

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION
AS IT IS PENDING COMMISSION REVIEW**

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

SECRETARY OF LABOR,

Complainant,

v.

MONROE DRYWALL CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 12-0379

APPEARANCES:

Melanie L. Paul, Esquire, U.S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For the Complainant.

Nathalie Monroe and Jeremy Monroe, Monroe Drywall Construction, Inc.
Panama City Beach, Florida
For the Respondent, *pro se*.

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under 29 U.S.C. § 659(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act). The Occupational Safety and Health Administration (OSHA) inspected a worksite of Respondent in late September and early October of 2011. The worksite was located in Panama City, Florida. The inspection came about after a worker at the site was electrocuted on September 27, 2011, while engaged in drywall work.

On January 24, 2012, OSHA issued Respondent a Citation and Notification of Penalty (Citation). Item 1a of Citation 1 alleged a serious violation of 29 C.F.R. § 1926.20(b)(1), for not having a safety and health program. The Secretary withdrew this item at the hearing. Item 1b of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for not instructing employees in the recognition and avoidance of unsafe conditions at the site. Item 2 of Citation 1 alleges a violation of 29 C.F.R. § 1926.416(a)(3), for not inquiring about the status of exposed circuit wires or warning employees of the electric shock hazard. Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. 1910.1200(e)(1), for not having a written hazard communication program. The Secretary has proposed a total penalty of \$6,600.00 for the alleged violations.

Respondent, Monroe Drywall Construction (MDC), timely contested the Citation. The court held a hearing in this matter on June 12, 2012, in Panama City Beach, Florida. MDC contended at the hearing, as it has since the beginning of this case, that it had no employees at the site and that the individual who died was not its employee. The Secretary's contention was that MDC had several employees performing drywall work at the site and that the individual who died was in fact an employee of MDC.

Only the Secretary has filed a post-hearing brief. For the reasons that follow, the court finds the Secretary has not met her burden of proving the workers who were performing drywall work at the site were employees of MDC. The citation items noted above are vacated.

Procedural Background

This case was initially designated for the Commission's Simplified Proceedings, under Commission Rule 203(a). On March 14, 2012, the Secretary filed a motion to remove the case from Simplified Proceedings. On March 21, 2012, the court issued an order granting the motion, rescheduling the hearing for June 12, 2012, and directing Respondent to file an answer on or before April 9, 2012. On May 2, 2012, the Secretary's counsel (counsel) filed a motion to dismiss MDC's notice of contest and grant a default judgment arguing that she had not received an answer and was not able to reach Respondent's owners. On June 8, 2012, the court held a telephone conference to discuss the hearing set for June 12, 2012. During that conference, counsel stated she first learned at that time, that MDC had faxed the court a letter on May 12, 2012, reiterating its intent to contest the Citation. Also during the conference, the court advised that it was deeming the May 12 letter to be MDC's answer. Counsel informed the court she was

unaware of the letter and had not received a copy of it. The court faxed counsel a copy of the letter. Stating she had not previously received the letter and had not initiated discovery, counsel made an oral motion for a continuance during the telephone conference. The court denied the motion and ordered the parties to appear for the hearing as scheduled. Later that same day, counsel faxed to the court her “Emergency Motion for Reconsideration of Motion to Continue Hearing Date” (Motion).

At the beginning of the hearing, the Secretary’s counsel argued her Motion and gave the reasons why she felt she had been prejudiced by not being able to conduct discovery. The court found the Secretary had not been prejudiced and denied the Motion. The court then provided the parties a brief recess so that they could discuss the case and possibly reach agreement on some issues. After the recess, the Secretary’s counsel advised that she was withdrawing Item 1a of Citation1 and that the parties had stipulated to jurisdiction and coverage under the Act.

During the hearing, all of the exhibits offered by the parties were admitted except for MDC’s exhibit R-3. R-3, entitled “Amended Verified Petition for Attorney Fees and Costs,” which relates to the worker compensation claim filed on behalf of the deceased worker. MDC offered R-3 because the claim information set out on the first page of the document shows the employer of the deceased employee as “GMB Construction Services/The Hatch Group, LLC,” rather than Respondent. The Secretary’s counsel objected to R-3 being admitted. The court deferred ruling on the admissibility of R-3. The court also left the record open for 30 days to give the Secretary the opportunity to develop the record in regard to the employer/employee relationship at issue in this case.

On July 10, 2012, the Secretary conducted a post-hearing deposition of George Blanchette, the owner of GMB Construction Services. On August 7, 2012, the Secretary filed a motion seeking the admission of Blanchette’s deposition testimony. Attached to the deposition are several exhibits. The deposition testimony of Blanchette and the attached exhibits are admitted as the Secretary’s exhibit C-16. Exhibit R-3 is also admitted.

Factual Background

The worksite was a store located in a strip mall in Panama City, Florida, that was being remodeled to become a Big Lots store. The Hatch Group (THG) was the general contractor on the site, and Paul Kidder was THG’s superintendent. Several other companies had been contracted to perform work at the site. GMB Construction Services (GMB) had been contracted

to do framing and drywall work. It subcontracted with an Orlando-based company to do framing work, and allegedly subcontracted with MDC to do drywall work. GMB subcontracted with MDC because Thomas Grant, the superintendent of GMB at the site, had recommended MDC; Grant was the ex-husband of Nathalie Monroe, MDC's president, and he was familiar with her work. GMB also subcontracted with MDC because GMB is based in the Orlando area and it wanted to defray its costs by utilizing a local drywall company. George Blanchette, GMB's owner, sent a proposal of the work to be done to MDC on September 19, 2011. MDC sent a document entitled "Contractor's Invoice" to GMB on September 21, 2011. Nathalie Monroe asserted this was not an invoice for completed work, but rather the respondent's proposal using this form. On September 17, 2011, Grant began working at the site, acting as a liaison between GMB's framers and THG. Grant was also supervising GMB's subcontract with MDC. MDC began working at the site about that same date. Nathalie Monroe and her husband, Jeremy Monroe, MDC's vice-president, both worked at the site. Four Hispanic laborers were performing drywall work on the building. GMB's framers were also doing some drywall work. In addition, there was also an electrical contractor working at the site. On September 27, 2011, one of the Hispanic drywall workers contacted wiring protruding from conduit on the job site, while preparing to stack drywall boards. He was electrocuted.

The accident took place at about 9:00 a.m. on September 27, 2011. Nathalie and Jeremy Monroe were not at the site at that time. Nathalie Monroe arrived shortly after the accident, after the deceased had been taken away by ambulance. Law enforcement officials were still there when she arrived. When they questioned her, she stated that she did not know the deceased worker and that he did not work for her. Later that day, Blanchette of GMB sent Nathalie Monroe an e-mail. The e-mail informed her that no employees of MDC would be allowed back on the worksite.

On September 28, 2011, OSHA Compliance Officer Jeffrey Lincoln conducted an inspection at the site. He had spoken with the local medical examiner's office and police department before going to the site. He met with Nathalie Monroe in the parking lot and arranged with THG for her to enter the site. She told him she felt it was unfair for her to be barred from the site for not having worker compensation coverage as the deceased worker was not her employee. During the inspection, Lincoln also spoke to Kidder, THG's superintendent, and to Grant, GMB's superintendent. They both told him that the subcontract was for MDC to

hang and finish the drywall but that MDC was disputing the scope of the subcontract. On September 29, 2011, Lincoln interviewed two of the Hispanic workers with the help of a local interpreter, and he wrote down what they said. Lincoln took photographs of what he saw at the site. He also obtained photographs the police department had taken. Based on what he learned, Lincoln determined the Hispanic workers were employees of MDC. He recommended the issuance of the Citation.

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). In this case, the Secretary must first prove that MDC was properly cited as the employer of the four Hispanic workers at the site. *See, e.g., Joel Yandell*, 19 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999) (citation omitted).

The Secretary relies on statements Lincoln obtained during the inspection. Exhibits C-3 and C-4 are Lincoln's notes from what Cesar Torres and Genaro Angeles-Vicentes, two of the Hispanic drywall workers, stated to him. Lincoln used a local interpreter when he took the statements. Based on the statements of Cesar Torres and Genaro Angeles-Vicentes, Lincoln concluded that they, along with the deceased worker and one more person, worked for Nathalie Monroe at the site and were paid in cash. The court gives no weight to these statements.

Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay if it is offered against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The threshold question is whether the statements were made by employees of MDC. The Secretary made no initial showing that Cesar Torres and Genar Angeles-Vicentes were employees of MDC other than their statements. The Secretary asks this court to assume these workers were MDC employees. She relies on the statements of these workers to establish an employer/employee relationship. These statements alone are insufficient to prove these workers are MDC employees. The Secretary must also produce credible independent evidence of an employment relationship. Assuming, for the sake of argument, these workers were employees on the date of the alleged violations, they were not

employees when they gave their statements to the OSHA compliance officer, Mr. Lincoln. As a former employee is no longer an agent of the company or corporation, a statement made after employment has ended is not an admission attributable to the organization. *Cruz v. Aramark Serv., Inc.*, 213 Fed. Appx. 329, 333 (5th Cir. 2007); *Walsh v. McCain Foods Ltd.*, 81 F.3d 722 (7th Cir. 1996). GMB sent Nathalie Monroe an e-mail on September 27, 2011, barring employees of MDC from the site. See C-16, Exh. 6. Lincoln did not take the statements of two of the Hispanic workers until September 29, 2011. Even if these individuals had been employees of MDC, there is no evidence they were employees of MDC when Lincoln interviewed them. At most, they were former employees at that time. Their statements are thus not admissions attributable to MDC.

Should the statements be deemed admissions, the Commission has held that the judge hearing the case must decide the reliability of such statements and the weight to give them. *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-48 (No. 87-1309, 1991). There are two significant problems with Exhibits C-3 and C-4. As noted above, Lincoln interviewed the workers with the help of a local interpreter, and he wrote down what they said. The Secretary offered nothing to show the interpreter's qualifications or that the interpretation was accurate. Even more important, the statements are not signed. Exhibits C-3 and C-4 are found to be unreliable and are accorded no weight.

Finally, even if Exhibits C-3 and C-4 were accorded some weight, the judge, in determining the agency or employment relationship and its scope, is to consider the contents of the statement but must also find other supporting evidence independent of the statement. *Krause v. City of La Crosse*, 246 F.3d 995, 1002 (7th Cir. 2001). In other words, the Secretary cannot prove that the Hispanic workers in this matter were employees of MDC by means of Exhibits C-3 and C-4 alone; she must also present persuasive supporting evidence.

The Secretary's other evidence regarding who the Hispanic employees worked for is not persuasive. As indicated above, Kidder, THG's superintendent, and Grant, GMB's superintendent, told Lincoln that MDC's subcontract was to hang and finish the drywall; at the same time, they said that MDC was disputing the scope of the subcontract. Lincoln did not take a written statement from Kidder. He did take one from Grant, and Grant signed his statement. In Exhibit C-14, Grant said that MDC had hired Torres and the other Hispanic employees to hang drywall. There is reason to question the reliability of Grant's statement. Grant indicated in

Exhibit C-14 that GMB had hired him as its superintendent at the site because he knew Blanchette, GMB's owner. Nathalie Monroe testified that Grant and Blanchette had grown up together, which was confirmed by Blanchette during his deposition. The court also notes Nathalie Monroe's testimony that when she arrived at the site shortly after the accident, Grant ran out of the building, holding a rotor and saying, "here's the tool of your hanger." He then indicated she was going to be in trouble because "one of your [guys] just got killed." (Tr. 91-92). It was Ms. Monroe's impression that by the time she arrived, Grant had told everyone the employee was hers, which was not true, and that no one would take her word he was not. Ms. Monroe's testimony, and that of Jeremy Monroe, indicates the Hispanic employees worked for GMB.

As to the deposition testimony, Blanchette testified he had no employees at the site and that the drywall work was subcontracted to MDC. He even denied employing Grant, contrary to Exhibit C-14, and stated that Grant was just "helping [him] out" for a couple of weeks, in return for room and board, because he (Blanchette) could not be at the site to check on the work. (Exhibit C-16, pp 10-12). In light of this testimony, which conflicts with Grant's statement, the court gives no weight to Blanchette's deposition testimony on the point. The court also gives no weight to Grant's hearsay statement. It appears, due to their long acquaintance, that Grant may have been attempting to help Blanchette by reporting, after the accident occurred, that the Hispanic workers were MDC's employees.

Nathalie Monroe was adamant in her testimony at the hearing that MDC has never had any employees and that the Hispanic employees did not work for MDC. Ms. Monroe has been very consistent in this regard. After the accident, she told law enforcement officials and OSHA that she did not know the deceased employee and that he had not been working for MDC. At the hearing, Ms. Monroe presented Exhibits R-1 and R-2, Certificates of Election to be Exempt from Florida Workers' Compensation Law for herself her husband and Jeremy Monroe. She explained that such certificates are available to employers who own their own companies and do not hire any employees. Ms. Monroe also testified that she and Jeremy Monroe do their own work. This testimony was supported by Blanchette, who stated that on one of his early visits to the site, both Nathalie and Jeremy Monroe were doing drywall work and no one else was there.

In support of her position, the Secretary points to Exhibit C-2, the proposal GMB sent to Nathalie Monroe on September 19, 2010, and Exhibit C-13, a document entitled "Contractor's

Invoice,” that Ms. Monroe sent to GMB on September 21, 2010. The Secretary asserts that these documents show that MDC was to both hang and finish the drywall, contrary to Ms. Monroe’s indicating at the hearing that MDC was only finishing the drywall at the site. The court finds that no determination in this regard need be made. The Secretary has not proved that the Hispanic workers were employees of MDC, and Exhibits C-2 and C-13 do not help the Secretary in this regard.

The Secretary also points to evidence in the record that Nathalie Monroe had known Torres before this job and had contacted him and asked him to work for her at the subject site. Ms. Monroe agreed she had known Torres prior to this job, as they had worked on some of the same job sites before. She categorically denied that he worked for her on this job. She also denied she had paid him or any other employees any money for working on this job.

Finally, as noted above, Exhibit R-3 was received in evidence after the hearing. Exhibit R-3, entitled “Amended Verified Petition for Attorney Fees and Costs,” pertains to the worker compensation claim (WCC) filed on behalf of the deceased employee. MDC offered Exhibit R-3 as the claim information on the first page shows the employer of the deceased employee as “GMB Construction Services/The Hatch Group, LLC,” instead of Respondent. To rebut Exhibit R-3, one of the Secretary’s exhibits attached to Exhibit C-16, Blanchette’s deposition, shows the employer of the deceased employee as both GMB and MDC. (*See* Exhibit 7.), entitled “Employer/Carrier’s Response to Request to Produce,” which was filed in the WCC proceeding relating to the deceased employee. As the Secretary herself pointed out at the hearing, however, WCC documents are not relevant in determining whether an entity was properly cited as the employer under the Act. The court finds Exhibit R-3 and Exhibit 7 of Exhibit C-16 are not probative in that regard.

Complainant’s case rests totally on hearsay. She produced no witnesses at the hearing with direct knowledge of the facts surrounding the incident at issue. Her only witness at the hearing relied on unreliable hearsay. Respondent appeared pro se through its president Natalie Monroe and her husband Jeremy Monroe. Both were unfamiliar with legal proceedings and appeared unaware that they could object to the introduction of hearsay evidence by the Secretary. Natalie Monroe’s testimony was generally consistent and that testimony was generally consistent with her out of court statements. Minor inconsistencies were explained to the Courts satisfaction. Ms. Monroe testified that she was French Canadian and had some difficulty in her

flow of testimony. She consistently asserted, however, that she and her husband were the only employees of MDC on this jobsite, that the workers on the job were not MDC employees and that she arrived on site on September 27, 2011 after the occurrence of the fatal incident. I find her testimony consistent. Her demeanor, while excitable, was consistent with that of a person truthfully testifying and sensing that no one believes her protestations that these workers were not MDC's employees. I find her testimony credible and convincing.

The Secretary was given the opportunity to produce post trial evidence regarding MDC's employment relationship with these workers on the jobsite. She chose to depose George Blanchette with GMB. She offered no other evidence during the 30 day period following the hearing.

While the Court did not observe Mr. Blanchette's demeanor, reading his deposition testimony reveals inconsistencies with the hearsay statement of Mr. Grant as to whether Mr. Grant even worked for GMB. Both Blanchette and Grant appear to be motivated to show that GMB was not the employer of the deceased worker or three other workers on the site. At most, if accepted, Blanchette's testimony goes to whether GMB is the employer of these workers. It does not establish that MDC is the employer. Neither Blanchette's testimony nor Grant's statement are found to be consistent or credible. They are accorded no weight regarding the identity of the employer of the four Hispanic workers on this jobsite.

For all of the foregoing reasons, the court finds that the Secretary has failed to meet her burden of proving that MDC was the employer of the Hispanic workers at the jobsite. The citation items issued to MDC are VACATED.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.20(b)(1), is vacated.
2. Item 1b of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.21(b)(2), is vacated.
3. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.416(a)(3), is vacated.
4. Item 1 of Other Citation 2, alleging a violation of 29 C.F.R. 1910.1200(e)(1), is vacated.

/s/ _____

STEPHEN J. SIMKO, JR.

Judge

Date: November 20, 2012
Atlanta, Georgia