United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
U.S. Custom House
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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>DNCTHS BOISE PARTNERS, INC.,<br><br>Respondent. | OSHRC Docket No. 16-1202 |

**ORDER ON THE ISSUE OF PROPER RESPONDENT**

**Procedural Matters**

The Occupational Safety and Health Administration ("OSHA") inspected "Delaware North Companies, Inc., dba DNCTHS Boise Partners, Inc." on June 8 and 14, 2016. (Complainant's Brief, Exhibit 1) On June 29, 2016, OSHA sent Respondent a Hazard Alert Letter ("Citation") addressed to "Delaware North Companies, Inc.". (Complainant's Brief Exhibit 2) Respondent contested the Citation on July 26, 2016. ("Notice of Contest") In its *Notice of Contest*, Respondent asserted that OSHA had improperly named the Respondent. (Complainant's Brief, Exhibit 3)

The Court held a conference with the Parties on November 18, 2016 at which time the Parties briefed the Court on the dispute regarding the proper name of Respondent. In an Order dated November 18, 2016, the Parties were directed to meet and confer in an attempt to resolve the issue. Absent a resolution of the issue, the Parties were directed to file a *Status Report* with the Court by February 16, 2017. The Parties having failed to reach a resolution of the issue informed the Court and filed an unopposed *Motion for Oral Argument on the Proper Respondent/Employer* ("Motion"). The Motion was GRANTED and oral argument was scheduled for March 8, 2017. The Parties were given the opportunity to submit Position

Statements to the Court not exceeding seven pages (hereinafter referred to as "Brief"). Each party submitted a Brief with exhibits.

Appearing at oral argument on March 8, 2017, for Complainant was Jeannie Gorman, Senior Trial Attorney with the Office of the Solicitor. Brent Clark, Esq. and Kay Bonza, Esq. from Seyfarth Shaw, LLP appeared for Respondent. The oral argument was memorialized by a Court Reporter.[1] The Court has received a certified copy of the hearing transcript. The Court will reference the hearing transcript and exhibits attached to each party's Brief.

**Position of the Parties**

Complainant argues Respondent is properly identified in the issued Citation. Complainant's argument is based on: (i) the general manager at the Boise worksite ("Boise worksite") provided the Compliance Health and Safety Officer ("CHSO") a business card containing the words "Delaware North"; (ii) interviews with employees as to who they work for; (iii) an Annual Report of Delaware North Companies, Inc. ("Delaware North") posted on the internet; (iv) past history of citing violations; and (v) Delaware North, as the parent company, is appropriately named since DNCTHS Boise Partners, Inc. ("Boise Partners") represents a legal fiction unrelated to the actual employer.

Respondent argues that: (i) Boise Partners is not a legal fiction and is the only entity operating the Boise worksite; (ii) Boise Partners is the employer of the personnel at the Boise worksite and has issued W-2 statements[2] to employees under its federal employer identification number[3]; (iii) statements made in the Annual Report of Delaware North does not invalidate the legally organized corporate structure of Boise Partners; and (iv) a business card containing the

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[1] The Court will make reference to the certified transcript by using the designation "Tr".

[2] Every employer engaged in a trade or business who pays remuneration, including noncash payments of $600 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 for each employee (even if the employee is related to the employer) from whom:

- Income, social security, or Medicare tax was withheld.
- Income tax would have been withheld if the employee had claimed no more than one withholding allowance or had not claimed exemption from withholding on Form W-4, Employee's Withholding Allowance Certificate.

*See* www.irs.gov/uac/about-form-w2.

[3] An Employer Identification Number (EIN) is also known as a federal tax identification number, and is used to identify a business entity. Business owners use their EINs to conduct activities that would otherwise require a Social Security number. According to the IRS, a business entity must have an EIN if it has employees. https://www.irs.gov/businesses/small-businesses-self-employed/employer-id-numbers-eins

words "Delaware North" is not controlling in determining who is the employer of the Boise worksite.

**Legal Precedent**

In order for a Respondent to be properly cited under the Occupational Safety and Health Act ("Act") it must be deemed an "employer" under the Act. A Respondent is deemed an "employer" either under the: (i) multi-employer doctrine; (ii) traditional analysis of an employer/employee relationship[4]; or the single entity doctrine. The Court rejects the argument of Complainant that the test should be who OSHA, or the public, may perceive the employer to be at the Boise worksite based upon employee statements or how they held themselves out to the public. The Court will incorporate all arguments, exhibits and findings as applying to all legal analysis contained in this Order to avoid duplication.

A. Multi-Employer Analysis.

An employer who either creates or controls the cited hazard has a duty under §5(a)(2) of the Act…to protect not only its own employees, but those of other employers "engaged in the common undertaking." *Secretary of Labor v. Summit Contractors, Inc.,* 23 BNA OSHC 1196 (No. 05-0839, 2010); *McDevitt Street Bovis*, 19 BNA OSHC 1109 (No. 97-1918, 2000)(citation omitted).

With respect to controlling employer liability, "an employer may be held responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.' *Id. Grossman Steel*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975), IBP, Inc., 17 BNA OSHC 2073, 2074 (No. 93-3059, 1997) (quoting *Red Lobster Inns of Am., Inc.,* 8 BNA OSHC 1762, 1763, (No. 76-4754, 1980)), *rev'd on other grounds*, 144 F.3d 861 (D.C. Cir. 1998); *Harvey Workover, Inc*., 7 BNA

[4] Traditional analysis requires the Court to evaluate the evidence under the *Darden* factors and the economic realities test discussed *infra.* Where this determination must be made, the Commission has used either the "economic realities" test or the *Darden* "common law agency" or "right of control" test. *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001). (citations omitted). Both of these tests involve essentially similar factors. *Id.* Under *Darden*, the court must analyze "the hiring party's right to control the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). Such analysis must include control over the workers and not just the results of their work. *Don Davis*, 19 BNA OSHC at 1482. Thus, one who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set his pay or work hours cannot be said to control the worker. *Id*. Under the economic realities test, the factors to consider include who pays the employees, who directs and controls them, who provides the safety training and instructions, and who the employees consider to be their employer. *Griffin & Brand*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978); *Van Buren-Madawaska Corp*., 13 BNA OSHC 2157, 2158 (No. 87-214, 1989*). See also Loomis Cabinet Co*., 15 BNA OSHC 1635 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994).

OSHC 1687, 1689 (No. 76-1408, 1979); *see Summit Contractors, Inc*., 23 BNA OSHC at 1206 (finding controlling employer where record shows company maintained significant control over the worksite in general and over the cited condition in particular).

With respect to creating employer liability, the Commission "has long held that the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as the employees of other contractors who are exposed to the hazard." *Smoot Constr*., 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006).

Complainant did not present oral argument that Delaware North was a creating employer. During oral argument the Court discussed controlling employer analysis with the Parties. At the conclusion of argument on a controlling employer analysis, Complainant expressly waived any argument that it was pursuing Delaware North as a controlling employer. (Tr. 19). Therefore, the analysis of which entity identified as the Respondent in this case is the "employer" of employees at the Boise worksite must proceed along traditional legal precedents or the single entity doctrine.

B. Employer/Employee Analysis under *Darden*.

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co*., 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). It is the Secretary's burden to prove coverage under the Act by demonstrating that the cited entity is an employer. *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005); *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC 1477 (No. 96-1378, 2001), *citing, Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997).

The Act places duties on "employers" to protect the health and safety of "employees." 29 U.S.C. § 654(a). The Act requires each employer to comply with occupational safety and health standards and regulations promulgated under the Act. *Id*. An employer is a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "Person" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). An employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(3). Section 3 of the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees" and defines "employee" as "an employee of an employer who is interstate employed in a business of his employer which affects

commerce." 29 U.S.C. § 652. As the Commission noted in *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC at 1480, this definition is "unhelpfully circular."

Therefore, in order to short circuit the circular, to determine whether Complainant has cited the correct employer of the Boise worksite, the Court will access the facts under the common law agency doctrine enunciated in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992). *See, e.g., All Star Realty Company, Inc., d/b/a All Star Realty & Construction, Co*., 24 BNA OSHC 1356 (No. 12-1597, 2014); *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010); *Sharon & Walter Constr. Co*., 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting*, 21 BNA OSHC at 1035; *Sharon and Walter Construction, Inc.*, 23 BNA OSHC 1286 (No. 00-1492, 2010); and *AAA Delivery Service, Inc.*, 21 BNA OSHC 1219 (No. 02-0923, 2005). In *Darden*, the primary consideration is "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323. *See also Froedtert Mem'l Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (citing *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)(The Commission recognizes the company's control over the worker is the "principal guidepost" to determine the existence of an employment relationship). Other factors relevant to the inquiry are: (i) the skill required; (ii) the source of the instrumentalities and tools; (iii) the location of the work; (iv) the duration of the relationship between the parties; (v) whether the hiring party has the right to assign additional projects to the hired party; (vi) the extent of the hired party's discretion over when and how long to work; (vii) the method of payment; (viii) the hired party's role in hiring and paying assistants; (ix) whether the work is part of the regular business of the hiring party; (x) whether the hiring party is in business; (xi) the provision of employee benefits; and (xii) the tax treatment of the hired party. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). Therefore, the Court will proceed to assess the *Darden* factors.

1. Employer's Right to Control the Manner and Means of Employment, Assign Projects, Direct Work and Control Over When and How Long to Work.

Argument demonstrates Boise Partners has the right to control the manner and means of employment. Boise Partners directs the work schedule of managers and employees and supervises them throughout the day. (Tr. 13) Boise Partners has the authority to hire and fire the employees at the Boise worksite. (Tr. 20) Boise Partners has on-site management that handles the workforce, hiring, firing, training and enforcement of the health and safety policies at the

Boise worksite. (Tr. 20, 21) Boise Partners ultimately can modify, change, and revise and has the responsibility to implement work safety and health policies. (Tr. 22) Boise Partners in the end is the one that decides what to do as it relates to the Boise workplace. (Tr. 22) And, finally Boise Partners has its own disciplinary program to enforce the decisions and policies it implements. (Tr. 23) Complainant presented no evidence to contradict the above or to indicate the parent company, Delaware North, had adopted policies or procedures or had taken steps to control the manner and means of employment at the Boise worksite.

2. Skills Required.

The Parties presented no argument which addressed this issue.

3. Source of Workplace, Instrumentalities and Tools and Location of the Work.

Boise Partners is the corporate entity that entered into the lease with the City of Boise, Idaho ("Lease") covering the Boise worksite. (Tr. 12, Respondent Brief, Exhibit B) Under the Lease, Boise Partners was responsible to construct the worksite, equip the worksite, maintain the worksite and operate the worksite. (Respondent Brief, Exhibit B) Complainant presented no evidence to contradict the above or to indicate the parent company, Delaware North, was the entity responsible for providing, equipping and operating the Boise worksite.

4. Duration of the Relationship and Whether Work is the Business of Boise Partners or Delaware North.

Boise Partners was incorporated in 2014 before the Lease was entered into. (Respondent Brief, Exhibit A) Boise Partners is a corporation in good standing in the State of Idaho. (Respondent Brief, Exhibit A) Complainant does not dispute that Boise Partners is a separate corporate entity. (Tr. 25) Boise Partners has been the lessee under the Lease since 2014, and has operated the Boise worksite by hiring employees since that time. (Tr. 12-13) This is a situation where Delaware North has never been in the picture; except for being the parent corporation of the parent corporation of Boise Partners. (Tr. 15) There has been no disruptions in the role or responsibility of Boise Partners since it was incorporated, or entered into the Lease. Argument demonstrates that Boise Partners is in the sole business of providing food and beverage services at the Boise worksite, that providing food and beverage services at the Boise worksite is the only business of Boise Partners, and that Delaware North has never maintained an office in Boise, Idaho. (Tr. 14, Respondent Brief, Exhibit B)

5. Method of Payment, Employee Benefits and Tax Treatment of Employees.

The Parties provided no argument on provision of employee benefits. Boise Partners pays the employees' wages. (Tr. 13) Boise Partners has its own federal tax identification number. (Tr. 18, Respondent Brief, Exhibit C) Boise Partners issued W-2 statements to its employees using its own separate tax identification number. The statements indicate that wages were paid and federal and state taxes were withheld from those wages. (Respondent Brief, Exhibit C) Such practice indicates that Boise Partners considers itself the employer of the employees. Complainant provided no argument that Delaware North ever hired employees for the Boise worksite, paid the employees at the Boise worksite or issued W-2 tax statements to employees.

6. Whether the Employer is a Current Operating Business Entity.

Boise Partners is a corporation organized under the laws of the State of Idaho and is currently in good standing. (Respondent Brief, Exhibit A) It is a legally separate entity from Delaware North. (Tr. 12) Boise Partners operates the Boise worksite and Delaware North does not have a worksite at the Boise airport; nor does it employ individuals at the Boise airport. (Tr. 14)

The Delaware North group of business entities operates in a typical holding company[5] arrangement which is common in large business organizations. Delaware North is the parent corporation of all its subsidiaries and affiliates. (Tr. 15, Complainant's Brief, Exhibits 4, 5 and 6)

Delaware North Travel Hospitality Services, Inc. is owned by Delaware North and is the parent company which owns Boise Partners. (Tr. 15) In issuing the Citation, OSHA alleges the parent company of the entire holding company structure - Delaware North - is the employer of the individuals at the Boise worksite; in effect, skipping over Delaware North Travel Hospitality Services, Inc. which owns Boise Partners. (Tr. 15) By issuing the Citation, and in not disputing that Boise Partners is an ongoing business (Tr. 25), OSHA acknowledges that Boise Partners is currently an operating business entity that is currently operating the Boise worksite under the Lease.

[5] A corporation that limits its business to the ownership of stock in and the supervision of management of other corporations. A holding company is organized specifically to hold the stock of other companies and ordinarily owns such a dominant interest in the other company or companies that it can dictate policy. *See* West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved

Under the *Darden* factors, the weight of the evidence is that Boise Partners is the employer for the purposes of the Act. However, before finding such, the Court will consider additional arguments raised by Complainant.

7. Additional Arguments of Complainant.

Complainant argues that Boise Partners is a legal fiction (Tr. 25) and that OSHA has the right to rely on statements made, a business card provided, and how it holds itself out to the public in determining that Delaware North is the proper Respondent in this matter. In so holding, Complainant would ask Court to overrule legal precedent which establishes that only an employer can be cited under the Act. And as stated above, the determination of whether an entity is an employer is determined under *Darden,* the economic realities doctrine, the single entity doctrine or the multi-employer doctrine.

Complainant argues past practice in citing Delaware North as Respondent provides precedent for Delaware North being the proper Respondent in this case. (Complainant Brief, Exhibit 11) However, an examination of past citation practices does not entirely support Complainant's position. Complainant's Exhibit 11 verifies citations have been issued to Delaware North Companies, Inc.; Delaware North Companies Parks and Resorts, Inc.; and Delaware North at Yosemite. The history of citations itself underscores determinations made by OSHA that sometimes different corporate entities of the holding company were the correct employer in the facts driving the issuance of those citations. Whether an entity is an employer and therefore can be cited under the Act, is an individual factual determination that cannot be made by simply taking a position that any corporate subsidiary of Delaware North is a legal fiction, and in all instances Delaware North is the employer.

Twice OSHA issued past citations to Delaware North Corporation Parks and Resorts, Inc. Pursuant to Exhibit 5 of Complainant's Brief, Delaware North Corporation Parks and Resorts, Inc. is a separate legal entity which is owned by Delaware North Companies, Inc. In citing the subsidiary as opposed to the parent company, OSHA made an individual determination that Delaware North Corporation Parks and Resorts, Inc. was not merely a legal fiction but the employer for the purposes of being cited. OSHA evidentially made this determination after investigation and weighing the facts.

Likewise, Delaware North at Yosemite was cited by OSHA on five separate occasions for violations. Delaware North at Yosemite refers to a worksite located at the U. S. National Park at

Yosemite. (Complainant Brief, Exhibit 4). In citing Delaware North at Yosemite, OSHA did not argue it was a legal fiction. OSHA determined that business entity, which is a subsidiary of Delaware North, was the employer of this worksite.

Thus, past practice in citing some subsidiaries of Delaware North as opposed to always citing Delaware North undermines Complainant's argument. A determination of whether a business entity is an employer under the Act is a factual determination that should be made by OSHA after gathering and investigating those facts. Such determination should be not undermined by permitting OSHA to ignore legal precedent used to determine whether a business entity is an employer and simply allowing it to argue that Boise Partners is a legal fiction. Finally, the prior citations issued to the Delaware North umbrella of companies do not demonstrate a pattern of interrelationships or the companies holding themselves out as the same entity. Based on the citation history, the Court finds that Respondents lacked fair notice that Complainant considered all subsidiaries and affiliates of Delaware North to be one and the same.

In making the argument that Boise Partners is a legal fiction, Complainant ignores that in order for fiction to exist there has to exist the lack of factual predicates. Complainant's argument might carry some weight if Boise Partners was not an ongoing business entity organized as a corporation under Idaho law, if Boise Partners was not operating the Boise worksite, if Boise Partners did not hire and fire its employees, if Boise Partners did not have its own disciplinary policy, if Boise Partners did not have its own federal employer tax identification number, if Boise Partners did not issue W-2 statements to its employees and withhold appropriate federal and state taxes, if Boise Partners did not have its own checking account, if Boise Partners did not have its own health and safety policies, if Boise Partners did not have its own Board of Directors and management, if Boise Partners ignored corporate requirements to meet and maintain minutes and if Boise Partners did not maintain its own OSHA 300 logs in recording workplace injuries. However, as argument establishes, all these "ifs" are factual and existing so there can exist no fiction to argue. (Tr. 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25)

Complainant also argues that it has the right to rely on a business card that was provided to OSHA by the general manager, and how it holds itself out to the public in its Annual Report to Shareholders, which is accessible on the internet, as being the proper benchmark to determine who the employer at the Boise worksite is. (Tr. 27-29, 43) Complainant also argues it has the right to rely on statements of the general manager that were given to OSHA. Complainant states

that OSHA identified Respondent as it did and identified Delaware Partners dba DNCTHS Boise Partners, Inc. as the proper Respondent because the CHSOs "don't know what the specific legal fictions are and what corporate documents have been filed." (Tr. 27) Finally, Complainant argues that during the closing conference when the general manager was informed a citation would be issued to Delaware North, the general manager insisted that DNCTHS Boise Partners, Inc. be also listed. (Tr. 43, Complainant Brief, Exhibits 8 and 9)

A business card given to the CSHO by Bill Best identified Mr. Best as General Manager and had the heading "Delaware North". (Complainant Brief, Exhibit 10) Complainant argues that the business card identified Delaware North as the employer. While the business card does contain only the words "Delaware North" Respondent argues that it simply demonstrates that it is not uncommon for personnel at the Boise worksite to refer themselves as employees of Delaware North as shorthand since the "DN" in DNCTHS Boise Partners, Inc. stands for Delaware North. Respondent also argues that the use of a business card bearing only the words "Delaware North" is not an admission that they work for someone else or that it invalidates the corporate structure put into place. (Tr. 14)

Complainant argues that the employees at Boise worksite hold themselves out as Delaware North employees and thus this action justifies a finding that Delaware North is the correct Respondent in this action. (Tr. 28) Complainant has provided excerpts from the Annual Report of Delaware North obtained from its website along with a City of Boise resolution which use the Delaware North acronym as supporting his contention that Delaware North is the employer for the purposes of the Act. (Complainant's Brief, Exhibits 4-8) Respondent argues as to the Annual Report it is common practice for companies that have a corporate family to conglomerate all the companies into the Annual Report, and use a common term to refer to all members of the corporate family. (Tr. 15)

As to portions of the Annual Report, as Exhibit 5 to Complainant's Brief outlines, the Annual Report states clearly that references to "Delaware North" or when the terms "we, us and ours are used" it is used to generally describe the operations and functions of the subsidiaries and affiliates of Delaware North Companies, Incorporated. Thus, the Court concludes that this statement is recognition that Delaware North is composed of subsidiaries and affiliates that operate in their own legal being and the use of the term "Delaware North" is merely shorthand to make the reading of the Annual Report easier to understand.

As to the resolution of the City of Boise which approved entering into the Lease with Boise Partners (Complainant Brief, Exhibit 7), Complainant offers it to highlight throughout that the use of the words "Delaware North" indicates Delaware North Companies, Inc. is the employer for the purposes of the Act. Reliance of Complainant on this argument and Complainant's Exhibit 7 clearly fails to recognize that under the subject line the matter of the resolution is identified as "DNCTHS Boise Partners, Inc. Food & Beverage Concession Lease Agreement." Thus, in passing the resolution, the City of Boise clearly recognized that the lessee under the Lease was Boise Partners and not Delaware North. Use of the term "Delaware North" throughout the rest of the resolution, the Court determines, did not change the responsibilities of Boise Partners under the Lease and was simply used for ease of reading the resolution.

Therefore, the Court concludes that the use of the terms "Delaware North" either in Annual Report, the City of Boise resolution, or the business card does not change the legal analysis required in determining who the employer of the Boise worksite was for the purposes of the Act.

Finally, the Court is drawn to the argument of Complainant that "inspectors should be able to rely on the information they are given **when all the other attentive information supports that conclusion.**" (Tr. 43)(emphasis added) The two things relied upon here by OSHA in the issuance of the Citation (at the time the Citation was issued) was a business card and statement of the general manager that when informed a citation would be issued in the name of Delaware North the general manager also gave the CSHO the name of Boise Partners to add as a "dba". Clearly, the Court is perplexed by the lack of further investigation into who was the "employer" at the Boise worksite. It is noted that the inspection took place in June 2016. The citation was issued 15 days after the inspection. Clearly, OSHA had an additional 45 days before it had to issue the Citation to investigate the facts and determine - in light of the general manager giving them the corporate name of DNCTHS Boise Partners, Inc. - which entity was the correct employer. The easy reliance as proposed by Complainant on a business card and statement of the general manager who has not been demonstrated to have knowledge of the corporate structure or operations of Boise Partners cannot be permitted to substitute for good investigatory work or as an override to established legal doctrines.

What could the CSHO have done to assist him in his determination of the proper employer; considering he had 45 days remaining to issue the Citation? First, he could have

asked to see the OSHA 300 logs to determine which corporate entity was doing the reporting. Second, he could have asked to see the W-2 Statements issued to the employees. Third, he could have went online and obtained information that Boise Partners was a corporation organized under Idaho law and was in good standing. Fourth, he could have done what Complainant's counsel did in this case, and that is pull the City of Boise Lease resolution from the public website. Fifth, he could have asked to see the Health and Safety Program of Boise Partners. Finally, he could have pulled the history of the Delaware North corporate family as did Complainant's counsel and determine that in the past an individual determination was undertaken to determine the correct employer. Without the above information, which was easy to obtain either through a public domain or by requesting it from Boise Partners, the CSHO did not have attentive information to support the decision he made.

The Court concludes under *Darden* the employer of the Boise worksite, for the purposes of being cited under the Act, is "DNCTHS Boise Partners, Inc."

C. The Economic Realities Doctrine**.**

Current Commission precedent holds the term "employer" should be interpreted consistent with common law principles. Following the Supreme Court's decision in *Darden*, the Commission modified its prior position that the term "employer" is not limited to common law principles but may take into account the economic realities of the relationship. *See Timothy Victory*, 18 BNA OSHC 1023, 1026 (No. 93-3359, 1997), citing *Vergona Crane*, 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992).

In applying the economic realities doctrine, questions to be considered are: (i) whom do the workers consider their employer; (ii) who pays the workers' wages; (iii) who has the responsibility to control the workers; (iv) does the alleged employer have the power to control the workers; (v) does the alleged employer have the power to fire, hire, or modify the employment condition of the workers; (vi) does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and (vii) how are the workers' wages established. *Griffin and Brand,* 6 BNA OSHC 1702, 1703 (No. 14801, 1978).

As with analysis under *Darden,* Complainant has the burden of proof to establish an employer relationship under the economic realities doctrine. Argument and exhibits support a finding that Boise Partners is the employer at the Boise worksite under the economic realities doctrine. Boise Partners pays the workers at the Boise worksite. (Tr. 13, Respondent Brief,

Exhibit C) Boise Partners directs the work of the employees and supervises them throughout the day. (Tr. 13) Boise Partners hires and fires the employees. (Tr. 20) Boise Partners also has on-site management that handles the workforce, discipline, training and health and safety issues. (Tr. 21)

There is no direct evidence who the workers consider their employer. On one hand, Complainant argues that employees must consider Delaware North their employer because that term was used on the business card provided to the CSHO. However, that position is undermined by the actions of the same individual who provided the business card when he insisted to the CSHO that Boise Partners be added to the citation in addition to Delaware North. Such action by the general manager would indicate that he considered Boise Partners his employer.

There was no argument, testimony or exhibits which addressed whether the wages of the Boise employees were based on efficiency rather than initiative, judgment or foresight or how the wages were determined. Overall, the Court finds the elements that are entitled to more weight and therefore, the "principal guidepost" is which entity has control over the worker in determining the existence of an employment relationship. The evidence and argument clearly support a finding that Boise Partners has control over the worker, the worksite, and worker safety and health issues. Therefore, under the economic realities doctrine, the Court finds that Boise Partners is the employer for the purposes of citation under the Act.

**D. Separate Business Entity Doctrine.**

Pursuant to long-standing Commission precedent, two related employers will be regarded as a single entity or a single employer where they share a common worksite and common ownership, management or supervision, and where they have interrelated and integrated operations. *See C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-87 (Nos. 94-3241, 94-3327, 2003); *Vergona Crane Co*., 15 BNA OSHC 1782, 1783 (No. 88-1745, 1993). *See generally, Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) (to effectuate a clear legislative purpose, technical distinctions between related corporations will be disregarded). Complainant bears the burden of showing that the cited employer is part of a single-employer relationship. *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358 n.4 (Nos. 02-1164 & 02-1174, 2011), *aff'd,* 692 F.3d 65, (2d Cir. 2012), overruling in part *Trinity Indus., Inc*., 9 BNA OSHC 1515, 1518-19 (No. 77-3909, 1981) (overruling the Trinity holding that the employer has the burden of persuasion when the Secretary alleges a single-employer relationship).

Delaware North and Boise Partners do not share a common worksite. Delaware North does not have a worksite in Boise. (Tr. 14) Complainant states that Delaware North has its office in either New York or Philadelphia. (Tr. 26) Boise Partners has its own board of directors and officers. Complainant did not establish that while Boise Partners may have its own board of directors and officers; the Boise Partners board of directors overlaps with the membership of Delaware North. Boise Partners has on-site management responsible for hiring, firing and discipline of the employees and establishing and administering its own health and safety program. (Tr. 13, 21) Delaware North has no employees at the Boise worksite. Therefore, Complainant has failed to prove that there is common ownership, management or supervision of the Boise worksite.

As the parent company of the holding company, Delaware North does have an overall interest in the performance of Boise Partners. Complainant has established that Boise Partners has access to and does rely upon standard health and safety programs provided by Delaware North. (Tr. 21) In addition, Delaware North files a consolidated tax return on behalf of the Delaware corporate family. (Tr. 20) However, Complainant has not established beyond Delaware North having an interest in the economic performance of Boise Partners, access to information from Delaware North or the filing of a joint tax return by Delaware North that they have integrated operations. Contrary, argument and the exhibits establish that Boise Partners has its own board of directors and officers, has its own business location, has its own health and safety policy, has the final decision to implement health and safety policies, has a separate disciplinary policy, has a separate tax identification number and reports its own injury and illness under OSHA 300 logs under its name.

This evidence is strong enough to overcome any inference from Complainant's arguments and evidence that the operations of Delaware North and Boise Partners are substantially integrated to find an employment relationship under the single entity doctrine. For all of the foregoing reasons, the Court finds that Complainant has not met his burden of proving, under the Commission's precedent set out above,that Delaware North and Boise Partners operate as a single entity.

**E. Absolute Roofing and Construction, Inc. is not Dispositive on the Issue.**

Complainant argues *Absolute Roofing & Construction, Inc.,* 24 O.S.H.Cas. (BNA)(No. 11-2919, 2013)(ALJ Baumerich) is dispositive of the issue in this case. Complainant's argument is that an entity can be found to be an employer based on how the entity held itself out to the public and responded to CSHO questions. In making these arguments, Complainant relies on two statements by Judge Baumerich in *Absolute Roofing* that OSHA has the right to rely on information provided during the course of an inspection in determining who was the employer (*Id.* at 1895) and when companies hold themselves out to the public as the same entity (*Id.* at 1888), they can be deemed an employer.

Complainant's reliance on *Absolute Roofing* misplaced. First, *Absolute Roofing* is factually distinguishable from this case, by the depth of the investigation which took place in *Absolute Roofing,* the history of *Absolute Roofing* citations, the operating relationship between the related entities and finally the longstanding relationship between OSHA inspectors and the principals of *Absolute Roofing.* Also, *Absolute Roofing* did not address the evidence in terms of a holding company formation and operation of the parent and subsidiary corporations.

Second, reliance on two statements in Judge Baumerich's Decision does not support the argument of Complainant in this case. An examination of the *Absolute Roofing Decision* clearly establishes that when Judge Baumerich made a decision of who was the "employer" under the Act for the purposes of the citations issued in that case, she analyzed the facts according to the *Darden* factors, the economic realities doctrine and the single entity doctrine. Under all these evaluations, (which is also the case in this matter), Judge Baumerich found Absolute Roofing & Construction, Inc. the "employer" and therefore the proper Respondent.

Third, Judge Baumerich's statement in *Absolute Roofing*, that the CSHO has the right rely on information given to him during the course of an investigation was given in the context of Judge Baumerich weighing the evidence and accessing credibility of the CSHO and not for the purpose of making a new legal standard. It is clear that Judge Baumerich did not hold in determining whether one is an employer under the Act, OSHA can solely rely on the information provided by managers that may not be knowledgeable of corporate structure or operations when providing information which may be contradicted by other readily available evidence.

Finally, the statement in *Absolute Roofing* that when two entities hold themselves out to the public as one entity they should be considered one employer was made in Judge Baumerich's

analysis of whether the two related entities in *Absolute Roofing* were considered one employer under the single entity doctrine. Two entities holding themselves out to the public as one entity was not the only fact that Judge Baumerich discussed in reaching the decision she did in *Absolute Roofing*.

For the above reasons, Complainant's reliance on *Absolute Roofing* is misplaced.

**Conclusion**

For the foregoing reasons, under *Darden*, the economic realities doctrine and the single entity doctrine, the Court finds the employer for the Boise worksite was "DNCTHS Boise Partners, Inc." According, Delaware North Companies, Inc., is DISMISSED from this action. In addition, the Citation and the case caption in this matter is amended to reflect solely the Respondent is "DNCTHS Boise Partners, Inc." and going forward all pleadings shall reflect the caption identified in this Order.

SO ORDERED.

/s/ *Patrick B. Augustine*
Patrick B. Augustine
Judge - OSHRC

Dated: March 20, 2017
Denver, CO