United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. David Stillwell d/b/a David Stillwell Roofing, Respondent.	OSHRC Docket No. **14-0841**

Appearances:

LaTasha T. Thomas, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

David Stillwell, *pro se*, David Stillwell Roofing, Northport, Alabama
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). David Stillwell d/b/a David Stillwell Roofing (hereinafter Respondent) is a roofing contractor located in Northport, Alabama. On March 11, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Donald Bar Kirby conducted an inspection of Respondent at 929 McFarland Blvd., in Northport, Alabama. Based upon CSHO Kirby's inspection, the Secretary of Labor, on May 13, 2014, issued two Citations and Notification of Penalty to Respondent alleging serious and repeat violations of the Act and standards thereunder. The Secretary proposed a total penalty of $15,840.00 for the Citations. Respondent timely contested the Citations. All of the violations are at issue.

The undersigned held a hearing in this matter on March 20, 2015 in Birmingham, Alabama. No representative for Respondent appeared at the hearing. The Secretary moved for an order of default based on Respondent's failure to appear. The undersigned held a ruling on the Secretary's motion in abeyance. The Secretary presented testimony and documentary evidence in support of the Citations.

For the reasons discussed below, Respondent is found to be in DEFAULT and its notice of contest is DISMISSED.

Factual Background

On March 11, 2014, while traveling on a roadway in Northport, Alabama, CSHO Kirby observed four individuals on the roof of a strip mall (Tr. 11-12). He noted the four individuals, who were installing roof shingles, were not wearing any fall protection (Tr. 12). CSHO Kirby stopped on the roadside and photographed the workers on the roof (Tr. 15-16, 38-41; Exh. C-3). Pursuant to a local emphasis program on fall hazards in construction, CSHO Kirby then opened an inspection (Tr. 11). CSHO Kirby testified he attempted to talk with the individuals on the roof but they would not speak with him, packed up their tools in a truck, and left (Tr. 12).

In an attempt to discover who was performing the work on the roof, CSHO Kirby spoke with an owner of one of the businesses in the strip mall. From the store owner, he obtained the name and phone number of the landlord (Tr. 12). CSHO Kirby contacted the landlord and learned he had contracted with John Kirski Company to perform the roofing work (Tr. 13). CSHO Kirby contacted John Kirski Company and learned it had subcontracted the work to Mid-South Tool Rental Company (Tr. 13). Mid-South Tool Rental Company then informed CSHO Kirby it had subcontracted the work to David Stillwell d/b/a David Stillwell Roofing (Tr. 13).

CSHO Kirby contacted David Stillwell initially by phone (Tr. 13). During that phone conversation, Mr. Stillwell identified one of the individuals on the roof with him as a "visitor;" he told CSHO Kirby the other two worked for him (Tr. 13-14). Mr. Stillwell would not provide any further details to CSHO Kirby over the phone. OSHA then subpoenaed Mr. Stillwell (Tr. 14). Mr. Stillwell apparently complied with the subpoena and appeared at the Birmingham Area OSHA office in person accompanied by two of the individuals CSHO Kirby had seen working on the roof (Tr. 14). During the meeting, CSHO Kirby spoke with the two individuals. One told CSHO Kirby he had worked for Respondent for "a couple years;" the other for "several months." (Tr. 14). At some point, the "visitor" roof was identified as Mr. Stillwell's stepson. (Tr. 13-14).

CSHO Kirby later identified all four individuals working on the roof in the photographs he took from the roadside during his inspection. In the photographs, four individuals are seen working on the roof with pneumatic nail guns without any eye protection or fall protection (Exh. C-3a, 3c, 3d, 3e, and 3g). Roofing materials still in packaging are placed neatly throughout the

roof (Exh. C-3c). Each individual is wearing a different colored shirt and CSHO Kirby was able to identify each by his shirt color.[1] David Stillwell is wearing a red shirt (Tr. 37); W.C.[2] is wearing a blue shirt (Tr. 44); and J.W. is wearing a grey shirt (Tr. 40). The individual in the white shirt is J.S. who was identified as the "visitor" by Mr. Stillwell (Tr. 37). CSHO Kirby was able to identify W.C. and J.W. as the same two individuals who came into the OSHA Area office with Mr. Stillwell (Tr. 37- 38). CSHO Kirby testified Mr. Stillwell was directing the work of these individuals on site (Tr. 29).

Based upon his observations on March 11, 2014, CSHO Kirby recommended the citations at issue in this proceeding be issued to Respondent. Each of the alleged violative conditions (with the exception of the violation of §1926.503(a)(1)) is depicted in the photographs taken by CSHO Kirby. CSHO Kirby recommended the alleged violation of § 1926.501(b)(11) be issued as a repeat violation based upon Respondent having received a prior citation for a violation of the same standard on March 15, 2013 (Exh. C-5). Respondent did not contest that citation and it became a final order by operation of law on April 5, 2013 (Tr. 33). The Secretary issued Respondent the Citations on May 13, 2014.

Procedural Background

On May 23, 2014, Respondent filed a Notice of Contest with the Birmingham Area OSHA Office contesting the citations and penalties. The Notice of Contest was received by OSHA on May 28, 2014, and forwarded to the Commission. The matter was docketed by the Commission on June 4, 2014. The Secretary filed his Complaint on June 17, 2014. Respondent did not file an Answer within 20 days.

The Notice of Contest was filed and signed by David Stillwell. In it, Mr. Stillwell asserts his company, David Stillwell Roofing, is not incorporated, licensed, or insured. He provided what is presumably his home address of 18147 North River Lane, Northport, Alabama 35475 as a contact address and a telephone number of 205-861-8129.

[1] CSHO Kirby's testimony regarding which individual was wearing a particular color shirt does appear somewhat confused (Tr. 44). The undersigned does not find this confusion material to a determination of whether the two individuals were employees of Respondent.

[2] The individuals' initials are used herein to protect the identity of the individuals.

On August 6, 2014, Chief Judge Covette Rooney issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed. That order was sent via first class mail return receipt requested to the address provided in the Notice of Contest. Mr. Stilwell responded to that order on August 19, 2014, again reiterating he was self-employed, had no employees, and that Respondent was not licensed. The return address for Respondent's response was the same as on the Notice of Contest. Thereafter, Chief Judge Rooney assigned the case to the undersigned.

On September 24, 2014, the undersigned issued an order setting the matter for hearing on December 16, 2014. The order also directed the parties to jointly submit recommendations for a pretrial schedule by October 10, 2014. That order was sent via first class mail to the address provided in Respondent's Notice of Contest.

On October 10, 2014, the Secretary requested additional time to submit the joint recommendations. In his motion, the Secretary asserted his counsel had attempted to reach Mr. Stillwell by telephone but was unable to do so by the required deadline. The motion was granted. On October 29, 2014, the Secretary submitted an individual recommendation for pretrial schedule, indicating in that pleading counsel for the Secretary had been unable to reach Mr. Stillwell by telephone or mail.

The undersigned directed my office attempt to reach Mr. Stillwell and counsel for the Secretary in order to discuss the pretrial schedule. Shelia Maxwell of the undersigned's office made several unsuccessful attempts to speak with Mr. Stillwell at the telephone number provided. Ms. Maxwell was unable to leave a message for Mr. Stillwell because Mr. Stillwell did not have voicemail.

On November 6, 2014, the undersigned issued an order cancelling the December 16, 2014, hearing and directing Respondent to provide both its recommendations for a pretrial schedule and updated contact information by November 20, 2014. The order was not returned and the Commission received no response. On November 24, 2014, the undersigned issued an Order to Show Cause directing Respondent to show cause by December 15, 2014, why its notice of contest should not be dismissed for failure to comply with the undersigned's prior orders.

On November 25, 2014, the undersigned received a letter from Mr. Stillwell dated November 19, 2014, again stating the citations should be dismissed because he was not an

employer. The letter contained the same address as all prior correspondence. In it, Mr. Stillwell also noted his phone was no longer working.

On November 25, 2014, the undersigned issued a Notice of Hearing notifying the parties that a hearing would be held in this matter on February 23, 2015, in Birmingham, Alabama. The parties were further ordered to file a joint prehearing statement with the Court by February 16, 2015. The original hearing notice sent to the address provided by Respondent was returned as undeliverable. A subsequent Notice of Hearing Location was sent to Respondent at that same address via Federal Express on February 12, 2015. On February 17, 2015, the Secretary filed his prehearing statement. On February 20, 2015, the undersigned cancelled the hearing due to severe weather in the area.

On February 27, 2015, the undersigned issued an order rescheduling the hearing for March 5, 2015. That hearing was also cancelled due to severe weather that resulted in a last minute closure of the building in which the hearing was scheduled to be held.

The hearing was rescheduled for March 20, 2015, at 9:00 a.m., in Birmingham, Alabama. The undersigned issued an order notifying the parties of the date, time, and location of the hearing. That order was sent to Respondent via first class mail and Federal Express (Air Bill No. 805723501276). The Notice was not returned to the Court as undeliverable and Federal Express records indicate the Notice was delivered on March 17, 2015, at 11:49 a.m.

On March 20, 2015, the undersigned convened the hearing in this matter at 9:10 a.m., at the location indicated on the Notice (Tr. 4). The undersigned adjourned the hearing at approximately 10:19 a.m., after the Secretary had presented his evidence (Tr. 47). The undersigned remained at the location of the hearing until approximately 11:00 a.m. No representative for Respondent appeared at the hearing at any time.

On March 26, 2015, the undersigned issued a Notice to Show Cause to Respondent. In the order, Respondent was ordered to show cause why it should not be deemed to have waived its right to present evidence in its defense or, in the alternative, in default. That notice was sent via certified mail. The signed return receipt was received by this office indicating the Notice to Show Cause had been received by Respondent on April 2, 2015. On April 7, 2015, Mr. Stillwell filed a letter in response to the Notice to Show Cause. In it, he again reiterated Respondent's

position it is not an employer. It did not contain any explanation for its failure to appear for the hearing.

DISCUSSION

Coverage

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co*., 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). Respondent has consistently contended it is not an employer. It is the Secretary's burden to prove **coverage under the Act**[3] by demonstrating that the cited entity is an employer. *Allstate Painting & Contracting Co*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005).

Section 3 of the Act defines an "employer" as "a person engaged in a business affecting commerce[4] who has employees" and defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652. As the Commission noted in *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001), this definition is "unhelpfully circular." In determining whether the Secretary has satisfied his burden to establish a cited entity is an employer under the Act, the Commission has consistently applied the common law agency doctrine enunciated in *Nationwide Mutual*

[3] The issues of jurisdiction and coverage are often muddled in the case law. A timely notice of contest establishes jurisdiction with the Commission pursuant to § 10(c) of the Act. *Sharon & Walter Constr. Inc*., 23 BNA OSHC 1286, 1288, n. 2 (No. 00-1402, 2010). Whether an entity is an employer under the Act is not a question of jurisdiction, but of coverage. *StarTran, Inc*., 21 BNA OSHC 1730, 1732 (No. 02-1140, 2006), *citing Arbaugh v. Y&H Corp*., 126 S.Ct. 1235, 1244 (2006). The undersigned finds the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act. The issue to be resolved is whether Respondent is an employer covered under the Act.

[4] Respondent did not contend it was not engaged in interstate commerce. Nevertheless, the Secretary has the burden to establish this element of coverage as well. The use of the term "affecting commerce" indicates a congressional intent to "exercise fully its constitutional authority under the commerce clause." *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976); *U.S. v. Dye Construction Co*., 510 F.2d 78 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); *see also Piping of Ohio, Inc*., 16 BNA OSHC 1236 (No. 91-3481, 1993). Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Following the Ninth Circuit in *Usery v. Franklin R. Lacy*, 628 F.2d 1226 (9th Cir. 1980), the Commission has held a business may be found to engage in interstate commerce where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce*." Id., citing NLRB v. Int'l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce.

Insurance v. Darden, 503 U.S. 318 (1992). *See, e.g.*, *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010); *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting*, 21 BNA OSHC at 1035. In *Darden*, the Court considered primarily "the hiring party's right to control the manner and means by which the product is accomplished." *Id*. at 323. Other factors relevant to the 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.

Id. at 232-24, n. 3, *citing, Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

The undersigned finds the Secretary's unrebutted evidence establishes Respondent met the definition of an employer under the Act. Respondent is in the roofing business. Both the worksite at issue in this proceeding and the worksite that was the subject of the 2013 citation involved commercial roofing jobs (Exh. C-5). In neither instance was Mr. Stillwell working alone. Rather, in both he was working alongside at least one other individual also involved in installing roofing (Exhs. C-3 and C-5). Mr. Stillwell initially represented W.C. and J.W. worked for him (Tr. 13-14). Both W.C. and J.W. identified themselves as employees of Mr. Stillwell, at least one of whom stated he had worked for him for several years. CSHO Kirby observed Mr. Stillwell directing the work of the other individuals. This belies Respondent's assertion Mr. Stillwell is just an individual performing these jobs with the help of family[5] and other independent roofers.

With regard to location, hours, and tools, the undersigned finds the unrebutted evidence weighs in favor of a finding of an employer/employee relationship. The location of the work was established by Respondent. CSHO Kirby observed the individuals pack up their material into a single truck and leave together. Based upon this observation, the Court infers the

[5] Although Mr. Stillwell identified one of the individuals on the roof as his stepson during the inspection, it was not until his April 7, 2015, letter that he alleged another one of the individuals was his son. Even if true, the fact an individual is a family member does not exempt him from being found an employee if he is performing work for the business as an employee. *Howard M. Clauson Plastering Co*., 5 BNA OSHC 1760 (No. 76-2669, 1977).

individuals were brought to the worksite together and performed the work on Respondent's schedule. The photographs show three individuals sharing two pneumatic nail guns. These were powered by a single compressor. There was a single ladder for all individuals to access the worksite. All the roofing materials were at the worksite. The evidence establishes the work was performed at a location established by Respondent, on Respondent's schedule, using shared tools and materials.

The record is silent on the issue of compensation (including benefits and tax treatment). Because control of the manner and means of accomplishing the work is the primary consideration, the undersigned does not find this absence of evidence significantly undermines the Secretary's showing of an employer/employee relationship.

Respondent's conduct in this matter displays a pattern of disregard of Commission proceedings. Respondent has not provided any explanation for its failure to appear at the hearing. Rather, Mr. Stillwell's response to the Court's Order to Show Cause was "I can't afford to fight you and I can't afford to pay you…shouldn't that disqualify the whole deal?" Mr. Stillwell's November 19, 2014, letter indicated Mr. Stillwell had early on decided he did not intend to appear or participate in these proceedings. In it he wrote, "I'm not driving anywhere to see you or meet with you." This statement along with Respondent's failure to participate in any pretrial planning and to appear for the hearing demonstrate disdain for the orders of the Commission. Therefore, the undersigned finds Respondent has waived its right to present evidence in rebuttal to the Secretary's case in chief.

When considered as a whole, the evidence establishes W.C. and J.W. were employees of Respondent.[6] The Secretary has established Respondent is covered under the Act.

Motion for Default

At the start of the hearing, the Secretary moved for and order of default based upon Respondent's failure to appear. Commission Rule 64(a) provides: "The failure of a party to appear at a hearing may result in a decision against the party." Under Commission Rule 101(a), a judge may declare a party in default for failure to "proceed as provided by [Commission] rules

[6] It is not necessary to make a finding as to the status of J.S., the purported stepson, as the "bare minimum of one single employee is sufficient to invoke coverage under the Act." *Poughkeepsie Yacht Club, Inc*., 7 BNA OSHC 1725, 1727 (o. 76-4026, 1979).

or as required by the Commission or Judge," after having been afforded an opportunity to show cause why he should not be declared in default. The Commission "follows the policy in law that favors deciding cases on their merits." *DHL Express, Inc.*, 21 BNA OSCH 2179, 2180 (No. 07-0478, 2007). Rule 101(a) nevertheless permits the harsh sanction of dismissal of a notice of contest where a party has displayed a "pattern of disregard" of Commission proceedings. *Philadelphia Constr. Equip., Inc*., 16 BNA SOHC 1128, 1131 (No. 92-899, 1993); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001).

As previously noted, Respondent's conduct displays a pattern of disregard of Commission proceedings that warrants a sanction. The Court's records indicate Respondent has received the notices regarding its obligations to file various pretrial submissions, but has failed or refused to do so. Respondent received notice of the hearing date, time, and location, but chose not to appear. When afforded the opportunity to show cause why he failed to appear, Mr. Stillwell did not offer an explanation. He simply stated the Citations should be dismissed solely on his representations Respondent was not an employer. The Court also put Respondent on notice his failure to provide a reason for its failure to appear would result in a finding of default. Mr. Stillwell had made clear previously he did not intend to appear at any hearing scheduled by the undersigned. The tone of his letters suggests a contemptuous attitude toward these proceedings. For example, in his November 19, 2014, letter Mr. Stillwell wrote, "I'm not the threat to worker's here – you are" and ended the letter, "Thanks for nothing." Respondent's conduct has been prejudicial to the administration of justice and to the Secretary's enforcement responsibility under the Act, and cannot be permitted to continue. Dismissal of Respondent's notice of contest is necessary and appropriate to remedy the Respondent's continuing prejudicial conduct.

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 hereby ORDERED that:

Respondent is determined to be in DEFAULT, and its notice of contest is DISMISSED. Citation No. 1 and Citation No. 2 issued to Respondent pursuant to Inspection No. 962672 on May 13, 2014, are hereby AFFRIMED as issued in their entirety.

SO ORDERED.

/s/

Date: May 26, 2015

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia