United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. WARZALA CONSTRUCTION Respondent.	OSHRC Docket No. 19-0265

DECISION AND ORDER

Attorneys and Law firms

For Complainant: Stephanie D. Adams, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Cleveland, OH

For Respondent: Kevin P. Murphy, Esq., Harrington, Hoppe & Mitchell, Ltd., Warren, OH

BEFORE: John B. Gatto, United States Administrative Law Judge

I. INTRODUCTION

The United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), investigated the death of Scott Stone, a worker at the site of a waste transfer facility located in Warren, Ohio. Following that investigation, OSHA determined Stone was employed by Respondent, sole proprietor Richard Warzala d/b/a Warzala Construction ("Warzala"),[1] and issued two citations to Warzala on January 29, 2019, under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678.[2] Citation 1 asserted Warzala

[1] In Ohio, "[a] sole proprietorship has no legal identity separate from that of the individual who owns it." *Patterson v. V & M Auto Body*, 589 N.E.2d 1306, 1308 (Ohio 1992).

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

committed a serious[3] violation of 29 C.F.R. § 1926.760(a)(1), one of OSHA's fall protection standards. Citation 2 asserted Warzala committed an other-than-serious violation of 29 C.F.R. § 1904.39(a)(1), for failing to report the death of an employee to OSHA within eight hours. After Warzala timely contested the citations, the Complainant, Secretary of Labor filed a formal complaint with the Commission seeking an order affirming the citations and proposed penalties.[4] A bench trial was held in Cleveland, Ohio.

The Court finds that at all relevant times Warzala was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. (Compl. ¶¶ 2(a), 3(a); Answer ¶¶ 2, 4; *see also* Joint Status Report ("JSR") ¶¶ (c)(1)-(4)). Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law, which constitutes its final disposition of the proceedings. All arguments not expressly addressed have nevertheless been considered and rejected.[5] For the reasons indicated *infra*, the Court **VACATES** the citations without civil penalty assessments.

II. BACKGROUND

A. Warzala

Warzala is a sole proprietorship owned by Richard Warzala whose principal place of business is located in Warren, Ohio. (JSR ¶ (c)(2)). Warzala has been in the construction industry since 1985. (Tr. 80). Regular jobs for Warzala include residential remodels and renovations, flooring, concrete work, and, at least at some point in the past, roofing. (Tr. 58, 61-62). Warzala had at least two employees at the time relevant to this proceeding: two "laborers" named Wally Weaver and Joe Bush.[6] (Tr. 77-78). Warzala assigned Bush and Weaver tasks such as "clean[ing]

[3] The Act contemplates various grades of violations of the statute and its attendant regulations— "willful"; "repeated"; "serious"; and those determined "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. § 666. A serious violation is defined in the Act; the other grades are not. *See* 29 U.S.C. § 666(k).

[4] Attached to the Complaint and adopted by reference were the citations at issue (Compl., Ex. A). Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[5] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

[6] Warzala also testified that his niece, and possibly his wife, had some involvement in the operations of the company, like handling payroll. (Tr. 77). However, they were not paid for these services. (*Id.*)

up, unload[ing], basically whatever needed done labor-wise."[7] (Tr. 77). Warzala paid both employees weekly at an hourly rate. (Tr. 55, 77-78). Weaver was paid $12 an hour while Bush was paid $13 an hour because he "was there a little longer." (*Id.*) Warzala completed a W-2 for Bush and Weaver. (Tr. 55, 77).

B. Stone and Warzala

Warzala met Stone at some point in 2018 through a mutual friend. (Tr. 55). At the time, Stone was working at the friend's house. (Tr. 55-56). Warzala asked the friend if Stone could work for other people. (Tr. 58). Stone thereafter started doing work for Warzala. (*Id.*). Warzala assigned Stone tasks similar to those he assigned his other "laborers," Bush and Weaver, including raking, cleaning up, and other "odd jobs." (Tr. 22, 77). For example, in 2018, Stone assisted Warzala with a bathroom remodel and a full residence remodel. (Tr. 58, 80-81). Stone did not require any tools or special expertise for the jobs assigned to him by Warzala. (Tr. 72).

Like he did for Bush and Weaver, Warzala paid Stone weekly at a rate of $12 an hour. (Tr. 60, 71-72, 107). Because Stone did not have a driver's license, Warzala also drove Stone to and from the sites of the various projects where he worked, dropping him off at 7:30 in the morning and picking him up at 3:30 in the afternoon. (Tr. 59). For Stone's jobs with Warzala, Warzala knew how much to pay Stone each week because he drove him to each site and thus knew the number of hours he worked. (Tr. 75, 109-10). Warzala did not withhold any taxes from Stone's weekly paychecks, nor did he offer him any employment benefits. (Tr. 81-82, 106; *see also* Ex. R-E). Stone worked on other jobs with which Warzala had no involvement. For example, Stone had a gutter cleaning job in Austintown, Ohio and another job doing gutter cleaning and roof repair for an individual named Anthony Tountas. (Tr. 69-70, 89-91). Although Warzala drove Stone to the job with Tountas, he did not do so for the job in Austintown. (*Id.*).

C. The Environmental Transfer Building Project

The building where Stone's death occurred is called the "Environmental Transfer Station" ("ETS") and is located in Warren, Ohio. (Tr. 91; *see also* Ex. C-2, Ex. C-6, Ex. C-8). The building functions as a waste transfer facility, where the City of Warren and other entities bring their garbage to be loaded onto semi-trucks and hauled to a landfill. (Tr. 91). The building itself is owned by an individual named Gil Reiger, while an individual named Rick Jones runs the waste

[7] Warzala did not testify specifically as to the duties he assigned to Bush, but it appears he held a similar position with the company as Weaver. (Tr. 78).

transfer business from the building. (*Id.*). Warzala has known Jones his whole life and frequently did construction work for him. (Tr. 62).

At some point before 2018, Jones contacted Warzala about replacing the metal roofing on the ETS. (Tr. 63; *see also* Ex. C-10). Warzala initially accepted the job, and Jones purchased the replacement roofing for it. (Tr. 63, 93, 96; *see also* Ex. C-9). However, for reasons unclear from the record, Warzala did not do any work in furtherance of the roof replacement for about a year. (Tr. 63, 93). At some point thereafter Warzala and Jones discussed the roof replacement, Warzala separately contracted with Jones to pour concrete at the ETS. (Tr. 61). Stone worked on this job with Warzala, as did an individual named Norman Miller. (Tr. 93-94). Warzala and Miller had an extensive history, having worked together on approximately 500 projects over six years. (Tr. 70-71). Warzala did not consider Miller to be an employee and completed a 1099 for him, rather than a W-2. (Tr. 80-83; *see also* Ex. R-F). He did not extend any employment benefits to Miller. (Tr. 81-83).

While doing the concrete work at the ETS with Warzala, Miller saw the metal roofing and inquired about the roof replacement job. (Tr. 93-94). Warzala told Miller he could "have the job," but that he'd "have to take it and okay it with Rick Jones." (Tr. 94). Thereafter, Warzala arranged a meeting with Jones and Miller to discuss the job. (Tr. 94). The result of that meeting was a "handshake deal" between Warzala and Jones for Miller to take on the roof replacement job. (Tr. 40-41). Jones gave Miller a key to access the ETS building. (*Id.*). Warzala did not have a key or other access to the building. (Tr. 100). Jones supplied the metal decking to replace the roof as well as a scissor lift that was onsite to access the roof. (Tr. 43-44, 94). For his part, Warzala provided a welder and a generator. (Tr. 43-44, 68, 97-98, 108-09). No payment arrangement for the roofing job was ever discussed at this meeting. (Tr. 43, 109). After this initial meeting, Warzala had no further involvement with the roofing job. He had no role in any payment between Jones and Miller and did not set the schedule for Miller and Stone to work or complete the job. (Tr. 95, 100).

After Miller had taken on the roofing job, Stone asked Warzala if he also could also work on it.[8] (Tr. 95). Warzala told Stone it was Miller's job, and Stone would have to discuss it with him. (*Id.*). Miller agreed to let Stonework on the job because he had "12 years in the roofing

[8] According to Warzala, Stone was a "hustler" and was "always looking for extra stuff to do." (Tr. 95).

business." (*Id.*). As he did for Stone with his other jobs, Warzala drove Stone to the ETS on the days he worked there.[9] (Tr. 102).

D. The Accident and OSHA Inspection

On the Friday after Thanksgiving in 2018, Stone and Miller were working on the roof of the ETS, tearing off the old metal roofing. (Tr. 96; *see also* Ex. C-1, p. 25[10]). Neither was wearing any form of fall protection. (Tr. 19-21; *see also* Ex. C-1, p. 25). At some point, "[r]ather than walking on the new metal roofing, which was being installed, [Stone] stepped out onto the old roofing. The old metal roofing was highly deteriorated[,] and he fell through to the concrete floor below[,]" a distance of nearly thirty feet. (Ex. C-1, p. 25). Stone died as a result of his fall. (Tr. 20-21, 72; *see also* Ex. C-1, pp. 52-60, 76-77). Miller called Warzala to inform him of the accident. (Tr. 72). Warzala did not inform OSHA of Stone's death. (Tr. 19, 32). However, an OSHA Compliance Officer's father read Stone's obituary and reported the accident to that Compliance Officer. (Tr. 32; *see also* Ex. C-1, pp. 76-77). That Compliance Officer then referred the case to the area OSHA office, which assigned Compliance Officer Grakauskas to investigate. (Tr. 32).

Grakauskas investigated the worksite on December 3, 2018, accompanied by a representative from the Ohio Bureau of Worker's Compensation ("BWC"). (Tr. 32, 33-34; *see also* Ex. C-1, pp. 24-25). The BWC representative measured the height of Stone's fall, which was about 30 feet. (Tr. 19, 24, 33-34). Grakauskas interviewed Miller and Jones. (Tr. 30, 33-34). Grakauskas determined Stone had not been using any form of fall protection while working on the ETS roof. (Tr. 19-21; *see also* Ex. C-1, p. 25).

Because Stone's obituary reported him to be an employee of Warzala, Grakauskas tracked down Warzala for an interview. (Tr. 34; *see also* Ex. C-1, pp. 76-77). Warzala told Grakauskas the roofing job was Miller's, not his. (Tr. 39; *see also* Ex. C-1, p. 25). Over the course of his interview, however, Grakauskas asked a series of questions concerning the work relationship between Stone and Warzala. (Tr. 19-20, 42-43; *see also* Ex. C-1, p. 25). Grakauskas ultimately determined Stone was Warzala's employee and recommended the issuance of the two citations at issue. (*Id.*).

[9] Normally this would be on weekends when Warzala did not do his own construction work. (Tr. 94, 105-06). However, the accident occurred on the Friday after Thanksgiving while Warzala was working on another job. (Tr. 96).

[10] Citations to specific pages in Complainant's Exhibit 1 are to the Bates number.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id.* To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standards at issue in this case were promulgated. "The Secretary establishes these standards through the exercise of rulemaking powers." *Id. See* 29 U.S.C. § 665. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam).

Under the law of the Sixth Circuit where this case arose,[11] to establish a violation of a health or safety standard under the Act, "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence." *Carlisle Equip. Co. v. U.S. Sec'y of Labor & Occupational Safety*, 24 F.3d 790, 792 (6th Cir. 1994). Warzala has

[11] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Ohio, in the Sixth Circuit, where Warzala's office is also located. *See* 29 U.S.C. § 660(b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The Court therefore applies the precedent of the Sixth Circuit in deciding the case where it is highly probable that the case would be appealed.

not contested any elements of the Secretary's *prima facie* case. Rather, its case rests on its contention that Stone was not an "employee" as defined by the Act. (JSR ¶ (b)).

A. Alleged Violations

1. Citation 1

Citation 1 alleges Warzala violated 29 C.F.R. § 1926.760(a)(1) when its "employees engaged in steel erection activities were not protected from fall hazards as required. Employees were exposed to a fall of approximately 30 feet while engaged in metal roofing tear off and application." (Compl., Ex. A.) The cited standard mandates that "each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems." 29 C.F.R. § 1926.760(a)(1).

2. Citation 2

Citation 2 alleges Warzala violated 29 C.F.R. § 1904.39(a)(1) when it "failed to report the fatality of an employee." (Compl., Ex. A.) The cited standard mandates that "[w]ithin eight (8) hours after the death of any employee as a result of a work-related incident, you must report the fatality to the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor." 29 C.F.R. § 1904.39(a)(1).

B. Covered Employer

As a condition precedent to citing Warzala, the Secretary must show Warzala was an employer within the meaning of the Act. *See All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) ("[T]he Secretary has the burden of proving that a cited company is the employer of the affected workers at the site") (*citing Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated)). Here, the Act defines employer as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "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(6). As the Commission noted, this definition is "unhelpfully circular." *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001). "[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989). Thus,

"[i]n determining whether the Secretary has established that a cited entity is the employer of the particular workers at issue, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992)." *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010)).

In *Darden*, the Supreme Court held that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323 (*quotation omitted*). The *Darden* Court held "[a]mong the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Darden*, 503 U.S. at 323-24) This "common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*, 503 U.S. at 324 (ellipsis in original) (*quotation omitted*).

First, the Court finds that Warzala did not exercise so much control over the manner and means of Stone's work at the ETS job as to render him an employee. The Secretary asserts that Warzala "controlled all aspects of the [ETS] project, determining who would work on the project, the schedule for the work and the tools to be used." (Sec'y's Br. 8). The Court finds no merit in the Secretary's assertion. Warzala testified, without contradiction, that once Miller took over the job after meeting with Jones, Warzala had no further involvement in the day-to-day of the job. (Tr. 95, 100). The Secretary argues "[a]lthough Mr. Stone did not need direct supervision, Mr. Warzala told him what to do, where to do it and he did it." (Sec'y's Br. 9). However, the portion of Warzala's testimony cited by the Secretary for this assertion was extremely general, and the line of questioning related only to the jobs for which Stone worked directly for Warzala. (Tr. 59-60).

With regard to the ETS job, Warzala specifically testified that Stone had to make any arrangements with Miller, not Warzala. (Tr. 95). Indeed, Jones gave Miller, not Warzala, the key to access the ETS building and complete the work. (Tr. 66-67). When Stone approached Warzala about possibly working on the ETS job, Warzala told him it was Miller's job and Stone would

have to ask him to work on it. (Tr. 95). The Secretary cites no support in the record, and the Court finds none, for his assertion that "Miller was told by Mr. Warzala to complete the transfer station job with Mr. Stone." (Sec'y's Br. 9). Thus, the Court does not find the record supports the level of control the Secretary alleges.[12]

The preponderant evidence establishes that while Warzala had initially contracted for the roofing job at the ETS building, this job was eventually given to Miller. (Tr. 39-41, 67-68, 94). After Miller took the job from Warzala, Warzala had no further involvement in the project, including any supervision over Stone on the day-to-day of the project. (Tr. 95, 100). Thus, Warzala retained no "right to control the manner and means by which the ETS roofing job was accomplished." This finding heavily weighs in favor of finding Stone was not Warzala's employee.

Turning next to the nonexhaustive list of twelve additional factors set forth in *Darden*, the majority support the conclusion that Stone was an independent contractor. First, regarding "the skill required," where a hired party provides highly specialized labor to a hiring party, this factor weighs in favor of independent contractor status. *Weary v. Cochran*, 377 F.3d 522, 527 (6th Cir. 2004). Here, there is no dispute that the work Stone was doing was not performing highly specialized work, mainly providing labor to remove the metal decking from the ETS roof. (Tr. 96; *see also* Ex. C-1, p. 25). As the Secretary also points out, the other work Stone performed for Warzala consisted of unskilled manual labor similar to the work performed by Warzala's two other employees, Bush, and Weaver. (Tr. 72, 77; *see also* Sec'y's Br. 10). This factor weighs in favor of finding Stone was Warzala's employee.

Second, as to "the source of the instrumentalities and tools," a hired party supplying all of his own tools supports his status as an independent contractor, but if the hiring party supplies or owns the tools, this factor favors finding the hired party is an employee. *Absolute Roofing & Constr., Inc. v. Sec'y of Labor*, 580 F. App'x 357, 361 (6th Cir. 2014) (unpublished) (citing *Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 250 (6th Cir. 2005)). As the Secretary correctly points out, for most of the work Stone did for Warzala, like

[12] Although the Secretary cites in support of his position *Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012), *aff'd* 20 F.3d 938, 942 (9th Cir. 1994), *Loomis* does not compel a different conclusion. In *Loomis*, the Commission applied its own "economic realities" test, not the *Darden* factors. *See Loomis Cabinet Co.*, 15 BNA OSHC at 1637. Indeed, the Commission expressly declined to apply the *Darden* factors, noting only that it would have reached the same result under the *Darden* test as it did under its economic realities test. *Id.* at 1638 n.9. In any event, the degree of control of the employer in *Loomis* was far more significant than the record demonstrates here, as the Court's analysis of the *Darden* factors demonstrates *infra*.

cleaning up or unloading materials, few specialized tools were required. For the ETS roofing job in particular, Warzala admitted to supplying at least two pieces of equipment necessary to complete the work: a generator and a welder. (Tr. 20, 43-44, 68, 97-98, 108-09). Ultimately, Miller and Stone used their own generator. (Tr. 97-98). On the other hand, the replacement roofing was supplied by Jones, who also supplied a forklift necessary to complete the work. (Tr. 43-44, 94). Thus, on balance, this factor weighs more heavily toward the conclusion that Stone was an independent contractor than toward the conclusion that he was an employee.

As to the third factor, "the location of the work," when a hired party regularly reports to a site owned or controlled by the hired party, or the hiring party otherwise controls the location of the work to be performed, this factor weighs in favor of finding the hired party is an employee. *Absolute Roofing*, 580 F. App'x at 361 (citing *Weary*, 377 F.3d at 526–27). Warzala did not own or control the ETS worksite. The building itself was owned by an individual named Gil Reiger, while Jones ran the waste transfer business from the building. (Tr. 91). For the roofing job, only Miller had a key to access the worksite. (Tr. 40-41, 100). Warzala did not assign Stone to work at the ETS; rather, Stone arranged with Miller to work there. (Tr. 95). This finding weighs in favor of finding Stone was not Warzala's employee.

On the other hand, the fourth factor, "the duration of the relationship between the parties," appears to militate toward employee status in light of Stone's relationship with Warzala, since evidence of an indefinite duration favors employee status rather than independent contractor status. *See Absolute Roofing*, 580 F. App'x at 351 (citing *FM Home Improvement*, 22 BNA OSHC 1531, 1538 (No. 08-0452, 2009) (ALJ)). As the Secretary points out, Warzala met Stone sometime in 2018 and hired him for several projects throughout that year. (Sec'y's Br. 11). This factor weighs in favor of finding Stone was Warzala's employee.

As to the fifth factor, "whether the hiring party has the right to assign additional projects to the hired party," a hiring party's right to assign additional projects is indicative of the hired party's status as an employee. *Absolute Roofing*, 580 F. App'x at 362. The Secretary argues that Warzala had the right to assign additional duties based largely on Warzala's testimony that "he told [Stone] what to do and he would do it." (Sec'y's Br. 9). Warzala's testimony on this point was heavily influenced by the framing of the question when he was asked, "You told [Stone] what to do and he would do it?" And Warzala responded, "Correct." (Tr. 60). However, there is nothing in the record to indicate Stone was required to accept the jobs Warzala offered him. *Cf. Absolute*

Roofing, 580 F. App'x at 362 (finding this factor indicated employee status where hired party received daily job assignments and could be moved around jobsites for the same employer); *see also Sharon & Walter Constr.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (finding in part that a worker was an employee because the company required him to report back to headquarters for additional assignments if he finished his work before the end of his shift). In fact, at the time of the accident, Stone was working on at least one other job in Austintown, Ohio, with which Warzala had no apparent connection at all.[13] (Tr. 89-91, 102). As to the ETS job specifically, Warzala did not assign this job to Stone; rather, he referred Stone to Miller if he wanted the job. (Tr. 95). This finding weighs in favor of finding Stone was not Warzala's employee.

Sixth, we look to "the extent of the hired party's discretion over when and how long to work" since an "independent contractor … has complete authority over when and how long to work" while an employee's hours are controlled by his employer." *Absolute Roofing*, 580 F. App'x at 362. The Secretary argues that Warzala had control over Stone's hours because he drove him to and from Warzala's various worksites and used this to calculate his hours for payment each week. (Sec'y's Br. 8, 14). As to the ETS job itself, the Secretary further asserts that Warzala controlled Stone's hours because (1) Warzala told Jones the job would only be done on weekends and (2) Warzala drove Stone to and from the ETS site on the days he worked there. (*Id.* at 10). The Court finds no merit in the Secretary's arguments. Since Warzala was not paying Stone for his work on the ETS (Tr. 95), the Court does not find it particularly relevant as to how Warzala kept track of Stone's hours for the projects that Stone *was* working for Warzala. While Warzala did indicate to Jones that Miller and Stone would only be working on the ETS roofing job on weekends, he also testified that on those days he had no control over when or how many hours the two actually worked. (Tr. 95-100). This is not the sort of control over an employee's hours contemplated by *Darden*. *Cf. Weary*, 377 F.3d at 527 (finding in part that, because the hired party controlled his hours and was "free to take vacation at his leisure and did not report his hours to anyone," the hired party was an independent contractor). Further, the Court finds no merit in the Secretary's assertion that when Warzala drove Stone to and from the ETS site on the days he worked there, Warzala

[13] Although the Secretary argues Warzala "had no evidence to substantiate" its claim that Stone took on jobs from companies other than Warzala (Sec'y's Br. 13), it is the Secretary's burden to prove an employer-employee relationship and he offered no evidence to refute Warzala's testimonial evidence.

had control over Stone's hours on those days. This finding weighs in favor of finding Stone was not Warzala's employee.

As to the seventh factor, "the method of payment," payment on a commission basis is indicative of a hired party's status as an independent contractor while a set hourly rate weighs in favor of employment status. *Absolute Roofing*, 580 F. App'x at 363. With regard to this factor, the Secretary emphasizes that Warzala paid Stone weekly at a rate of $12 an hour for his work. (Sec'y's Br. 13-14). While this may have been true of some of the work Stone performed for Warzala, there is simply no evidence to rebut Warzala's testimony that this payment arrangement did not apply to the ETS roofing job. (Tr. 95, 100). This finding weighs in favor of finding Stone was not Warzala's employee.

As to the eighth factor, "the hired party's role in hiring and paying assistants," a hired party's ability and discretion to hire and fire his own assistants is indicative of independent contractor status, whereas a hired party's lack of authority to hire or fire anyone is indicative of employee status. *Absolute Roofing*, 580 F. App'x at 381 (citing *Weary*, 377 F.3d at 527). There was no evidence adduced to suggest Stone was allowed to hire or fire assistants or had any authority to do so. This factor weighs in favor of finding Stone was Warzala's employee.

As to the ninth and tenth factors, "whether the work is part of the regular business of the hiring party" and "whether the hiring party is in business," where a hiring party is in business and the hired party's work is part of the hiring party's regular business, this factor favors a finding that the worker is an employee. *Weary*, 377 F.3d at 528. There is no material dispute that Warzala was generally in the business of construction or that many of the tasks Stone performed on behalf of Warzala, like helping with home remodels, were part of Warzala's regular business of construction work. While Warzala disputes he was in the business of roofing, which was the work being performed at the ETS, and he testified he did not typically engage in roofing activities, he also testified that it was work he had done in the past. (Resp't's Br. ¶¶ 4, 43; Tr. 62-62, 99). Indeed, he had originally accepted the ETS roofing job from Jones before ultimately giving it to Miller. (Tr. 63, 93, 96). Thus, the Court finds roofing was part of Warzala's regular business. These factors weighs in favor of finding Stone was an employee.

As to the eleventh factor, "the provision of employee benefits," provision of employee benefits is indicative of a hired party's employee status. *Absolute Roofing*, 580 F. App'x at 361.

The Secretary has not rebutted Warzala's testimony that he provided no employee benefits to Stone. (Tr. 81-82). This finding weighs in favor of finding Stone was not Warzala's employee.

The twelfth, and final, additional factor from the *Darden* list is "the tax treatment of the hired party." An employer's tax treatment of a hired party as an independent contractor (by filing a form 1099 instead of a W-2) also weighs against finding the party is an employee. *Absolute Roofing*, 580 F. App'x at 361. The Secretary does not dispute Warzala's evidence that Warzala treated Stone as an independent contractor for tax purposes. *See* Ex. R-E. However, the Secretary does argue that "Mr. Warzala simply issued a 1099 to Mr. Stone after his death in an effort to deny an employment relationship." (Sec'y's Br. 14). The only evidence the Secretary cites in support of this assertion is the following exchange at trial between Compliance Officer Grakauskas and the Secretary's attorney:

> Q Did you ask Mr. Warzala how Mr. Stone was paid?
>
> A Yes.
>
> Q Do you recall the response?
>
> A I believe he said he had given him checks a few times and he was paid hourly depending on what work he was doing.
>
> Q Did you ask Mr. Warzala if he had issued a 1099 for Mr. Stone?
>
> A I did.
>
> Q And what was his response?
>
> A I would have to refer back to my notes, but I don't think he had completed one.

(Tr. 21). Grakauskas then read from his notes that Warzala "never had him fill out a 1099" but he "did give him his Social for the end of the year." (Tr. 22).

The Court finds no merit in the Secretary's assertion that Warzala's issuance of a 1099 for Stone was done "in an effort to deny an employment relationship" and his implicit assertion that the timing of Warzala's issuance of a 1099 for Stone was somehow irregular. Under the Internal Revenue Code, "[i]n connection with payments to 'independent contractors,' employers only have to send annual information returns, on Form 1099 to the workers and on Forms 1096 and 1099 to the IRS, indicating the income paid [to the independent contractor] during the year." *Hosp. Res. Pers., Inc. v. United States*, 68 F.3d 421, 424 (11th Cir. 1995). Forms 1099 and 1096 are required when the "salaries, wages, commissions fees, and other forms of compensation for services

rendered aggregat[es] $600 or more." 26 C.F.R. § 1.6041–1(a)(1)(i)(A). Thus, there is nothing unusual about filing a 1099 after the end of a calendar year. Additionally, the Court notes that the payments reflected in Stone's 1099 did not reflect any payments made for the ETS job. (Tr. 82). This finding weighs in favor of finding Stone was not Warzala's employee.

Lastly, the Court considers the "economic realities" of the relationship between Stone and Warzala. *See Wilde,* 15 F.3d at 105. Most aspects of this issue have already been addressed in the discussion above, but the Court further notes the lack of any leave or vacation policy and observes that the Secretary proffered no evidence that the working relationship could not be terminated at will by either party. Both of these factors weigh in favor of independent contractor status.

IV. CONCLUSION

In summary, then, on the general issue of control, this factor weighs heavily in favor of finding Stone was not Warzala's employee. Of the twelve additional *Darden* factors, seven count in favor of independent contractor status and five count toward employee status. Finally, to the limited extent that the economic realities of Stone's working relationship with Warzala are not reflected in the analysis of the *Darden* factors, they support the view that he was an independent contractor.[14] The Court therefore concludes Stone was an independent contractor, and therefore, the Secretary has failed to establish by a preponderance of evidence that Stone was Warzala's employee. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT both citations are **VACATED** and no civil penalties are assessed.

SO ORDERED.

/s/

First Judge John B. Gatto

Dated: November 16, 2020
Washington, D.C.

[14] The Secretary also proffered Stone's obituary, which stated he was "a roofer and construction worker for Warzala[.]" (Ex. C-1, p. 77). However, labels carry little weight in determining a hired party's status as an employee. *Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n,* 20 F.3d 938, 942 (9th Cir. 1994). The Court therefore gives little weight to Stone's obituary. Warzala also proffered a decision from the Ohio BWC concluding that for purposes of worker's compensation benefits Stone was not Warzala's employee (Ex. R-H), which the Court does not find relevant since the factors relied on to determine whether a worker is an employee for Ohio worker's compensation benefits are not coterminous with the *Darden* factors. *Bostic v. Connor,* 524 N.E.2d 881 (Ohio 1988).