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.

NEMECKAY'S ROOFING AND HOME IMPROVEMENT COMPANY,

Respondent.

OSHRC Docket No. 20-1309

DECISION AND ORDER

APPEARANCES:

For the Complainant:
Adam Lubow, Esq.
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For the Respondent:
Philip Nemeckay, Owner/Sole Proprietor
Richfield, Ohio

BEFORE: Administrative Law Judge William S. Coleman

INTRODUCTION

Mr. Philip Nemeckay of Richfield, Ohio, owns and operates the named Respondent, Nemeckay's Roofing and Home Improvement Company (Nemeckay's Roofing).

Nemeckay's Roofing is a sole proprietorship and as such it has no legal identity separate from Mr. Nemeckay. *See Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 574-75, 589 N.E.2d 1306, 1308 (1992) (noting that a "sole proprietorship has no legal identity separate from that of the individual who owns it" and that "[i]t may do business under a fictitious name if it chooses, but doing business under another name does not create an entity distinct from the person operating

the business"). Accordingly, all references herein to Nemeckay's Roofing constitute references to Mr. Philip Nemeckay as well, and vice versa.

On June 29, 2020, a Compliance Safety and Health Officer (CO) from the Occupational Safety and Health Administration (OSHA) was driving an official government automobile in Columbia Station, Ohio, when he noticed people working atop the roof of a two-story house without any apparent means of fall protection. The CO initiated an investigation that ultimately resulted in OSHA issuing on July 15, 2020 a Citation and Notification of Penalty to Nemeckay's Roofing that alleged four serious violations of occupational safety standards that had been promulgated under the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §§ 651–678 (Act). The citation alleged that on or about June 29, 2020, Nemeckay's Roofing violated construction industry standards codified at 29 C.F.R. pt. 1926 pertaining to the use of (1) protective helmets [§ 1926.100(a)], (2) eye protection [§ 1926.102(a)(1)], (3) fall protection in residential construction [§ 1926.501(b)(13)], and (4) portable ladders [§ 1926.1053(b)(1)]. (Respectively designated as Items 1, 2, 3, and 4 of Citation 1.) Penalties that totaled $12,144 were proposed for the alleged violations.

Mr. Nemeckay timely contested the Citation and Notification of Penalty and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Act. 29 U.S.C. § 659(c).

The Secretary of Labor (Secretary) thereafter filed a formal complaint pursuant to Commission Rule 34(a) [29 C.F.R. § 2200.34(a)] that re-alleged the allegations of the Citation and Notification of Penalty. Mr. Nemeckay, who represented himself in these Commission proceedings, filed a formal answer that generally denied the allegations of the complaint, including denying the Secretary's averment that he was "an employer employing employees in his business

at the [identified] workplace." The answer also effectively asserted that the OSHA inspection violated the U.S. Constitution's Fourth Amendment.

The matter was assigned to the undersigned Commission Judge for hearing and decision. The evidentiary hearing was conducted by remote means utilizing videoconferencing technology on September 29, 2021. (The parties assented to conducting the hearing by remote means instead of having the hearing conducted in-person in a Cleveland courtroom.) In lieu of filing written post-hearing briefs pursuant to Commission Rule 74(a) [29 C.F.R. § 2200.74(a)], the parties opted to make oral closing arguments on the record at the close of the hearing. (T. 195).

The principal questions of law presented for decision are as follows:

- Did Mr. Nemeckay have a constitutionally protected reasonable expectation of privacy while working on the exterior of his customer's house?

  Decision: No.

- Did the Secretary establish that Mr. Nemeckay is an "employer" as defined by the Act?

  Decision: No.

The Citation and Notification of Penalty must accordingly be vacated because the Secretary has not established that Mr. Nemeckay is an "employer" as defined by the Act and thus has not established that he was required to comply with occupational safety and health standards promulgated under the Act.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that evidence respecting a matter of fact was not presented or was not preponderant, the following facts were established by at least a preponderance of the evidence:

1. Mr. Philip Nemeckay (Nemeckay) owns and operates Nemeckay's Roofing as a sole proprietorship. (T. 17). Nemeckay's Roofing engages in residential construction activities in the Cleveland, Ohio area. (T. 29).

Oral Agreement to Install Shingles

2. In June 2020, Nemeckay made an agreement with the owner-occupant of a single-family residence (House) located in Columbia Station, Ohio, to install shingles on the House. The owner-occupant testified at the hearing, and he is identified herein as the Homeowner. (T. 110-13).

3. The Homeowner had previously purchased the shingles and associated materials (flashing and nails) that he wanted installed on his House, and he was looking for a contractor who would agree to install those shingles. (T. 112-15).

4. The Homeowner learned about Nemeckay from an acquaintance who happened to be Nemeckay's cousin. The Homeowner contacted Nemeckay and asked Nemeckay to bid on the job. (T. 37-38, 112-13).

5. In mid-June 2020, Nemeckay went to the House to assess the roofing job. He had not previously been to the House, and he had not previously met the Homeowner. (T. 114).

6. Nemeckay orally agreed to install the shingles, and the Homeowner orally agreed to pay him $2,000 to do so. (T. 114). The agreement was never reduced to writing.

7. Nemeckay installed the shingles on June 29 & 30, 2020. (T. 58, 129, 217).

8. The Homeowner paid Nemeckay $1,000 in cash, but there is no evidence when the cash payment was made. (T. 121-22). The Homeowner paid Nemeckay the other $1,000 by a check payable to "Phil Nemeckay" dated June 30, 2020. Nemeckay deposited that check to his account at a local bank at 3:27 p.m. on June 30 (the second and final day of the roofing job). (Ex. C-6).

Installing the Shingles

9. On June 29, Nemeckay picked up shingles that he would later install on the House from the supplier that had sold them to the Homeowner, and he transported them to the House in a dump truck that he uses in his business. (T. 60, 114, 129).

10. On June 29, two other individuals assisted Nemeckay in the roofing job. (The Secretary alleges that Nemeckay was the statutory employer of both.)

11. One of those two individuals was Nicholas Armstrong. In the photographs that are in Exhibit C-5, Armstrong is shirtless. (T. 79).

12. The other individual who assisted Nemeckay on June 29 is the person wearing the "safety green" tee shirt in photographs that comprise Exhibit C-5 and the video clip that comprises Exhibit C-9. There is no evidence of this individual's identity, and so he is identified herein as Worker Two.

13. Nemeckay arranged for both Armstrong and Worker Two to be present to assist him. (T. 117-18, 123).

14. Armstrong and Worker Two assisted Nemeckay in getting the shingles up to the roof. (T. 78). For some of the time on June 29, Worker Two worked at ground level below the roof's edge picking up debris. At other times he also worked atop the roof. (T. 78; Exs. C-5 & C-9).

15. On June 29, Nemeckay, Armstrong, and Worker Two worked at the House from about 7:30 a.m. to about 11:30 a.m., when Nemeckay decided to end work for the day. (T. 57-58). (There is no evidence of when during this timeframe the CO initiated the OSHA inspection.)

16. Nemeckay testified that he ended work around 11:30 a.m. on June 29 because a certain phase of the roofing job has been completed and because it was getting hot. (T. 57-58).

17. Nemeckay and Armstrong returned to the House on June 30 at about 7:30 a.m. (T. 59). The roofing job was completed that day, probably sometime before 3:27 p.m. (the time that Nemeckay deposited the Homeowner's check at a local bank). (T. 58; Ex. C-6).

18. There is no evidence that Worker Two returned on June 30 and thus no evidence addressing whether Worker Two worked that day.

19. Even though Nemeckay had agreed to install only the shingles that the Homeowner had previously purchased, the Homeowner had not purchased quite enough shingles to complete the job, and so Nemeckay finished the job with other shingles that Nemeckay had on hand. (T. 125). Even though Nemeckay provided a small number of shingles to complete the job, the Homeowner did not pay Nemeckay any more than the original agreed price of $2,000. (T. 115).

20. The part of the House's roof on which Nemeckay, Armstrong, and Worker Two all worked on June 29 had a slope of 3 in 12 (vertical to horizontal), and the edge of the roof was about 15 to 17 feet above ground level. (T. 158-59, 161; Exs. C-5 & C-9). Nemeckay, Armstrong, and Worker Two each accessed this part of the House's roof on June 29 by using two portable extension ladders. The side rails of those two ladders did not extend at least three feet above the upper landing surface to which the ladders were used to gain access. (T. 74-75, 164-65; Exs. C-4 & C-5).

21. On June 29, Nemeckay, Armstrong, and Worker Two all worked on the roof without using any form of fall protection that would be permissible for use in residential construction work under 29 C.F.R. § 1926.501(b)(13). (T. 72-73, 84-85, 158-64; Ex. C-9).

22. On June 29, Armstrong used a pneumatic nail gun to install shingles without wearing protective eyewear. Armstrong also used either a hand-held circular saw or a hand-held drill without wearing any protective eyewear. Armstrong was in plain sight of Nemeckay while

operating handheld power tools on the roof without wearing eye protection. (T. 84, 154; Ex. C-5 at 6). Nemeckay recorded a video (received in evidence as Exhibit C-9) that depicts Armstrong operating a handheld power tool without wearing any protective eyewear. (T. 84-85).

23. On June 29, 2020, Worker Two worked part of the time on the ground collecting debris while Nemeckay and Armstrong were on the roof using hand tools to install shingles. Worker Two was working in an area on the ground where there was a potential for any objects falling from the roof to strike him. Worker Two was not wearing a protective helmet while in this area and was in plain sight of Nemeckay. (T. 79, 144-45; Ex. C-5 at 3).

OSHA Inspection on June 29 & Follow-up on July 1

24. On the morning of June 29, 2020, the CO was on duty and driving an official government auto on a public street that intersected the public street on which the House is located. (T. 91, 111). An OSHA trainee (Trainee) was riding with the CO. (T. 134). From his vantage point in the auto on the public street, the CO saw Nemeckay and Armstrong working on the roof of the House without using any discernable form of fall protection. (T. 133-35). Worker Two was working on the ground at the time. (Ex. C-5).

25. The Trainee took some photographs of the House and workers while seated in the auto when it was located on a public street. Those photographs were received in evidence at Exhibit C-5. The CO then drove the auto into the House's driveway and parked. The CO and the Trainee both exited the auto and approached the House on foot. Once near the House, the CO attempted to get the attention of Nemeckay and Armstrong, who were on the roof. The CO stated he was from OSHA, and he displayed his official credentials. Nemeckay soon descended from the roof, and he and the CO spoke while in front of the House. (T. 136-37).

26. Nemeckay falsely told the CO that he was not in charge of the site. (T. 138).

27. Nemeckay falsely told the CO that the roofing work was being done as a favor for the Homeowner.

28. Nemeckay falsely told the CO that the Homeowner was his cousin. (T. 39; 138).

29. Nemeckay falsely told the CO that he was not being paid for the work. (T. 138).

30. Nemeckay told the CO that he was not paying the other two workers for their work. (T. 138). (The evidence is not preponderant as to whether this statement was truthful or false).

31. The CO then asked Nemeckay questions to follow-up on his representations about the work not being done for pay but rather as a favor for a relative. He posed these questions to glean more information to assess whether an OSHA investigation would be appropriate considering Nemeckay's representations. (T. 138-39). Instead of answering those inquiries, however, Nemeckay asked the CO for a search warrant, which the CO did not have.

32. Even though the CO believed that a search warrant was not required unless the Homeowner were to have refused consent to the inspection, Nemeckay became hostile and aggressive toward the CO, so "to avoid conflict" the CO decided that he and the Trainee ought to "back up" from Nemeckay and leave the premises. (T. 139).

33. Nemeckay used the camera on his cell phone to make a 31-second video that showed the CO and the Trainee departing. At the beginning of the video, the CO and the Trainee have begun to get back in the auto and Nemeckay is approaching the auto on foot. The video ends when the auto has backed up to the end of the driveway. Nemeckay later posted the video on social media for anyone to see and hear. (T. 87, 141-42). The video was received in evidence as Exhibit C-10. In the video, Nemeckay is heard shouting the following at the CO and the Trainee as they are departing the grounds:

> Get out of here! What are you wantin', you harassin' us? We're workin'! We're workin'! Get the f*** out of here! I got your license

> number. Good. Get out of here! You're both, you're both bull****. Government! Ain't ya got, where's your masks at? Where's your masks government? Where's your masks at [vulgarity]? Where's your mask? Come on! Where's your masks at? Corona! Piece of s***!

34. Altogether, the CO and the Trainee were on the grounds of the House on June 29 for about five minutes. (T. 119, 138). The CO did not have the opportunity before departing the grounds to interview Armstrong, Worker Two, or the Homeowner (who had been inside the House the entire time that the CO was on the grounds). (T. 119).

35. Soon after the CO's departure, Nemeckay told the Homeowner that OSHA officials had been there. The Homeowner had heard some "commotion" as the CO was backing the auto out of the driveway, but the Homeowner had no contact with the CO on June 29. The Homeowner did not refuse consent or otherwise communicate any objection to the CO and the Trainee being on the House's grounds to inspect and investigate. (T. 120; Ex. C-10).

36. Nemeckay showed the 31-second video he had made to the Homeowner. (T. 120; Ex. C-10). Nemeckay asked the Homeowner to falsely tell any OSHA officials who might later contact the Homeowner that he and Nemeckay were relatives. (T. 120).

37. About two days later, the CO returned to the House accompanied by two deputy sheriffs to interview the Homeowner to verify the representations that Nemeckay had made to the CO about Nemeckay and the Homeowner being cousins and the roofing work being done without charge. (T. 142-43). The CO first asked the Homeowner whether Nemeckay was his uncle, and the Homeowner falsely responded affirmatively. The CO then informed the Homeowner that Nemeckay had told the CO that they were cousins (not nephew and uncle), and in response the Homeowner falsely told the CO that he and Nemeckay were "like cousins." And then the

Homeowner gave a third answer, this time falsely stating that he and Nemeckay were "just real good friends." (T. 143).

38. At the hearing, the Homeowner admitted in sworn testimony that he had lied to the CO about having a familial or social relationship with Nemeckay, explaining that he had done so because he "just wanted this thing to blow over smoothly and be done with it." (T. 121).

39. The Homeowner truthfully told the CO that he did not know the identity of the other two individuals working with Nemeckay (Armstrong and Worker Two), and he truthfully told the CO that he believed Nemeckay had arranged for their presence. (T. 143).

Facts Bearing on Whether Nemeckay Had a Master-Servant Relationship with Armstrong or Worker Two

40. On his 2019 and 2020 federal tax returns, Nemeckay reported labor costs in the operation of his construction business (exclusive of monies he paid himself) to have been respectively $11,800 and $12,800. (Ex. C-7, at 6 & 22 [Sched. C, Line 37]; T. 34-35). In both tax returns, Nemeckay checked a box to indicate that he had made payments in his construction business that would require him to file IRS Form 1099 (which would represent payments of non-employment income that Nemeckay had made to another taxpayer). (Ex. C-7 at 5 & 21 [Schedule C, Lines I & J]). Both tax returns also indicated that in the operation of his construction business Nemeckay had not paid any wages. (Ex. C-7 at 5 & 21 [Schedule C, Line 26]).

41. Nemeckay applied for and received a federal Paycheck Protection Program loan of $8,130 in April 2021. (T. 35-37). He testified that he had not obtained the loan to make any payroll payments and that he believed he would have been eligible for a larger loan if he had had any employees to pay. (T. 35-37, 108). There is no evidence that Nemeckay has applied to have that loan forgiven. (T. 37).

42. Nemeckay has known Armstrong for about 25 years, and he describes Armstrong as being like a son to him. (T. 50-51). Nemeckay testified that "every now and again" he calls on Armstrong to help him with his jobs "if I ever need a hand or something," and that he has never paid Armstrong for that help. (T. 51-52). Nemeckay testified that Armstrong learned how to install shingles from him. (T. 52-53). Nemeckay testified further that he did not know what Armstrong does to make a living "right now," but that he understands that Armstrong sometimes does construction work. (T. 50).

43. There is no affirmative evidence that Nemeckay paid either Armstrong or Worker Two for their work, and the only direct evidence bearing on this issue of fact is Nemeckay's testimony that he did not pay either of them.[1] (T. 51, 77-78).

44. Armstrong lives about 25 miles from the House. Nemeckay provided Armstrong with the House's address, and Armstrong drove there in his own auto on both June 29 and 30. (T. 54-55, 60).

45. Worker Two arrived at the House on June 29 in a separate vehicle. (T. 116).

46. The two ladders that Nemeckay, Armstrong, and Worker Two used to access the roof belonged to the Homeowner. (T. 123).

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[1] Although Armstrong testified at the hearing, he was not asked whether Nemeckay had paid him for his work on the House. Nemeckay conducted the following two-question direct examination of Armstrong, which is the entirety of Armstrong's testimony (T. 129):

> Q: Whose tools and ladders were we using on [Homeowner's] home on June of 2020?
>
> A: We were using the homeowner's tools and ladders. I mean, I guess we were using all the homeowner's tools.
>
> Q: And why did I bring my dump truck there?
>
> A: Because we had to take up some shingles. We had to -- he bought shingles, so we had to take them out of the truck, carry them up on the roof.

47. Both Nemeckay and Armstrong used Nemeckay's pneumatic nail gun to install the shingles, but they used the Homeowner's compressor and air hose to power the nail gun. (T. 62, 65, 72, 123, 125).

48. Nemeckay testified that if Armstrong were to have used a hammer instead of a nail gun to install the shingles on the House that "[i]t would have been fine" with Nemeckay even though it is faster to install the shingles with a nail gun than with a hammer. (T. 65).

49. Nemeckay brought a power drill to use to do the roofing work. (T. 85-86).

50. Armstrong did not use any of his own tools in doing the roofing work. (T. 128).

51. There is no evidence what tools, if any, Worker Two used in assisting Nemeckay on June 29.

52. With respect to providing or requiring workers to use safety equipment on a job site, Nemeckay testified that he believed no fall protection was necessary for the work atop the House's roof because the roof was "almost flat" with its slope of 3 in 12. (T. 70). With respect to eye protection, Nemeckay testified, "I always make sure people wear safety glasses" and that it was possible that Nemeckay had provided to Armstrong the eyewear that Armstrong had placed on top of his head (not protecting his eyes) when Armstrong was using a pneumatic nail gun. (T. 71). Nemeckay testified that he ended work before noon on June 29 in part because it had gotten hot. (T. 57-58).

53. The Homeowner did not arrange for Worker Two to assist Nemeckay. The Homeowner was not acquainted with either Armstrong or Worker Two. The Homeowner did not pay Armstrong or Worker Two for their work. (T. 123).

54. As indicated in the "Discussion" section that follows this paragraph, it is likely that Nemeckay's hearing testimony as to the following was knowingly false: (a) that he did not recall

how long he had known the Homeowner (T. 38), (b) that he did not recall whether the Homeowner had asked him to make a bid on installing the shingles (T. 40), (c) that the Homeowner did not offer to pay him to do the job (T. 40), (d) that he believed the Homeowner had arranged for Worker Two to help him do the roofing work (T. 77-78), (e) that the Homeowner directed Worker Two to help him move the shingles onto the rooftop (T. 78), (f) that he had never met Worker Two before June 29, 2020 (T. 77), (g) that he did not know who Worker Two was and had never seen him before (T. 76-77), (h) that he did not ask Worker Two to help him with the roofing job (T. 79), (i) that he did not know how or when Worker Two arrived at the House (T. 77), (j) that he did not ask the Homeowner to tell OSHA officials that he and the Homeowner were cousins (T. 99), (k) that he did not ask the Homeowner to tell OSHA officials that the roofing work was not a "job." (T. 99).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon Nemeckay's timely filing of a notice of contest. 29 U.S.C. § 659(c).

Whether Nemeckay Had a Constitutionally Protected Reasonable Expectation of Privacy While Engaged in Business Activity on the House's Rooftop and Grounds

Nemeckay contends that the warrantless inspection on June 29 violated his Fourth Amendment right to be free of unreasonable searches and seizures.

The Fourth Amendment governs non-consensual inspections conducted pursuant to the OSH Act, and those administrative inspections are subject to the Fourth Amendment's warrant requirement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

"The Fourth Amendment protects against intrusions only into areas where an individual has a reasonable expectation of privacy." *L.R. Willson & Sons, Inc.*, 17 BNA OSHC 2059, 2060 (No. 94-1546, 1997), *aff'd in relevant part*, 134 F.3d 1235, 1238 (4th Cir. 1998) (finding no Fourth

Amendment violation); *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("the touchstone of [Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy").

Nemeckay had no reasonable expectation of privacy respecting any of his activities that the CO observed from the CO's position while seated in the government vehicle on a public street (which is the vantage point from which the photographs in Exhibit C-5 were taken). *Reg'l Scaffolding & Hoisting Co., Inc.*, 17 BNA OSHC 2067, 2069 (No. 93-577, 1997) (ruling that where the respondent's activities were viewable from a vantage point in a public place, the respondent had no reasonable expectation of privacy protectable under Fourth Amendment).

As for the approximately five minutes that the CO and Trainee were on the House's grounds, Nemeckay has failed to "demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998), quoting *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978). Nemeckay was present on the rooftop and grounds of the House solely for the purpose of engaging in his business enterprise, and he had no previous connection with the House or the Homeowner. *Cf. Minnesota v. Carter*, 525 U.S. at 91 (ruling that with respect to a commercial invitee's challenge to a warrantless observation through an exterior window into the *interior* of another's residence, that "the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises" and thus not to have any protectable privacy interests under the Fourth Amendment).

Further, when the CO decided to depart the grounds moments after Nemeckay asked the CO about a search warrant, the CO effectively acceded to Nemeckay's apparent withholding of consent to continue the inspection (notwithstanding that Nemeckay's consent was not constitutionally mandated).

For these reasons, the evidence fails to establish that the inspection on June 29 violated Nemeckay's rights under the Fourth Amendment.

Whether Nemeckay Was an "Employer"

Section 3(5) of the Act defines the term "employer" as "a person engaged in a business affecting commerce who has employees."[2] 29 U.S.C. § 652(5). Only an "employer" as defined may be cited for a violation of occupational safety and health standards promulgated under the Act. 29 U.S.C. § 658(a); *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated). The Secretary bears the burden of establishing that the cited respondent is an "employer" as defined by section 3(5). *See Lake Cnty. Sewer Co., Inc.*, 22 BNA OSHC 1522, 1523 (No. 07-1786, 2009).

Nemeckay denies that he meets either prong of the Act's definition of the term "employer." He denies (1) that he is "engaged in a business affecting commerce," and (2) that he "has employees."

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[2] The terms "commerce," "person," and "employees" that appear in the definition of "employer" are themselves defined terms in subsections 3, 4 and 6, 29 U.S.C. § 652, in pertinent part as follows:

> (3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, . . . or between points in the same State but through a point outside thereof.
>
> (4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.
>
> (6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

Whether Nemeckay "Engaged in a Business Affecting Commerce"

Even though Nemeckay's sole proprietorship is a small business in the construction industry, that small business nevertheless constitutes a "business affecting commerce" under section 3(5). *Slingluff v. OSHRC*, 425 F.3d 861, 865 (10th Cir. 2005) (holding that a small stuccoing business is a business affecting commerce because the "economic activity of stuccoing/construction, as an aggregate, affects interstate commerce"); *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983) (holding that construction work is within the class of activities Congress intended to regulate under the Act). The Secretary has established that Nemeckay is "a person engaged in a business affecting commerce" within the meaning of section 3(5). (Findings of Fact ¶ 1).

Whether Nemeckay "Has Employees"

The Secretary alleges that both Armstrong and Worker Two were Nemeckay's employees during the two-day roofing job at the House. The Secretary does not assert and did not seek to prove that any other individuals were Nemeckay's employees. (*See* Sec'y's closing oral argument, T. 199-208.)

Having "one single employee is sufficient to invoke coverage under the Act." *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). So, to establish that Nemeckay was covered by the Act, the Secretary was required to establish that either Armstrong or Worker Two was Nemeckay's employee. *Lake Cnty. Sewer Co., Inc.*, 22 BNA OSHC at 1523. As discussed below, the evidence is insufficient to establish that either of them was Nemeckay's employee.

In determining whether an identified worker relates to a putative employer as either an employee or as an independent contractor, both the Commission and the Sixth Circuit Court of

Appeals[3] apply the common law agency test described in *Nationwide Mut. Ins. Co. v. Darden* (*Darden*), 503 U.S. 318 (1992). *See All Star Realty Co.*, 24 BNA OSHC 1356, 1358-59 (No. 12-1597, 2014) (applying *Darden* in determining whether two individuals were statutory employees of the cited company); *Absolute Roofing & Constr., Inc. v. Sec'y of Labor* (*Absolute Roofing*), 580 F. App'x 357 (6th Cir. 2014) (applying *Darden* in affirming Commission Judge's decision that an individual was an employee and not an independent contractor) (unpublished); *see also Clackamas Gastroenterology Assocs., P.C. v. Wells* (*Clackamas*), 538 U.S. 440, 445 n.5 (2003) (noting that the *Darden* test is geared toward "drawing a line between independent contractors and employees"); *Froedtert Mem. Lutheran Hosp., Inc.* (*Froedtert*), 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (noting that the *Darden* test "generally envisions a two-dimensional focus [of] whether the worker relates to a putative employer as an employee or as an independent contractor").

The common law test of *Darden* "incorporate[s] traditional agency law criteria for identifying master-servant relationships." *Darden* at 319. The Court in *Darden* articulated this common law test as follows:

> In 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. Among 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

[3] Under section 11 of the Act, the Commission's final order in this matter is subject to judicial review in the Sixth Circuit Court of Appeals. In deciding a case, the Commission generally applies the precedent of the circuit court of appeals to which that decision may be appealed. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

> 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 at 323-24, quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

"The crux of *Darden's* common law agency test" is contained in its first stated factor—"the hiring party's right to control the manner and means by which the product is accomplished." *Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004); *see also Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1638 (No. 88-2012, 1992) (stating that a "central inquiry" of the *Darden* test is "the question of whether the alleged employer controls the workplace"), *aff'd*, 20 F.3d 938 (9th Cir. 1994); *Don Davis*, 19 BNA OSHC at 1480 ("The *Darden* test originates in the common law, which looks to the element of control by the hiring party over the hired party"); *Sharon & Walter Const., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (noting that in *Darden* "the Court focused primarily" on the first stated factor).

The Commission has stated that the application of *Darden*'s first stated factor "must include" consideration of the putative employer's "control over the *workers* and not just the results of their work." *Don Davis*, 19 BNA OSHC at 1482; *see also Allstate Painting*, 21 BNA OSHC at 1035 ("the primary focus is whether the putative employer controls the workers"); *Froedtert*, 20 BNA OSHC at 1506 (noting that "the control exercised over a worker remains a principal guidepost" in determining whether an employment relationship exists), quoting *Clackamas,* 538 U.S. at 448.

The factors that the Court in *Darden* described as being "relevant" to the test's central inquiry of the putative employer's control over the workplace and the workers "includes within the rubric of 'control' factors that address the economic and financial aspects of the relationship between the parties, such as matters of compensation, taxation, working hours, and provision of

tools and equipment." *Don Davis*, 19 BNA OSHC at 1480; *accord Absolute Roofing*, 580 F. App'x at 363 (noting that *Darden*'s first stated factor is "a broad consideration that is embodied in many of the specific factors articulated in *Darden*," quoting *Weary v. Cochran*, 377 F.3d at 525.

The determination of whether a person is an "employee" under the *Darden* test "is a mixed question of law and fact that a judge normally can make as a matter of law." *Jammal v. Am. Fam. Ins. Co.* (*Jammal*), 914 F.3d 449, 453–54 (6th Cir. 2019). "Each *Darden* factor is … itself a 'legal standard' that the district court is applying to the facts." *Id.* at 456. "[T]he district court's findings underlying its holding on each of the *Darden* factors are factual findings, and the court's ultimate conclusion as to whether the [workers] were employees is a question of law." *Id.* at 455; *see also United States v. Doig*, 950 F.2d 411, 414 n.3 (7th Cir. 1991) ("[W]hether an individual is an employer under" the Act and thus subject to criminal liability under sec. 17(e) is a question for the court, not the jury); *cf. FreightCar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *4 (OSHRC, Mar. 3, 2021) (concluding "that the preponderance of the evidence does not show that [respondent] is the employer of the … workers").

The Court in *Darden* noted that the "common-law test contains no shorthand formula or magic phrase that can be applied to find the answer," and that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324, quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). The Commission has echoed this view, observing "that there is no precision to the weighing of all of these factors." *Froedtert*, 20 BNA OSHC at 1508.

Even though "there is no precision to the weighing" of the *Darden* factors in any given case, the conclusion of law that a cited respondent is an "employer" requires an evidentiary record that demonstrates the respondent has sufficient authority to control both the workplace and the

worker to meet *Darden's* common law test. *See FreightCar Am., Inc.*, 2021 WL 2311871, at *4 (determining the evidentiary record was insufficient to establish employment relationship, noting that "we are troubled by the lack of evidence addressing many of the factors listed in *Darden*"); *All Star Realty Co.*, 24 BNA OSHC at 1359 (noting that the "Secretary has produced so little evidence of control that when we apply the remaining *Darden* factors to this record, the evidence either weighs clearly against an employment relationship or is equivocal at best").

Nemeckay's Right to Control the Manner and Means by Which
the Product is Accomplished
(Nemeckay's Control over the Workplace and the Workers)

Nemeckay agreed to install shingles on the House for profit, and to perform that work he enlisted the assistance of both Armstrong and Worker Two. The greater weight of the evidence showed that Nemeckay had control over the performance of the roofing work itself. Nevertheless, "control over the 'means and methods' by which a task is accomplished is not dispositive of employment status under the Act." *Don Davis*, 19 BNA OSHC at 1479. Here, as in *Don Davis*, the Secretary must show that Nemeckay had "control over the *workers* and not just the results of their work." *Id.* at 1482.

There is scant evidence that Nemeckay had control over either Armstrong or Worker Two beyond controlling the results of their work. The sparse record in this regard is due in large part to Nemeckay's decision to provide false and incomplete testimony as to many matters. However, the many falsehoods that Nemeckay uttered in his sworn testimony do not by themselves constitute affirmative evidence that Nemeckay had the right to control either Armstrong or Worker Two. *See United States v. Eisen*, 974 F.2d 246, 259 (2d Cir. 1992) (noting that the jury in criminal trial "is free to draw negative inferences from an untruthful witness's testimony as long as there is affirmative testimony to supplement or corroborate those negative inferences").

Presumably, Nemeckay chose to testify falsely and incompletely in responding to many questions because he believed that he would not prevail if he testified truthfully and completely.[4] But Nemeckay represented himself at the hearing, and he is not trained in the law. It is certainly possible that if Nemeckay had given truthful and complete responses to all the questions put to him, some of those responses might have supported his position that neither worker was his employee, or might at least have been neutral on the issue.

Nemeckay's false testimony to questions seeking to elicit evidence that would bear on his control over Armstrong and Worker Two, standing alone, does not amount to substantial evidence on which to find that Nemeckay possessed such control to have created a common law master-servant relationship with either worker. *See Roper Corp. v. NLRB*, 712 F.2d 306, 310 (7th Cir. 1983) (holding that an administrative law judge's finding that two witnesses were untruthful did not constitute substantial evidence "that the opposite of that to which they testified was true," noting that "if such 'proof' were acceptable as sufficient evidence, effective review of fact-finding would involve analysis of a chimera"). Rather, some evidence that is independent of Nemeckay's false testimony and that would supplement or corroborate the sought-after negative inference would be necessary before that negative inference may be drawn. *United States v. Eisen*, 974 F.2d at 259.

[4] Nemeckay's false representations before the Commission began with his written notice of contest dated August 7, 2020, in which he falsely asserted that he "was not working as a paid contractor," but rather had been working on the roof of his cousin's house "solely as family helping out." In the face of unassailable evidence presented at the hearing, Nemeckay did not deny that the Homeowner had paid him as a paid contractor and that the Homeowner was not his family member.

Skill Required

The evidence suggests that Armstrong provided skilled labor in assisting Nemeckay in installing the shingles. (Findings of Fact ¶ 42). This generally tilts in favor of independent contractor status.

The only evidence of the type of work that Worker Two performed was to help Nemeckay move the shingles to the rooftop and that he collected debris from off the ground. (Findings of Fact ¶ 14). Nemeckay recorded a video (Ex. C-9) that shows Worker Two standing on the rooftop, but there is no evidence that bears on whether Worker Two was doing any skilled work on the rooftop. The dearth of evidence regarding the full scope of Worker Two's work activities is mostly a result of Nemeckay's willful failure to testify truthfully and forthrightly about Worker Two.

Source of the Instrumentalities and Tools

There is no evidence what tools, if any, Worker Two used on June 29, again because Nemeckay decided not to testify truthfully and forthrightly about Worker Two.

Armstrong did not use any of his own tools in doing the roofing work. (Findings of Fact ¶ 50). Armstrong used Nemeckay's pneumatic nail gun, and in the video at Exhibit C-9 he is seen and heard using Nemeckay's circular saw or drill. (Findings of Fact ¶¶ 22, 47).

The Homeowner provided the two ladders that were used to access the roof. (Findings of Fact ¶ 46). The Homeowner also provided an air compressor and air hose that both Nemeckay and Armstrong used to power Nemeckay's pneumatic nail gun. (Findings of Fact ¶ 47). There is no evidence that bears on whether Nemeckay would have supplied the necessary ladders, air compressor, and air hose to do the work if the Homeowner had not allowed Nemeckay to use that equipment.

The affirmative evidence that Armstrong used none of his own tools and instead used tools and equipment belonging to Nemeckay or the Homeowner weighs in favor of employee status. *See Absolute Roofing*, 580 F. App'x at 361-62.

Location of the Work

All the roofing work took place at the House on which Nemeckay had agreed to install shingles. This *Darden* factor has no weight here because the roofing work would be done at the location of the construction site regardless of the status of the workers as employees or independent contractors.

Duration of the Relationship between the Parties

Nemeckay and Armstrong have known each other for many years and have a close personal relationship. The only evidence of their *working* relationship is Nemeckay's testimony that sometimes Nemeckay asks Armstrong to help him on his jobs and that he has never paid Armstrong for the help that Armstrong has provided. Armstrong testified at the hearing, but he was not asked about his history of helping Nemeckay in his business or whether Nemeckay had ever paid him for that help. And so, there is no testimony from Armstrong on those subjects that is available to be considered and its credibility and reliability assessed.

There is no evidence of the duration of Nemeckay's relationship with Worker Two, but this is because Nemeckay falsely testified that he had never met Worker Two before and did not know him. Nemeckay's testimony that the Homeowner had arranged for Worker Two to be present was decisively contradicted by the Homeowner's credible testimony to the contrary. The Homeowner's credible testimony proved Nemeckay's contrary testimony that he did not know the identity of Worker Two to be incredible. While it is likely that Nemeckay and Worker Two had some prior working relationship, findings about the duration and nature of that prior relationship would be speculative on this record. This is so even though the absence of substantial evidence

on this point is a result of Nemeckay having willfully obstructed the search for the truth by providing false and incomplete testimony regarding his knowledge of Worker Two.

Hiring Party's Right to Assign Additional Projects

There is no evidence that Nemeckay has any right to assign additional projects to either Armstrong or Worker Two.

Extent of the Hired Party's Discretion Over When and How Long to Work

There is evidence that from time-to-time Nemeckay asks Armstrong to assist him in his business, but there is no evidence that Armstrong is somehow obliged to do so when asked. Similarly, there is no evidence that Nemeckay had any authority to call upon Worker Two and summon him to work. While Nemeckay controlled the start and ending times for the work on the House, his control over the means and manner of installing the shingles on the House is not dispositive of whether Nemeckay had such control over either Armstrong or Worker Two that a master-servant relationship arose. *See Don Davis*, 19 BNA OSHC at 1479.

Method of Payment

There is no evidence that Nemeckay paid either Armstrong or Worker Two for work on the House. In view of Nemeckay's close personal relationship with Armstrong, Nemeckay's testimony that he did not pay Armstrong for his work on the House (and that he had never paid Armstrong) is not implausible.

In contrast, it is implausible that Worker Two assisted Nemeckay for no pay. Nemeckay certainly realizes this, which may be why he suggested in his testimony that the Homeowner might have paid Worker Two, since Nemeckay claimed not to have paid him. (T. 76-78).

If it were assumed that the roofing job was completed in a day and a half of work, and that Nemeckay had devoted twelve hours of his own time to complete the job, then if Nemeckay retained the entire $2,000 that the Homeowner paid for the work, Nemeckay would have been paid

at the rate of about $166 per hour.

If Nemeckay did in fact pay Armstrong or Worker Two (or both), he likely paid them in cash, possibly with some of the $1,000 cash payment that the Homeowner had given Nemeckay.[5]

Hired Party's Role in Hiring and Paying Assistants

There is no evidence that either Armstrong or Worker Two had authority to hire and pay any assistants.

Work as Part of the Hiring Party's Regular Business, and Whether the Hiring Party is in Business

Nemeckay is in the roofing business, and the work performed by Armstrong and Worker Two was integral to that business. These factors weigh in favor of concluding a master-servant relationship existed.

Provision of Employee Benefits; Tax Treatment of the Hired Party

Since there is no evidence that Nemeckay paid either Armstrong or Worker Two for their work on the House, there is no evidence of any employee benefits or the tax treatment of any pay or benefits. The only evidence is that Nemeckay has historically treated any paid labor in his business to have been independent contractors for purposes of his personal income tax returns. (Findings of Fact ¶ 40). *Cf. Sharon & Walter Const., Inc.*, 23 BNA OSHC at 1290 (finding "failure to withhold federal income and social security taxes was … not a bona fide reflection of an authentic independent contractor relationship").

Conclusion of Law Based on the Darden *Factors*

Based on the foregoing analysis of the *Darden* factors, the evidence is insufficient to

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[5] The Secretary obtained by subpoena records of Nemeckay's checking account to which Nemeckay had deposited the $1,000 check that the Homeowner wrote to Nemeckay. (T. 46-47). Those bank records apparently did not reveal Nemeckay having written any checks to Armstrong or anyone else.

establish that a common law master-servant relationship existed between Nemeckay and either Armstrong or Worker Two.

It is possible that Nemeckay will regard this conclusion that the Secretary did not meet the burden to prove that Nemeckay was a statutory employer to vindicate him. He might also regard this result to validate (1) his act of making knowing material misrepresentations to the CO during the investigation, (2) his profane belligerence toward the OSHA officials engaged in the proper performance of their official duties, (3) his recruiting the Homeowner into his effort to obstruct the investigation, and (4) his providing knowingly false testimony in these Commission proceedings. He ought not do so.

Nemeckay's knowingly false and incomplete testimony at the hearing was contemptuous of the adjudicatory process and prejudicial to the administration of justice. *Cf. In re Weiss*, 703 F.2d 653, 662–64 (2d Cir. 1983) (holding that false or evasive testimony is tantamount to refusal to answer and is properly punished by contempt). Nemeckay's actions could subject him to prosecution and resulting substantial fines and/or incarceration for perjury as well as for knowingly making materially false statements during the investigation. *See, e.g., United States v. Craigue*, 565 F. Supp. 3d 267 (D.N.H. 2021) (prosecution under 18 U.S.C. § 1001 for knowingly and willfully making materially false statement to an OSHA agent that certain workers were subcontractors and not the defendant's employees).

ORDER

The foregoing decision constitutes findings of fact and conclusions of law on all material issues of fact, law, or discretion in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1).

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Items 1 through 4 of Citation 1 that allege serious violations of 29 C.F.R. §§ 1926.100(a),

1926.102(a)(1), 1926.501(b)(13), & 1926.1053(b)(1), along with their associated proposed penalties, are VACATED.

s/ *William S. Coleman*
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 19, 2022