervisory authority over the performance of actual construction work.

The judge reached the same conclusion with regard to the drafting of the contract modification and subsequent clarification. He viewed these actions as having been conducted "at the MMSD's request and pursuant to its [CH2M's] contract with the MMSD" and determined that they were advisory rather than supervisory activities.

III. DISCUSSION AND ANALYSIS

A. Precedent

In our review of the Commission precedent we will focus on three aspects that are particularly relevant here: 1) the breadth of responsibility which has accompanied inclusion or exclusion from the construction standards, 2) the specific authority over trade contractors on which inclusion or exclusion has been predicated, and 3) the specific safety-related responsibility and authority which has been identified as relevant in our decisions.

The Commission has addressed the applicability of the construction standards to non-trade contractors in just a small number of cases, the earliest being *Bechtel*. This was the first

case in which the Commission was confronted with an employer acting in the role of a "construction manager." The Commission described Bechtel's duties as designing the project, "administering and coordinating the construction on behalf of the owner," and conducting daily inspections to ensure conformity to the design specifications. Bechtel also coordinated the safety program and provided two full-time safety representatives who inspected the site for safety hazards which would be reported to both the prime contractor and a Bechtel coordinator. Bechtel had the authority to order that work be stopped ("stop work authority") in the presence of a "serious hazard" until the condition was corrected. However, other than whatever power is implicit in stop work authority, Bechtel had no contractual right to direct action or to dictate that a particular means or method of construction be employed. Thus, our decision noted that "[w]hen hazards were present, Bechtel attempted to persuade the contractors to comply." 4 BNA OSHC at 1006, 1975-76 CCH OSHD at p. 24,498. The Commission concluded that Bechtel came within the scope of the construction standards because its work was "directly and vitally related" to the construction project. *Id.* at 1007, 1975-76 CCH OSHD at p. 24,499.[13]

Thereafter, the Commission found the reasoning of *Bechtel* dispositive in *Bertrand Goldberg Assocs.*, 4 BNA OSHC 1587, 1976-77 CCH OSHD ¶ 20,995 (No. 1165, 1976), in which an architect designed a construction project, prepared contract documents, administered the construction contracts, and inspected the trade contractors' work to ensure that it conformed to contract and design specifications. The architect, like Bechtel, was empowered to stop work if it encountered either nonconformity with a specification or a

[13]The Commission's "integral part" test relied on cases interpreting the jurisdictional scope provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, which have held that employees who do not perform physical craft labor are nevertheless entitled to wage and hour protection at covered construction worksites so long as the tasks they perform have a direct impact on the completion of the construction work.

safety hazard. However, also like Bechtel, it otherwise could not control or direct any of the work activities, and did not have authority over construction means and methods.

The Commission next considered its "integral part" test for determining applicability in *Skidmore, Owings & Merrill*, 5 BNA OSHC 1762, 1977-78 CCH OSHD ¶ 22,101 (No. 2165, 1977) ("*SOM*"), a case arising out of the construction of the Sears Tower in Chicago. In *SOM*, the cited employer was an architectural and engineering firm having a contract with the building owner to inspect the work of the trade contractors for conformity to design specifications. It acted solely as a conduit for the owner, having authority to instruct the trade contractors to correct nonconforming work only if that work was unacceptable to the owner. It was expressly prohibited from directing or supervising "construction methods, techniques, procedures or safety methods," and the general contractor was responsible for "establishing, maintaining, and supervising" contractors' safety programs. The Commission distinguished *Bechtel* and *Bertrand Goldberg* on the ground that as construction managers, the employers in those cases had supervisory authority over both the progress of the work and the worksite safety program and performed management functions similar to those of a general contractor. The Commission thus concluded that to come within Part 1926 "an employer must perform actual construction work or exercise substantial supervision over actual construction." 5 BNA OSHC at 1764, 1977-78 CCH OSHD at p. 26,627. The Commission noted that the architect cited in *SOM* had "more limited functions and responsibility over the work" and accordingly found that the level of supervision it exercised was not equivalent to that of a construction manager. *Id*.[14]

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[14]Subsequently, in *SGH* the Commission explicitly stated that it was inappropriate to subject design or engineering firms to liability under the construction standards simply because their activities may have a relationship to the total construction project, and it made clear that it considered the "integrally related" test to be suitable only for activities involving the performance of physical or craft labor. 15 BNA OSHC at 1859, 1991-93 CCH OSHD at

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The Commission next addressed the question at hand in *Cauldwell-Wingate Corp.*, 6 BNA OSHC 1619, 1978 CCH OSHD ¶ 22,729 (No. 14260, 1978). In that case, like *SOM*, there was a general contractor at the site, but unlike *SOM*, the cited employer's tasks were not limited to ensuring that the work conformed to contract specifications. Cauldwell-Wingate was designated as a construction manager with responsibility to inspect work for conformity with plans and specifications. In addition, moreover, it also was to recommend and implement change orders, to certify trade contractors' work for payment, and to perform further tasks which reflected a general managerial responsibility, including overall coordination of the project, conducting job meetings, expediting work to maintain job progress, and monitoring job status to eliminate or minimize delay. Also like Bechtel, Cauldwell-Wingate's contract did not grant it authority over construction means and methods. Indeed, Cauldwell-Wingate lacked even SOM's power to direct that nonconforming work be redone. In contrast to Bechtel, the Commission did not find Cauldwell-Wingate to have any express responsibility for safety. Nevertheless, the Commission concluded that Cauldwell-Wingate's functions constituted "substantial supervision over actual construction" because the breadth of Cauldwell-Wingate's contractual authority provided the ability to effectuate abatement of hazardous conditions. *Id.* at 1621, 1978 CCH OSHD at p. 27,436 (quoting *SOM*, 5 BNA OSHC at 1764, 1977-78 CCH OSHD at p. 26,627). In doing so, the Commission noted that Cauldwell-Wingate's responsibilities were "considerably more extensive" than those of the architect in *SOM* and "went far beyond a mere ability to check the site and report back to the owner." *Id*. at 1621, 1978 CCH OSHD at pp. 27,436-37.

In *SGH*, the cited engineering company contracted with the architect (not the owner) to act as its consultant in preparing contract drawings and specifications and inspecting the work and certifying completion. There was no contention that these duties rose to the level of supervision commensurate with that of a construction manager or general contractor. The Commission concluded that SGH's involvement with the specific hazardous conditions at

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[14](...continued)
p. 40,672.

issue was too incidental to serve as a basis for subjecting it to the construction standards. 15 BNA OSHC at 1867, 1869-70, 1991-93 CCH OSHD at pp. 40,680.

In *Kulka*, the employer had a contract with a building site owner to provide administration and management services. These included tasks described broadly in the contract in terms of "evaluation," "review," "coordination," "analysis," "verification," "assistance," and "recommendations" in a number of areas, including the budget for the project, its design, the schedule for work, the availability of labor, equal employment opportunity, and award of subcontracts. In finding the construction standards applicable, the Commission focused on Kulka's role in the site safety program.[15] In so doing, it acknowledged that Kulka did not have any contractual authority to direct the contractors to take action in this area.[16]

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[15]Kulka was contractually obligated to "provide recommendations and information . . . regarding the assignment of responsibilities for safety precautions and programs." Although it had no contractual authority to evaluate the substance of any safety program, Kulka did in fact review them. The Commission noted that "[i]n addition to Kulka's general contractual obligation to provide for the institution of safety measures and safety programs, it is clear that the owner . . . depended upon Kulka to maintain safe working conditions." 15 BNA OSHC at 1872-73, 1991-93 CCH OSHD at p. 40,685-86.

[16]Kulka's onsite representative testified that "[w]e had no specific authority to tell the contractors exactly what to do. It was more of an overseeing type of thing." *Id*. at 1872, 1991-93 CCH OSHD at p. 40,685. In addressing this testimony, the Commission stated:

> [T]he judge placed undue emphasis on McKee's testimony that he could not personally enforce any instructions he gave to a subcontractor. There is no evidence to show that contractors routinely or customarily would ignore requests from McKee for the correction of safety hazards from which we could

(continued...)

Accordingly, while our precedent has used "overall supervisory authority" as a test for applicability, the specific content of that "authority" has varied. First, review of this precedent shows that we have not required an entity to be empowered to direct "means and methods" of construction. Indeed, there is no indication that this authority was present in any of the cases where we have found architects or engineers to be covered by the construction standards based on status as a "construction manager."[17] Second, while in *Bechtel* and *Bertrand Goldberg* there was authority to stop work, the Commission also relied on the fact that the employers had inspectors who directly involved themselves in safety issues in the discharge of their duties at the site. Third, in *Kulka* there does not appear to have been any contractual authority by which the architect or engineer could order contractor action. The Commission relied on an apparent *de facto* assumption of authority manifested by the cited employer taking specific actions to effectuate safe work practices at the site. Fourth, in *Cauldwell-Wingate*, where there was neither contractual authority to direct contractors nor any indication of direct involvement in safety matters, the Commission concluded that the

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[16](...continued)
conclude that Kulka could not effectively exercise the authority that [the owner] intended it to have.

Id. at 1873, 1991-93 CCH OSHD at p. 40,685.

[17]More generally, we note that as used in the construction industry, the term "construction manager" does not presume control over "means and methods" of construction. At oral argument counsel for CH2M acknowledged the discussion of the authority of a construction manager in a well-known standard handbook on the construction industry. That treatise points out that the term "construction manager" includes an entity "acting as the owner's agent that does not hold the construction subcontracts and is not responsible for construction means and methods." Conner, *Safety*, in STANDARD HANDBOOK OF HEAVY CONSTRUCTION A10-1 (1996).

breadth of the activities in which the employer was authorized to engage by contract necessarily empowered it to resolve safety issues.

In sum, in those cases in which we held that the construction standards apply to entities which do not perform physical trade labor, *Bechtel*, *Bertrand Goldberg*, *Cauldwell-Wingate*, and *Kulka*, the cited employers all had broad administrative and coordination responsibility at the worksite. Conversely, those employers whom we found not covered by the construction standards were those having only limited contractual responsibility, *SOM* (contract to inspect work for conformity to specifications) and *SGH* (prepare specifications and inspect work).[18] Implicit in our precedent is the recognition that the more extensive the involvement of a professional engineer or consultant in the activities at the site, the more likely that those activities will necessarily encompass safety issues. As the Commission stated in *Cauldwell-Wingate*, "Respondent seeks to avoid liability because it was not the general contractor at the worksite. There is no merit in the respondent's position. The labels used to describe the various contractors are not controlling as the record shows that respondent had the ability to effect abatement and held a position 'akin to that of a general contractor.'" 6 BNA OSHC at 1621, 1978 CCH OSHD at p. 27,437 (quoting *Bertrand Goldberg*, 4 BNA OSHC at 1589, 1976-77 CCH OSHD at p. 25,221)).[19]

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[18]See also our decision in *Foit-Albert Associates, Architects & Engineers, P.C.*, No. 92-654 (April 21, 1997), in which we similarly hold that an employer having authority limited only to inspecting work for compliance with contract specifications is not within the scope of the construction standards.

[19]Cauldwell-Wingate argued before the Commission that its prior decision in *Bechtel* was based on Bechtel's contractual duties regarding safety. The Commission rejected that contention, stating that "we found the construction manager's [contractual] safety duties to be only one of many functions . . . carried out on the worksite." 6 BNA OSHC at 1621 n.4., 1978 CCH OSHD at p. 27,436 n.4.

Accordingly, in determining whether the construction standards are applicable to an employer performing non-trade or professional services at a construction worksite, we look to two factors: the extent to which the employer is involved in the multitude of different sorts of activities that are necessary for the completion of the typical construction project and the degree to which it is empowered to direct or control the actions of the trade contractors. We consider our construction manager cases, *Bechtel*, *Bertrand Goldberg*, and *Kulka*, as illustrating the type of far-reaching or global responsibility for diverse activities at the site which would satisfy the first criterion. Conversely, in the cases in which we have held the construction standards inapplicable, *SOM* and *SGH*, we did so because the cited employers lacked any global responsibility but instead had limited functions only to prepare contract specifications and inspect for conformity thereto.[20]

B. Facts of This Case

We turn now to the facts of this case. In accord with the preceding discussion, we will initially focus on 1) the extent of CH2M's role and 2) the dimensions of its authority over trade contractors. We will then turn to a particularly novel issued posed by the facts here, the relationship between contractual language vesting the trade contractors with sole responsibility for safety measures and construction means and methods and the factual record

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[20]We appreciate Commissioner Montoya's commendation of our analysis of our precedent. We note that Commissioner Montoya summarizes our precedent as "cases in which we found the construction standards applicable involved employers who not only were construction managers but who also had specific and direct authority to give orders regarding the actual performance of the work." However, her further explanation is at odds with this formulation. In her view, *Cauldwell-Wingate* was wrongly decided because the employer lacked contractual authority over trade contractors; on the other hand, Commissioner Montoya expresses agreement with *Kulka*, where the employer also lacked such authority. In any event, we measure CH2M's role in the construction work by the criteria of both contractual and *de facto* authority.

showing that CH2M's other contractual responsibility or authority arguably led to its direct involvement in the safety matters at issue here.

1. Extent of CH2M's Role

It is clear that CH2M had broad and comprehensive responsibility in many aspects of a very complex and extensive construction project. In our view, Judge Brady's conclusion that the services CH2M contracted to provide were predominantly engineering in nature and that its managerial tasks were not substantial misconstrues the record. CH2M's administrative responsibilities encompassed a wide variety of managerial matters such as scheduling, coordination of construction activities, preparation and interpretation of contract documents and modifications including negotiation directly with trade contractors, claims processing, and even dispute resolution. Generally speaking, these tasks are similar in character to those performed by the employers in our three prior construction manager cases, *Bechtel*, *Bertrand Goldberg*, and *Cauldwell-Wingate* as well as in *Kulka*, where we noted the employer's contractual responsibility in such terms as evaluating, recommending, analyzing, assisting, and verifying. Furthermore, CH2M was involved in the Project from its very inception. Not only was CH2M part of the process by which the initial contracts and specifications were developed and let out for bids, but CH2M established the programmatic framework for the entire Project through its contractual responsibility to establish and staff the Project Management Office. Plainly, CH2M's involvement in the construction activities was of the broad, global nature that our precedents dictate as one prerequisite for applicability of the construction standards.

2. CH2M's Contractual Authority Over Contractors

The second factor on which we base applicability is authority to direct or control the work in some regard. CH2M argues that it was "contractually forbidden from directing or supervising" a trade contractor such as Healy, could not "order Healy to correct violative conditions," and had no authority to review "any contractor's safety program." In CH2M's view, its contractual authority over work performance is indistinguishable from that of the

engineering professionals in *SOM* and *SGH* because while it drafted contract modifications and inspected finished work for conformance to specifications, it "had no authority to modify the contract" and "could not tell the contractor how to perform the work." We disagree. We find that CH2M's contractual authority is far closer to the *Bechtel-Bertrand Goldberg* line of precedent than it is to *SOM-SGH*.

First, CH2M's authority to direct work activities is substantially different from that of SOM and SGH, whom we held not subject to the construction standards. SOM, who had solely inspection authority, could simply specify that nonconforming work be corrected if the work was unacceptable to the owner. There is no indication that SOM had any authority comparable to CH2M's contractual power to reject nonconforming work based on its own judgment as to when such action would be necessary to effectuate the construction contracts, nor did SOM have the right to allocate resources and make mandatory, binding determinations regarding project scheduling. *SGH* is even further removed from CH2M. In that case, the cited employer had contracted with the building architect as opposed to the project owner. SGH had no authority at all to give instructions of any sort to the trade contractors or indeed to interact with them directly in any way. Second, insofar as CH2M lacked authority to generally direct "means and methods," or how the contractors performed their work, its contractual authority is no less than that of the employers in *Bechtel*, *Bertrand Goldberg*, *Cauldwell-Wingate*, and *Kulka*, who similarly had no such power. Whereas Bechtel and Bertrand Goldberg were empowered to stop work in the event of safety hazards, CH2M had authority to implement its contractual responsibilities through the control of scheduling and the allocation of resources. In addition, it had the right and obligation to require that work which did not conform with contract specifications be corrected.

In sum, while CH2M's rights to control and direct the work were different than those of Bechtel, Bertrand Goldberg, and Kulka, the only respect in which CH2M had a lesser degree of power is the absence of explicit "stop work" authority. In other respects CH2M had

more substantial contractual authority than that which we have relied on in those cases in which we found employers subject to the construction standards.

For these reasons, we disagree with Commissioner Montoya that CH2M's contractual authority is akin to that in cases where the construction standards have been held inapplicable. As discussed, CH2M possessed authority which was lacking in those employers whom we found subject to the construction standards, specifically its right to interpret scheduling requirements, to establish priorities, to "enforce such measures as may be necessary to maintain" schedules, and to obtain "prompt" compliance by the trade contractors with its scheduling decisions. Bechtel's prerogative to "monitor" and "record" job progress simply does not encompass the same level of authority and power inherent in CH2M's rights both to establish and enforce project scheduling. Furthermore, CH2M had authority to order that questioned work be examined and to reject and obtain the correction of defective work.[21]

Although Commissioner Montoya relies on the premise that CH2M lacked control over construction "means and methods" and safety practices and had no "capability to direct trade contractors to perform their work in any particular way,"[22] our precedent, as discussed,

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[21]While Commissioner Montoya explains that stop work authority was present in *Bechtel* and *Bertrand Goldberg* (but not in *Cauldwell-Wingate* or *Kulka*), the authority to order a contractor to stop work is not equivalent to authority to order that work be performed, much less that it be performed in a particular manner. To the extent that stop work authority may imply the power to compel that work be performed in accordance with the contract specifications, Commissioner Montoya appears to agree that CH2M had the authority to require conformance with contract specifications in its own right.

[22]We note that we do not say, as Commissioner Montoya asserts, that CH2M had no "control" over means and methods or safety practices; rather, tracking the contract language, we observe that CH2M was not "responsible" for these matters. At the same time, it had a

(continued...)

has never required this authority as a prerequisite to considering an employer a "construction manager," and indeed we have never found such authority present in any of our cases.

3. CH2M's Involvement in Safety on the Facts Here

The final question before us is the implication of contract language which, as quoted *supra*, places sole responsibility for safety on Healy and other trade contractors. As we have discussed, our precedent does not require express safety responsibility as a prerequisite for holding an employer subject to the construction standards; however, the question of whether applicability can be found in the presence of the explicit language here presents a case of first impression.

At the outset, CH2M points out that the obligation to take preventive or corrective safety action was directly upon Healy; trade contractors have a nondelegable duty to comply with OSHA in any event. It is certainly the case that Healy was obliged to comply with OSHA. However, it is equally true that health and safety responsibility may be shared by more than one employer at a worksite—indeed, this is a central tenet of *Bechtel* and its progeny as well as other precedent addressing the apportionment of responsibility for violative conditions at a multi-employer construction worksite. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (consolidated); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976).

In addition, CH2M points to contract language, as quoted *supra*, that expressly places sole responsibility for safety on Healy. At the same time, however, the contracts assign broad

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[22](...continued)
broad range of areas for which it was responsible, as well as a degree of express contractual authority over trade contractors. It is the tension between CH2M's many affirmative responsibilities and its express contractual authority, on the one hand, and the express disclaimers of responsibility, on the other, that the Commission must resolve in deciding this case.

responsibility to CH2M as well as certain authority over trade contractors. The question before us is the relation between the contractual limitations on CH2M's responsibility for safety and such further terms that grant it responsibility and authority.

In order to answer that question we will review in some detail the circumstances of the Differing Site Condition ("DSC") contract modification. Broadly stated, from CH2M's perspective, the function of the modification was solely to determine whether or not Healy would be reimbursed for actions related to the potential methane gas hazard at CT-7. In the Secretary's view, the contract modification was not only about money but necessarily implicated safety. We agree with the Secretary.

Acting under the differing site condition and contract modification mechanisms, CH2M implemented a contract specification directed specifically toward, and with the intent of eliminating, a substantial safety hazard at the site, the occurrence of methane gas. CH2M initiated a safety meeting with Healy and gave explicit safety instruction to the trade contractors, who in turn understood that CH2M was providing guidance and direction. CH2M's manager of the geotechnical office, Ramage, initially formulated the contract modification, and it was communicated by the PMO through the resident engineer as a mandatory requirement. In response to an inquiry by Healy's project manager, Doig, Ramage issued further directives. Similarly, consistent with its contractual authority to determine and enforce project schedules, CH2M unilaterally evaluated J.F. Shea's ability to comply with the safety requirements set forth in the contract modification and prescribed alternative methods by which in its judgement Shea could perform the work in a safer manner. In fact, the MMSD and its approving official, Lutzenberger, relied on CH2M's expertise to determine what contractual provisions or specifications were necessary to meet the changed conditions encountered during the course of the work.

Although CH2M contends that it had no authority to review a contractor's safety program, Ramage himself proposed at the safety meeting that Healy present "a plan of action . . . for the evacuation of the tunnel should the level of methane reach 20% LEL [lower explosive limit]." This requirement was officially set forth in the contract modification as follows:

> The Contractor shall prepare a general plan for tunnel evacuation, to be implemented in the event that 20% LEL is indicated on methane monitors or when automatic power shutoff occurs. The plan, as a minimum, shall outline duties and responsibilities of key personnel. The plan shall include such items as ventilation controls, fire fighting equipment, rescue procedures, and communications. The plan shall be posted, and all workers informed of the plan, their roles and responsibilities.

Article III.2.k of Task Order 189 stipulated that CH2M would "review and document the contractor's technical submittals for compliance with the Contract Documents," and Article III.3.b generally required that CH2M "inspect the work for reasonable conformance with the Contract Documents and technical submittals." Consistent with these provisions of the task order, Doig's letter of June 6, 1988 informing Kennedy of the status of Healy's compliance with the contract modification included a copy of Healy's proposed evacuation plan and explicitly requested that CH2M provide its "input" before Healy published the plan. In that same letter, Doig also requested that CH2M generally review and approve the list of actions Healy had taken and intended to take to comply with the contract modification. On these facts, we cannot agree with CH2M's assertion at oral argument that any role in safety programs was simply ministerial.[23]

In summary, CH2M provided its expertise in the determination of whether or not a hazard existed; it effectively conceived and drafted contract language dictating what actions Healy would have to take in order to ensure safe working conditions, and the terms of that contract modification required a safety program which CH2M was obligated by other contractual provisions to review and approve. While the MMSD possessed formal "stop work" authority and CH2M was expressly denied control over "means and methods" and

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[23]In its brief, CH2M distinguishes *Kulka* on the ground that CH2M "did not have the responsibility of reviewing any contractors' safety program." As discussed *supra*, we found Kulka's role in safety planning to be highly significant, even in the absence of any explicit authority on Kulka's part to direct action by contractors. Here, CH2M not only possessed and exercised the *de facto* control over safety matters which we found determinative in *Kulka*, but it also had some explicit contractual authority over the adequacy of the contractor safety program at issue here.

safety precautions, contractors effectively deferred to CH2M on a major issue affecting safety; with respect to one particular contractor, J.F. Shea, CH2M exercised its own contractual authority in directing a means to address the hazard in CT-5/6.

In conclusion, CH2M possessed the broad, global set of responsibilities for the Project characteristic of those employers whom we have previously held subject to the construction standards. While it did not have responsibility for the "means and methods" of construction, neither did those employers whom we have found to be subject to the construction standards as "construction managers." In terms of contractual authority actually to direct trade contractors—as opposed to the exercise of moral suasion or the conveyance of instruction from the owner—CH2M possessed certain types of authority not routinely granted to all those whom we have held to covered by those standards, specifically the rights to interpret and enforce contract schedules, to resolve conflicts between contractors, and to reject or obtain correction of defective work. CH2M did not possess the "stop work" authority of Bechtel and Bertrand Goldberg; however, Cauldwell-Wingate and Kulka, whom we held under the construction standards, did not have any direct contractual authority over contractors.

The contracts here contain express language providing that the trade contractor, not CH2M, would have sole responsibility for safety precautions and programs. On the other hand, CH2M's many affirmative responsibilities and its authority clearly implicated safety, as did the exercise of its authority. In finding the construction standards applicable, we do not do so based on a presumption that a broad scope of duties necessarily implies responsibility for safety as well. Rather, we reach our conclusion based on an extensive record which illuminates specifically how safety concerns and safety issues were resolved in actual practice on the worksite in question. As we have stated, in terms of its *de facto* actions, CH2M effectively was the nerve center through which means were developed and implemented for allowing the work to be conducted in the light of a major safety hazard for

a tunneling operation, the presence of methane gas.[24] In terms of its contractual authority, CH2M was required to review and approve necessary actions, including Healy's safety program. [25]

Accordingly, for the reasons stated we reverse the judge's decision and remand for further proceedings consistent with this opinion.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

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[24]If *de facto* exercise of authority is determinative, as suggested by Commissioner Montoya's explanation of *Kulka*, CH2M meets this test. While Commissioner Montoya stresses the importance of facts, her dissent does not review them. She notes that Kulka acted as a representative for the owner and exercised *de facto* authority to instruct trade contractors to correct safety hazards, but ignores that, as we have discussed, CH2M was no less by contract the MMSD's representative and exercised both contractual and practical authority over the safety program at the tunnel. Contrary to Commissioner Montoya's suggestion that our decision holds that merely drafting a contract modification or processing a change is sufficient to trigger the applicability of the construction standards, we trust that our discussion of the facts makes clear that CH2M's role was hardly so limited.

[25]In addition, while not involved in Healy's tunnel, CH2M's authority to direct scheduling in order to ensure that work would be completed on time was the basis for the means of abatement of the methane hazard which was effectuated by another contractor, J.F. Shea.

Dated: April 21, 1997

MONTOYA, Commissioner, dissenting:

I dissent from the majority's decision holding that the construction standards are applicable to CH2M in the circumstances presented here. In my view, Judge Brady properly concluded that while CH2M did provide contract administration services, the scope of its contractual authority is characteristic of that of a consulting engineer. I therefore agree with Judge Brady that this case is controlled by *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1867, 1991-93 CCH OSHD ¶ 29,828, p. 40,680 (No. 89-1300, 1992), *aff'd,* 3 F.3d 1 (1st Cir. 1993) ("*SGH*"), in which the Commission held that drafting contract specifications and inspecting work for compliance therewith are not sufficient to bring a non-trade contractor within the scope of the construction standards.

I concur with the majority opinion insofar as it predicates applicability of the construction standards on the performance of a broad range of administrative and managerial tasks at the worksite coupled with authority to direct or control the work. Indeed, the majority is to be commended for its thorough and comprehensive explication of the case law which culminated in the *SGH* decision and for its efforts to deduce a coherent and common set of principles from those cases to guide employers in evaluating the reach of the construction standards. However, the conclusions I reach from our precedent differ substantially from those of the majority. Specifically, cases in which we found the construction standards applicable involved employers who were not only construction managers but who also had specific and direct authority to give orders to trade contractors regarding the actual performance of the work.

In *Bechtel Pwr. Corp.*, 4 BNA OSHC 1005, 1975-76 CCH OSHD ¶ 20,503 (No. 5064, 1976), *aff'd per curiam*, 548 F.2d 248 (8th Cir. 1977) and *Bertrand Goldberg Assocs.*, 4 BNA OSHC 1587, 1976-77 CCH OSHD ¶ 20,995 (No. 1165, 1976), such authority was conferred by contractual provisions that explicitly allowed the cited employers to order trade contractors to stop work if safety hazards became apparent. In *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1991-93 CCH OSHD ¶ 29,829 (No. 88-1167, 1992), notwithstanding the absence of clear contractual authority to direct the trade contractors, the

Commission found from the factual record that the construction manager, as the owner's representative, exercised authority to expressly instruct trade contractors to correct safety hazards; in other words, the construction manager's authority as a factual matter was no different from that of the same entities in *Bechtel* and *Bertrand Goldberg*.[26]

In this case, however, CH2M lacks authority to stop work, that power having been granted exclusively to the site owner, the MMSD. There are no other provisions giving it any capability to direct trade contractors to perform their work in any particular way, and as the lead opinion notes, CH2M had no control over construction means and methods or over contractor safety practices. The only other contractual prerogatives granted to CH2M are the rights to maintain project schedules and to reject nonconforming work. These rights reflect nothing more than a construction manager's customary responsibility for project management and an engineer's usual task to inspect work for contract compliance. For example, the construction manager in *Bechtel* under its contract "monitored and recorded the progress of the work," 4 BNA OSHC at 1006, 1975-76 CCH OSHD at p. 24,498, and in *Kulka* was empowered to "coordinate" the work schedule. 15 BNA OSHC at 1871, 1991-93 CCH OSHD at p. 40,685. By the same token, the contract in *SGH* obligated the engineer "to determine in general if such Work is proceeding in accordance with the Contract Docu-

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[26]*Cauldwell-Wingate Corp.*, 6 BNA OSHC 1619, 1978 CCH OSHD ¶ 22,729 (No. 14260, 1978), in which the Commission found a construction manager subject to the construction standards in the absence of any contractual authority whatever to direct or control the actions of the trade contractors, in my view represents a discontinuity in the case law, and I consider it to have been wrongly decided. A review of the provisions of the cited employer's contract as set forth in an appendix to the Commission's decision indicates that the Commission relied simply on language obligating the employer to inspect work for purposing of ensuring that contract schedules were followed and contract specifications adhered to so as to qualify the contractor for payment. The scope of these contractual duties is no different from that of the employer in *SGH*.

ments" and also provided that "[c]ertification by the Engineer . . . of an amount owing to the Contractor shall constitute a representation by the Engineer to the Architect that, based on the Engineer's observations at the site . . . the Work . . . has progressed to the point indicated." Clearly, the obligation to certify work for payment based on a determination that it has been completed according to contract specifications accords the inspector the right, in effect, to reject nonconforming work. Accordingly, I see nothing in the contract provisions here that distinguish this case from *SGH* or, for that matter, the companion case which we also decide today, *Foit-Albert Associates, Architects & Engineers, P.C.*, No. 92-654 (April 21, 1997).

Having discounted the significance of the contractual provisions themselves, I turn now to the question of whether, through the Differing Site Condition (DSC) process and the issuance of a contract modification, CH2M in fact exercised control over Healy and other trade contractors with regard to matters of safety. There can be no dispute that safety issues were a necessary component of the contract modification, since the differing condition that created the need for the modification in the first place was primarily a safety hazard. However, all sizable construction projects require change orders at some point in time, and the implementation of this change order was nothing more than an exercise of CH2M's authority to draft contract language as agent for the MMSD. Viewed from the perspective of the DSC process, and the primary objective of financial remuneration that it serves,[27] there is little difference, if any, between the drafting of a contract specification to address a known

[27]As counsel for CH2M quite properly points out, the purpose of the DSC system is merely to provide a process by which a trade contractor can be assured of payment for additional work deemed necessary for whatever reason. A Differing Site Condition clause "entitles the contractor to a price adjustment on the basis of 'subsurface or latent physical conditions at the site differing materially from those indicated in [the] Contract'" and is a standard clause in government construction contracts. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 478-79 (7th Cir. 1995).

condition at the site and the subsequent drafting of the same contract language to deal with the same condition as it becomes known. The majority does not contend, nor does our case law support the proposition, that drafting of contract language in itself constitutes the performance of construction work. In any event, the majority fails to specify any criteria by which we can identify those change orders that are so linked to safety as to bring the draftsman under the construction standards.

Lastly, the majority relies on CH2M's notifications to J.F. Shea regarding the modifications to its machinery in the exercise of its authority to set project schedules. As previously indicated, the authority to determine project scheduling is a customary attribute of those having broad managerial authority and therefore has no special significance in itself. The majority's reasoning would suggest that scheduling of work alone would be sufficient to bring an employer within the scope of the construction standards. I cannot join in such an expansive view of the breadth of those standards.

/s/
Velma Montoya
Commissioner

Dated: April 21, 1997