



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.

AAA DELIVERY SERVICES, INC.,

Respondent.

OSHRC Docket No. 02-0923

DECISION

Before: RAILTON, Chairman and ROGERS, Commissioner.

BY THE COMMISSION:

AAA Delivery Services Inc., (“AAA”) is a newspaper distributor in the Fort Lauderdale, Florida area. Before dawn on November 23, 2001, a newspaper vendor who had received copies of the Fort Lauderdale Sun-Sentinel from AAA was struck and killed while selling the papers near an intersection in Boca Raton, Florida. Following an inspection, the Occupational Safety and Health Administration (“OSHA”) cited AAA for a violation of 29 C.F.R. §1910.132(a).¹ The citation charged AAA with failing to

¹ The cited standard provides:

Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices and protective shields and barriers, shall be provided, used and maintained in a sanitary and reliable condition whenever it is necessary by reason of hazards of processes in the environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in

provide reflective vests to vendors who sold the Sun-Sentinel from street locations. AAA contested the citation, claiming that it was not the employer of the street vendors and that the cited standard did not require reflective vests. In his decision, Judge Stephen J. Simko vacated the citation on the ground that the standard did not apply. We also vacate the citation, but on the ground that the Secretary failed as a threshold matter to establish that AAA was the employer of the vendors.

Background

The basic terms of the vendors' relationship with AAA at the time of the accident are set out in written agreements that were signed by the vendors.² Under the terms of these agreements, the vendors paid AAA 35 cents for every daily paper and 85 cents for every Sunday paper sold. The agreements identified the vendors as independent contractors and required them to be responsible for their own taxes and any licenses. The decedent, Patrick McDonough, signed such an agreement.

The record shows that the vendors decided how many papers they wanted to take from AAA to sell on any given day. The vendors received the first 53 papers free of charge and any of those that were not sold were bought back by AAA. This arrangement ensured that each vendor received a minimum of \$26.50 a day. The vendors also chose the area where they wanted to work. If two or more vendors wanted to work in the same area, Julio Maldonado, an individual who drove some of the vendors from their homes to their work locations, would settle the matter. Maldonado could also deny a requested location to a vendor who chose not to work regularly. The vendors were not required to remain at the location where Maldonado left them, however, nor did they have to work for any specified period of time or exclusively for AAA.

The Sun-Sentinel provided non-mandatory safety training to the vendors, and AAA provided transportation to the training. The Sun-Sentinel offered accident

the function of any part of the body through absorption, inhalation or physical contact.

² While the agreements were written by AAA, AAA did not sign them.

insurance to the vendors through Aegis Insurance Company at a rate of \$2.00 per week. The newspaper also provided hats, aprons and shirts bearing the newspaper's logo as part of a package to those vendors who chose to participate in the insurance program. AAA collected the premium from the vendors for the Sun-Sentinel and also distributed the clothing.

Discussion

The Occupational Safety and Health Act, 29 U.S.C. §§651-678 (the Act), defines an "employer" as "a person engaged in a business affecting commerce 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. In determining whether there is an employment relationship between a cited employer and the affected workers, the Commission relies on the test set out in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992) ("*Darden*"). *See, e.g. Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, ___ CCH OSHD___ (No. 97-1631, 2005) (consolidated); *Don Davis*, 19 BNA OSHC 1477, 2001 CCH OSHD ¶ 32,402 (No. 96-1378, 2001); *Vergona Crane Co.*, 15 BNA OSHC 1782, 1991-1993 CCH OSHD ¶ 29,775 (No. 88-1745, 1992). *See also Wolf v. Coca-Cola Co*, 200 F.3d 1337 (11th Cir. 2000) (relevant circuit follows *Darden*).

In *Darden*, the Court held that the term employer is defined according to common law principles unless the statute specifically indicates otherwise. The *Darden* Court held the following factors to be pertinent in determining whether a party is an employer of the affected workers: "the skill required for the job, 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." 503 U.S. at 322, *citing Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

Here, the Secretary failed to prove that an employment relationship existed between AAA and the vendors. The evidence in this record does not show that AAA controlled the manner or the means by which the vendors, and McDonough in particular, performed their work. AAA did not tell the vendors how long to work or how to sell newspapers. Nor did it prevent them from moving to a location different from that where they were dropped; McDonough himself did this on at least one occasion. The record also shows that, contrary to the Secretary's claims, AAA did not prevent the vendors from selling papers for other distributors; McDonough was also known to have done this on at least one occasion. *Cf. Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1992 CCH OSHD ¶29, 689 (No. 88-2012, 1992) *aff'd*, 20 F.3d 938 (9th Cir. 1994) (employment relationship demonstrated by evidence that putative employees worked exclusively for respondent). There was also no requirement that the vendors sell papers for AAA every day or on any particular day.³

Although the vendors were guaranteed the proceeds of 53 papers, they could use their own initiative to sell more papers at whatever price they set and for as long a period as they chose. Indeed, this record indicates that, apart from the negotiated charge for papers, AAA had no other economic ties with the vendors. There is no evidence that AAA provided leave and retirement benefits, or paid worker's compensation, withholding or social security taxes for any of the vendors. *See Darden*, 503 U.S. at 324; *Don Davis*, 19 BNA OSHC at 1480, 2001 CCH OSHD at p. 49, 896, *citing Spirides v Reinhardt*, 613 F. 2d 826, 833 (D.C. Cir. 1979). The accident insurance was provided by the Sun-Sentinel, not by AAA. Finally, there is nothing in the record to indicate that AAA had authority to assign additional projects to the vendors. *Cf. Timothy Victory*, 18 BNA OSHC 1023, 1995-97 CCH OSHD ¶ 31,431 (No. 93-3359, 1997) (inability

³ The record fails to establish whether driver Maldonado was an agent whose control could be imputed to AAA. Even if he were, we find that Maldonado's ability to deny a location to a vendor, because of a dispute or because a vendor did not work regularly, is not a sufficient assertion of control to establish the existence of an employment relationship between AAA and the vendor.

of boat owner to assign additional tasks to divers evidence of lack of employment relationship even though owner chose where the dives would occur and could refuse to permit divers to enter water).

Based on these facts, we find that the Secretary failed to establish that AAA was an employer of the newspaper vendors. We accordingly vacate the citation.⁴

/s/

W. Scott Railton
Chairman

/s/

Thomasina V. Rogers
Commissioner

Dated: September 1, 2005

⁴ Based on our holding, we need not address the other issues raised on review. Because we have decided the case on the basis of the record and the briefs before us, we also deny AAA's request for oral argument.

Secretary of Labor,

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AAA Delivery Services, Inc.,

Respondent.

OSHRC Docket No. 02-0923

Appearances:

Ann G. Paschall, Esquire
Office of the Solicitor
U.S. Department of Labor
Atlanta, Georgia For Complainant

Brent I. Clark, Esquire
Seyfarth Shaw
Chicago, Illinois
For Respondent

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

DECISION AND ORDER

AAA Delivery Service, Inc. (AAA), is a Florida corporation engaged in the business of purchasing, distributing, and selling newspapers in the Fort Lauderdale area. On November 23, 2001, an automobile struck and killed a vendor selling newspapers distributed by AAA at a busy intersection in Boca Raton, Florida. Following an inspection by Occupational Safety and Health Administration (OSHA) Compliance Officer Natasha Sanborn, the Secretary issued a citation to AAA on May 10, 2002, charging AAA with a serious violation of 29 C.F.R. § 1910.132(a) for failing to provide reflective clothing to its vendors. The Secretary proposed a penalty of \$4,900.00.

AAA timely contested the citation and penalty, arguing that OSHA has no jurisdiction over it because it is not an employer within the meaning of the Occupational Safety and Health Act of 1970 (Act). AAA contends that the vendors to whom it delivers newspapers are independent contractors, and not its employees. Respondent also contends that the cited standard does not apply to the cited conditions.

A hearing was held in this matter in Miami, Florida, on January 23, 2003. For the reasons set forth below, it is determined that the cited standard does not apply to the cited conditions. The citation is vacated, and no penalty is assessed.

Background

Ben Babapour owns and operates AAA, which he started approximately fifteen years prior to the hearing. AAA contracted with the *Fort Lauderdale Sun Sentinel* to buy, distribute, and sell *Sun Sentinel* newspapers in designated routes. *Sun Sentinel* charges AAA a certain amount for daily newspapers (printed Monday through Saturday), and a higher amount for Sunday newspapers.

AAA made working arrangements with approximately 65 vendors and with drivers Julio Maldonado and Danny Christy. In February 2000, AAA began delivering newspapers to vendor Patrick McDonough, who regularly stationed himself at the corner of the Glades Avenue and U.S. 441 in Boca Raton, Florida. This intersection was part of what was designated as Route 630 under AAA's contract with the *Sun Sentinel*.

AAA's working arrangement with McDonough was typical of its arrangements with the other vendors. Van driver Maldonado, driving AAA's van, would pick up McDonough at his residence early in the morning and take him to the corner of Glades Avenue and U.S. 441. McDonough would tell Maldonado how many newspapers he wanted for the day. AAA would give McDonough 53 newspapers "free," and after that charge 25¢ per newspaper for each newspaper sold (a copy of the daily *Sun Sentinel* costs 50¢ retail). On Sunday, McDonough would pay AAA 85¢ per newspaper sold. Under this arrangement, McDonough was guaranteed \$26.50 for selling the 53 "free" newspapers, and would then earn an additional 25¢ per daily newspaper sold. On Sundays, McDonough would pay \$2.00 for the premium on his accident insurance provided by the *Sun Sentinel*. The \$2.00 also covered the cost of his hat, apron, and *Sun Sentinel* T-shirt.

Typically, Maldonado would pick up McDonough at his intersection at approximately 11:30 am. McDonough would give Maldonado the money owed to AAA for the newspapers sold. If McDonough had not sold all of the first 53 newspapers, AAA would buy them back from him for 50¢ each. Maldonado would then drive McDonough back to his residence.

Vendors on AAA's routes had the opportunity to attend a safety training class sponsored by the *Sun Sentinel*. Maldonado drove the vendors (including McDonough once) in AAA's van to the safety training classes. The class was not mandatory.

On November 23, 2001, Maldonado dropped off McDonough at the corner of Glades Avenue and U.S. 441 at approximately 5:30 am. At approximately 5:50 a.m., a car driven by a 20 year old woman jumped the median and struck McDonough, then dragged him underneath the car until it came to a stop. McDonough was killed instantly. Evidence produced at the hearing suggested that the driver, charged with driving under the influence, may have passed out.

The Fort Lauderdale Area OSHA Office received notification of the fatality. Compliance Officer Natasha Sanborn investigated the accident. Because McDonough was wearing a *Sun Sentinel* T-shirt and was selling *Sun Sentinel* newspapers, Sanborn first contacted the newspaper and learned that McDonough received the newspapers from AAA. She subsequently interviewed owner Ben Babapour and vendor Thomas Greco.

As a result of Sanborn's inspection on May 10, 2002, the Secretary issued the citation that gave rise to this case.¹

¹ AAA claims that it has no employees and, thus, is not an employer within the meaning of the Act. "Only an 'employer' can be cited for a violation of the Act," *Verona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992), although the bare minimum of one single employee is sufficient to invoke coverage under the Act. *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727 (No. 76-4026, 1979). Because the citation is vacated on its merits, it is unnecessary to address the employment issue.

Discussion

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1910.132(a)

The Secretary alleges that AAA committed a serious violation of 29 C.F.R. § 1910.132(a), which provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation alleges: "On or about 11/23/01, workers were not provided with the proper protective equipment such as a reflective vest while selling newspapers on a street corner under limited visibility conditions."

It is undisputed that McDonough was not wearing a reflectorized vest at the time of his death. At issue is whether respondent was required by 29 C.F.R. § 1910.132(a) to provide McDonough with a reflectorized vest.

Applicability of the Cited Standard

The standard at 29 C.F.R. § 1910.132(a) appears in "Subpart I—Personal Protective Equipment" of the general industry standards. Section 1910.132(a) requires employers to

assess the hazards of their workplace and provide appropriate personal protective equipment (PPE). PPE is not defined in the standard. “Protective” means “adapted or intended to afford protection”; “protect” means “to keep from harm, attack, or injury; guard” (*American Heritage Dictionary*, Second College Ed. 1982). The guarding quality is evident in the specific forms of PPE addressed in the other standards in Subpart I:

- § 1910.133—Eye and face protection
- § 1910.134—Respiratory protection
- § 1910.135—Head protection
- § 1910.136—Foot protection
- § 1910.137—Electrical protective equipment
- § 1910.138—Hand protection
- § 1910.139—Respiratory protection for M. tuberculosis

All of the PPE addressed in Subpart I provide actual physical protection from harm to the employee. None of the PPE operates solely as a warning garment, as is the case with reflectorized vests. Nowhere in Subpart I are reflectorized vests mentioned.

Reflectorized vests are mentioned in “Subpart G—Signs, Signals, and Barricades” found in the construction standards in 29 C.F.R. Part 1926. In November 2001,² 29 C.F.R. § 1926.201(a)(4) provided: “Flagmen shall be provided with and shall wear a red or orange warning garment while flagging. Warning garments worn at night shall be of reflectorized material.”

Similarly, the Secretary has promulgated standards requiring “high visibility vests” for employees who work at marine terminals [29 C.F.R. § 1917.71(e)] and perform cargo unloading work [29 C.F.R. § 1918.86(m)]. The specific provisions addressing warning

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Effective August 13, 2002, 29 C.F.R. § 1926.201 was revised to read as follows:

29 C.F.R. § 1926.201 Signaling

(a) Flaggers. Signaling by flaggers and the use of flaggers, including warning garments worn by flaggers shall conform to Part VI of the Manual on Uniform Traffic Control Devices, (1988 Edition, Revision 3 or the Millennium Edition), which are incorporated by reference in §1926.200(g)(2).

garments for employees engaged in flagging, unloading cargo, or working at a marine terminal indicates the Secretary's intention to require employers in these industries to provide warning garments for the safety of their employees. No standards require warning garments for newspaper vendors or other employees who work on street corners.

The protection offered by the PPE listed in Subpart I is that of an actual physical barrier between the potential hazard and the employee. The protection offered by a reflectorized vest is a visual warning to others. Wearing of the vest will do nothing to soften the impact on the employee if the warning is not heeded. Reflectorized vests lack the guarding or shielding quality characteristic of the PPE listed in Subpart I.

The Secretary has failed to establish that 29 C.F.R. § 1910.132(a) applies to the specific conditions cited. The evidence was insufficient to prove that AAA was required by this standard to provide McDonough with a reflectorized vest while selling newspapers on a street corner under limited visibility conditions. The alleged violation of 29 C.F.R. § 1910.132(a) is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Item 1 of Citation No.1, alleging a serious violation of 29 C.F.R. § 1910.132(a), is vacated and no penalty is assessed.

/s/

STEPHEN J. SIMKO, JR
Judge

Date: May 30, 2003