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

Secretary of Labor, Complainant, v. Jack Durham d/b/a Jack Durham and Company, Respondent.	OSHRC Docket No. **15-1587** Simplified Proceedings

Appearances:

Schean G. Belton, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

Jack Durham, *pro se*, Jack Durham d/b/a Jack Durham and Company, Quinton, 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 (the Act). Jack Durham, d/b/a Jack Durham and Company (hereinafter Respondent), is a sole proprietorship that performs maintenance and home repair work primarily in Jefferson County, Alabama. On July 28, 2015, Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officers (CSHO) Neon Douglas and John Zellar conducted an inspection of Respondent at 1278 Forestdale Square in Forestdale, Alabama. Based upon the inspection, the Secretary of Labor, on September 2, 2015, issued a Citation and Notification of Penalty with four items to Respondent alleging serious violations of 29 C.F.R. §§ 1926.501(b)(11); 1926.503(a)(1); 1926.1053(b)(4); and 1926.1053(b)(13) for failure to protect employees from falls from a roof and improper use of a ladder. The Secretary proposed a penalty of $5,600.00 for the Citation. Respondent timely contested the Citation. All the violations are at issue.

A hearing was held in this matter on February 24, 2016, in Birmingham, Alabama. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 C.F.R. §§ 2200.200-211. At the close of the hearing, the parties presented oral closing arguments (Tr. 158-80). The parties were given the opportunity to file written closing statements, but declined to do so.

For the reasons set forth below, the Citation is VACATED.

Jurisdiction

Based upon the record, I find jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 10).

Background

The Worksite

Respondent is a sole proprietorship owned and operated by Jack Durham. The site of the inspection at issue in this matter was a strip mall in Forestdale, Alabama. The strip mall is owned by Mitchell Companies (Tr. 151). Mr. Durham represented Respondent in this proceeding and also testified. According to Mr. Durham's unrebutted testimony, for approximately 20 years he has been responsible for performing maintenance work on the strip mall (Tr. 151). He performs this work pursuant to a "verbal agreement" with Mitchell Companies (Tr. 152). Although in the past he has performed the work himself, Mr. Durham testified he no longer feels comfortable doing certain tasks and hires individuals to perform the work for him (Tr. 151-52).

Mr. Durham's testimony suggests he has discretion to determine when and what type of work is necessary on the strip mall. He performs that work (or has it done) and then "sends a bill" to Mitchell Companies for the work (Tr. 154). He has access to credit cards held by Mitchell Companies with which he can purchase the materials necessary for the work (Tr. 154). Mr. Durham maintains a room in the strip mall in which he stores the tools and other equipment necessary to perform this work (Tr. 131).

Mr. Durham became aware of a need for repairs to the metal awning on the front of the strip mall. The awning, which overhangs the sidewalk, had been leaking. After deciding he did not want to perform the work himself, Mr. Durham hired Gary Lindsley to find the source of the

leak and fix it. Mr. Durham testified he hired Mr. Lindsley to perform that work because he is "a really good handyman." (Tr. 149). Mr. Durham and Mr. Lindsley have known one another for approximately 2 years and Mr. Lindsley has performed various "handyman" type jobs for Mr. Durham during that time (Tr. 126-27, 150). Mr. Lindsley testified he in turn hired Titus (Jermaine) Stevenson, a longtime friend, to assist him (Tr. 135). Mr. Lindsley purchased the materials used to perform the repair with a credit card supplied by Mr. Durham (Tr. 155).

Mr. Lindsley testified he considers himself a "contractor." (Tr. 127). He performs a wide variety of general labor for numerous people (Tr. 122, 127-29). He typically gets his jobs through word of mouth (Tr. 130). As he described it, he goes "out and I tell somebody how much I will charge them, and that's what I do." (Tr. 127). He owns his own tools, but conceded he uses Mr. Durham's tools upon occasion (Tr. 131-32).

The Inspection

On July 28, 2016, while returning from another inspection, CSHOs Douglas and Zellar[1] saw Mr. Lindsley working on the awning (Tr. 15, 45). They were able to observe Mr. Lindsley from the road (Tr. 83). CSHO Zellar, who was driving, pulled into the strip mall parking lot while CSHO Douglas began to take pictures (Tr. 15, 47). CSHO Zeller also took photographs once he had parked the car in the strip mall parking lot (Tr. 48). The photographs show Mr. Lindsley and Mr. Stevenson accessing the awning from the top step of an 8-foot ladder (Tr. 18-19, 49-51; Exh. C-1 pp. 1, 7, 8, 9). The photographs also show Mr. Lindsley walking and working on the awning without any form of fall protection (Tr. 18, 51, 53; Exh. C-1 pp. 2, 3, 4, 5, 6, 10, 11).

After taking photographs, CSHOs Douglas and Zellar approached Mr. Lindsley (Tr. 22). They spoke only briefly to Mr. Lindsley before Mr. Durham approached the worksite (Tr. 22-23). CSHO Douglas testified when Mr. Durham approached them, he informed them the worksite was "his business." (Tr. 23). Mr. Durham then spoke with CSHO Zellar while CSHO

[1] CSHO Douglas was being trained at the time of the inspection. Prior to working for OSHA, he had background in occupational safety, including serving as a preventative med tech while on active duty in the United States Navy and for six years as an Environmental Safety Compliance Specialist with the Department of Justice, Federal Bureau of Prisons (Tr. 12-14). CSHO Zellar, who was training CSHO Douglas, has been a CSHO with OSHA for approximately six years (Tr. 38). Prior to that, CSHO Zellar served 19 years with the United States Air Force (Tr. 39). From 2006 until being hired by OSHA in 2010, CSHO Zellar worked as a safety manager for several construction general contractors (Tr. 39-41).

Douglas continued to talk with Mr. Lindsley (Tr. 54-55). During their private conversation, CSHO Douglas testified Mr. Lindsley told him he "worked for" Mr. Durham and that he was using Mr. Durham's ladder (Tr. 25, 30 - 33). Because it was hot outside, Mr. Durham invited them to an air-conditioned office in a thrift shop in the strip mall (Tr. 110). Mr. Durham testified the thrift shop is owned by his wife (Tr. 152).

Mr. Durham provided CSHO Zellar with a business card that read "Jack Durham and Company." (Tr. 62). The card states the business performs "electrical, plumbing, HVAC, vinyl siding, and more." (Tr. 63). It stated Jack Durham and Company had been in business 40 years (Tr. 80). According to CSHO Zellar, Mr. Durham informed him he had hired Mr. Lindsley and Mr. Stevenson to caulk the joints between the awnings and the exterior walls of the strip mall (Tr. 63-64).

Initially, all five men went to the office together (Tr. 60). Later, CSHO Zellar and Mr. Durham left the office to allow CSHO Douglas to conduct private interviews with Mr. Lindsley and Mr. Stevenson (Tr. 64). CSHO Zellar and Mr. Durham returned to the area where Mr. Lindsley and Mr. Stevenson had been working (Tr. 64). CSHO Zellar could not recall what they discussed (Tr. 65). CSHO Douglas testified that during his interview Mr. Lindsley told him he worked for Mr. Durham doing general maintenance type work (Tr. 25). Mr. Lindsley told him he was paid by Mr. Durham and that Mr. Durham supplied the tools for the job (Tr. 27).

CSHO Zellar later joined CSHO Douglas inside interviewing Mr. Stevenson (Tr. 66). During that interview, Mr. Stevenson[2] stated he had worked for Mr. Durham for approximately 1 month and had been hired through Mr. Lindsley (Tr. 66). He stated he was paid in cash and did "whatever asked." (Tr. 67). Mr. Stevenson's prior work had been as a landscaper (Tr. 69). His prior work for Respondent consisted of replacing ceiling tiles, pressure washing, and caulking (Tr. 69). Mr. Stevenson had none of his own tools and had used Mr. Durham's tools and equipment when working on past jobs (Tr. 70). According to CSHO Zellar, Mr. Stevenson told him he was not an independent contractor (Tr. 70).

While the men were talking in the office of the thrift shop, a shipment arrived. Mr. Durham directed Mr. Stevenson to assist with unloading the shipment and he complied (Tr. 25-

[2] Mr. Stevenson was not called to testify by either the Secretary or Respondent. All of the statements attributed to Mr. Stevenson herein are out-of-court statements.

26, 60).

After receiving a letter from Mr. Durham in which he stated his position that he was not an employer, CSHO Zellar attempted to contact Mr. Lindsley and Mr. Stevenson for further investigation (Tr. 86-87; Exh. C-2). CSHO Zellar testified he was unable to reach Mr. Lindsley but did talk with Mr. Stevenson (Tr. 86). Based upon the information received from Mr. Stevenson, CSHO Zellar concluded Respondent was the employer of Mr. Lindsley and Mr. Stevenson.

Based on the information gathered the day of the inspection and during his subsequent investigation, CSHO Zellar recommended the Citation be issued to Respondent. Respondent timely contested the Citation alleging it was not an employer covered under the Act.

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); *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC 1477 (No. 96-1378, 2001), *citing, Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997).

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

[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). I find 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

employed in a business of his employer which affects commerce." 29 U.S.C. § 652. As the Commission noted in *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC at 1480, this definition is "unhelpfully circular." In determining whether the Secretary has satisfied his burden to establish a cited entity is an employer under the Act, the Commission has applied the common law agency doctrine enunciated in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992). *See, e.g.*, *All Star Realty Company, Inc., d/b/a A All Star Realty & Construction, Co.*, 24 BNA OSHC 1356 (No. 12-1597, 2014); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010); *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting*, 21 BNA OSHC at 1035; *Sharon and Walter Construction, Inc.*, 23 BNA OSHC 1286 (No. 00-1492, 2010); and *AAA Delivery Service, Inc*., 21 BNS OSHC 1219 (No. 02-0923, 2005). 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 Secretary argues both the individuals performing the awning repair work are employees of Respondent. The Secretary need only show Respondent has one employee to establish coverage. *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725 (No. 76-4026, 1979), *citing Elmer Vath, Painting Contractor*, 2 BNA OSHC 1091 (No. 773, 1974). Therefore, I will consider whether either Mr. Lindsley or Mr. Stevenson were employees of Respondent.

The record contains scant evidence regarding the nature of Respondent's business. There

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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, I find it is engaged in a business affecting interstate commerce.

is no evidence of the structure of the business, whether it is incorporated, or what type of work it typically performs. The only evidence in the record is the content of a business card that indicates Jack Durham and Company holds itself out as having been in business over 40 years and that it performs a wide range of repair and maintenance type work. The record contains no payroll or other business records.

Respondent does not contest that it is in the business of performing maintenance and repair work. Mr. Durham testified that historically he has done all the maintenance and repair work performed by the company himself. He occasionally hires a third party to do jobs he no longer feels capable of performing. On the occasions he hires a third party, Respondent provides the materials needed to perform the work and allows the individuals to use its tools and equipment. The work Respondent hires these individuals to perform is general labor, not requiring any specialized skills. In the instant case, Mr. Lindsley described himself as a "jack of all trades" and Mr. Durham called him a "really good handyman." (Tr. 129, 151). Mr. Stevenson had little prior experience other than landscaping. Neither Mr. Lindsley nor Mr. Stevenson were licensed contractors (Tr. 127). This evidence tends to support a finding the relationship between Respondent and Mr. Lindsley and Mr. Stevenson is one of an employer and employee.

In considering all of the factors set out by the Supreme Court in *Darden*, I give the greatest weight to the determination of who controls the manner and means of completing the work. I find the facts regarding this factor weigh in favor of finding Respondent is not an employer. Mr. Lindsley was given a specific and discrete repair task to perform. The terms of the agreement between Respondent and Mr. Lindsley dictated where and when the work was to be performed. Respondent paid directly for the materials needed to complete the work and allowed the use of its tools and equipment. However, unlike a situation in which an employer is the exclusive provider of the tools and material for completing the work, the evidence establishes Mr. Lindsley had considerable discretion to determine the manner in which to perform the work and to choose the materials he used to complete the work. Mr. Lindsley was given a credit card with which to purchase the materials. There is no evidence he was told what to purchase. Rather, he testified he was told the awning was leaking and to fix it. When asked who told him how to fix it, he responded, "Nobody, I told myself how to fix it." (Tr. 147). There is no

evidence once he was told the job that needed to be done, Respondent had any oversight of Mr. Lindsley's work. The Secretary presented no evidence Respondent had, or exercised, the authority to control the day-to-day activity of Mr. Lindsley or Mr. Stevenson. *See All Star Realty Company, Inc., d/b/a A All Star Realty & Construction, Co.*, 24 BNA OSHC 1356 (No. 12-1597, 2014) (finding Respondent not an employer because it lacked control over the activities observed by the CSHO). I find Respondent did not exercise sufficient control over the manner and means of completion of the work to find it is an employer under the Act.

It is undisputed Respondent did not have a written contract with either Mr. Lindsley or Mr. Stevenson to perform the work on the strip mall awning. Mr. Durham and Mr. Lindsley did have an agreement as to the performance of the repair work. According to Mr. Lindsley, Mr. Durham contacts him when he needs work done and he provides Mr. Durham with an estimate of how much it will cost to perform the work (Tr. 133, 143). He has had this working relationship with Mr. Durham for approximately 2 years. Importantly, Mr. Lindsley testified he has this type of relationship simultaneously with many other individuals (Tr. 122). The fact Mr. Lindsley only occasionally performs work for Respondent on a per job basis (Tr. 150) and has a similar relationship with other entities weighs in favor of finding Mr. Lindsley was an independent contractor.

The Secretary points to the fact Mr. Lindsley does not have a business and is not a licensed contractor. I do not find this dispositive. Mr. Lindsley owns his own tools. He bids his own jobs. On the instant job, he hired an assistant whom he paid out of the total payment he received from Respondent. Mr. Lindsley testified he sets his own hours (Tr. 121).[5] Although Mr. Lindsley may not meet all the formalities of an independent business, he operates as one.

In the instant case, Mr. Lindsley agreed to be paid by the hour and told Mr. Durham how many hours the job would likely take to complete (Tr. 144-45). Respondent did not set a wage or hourly rate for Mr. Lindsley (Tr. 133). Mr. Lindsley was paid by check and issued a 1099[6] for

[5] According to CSHO Zellar, Mr. Stevenson stated he was told, within a window, when to arrive at work and when he was permitted to leave. However, the statement is not specific as to who told him those were his hours. It is equally likely on this record that Mr. Lindsley set Mr. Stevenson's hours.

[6] I take judicial notice the term "1099" refers to IRS Form 1099-MISC which is used to "report payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business." *See http://www.irs.gov/Help-%26-Resources/Tools-%26-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-*

the work (Tr. 122, 132). Mr. Lindsley, in turn, hired Mr. Stevenson to assist him and paid Mr. Stevenson an hourly rate out of the money he received from Respondent (Tr. 135-36). There is no evidence Respondent provided either Mr. Lindsley or Mr. Stevenson any type of benefits. I find this evidence weighs in favor of finding Mr. Lindsley and Mr. Stevenson were independent contractors, rather than employees of Respondent.

The Secretary relies primarily on the out of court statements of Mr. Stevenson. During his second interview, Mr. Stevenson told CSHO Zellar he had been hired by Respondent after being referred by Mr. Lindsley (Tr. 90). He stated he worked Monday through Friday, was required to be at work between seven and eight o'clock, and could leave between four and six o'clock (Tr. 90). He was paid either in cash or by two-party check (Tr. 103). Mr. Stevenson also told CSHO Zellar he was paid directly by Respondent (Tr. 91). Mr. Stevenson worked with Mr. Lindsley on a daily basis (Tr. 92). At the time of the second interview, Mr. Stevenson no longer worked for either Mr. Lindsley or Respondent (Tr. 93-94). CSHO Zellar testified Mr. Stevenson told him he had met with Mr. Durham and Mr. Lindsley after the inspection at which time Mr. Durham told him he wanted Mr. Stevenson to claim to be an independent contractor (Tr. 94). According to CSHO Zellar, Mr. Stevenson told him he refused to do so (Tr. 94). Mr. Lindsley denies this meeting took place (Tr. 123).

To the extent Mr. Stevenson's statements contradict the testimony of Mr. Lindsley, I give greater weight to Mr. Lindsley's testimony. The record contains only CSHO Douglas's and CSHO Zellar's recollections of what Mr. Stevenson told them. No written statements were submitted into the record. Unlike the out-of-court statements of Mr. Stevenson, Mr. Lindsley's testimony was in person and subject to cross examination. Therefore, I was able to assess Mr. Lindsley's demeanor. I found Mr. Lindsley to be a credible witness. Although portions of his testimony appeared somewhat rehearsed, on cross examination he was straightforward and candid.

Nor do I agree with the Secretary that statements made by Mr. Lindsley during the inspection are inconsistent with his testimony or with a finding he was an independent contractor. CSHOs Douglas and Zellar testified Mr. Lindsley told them he "worked for" Mr.

%26-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099-MISC-%26-Independent-Contractors/Form-1099-MISC-%26-Independent-Contractors.

Durham (Tr. 25, 30, 32-33). Mr. Lindsley is not a lawyer, nor did he strike me as one who understands sophistry. Given the ambiguity of the statement, I find it equally likely his response referred to the person for whom the work was being performed as to the person by whom he was "employed."

The Secretary also places considerable reliance on the fact that, during the inspection, Mr. Stevenson assisted with unloading a truck at the direction of Mr. Durham. Although the right to assign additional tasks to an individual is an indication of an employer/employee relationship, I do not find this single incident sufficient to base a finding Respondent was Mr. Stevenson's employer.

I find the preponderance of the evidence weighs in favor of finding Respondent was not an employer of either Mr. Lindsley or Mr. Stevenson. Absent evidence Respondent had any other employees, I find Respondent is not an employer covered under the Act.

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:

Items 1 and 2, of Citation 1, alleging serious violations of the standards at 29 C.F.R. § 1926, are hereby vacated.

SO ORDERED.

/s/
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: March 28, 2016