Some personal identifiers have been redacted for privacy purposes.

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. IRELAND CONTRACTING, LLC, Respondent.	OSHRC Docket Nos. 20-0560 & 20-0561 Consolidated

APPEARANCES:
Judson Dean, Esquire
U.S. Department of Labor, Office of the Solicitor
Philadelphia, Pennsylvania
For the Secretary

Brian S. Kane, Esquire
Burns White LLC
Pittsburgh, Pennsylvania
For the Respondent

BEFORE: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

The Occupational Safety and Health Administration (OSHA) issued two citations to Respondent on March 20, 2020, alleging violations of the Occupational Safety and Health Act (the Act) at two worksites in Gibsonia, Pennsylvania. Respondent filed a timely notice of contest to both citations, bringing this matter before the Occupational Safety and Health Review Commission

(the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

I. BACKGROUND

On October 9, 2019, the Occupational Safety & Health Agency (OSHA) Pittsburgh Area Office received a complaint of roofers working without fall protection in Gibsonia, Pennsylvania. That same day an OSHA compliance officer (CO) inspected the two worksites that are the subject of the contested citations at issue here. (Tr. 362; RX-4; RX-8).[1]

Ireland Contracting, LLC (Ireland Contracting or Respondent) contracted with two homeowners for roof replacement at 4108 Fairway Drive and 4115 Fairway Drive in Gibsonia, Pennsylvania.[2] (JX-1, Stip. 7, 13). Ireland Contracting hired two roofing subcontractors to perform the roofing work.

A roofing crew from Integrity Construction LLC (Integrity) was re-roofing the residence at 4108 Fairway Drive (4108 Worksite) on October 9, 2019. (Tr. 148-49; GX-1). Based on hazards the CO observed during the inspection, OSHA issued a two-item Citation and Notification of Penalty to Respondent (4108 Fairway Citation) on March 20, 2020, alleging violations of the eye protection and fall protection safety standards. (RX-8). Upon receipt of Respondent's notice of contest, the 4108 Fairway Citation was docketed with the Commission as case docket no. 20-0560. Subsequently, the Secretary withdrew[3] one alleged violation, leaving the remaining item that alleged a violation of the fall protection standard with a proposed penalty of $5,398.

A crew from William Miller Construction LLC (WMC) was re-roofing the residence at 4115 Fairway Drive (4115 Worksite) on October 9, 2019. (Tr. 150-51; 376; JX-2 at 52; GX-2). On March 20, 2020, OSHA issued a five-item Citation and Notification of Penalty to Respondent (4115 Fairway Citation) for hazards observed at the worksite during the October 9, 2019, inspection. (RX-4). The 4115 Fairway Citation alleged violations of the eye protection, powered industrial truck, fall protection and scaffold safety standards with a proposed penalty of $23,906. The 4115 Fairway Citation was docketed with the Commission as case docket no. 20-0561.

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[1] Joint Exhibits are designated as JX, Respondent's Exhibits are designated as RX, and the Secretary's exhibits are designated as GX.

[2] The parties agreed to 32 joint stipulations, which were entered into the record as exhibit JX-1.

[3] The Secretary of Labor filed a Notice of Withdrawal for Citation 1, Item 1 in case docket no. 20-0560. Citation 1, Item 1 was severed and moved to case docket no. 23-0836, leaving Citation 1, Item 2 to proceed under case docket no. 20-0560

Per the undersigned's May 20, 2020, Order, dockets 20-0560 and 20-0561 were consolidated because the two matters shared numerous facts in common, identical citations, several key witnesses, common questions of law, and identical parties.

A three-day hearing was held in Pittsburgh, Pennsylvania on October 25-27, 2022. Five witnesses testified at the hearing: Gary Ireland, owner of Ireland Contracting; Richard Dunder, salesperson for Ireland Contracting; [Redacted], homeowner at the 4108 Worksite; and Christopher Robinson, Area Director (AD) of OSHA's Pittsburgh, Pennsylvania office.[4] Three witnesses were subpoenaed but failed to appear at the hearing: William Miller, owner of WMC; Adam Byler, owner of Integrity; and David Detweiler, foreman for Integrity. (Tr. 355-58, 394-99; GX-43; GX-44; GX-45). In lieu of testimony, William Miller's May 19, 2021, deposition (JX-2), Adam Byler's May 18, 2021, deposition[5] (JX-3), and David Detweiler's October 19, 2020, deposition (JX-4) were entered into the record. (Tr. 355-58, 394-99). Both parties submitted post-hearing briefs.

The primary dispute is whether Ireland Contracting was responsible for the safety of the roofers at the 4108 Worksite and the 4115 Worksite either as a direct employer of the roofers or as a controlling employer. Also, in dispute is whether Respondent had the requisite knowledge of the conditions at the worksite to meet the Secretary's burden of proof for each cited violation.[6]

For the reasons set forth below, the undersigned finds the roofers at the two worksites were not direct employees of Respondent. Further, the undersigned finds Respondent was not a controlling employer at either of the worksites. Accordingly, all citation items are vacated.

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[4] The compliance officer who inspected the worksites was unable to testify. (Tr. 361). AD Robinson was not present at either of the worksites at issue here. (Tr. 362).

[5] Notes taken by the compliance officer and signed by Mr. Byler on March 11, 2020, were admitted into evidence as RX-9. (Tr. 401-11). However, because neither Mr. Byler nor the compliance officer testified, the contents of RX-9 were given no weight and were not considered or relied upon by the undersigned.

[6] For each of the citation items, the parties stipulated to the elements of applicability, employee exposure, and violation of the cited standard. Knowledge of the cited condition was not stipulated. (JX-1, Stip.7-32).

II. JURISDICTION

Based upon the record, the undersigned finds that at all relevant times Respondent was engaged in a business affecting commerce[7] and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The Commission has jurisdiction over the parties and subject matter in this case.[8] (Tr. 259-60).

III. FINDINGS OF FACT

1. The Companies

A. Ireland Contracting LLC

Ireland Contracting is a limited liability company incorporated in Pennsylvania. (Tr. 32, 56, 193). Ireland Contracting's primary business is the replacement of roofs on residential homes. (Tr. 33). Gary Ireland is the operator and a co-owner of the company. (Tr. 32, 188, 198). Ireland Contracting employed approximately ten employees in October 2019.[9] (Tr. 193; RX-3). Four of those were assigned to sales, one performed general servicing repair work, and the others performed administrative work. (Tr. 35-37, 194-95). Ireland Contracting provided a 401K benefit plan and worker's compensation benefits for its own employees. (Tr. 213, 215). It did not provide benefits to the subcontractors or their employees. (Tr. 213).

Mr. Ireland estimated that Ireland Contracting completed about 300 roofing projects in 2019. (Tr. 39). At any given time, Ireland Contracting typically had five or six active worksites with five different subcontractors. (Tr. 39, 199; JX-4 at 25-26).

Ireland Contracting's role consisted primarily of customer sales, scheduling the roofing project, providing the roofing supplies, and customer service. (Tr. 188-189). When the company was founded in 1994, Mr. Ireland personally performed roofing work. (Tr. 32, 56, 193). However, at the time of the inspection none of Ireland Contracting's employees performed the labor for roof removal or installation. (Tr. 197). Nor did Ireland Contracting have its employees supervise the

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[7] The Commission has found that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The cited regulations are within OSHA's part 1926, Safety and Health Regulations for Construction. *See* 29 C.F.R. 1926*, et seq*. The undersigned finds that Respondent was an employer engaged in a business affecting commerce under the Act.

[8] The parties agreed and stipulated that Respondent was an employer under the Act, was engaged in business affecting commerce, and the Commission has jurisdiction over the matter. (JX-1, Stip. 1-3).

[9] Respondent does not assert that it has no employees. Respondent asserts that the employees of the subcontractors it hires are not employees of Respondent.

roofing work. (Tr. 74-79). Ireland Contracting marketed its services through television advertisements, promotional videos, displays on company vans, and sometimes a subcontractor's tool trailer. (Tr. 156-58, 203-04).

B. Integrity Construction, LLC

Integrity Construction, LLC (Integrity) provided the roofing crew and foreman for Ireland Contracting's 4108 Worksite. (Tr. 156). Adam Byler was the sole owner and operator of Integrity. (JX-3 at 9). Integrity began to subcontract roofing work from Ireland Contracting soon after Mr. Byler established the company in 2015. (JX-3 at 9, 20). Mr. Byler had previously worked for another Ireland Contracting subcontractor, MNW Construction. (JX-3 at 19-20). In October 2019, Integrity had two roofing crews with Mr. Byler acting as the primary foreman. If Mr. Byler was not at a worksite, David Detweiler was the foreman. (Tr. 39-41, 204; JX-3 at 17). Integrity worked for other contractors and directly with homeowners in addition to subcontracting from Ireland Contracting. (JX-3 at 36-37, 77, 82).

Most of the work Integrity performed for Ireland Contracting was roofing work, with occasional gutter, soffit, or fascia work. (JX-3 at 32). About 60% of all Integrity's work was at an Ireland Contracting worksite. (JX-3 at 82-83). An individual roofing job took between one to twelve days. (JX-3 at 32-33). Integrity worked at approximately 148-165 Ireland Contracting projects in 2019. (Tr. 39; JX-3 at 27).

Integrity had the right to refuse any project offered by Ireland Contracting. (Tr. 208). Integrity selected which employees worked at a site and had the sole authority to hire, fire, or reassign employees. (JX-3 at 79-81). To transport the crews to and from their homes to the worksites, Integrity leased two vans with drivers. (JX-3 at 15; JX-4 at 17). Integrity provided the roofing tools for its employees which were transported to the worksite in a tool trailer. (JX-3 at 14). Integrity owned two tool trailers that were stored at its rented storage space in Cranberry, Pennsylvania. (JX-3 at 14, 17, 29, 49). Integrity set the work hours for its employees. On one occasion, Ireland Contracting asked them to stop work at a particular time, which Integrity refused to do. (JX-3 at 76-77). Occasionally, Integrity's crew went to another worksite to help WMC's crew finish a job. (JX-3 at 61).

Integrity paid its crew members every two weeks; their pay was not dependent on whether Integrity received payment from Ireland Contracting. (JX-3 at 80). Integrity provided workers' compensation insurance for its employees. (JX-3 at 82).

C. William Miller Construction LLC

William Miller Construction LLC (WMC) provided the foreman and roofing crew for Ireland Contracting's 4115 Worksite. (Tr. 49; JX-2 at 7, 55-56). William Miller was the sole owner of WMC. (JX-2 at 7, 55-56). [Redacted], so Mr. Byler provided some financial assistance when Mr. Miller formed the company in 2016. (JX-2 at 8-9, 20; JX-3 at 38-39). WMC had one crew of employees with Mr. Miller as foreman. (JX-2 at 10, 24, 57).

WMC began to subcontract roofing work from Ireland Contracting soon after it was formed. (JX-2 at 8, 20). WMC worked at roughly 65 Ireland Contracting sites in 2019. (JX-2 at 23-24). About 60% of WMC's work was roofing jobs, which were generally for Ireland Contracting. (JX-2 at 25-29, 61). The remaining 40% of WMC's work was framing projects that it secured from other contractors. (JX-2 at 25-29, 61).

WMC set the work hours and determined which employees worked at the site. (JX-2 at 54-57). WMC could refuse to work at a project that Ireland Contracting offered to them. (Tr. 208). WMC determined how many days were needed to complete the roofing work. (JX-2 at 24, 28, 57). WMC's roofing jobs typically took between one to six days. (JX-2 at 24). Occasionally, Mr. Miller's crew went to another worksite to help Integrity's crew finish a job. (JX-2 at 46).

WMC provided transportation to and from the worksites for its employees. (JX-2 at 13-15). WMC provided all the necessary tools for its employees in a tool trailer owned by Mr. Miller. (JX-2 at 13-15). WMC stored its tool trailer at Cranberry Self Storage. (JX-2 at 13-15). WMC paid its employees every two weeks regardless of when it received payment from Ireland Contracting. (JX-2 at 59-60). WMC provided worker's compensation insurance to its employees. (JX-2 at 61).

2. Ireland Contracting's Marketing[10]

A. Television Advertising

Ireland Contracting had a local company develop a television advertisement that included a video of an active roofing project. (Tr. 59-60; GX-101; GX-105). Mr. Ireland appeared in, approved, and paid for the advertisement. (Tr. 48-49, 59; GX-101, 105). The advertisement includes the video of a crew working on the steep-pitched roof of a two-story home without the use of fall protection. (Tr. 44-45, 50, 367-68; GX-101; GX-105). The roofers in the video are

[10] Ireland Contracting's social media presence on Facebook was introduced into evidence. (Tr. 104-110; GX-40). However, the entries were dated after the inspection date, so the contents are not considered here.

employees of WMC. (Tr. 49). Mr. Ireland agreed the video showed that WMC's crew was not using fall protection. (Tr. 49; GX-101; 105). Mr. Ireland confirmed that when he talked about the Ireland Contracting worksite in the advertisement, he referred to the roofers as "our" rather than explicitly stating they worked for a subcontractor hired by Ireland Contracting. (Tr. 59, 63-64).

B. Display on Vehicles

Respondent also displayed its advertising on vehicles. Ireland Contracting owned two vans which prominently displayed the Ireland Contracting name, logo, and phone number. (Tr. 51-52, 236; GX-101).

Additionally, Mr. Ireland asked all the subcontractors if he could place Ireland Contracting advertising on the side of their tool trailers. (Tr. 203-04). Mr. Miller allowed Ireland Contracting to place advertising on the side of WMC's tool trailer. (JX-2 at 35-36). After some time, Mr. Byler also allowed Ireland Contracting advertising on one of Integrity's tool trailers. (Tr. 156-57, 204; JX-3 at 49-51; GX-3). None of the other subcontractors agreed to the advertising. (Tr. 158, 203-04). Mr. Ireland believed that he paid Integrity and WMC for the advertising, though he could not recall the amount. (Tr. 156-57). Both Mr. Miller and Mr. Byler stated they were not paid for the advertising. (JX-2 at 35-36; JX-3 at 49-51). Because no evidence was adduced to support payment, the undersigned credits Mr. Miller's and Mr. Byler's statements they had not been paid for the advertising on their tool trailers.

C. Promotional Video

The promotional video is approximately five minutes long and introduces Ireland Contracting to the customer. (GX-102; GX-106). The video describes the quality of the materials used for the homeowner's new roof, the affiliated warranty, and Ireland Contracting's promise to stand behind their work. (Tr. 249-51; GX-106). It also provides background information about Ireland Contracting including its various business ratings and its preferred status with the roofing products manufacturer Owens Corning. About 90 seconds of the video describes the roofing process so the homeowner knows what to expect–materials are delivered, shrubs are covered, the old roof is removed, materials are installed for the new roof, and debris is removed from the yard. (GX-102; GX-106). The video's narration states that Ireland Contracting uses hard-working Amish crews. (Tr. 126; GX-106).

Ireland Contracting's contract with the homeowner included a link to a website with a promotional video about Ireland Contracting produced by the company, Best of the Best. The video was intended to provide information to customers. (Tr. 119-121; GX-31). Mr. [Redacted], the homeowner for the 4108 Fairway Worksite, stated that he did not view this or any other Ireland Contracting video. (Tr. 321). Mr. Dunder did not describe the contents of this promotional video to the owner of either 4108 Fairway Drive or 4115 Fairway Drive. (Tr. 346-48).

3. Ireland Contracting's Relationship with its Roofing Subcontractors

There were no written contracts between Ireland Contracting and its roofing subcontractors. (Tr. 147, 152, 205). Ireland Contracting did not provide or require the subcontractors to be factory-trained on the roofing products. (Tr. 69, 76-77). Mr. Ireland admitted that any references to the use of factory-trained installers in Ireland Contracting's marketing information was inaccurate. (Tr. 75-77). Ireland Contracting did not employ roofing foreman or roofing installers. (Tr. 75-77). Ireland Contracting had a relationship with Owens Corning; the subcontractors did not. (Tr. 141; JX-2 at 31).

A subcontractor had no obligation to accept a job offered by Ireland Contracting. (Tr. 208). Each subcontractor provided a foreman to supervise the roofing work at a site. (Tr. 204; JX-24 at 24, 57; JX-4 at 15). The subcontractor determined the number of employees working at a particular job. (Tr. 210). Ireland had no role in paying the subcontractors' employees, providing transportation to a worksite, setting the work hours, hiring, or firing the employees or the reassignment of a worker from one site to another. (Tr. 179, 213-15; JX-2 at 56-59). If a subcontractor's work was not acceptable, Ireland Contracting no longer hired them to provide labor at a worksite. (Tr. 201-02).

Ireland Contracting did not have employees that performed roofing work. (Tr. 74-79). Occasionally, someone from Ireland Contracting offered advice to a subcontractor, such as how the fascia should look, but other than providing information about the scope of the contract with the homeowner, Ireland Contracting did not instruct the subcontractor on the roofing work. (JX-4 at 35-36, 40). Rarely, an Ireland Contracting salesperson climbed onto the roof to observe something during a project. (JX-4 at 35-36, 40). This did not occur at either of the worksites here.

Mr. Ireland admitted that he had never determined whether the subcontractors that Respondent hired complied with safety regulations because he believed he had no legal obligation to do so. (Tr. 42). Mr. Ireland did not believe he had authority, at the time of the inspection, to

tell the roofing workers they needed to use fall protection. (Tr. 61). Mr. Ireland stated that within a week after OSHA's inspection he called Mr. Byler and Mr. Miller and told them to use fall protection going forward. (Tr. 61-63; GX-42 at 8-9). Mr. Ireland recalled that Mr. Byler agreed to the use of fall protection in the future, he did not recall an objection to its use from Mr. Miller. (Tr. 62-63).

4. Ireland's Business Model for Roofing Projects

A. Sales

The sales process began when an Ireland Contracting salesperson was assigned to meet with a potential customer. At this visit the salesperson explained the process and products to the customer and took photographs of the home. Usually, an estimate for the cost of the proposed roofing work was provided to the homeowner during the initial visit. (Tr. 37-38). Estimates were based on an aerial survey of the roof provided by a service to Ireland Contracting. (Tr. 227-29, 234; GX-8; GX-9).

When the homeowner agreed to move forward with the roofing work, a contract was executed with Ireland Contracting and the job was added to Ireland Contracting's list of pending projects. (Tr. 38; GX-31; GX-32). The contract between the homeowner and Ireland Contracting included a link to the online promotional video. (Tr. 119-121; GX-31).

B. Scheduling and Supplies

Next, the job was scheduled with a roofing subcontractor to provide the labor for the removal of the old roof and installation of the new roof. (Tr. 40). To determine if a crew was available for one of Ireland Contracting's projects, Mr. Ireland or a salesperson contacted the subcontractor's foreman or owner. At times, a foreman had already notified Ireland Contracting the crew was available for a project. (JX-2 at 26-27; JX-3 at 40-42; JX-4 at 12-13, 17-18). The address of the worksite was provided to the foreman when the project was scheduled. (JX-2 at 26; JX-3 at 39-40).

After the work was scheduled, Ireland Contracting ordered the roofing materials and arranged to have them delivered to the worksite by a supplier, such as ABC Supply Company. (Tr. 191, 229, 235; JX-4 at 62; GX-10). Ireland Contracting also arranged the delivery of a stationary dumpster from another supplier, Mr. Sutter. (Tr. 154-55, 211; JX-2 at 31-33; GX-7). After the job was completed, Ireland Contracting's salesperson contacted Mr. Sutter to have the dumpster removed. (Tr. 155, 249).

Additionally, Ireland Contracting owned three Equipters (mobile dumpsters) that were used at worksites where the landscaping was suitable. (Tr. 158; GX-33). An Equipter could be placed closer to the roof's edge than a traditional stationary dumpster, so the debris could be placed directly into the dumpster rather than in the yard. This provided a cleaner look at the worksite with less damage to the customer's yard. (Tr. 158-59, 161-62, 164). The Equipters were stored at Ireland Contracting's office location. (Tr. 164-65; JX-2 at 33).

A subcontractor could use an Equipter at an Ireland Contracting worksite without advance notice and at no cost. (Tr. 164-65; (JX-2 at 32-34; JX-3 at 46-49; JX-4 at 39-40). Ireland Contracting did not train the subcontractors or their employees on the use of the Equipter or require a demonstration of competence with the equipment. (Tr. 165). Mr. Ireland recalled that both Mr. Byler and Mr. Miller had told him they had used an Equipter before and knew how to operate it. (Tr. 162, 165).

C. Roofing at a Site

On the first day of a scheduled roofing project, Ireland Contracting's salesperson met with the subcontractor's foreman at the residence to describe the project's scope from the job detail sheet, including any non-standard options related to the project. (Tr. 241-43; JX-2 at 28-29, 61). The salesperson also introduced the homeowner to the crew's foreman. (Tr. 222-23, 238-41; JX-2 at 28-29, 61; JX-3 at 40-42; JX-4 at 49-50). Ireland Contracting considered this introduction an important part of good customer service. (Tr. 240). Ireland Contracting's salesperson was the customer's primary contact. (Tr. 133-34). The salesperson also placed a sign in the yard to advertise that Ireland Contracting had been engaged by the homeowner to roof the house. (Tr. 169-70; GX-6; JX-4, p. 36). The salesperson left the site and usually had no additional duties until the project was completed. (Tr. 128, 153, 223, 254; JX-2 at 57-58).

After Ireland Contracting's salesperson left the worksite, the subcontractor's foreman directed the roofing crew's work. (JX-3 at 76-77; JX-2 at 54-58, 61). Typically, there was no one from Ireland Contracting at the worksite during the roofing work. (JX-2 at 57-58). A salesperson was only involved during the roofing work if the customer had a question about the contract or if unforeseen circumstances arose that required a change order to the homeowner's contract. (Tr. 223, 254). If a subcontractor found rotted wood decking or other issues that affected the project's scope, the subcontractor notified Ireland Contracting's salesperson. The salesperson then discussed the changes and additional cost with the homeowner. (Tr. 127-29, 152). When

additional materials were required during the project, Ireland Contracting had them delivered to the worksite. (Tr. 153, 236). At times, a salesperson or Mr. Ireland visited the worksite to deliver additional roofing materials or speak to the customer about a change to the scope of work. (Tr. 128, 153, 236; JX-3 at 29-30; JX-4 at 29-35).

D. Billing and Wrap-up

When Integrity completed a roofing job, Mr. Byler billed Mr. Ireland. (JX-3 at 42-43). The amount Mr. Byler charged was based on a pricing sheet that he provided to Mr. Ireland, with prices based on the size of the roof, the roof's pitch, and cost adjustments for extra work, such as replacing rotted wood. (JX-3 at 42-44).

Similarly, after WMC completed a job, Mr. Miller billed Ireland Contracting for WMC's work. (JX-2 at 30-31). The bill reflected the costs listed on the WMC's pricing sheet, based on the number of days worked and any work outside the original scope of the job. (Tr. 206-07; JX-2 at 30-31, 58). When Mr. Miller worked alongside Mr. Byler's Integrity crew, he billed Ireland Contracting directly for this work, he was not paid by Integrity. (JX-2 at 46-48, 52).

Mr. Ireland did not require a detailed bill from Mr. Miller or Mr. Byler; he trusted them to bill him accurately. (Tr. 180-84). Mr. Ireland knew what the approximate billed amount would be because each subcontractor previously provided a pricing sheet that set forth its charges. (Tr. 206-07). Each subcontractor had a separate pricing agreement with Ireland Contracting. (Tr. 206-07).

When the overall project was completed, Ireland Contracting's salesperson met with the homeowner to close out the job, collect the final payment and take final photographs of the finished work. (Tr. 223, 264-65). For example, Mr. Dunder took a photograph of how the roof's old vent pipe had been modified by Integrity's crew at the 4108 Worksite. (Tr. 223, 256-58, 265-66; GX-26).

If there was a problem after the project was completed, Ireland Contracting was responsible for resolving the problem. (Tr. 133). After Integrity completed its work at the 4108 Worksite, Ireland Contracting hired another subcontractor to install the gutters on the home. (Tr. 315-316, 330). After the gutter installation, the customer notified Ireland Contracting there was damage to the fascia and leaks from the gutter installation. (Tr. 300-33; GX-8; GX-24). To resolve the problems, Mr. Dunder purchased and delivered cedar for the fascia repair and Ireland Contracting hired a subcontractor to fix the gutter. (Tr. 314-16, 332-35).

5. The Inspected Worksites

A. 4108 Worksite

When the CO inspected the 4108 Worksite on October 9, 2019, a crew of four Integrity employees performed roofing work with David Detweiler as the foreman. (JX-1, Stip. 8; JX-4 at 46-47; GX-22; GX-23). Mr. Detweiler called Mr. Byler who then came to the worksite to talk to the CO. (JX-4 at 46-47). Mr. Byler did not contact Ireland Contracting during the OSHA inspection. (Tr. 212).

Photographs show that Mr. Detweiler's crew was working on the roof at the back of the home. The roof's eave was about 11 feet above the ground. (Tr. 303; JX-4 at 53; GX-21; GX-22; GX-23). The crew members were not wearing fall protection equipment, there were no guardrails in place, and no safety net was in use. (JX-4 at 53; GX-21; GX-22; GX-23).

At some point during the roofing project, Integrity had problems removing a roof ventilation pipe. (Tr. 256-57, 350-51). Mr. Detweiler called Mr. Dunder to inform him of the problem and described the non-standard approach the crew planned to use to fix the problem. (Tr. 257-58). Mr. Dunder agreed and made sure the customer found the solution acceptable. (Tr. 258).

After the October 19 inspection, Integrity purchased fall protection for the crew to use. (JX-3 at 74-75; JX-4 at 53-54, 60-61). Integrity did not have fall protection available for the crew's use prior to the inspection. (JX-3 at 74-75). When Mr. Ireland asked Integrity to use fall protection after the inspection, Mr. Byler responded that the crew would wear fall protection when Mr. Byler chose to require it. (JX-3 at 75).

B. 4115 Worksite

On October 9, 2019, WMC had a crew of four roofers, with Mr. Miller as the foreman, at the 4115 Worksite. (JX-1, Stip. 14; JX-2 at 24, 52, 57). Mr. Miller spoke with the CO during the inspection. Mr. Miller did not contact anyone at Ireland Contracting during the inspection. (Tr. 212; JX-2 at 52).

The home was a two-story residence with a roof pitch of 8 in 12.[11] (Tr. 364; JX-2 at 19, 41-42; GX-14; GX-17). The roof's eave was approximately 20 feet above the ground. (JX-2 at 41-42). Ladder jack scaffolds were erected at the back of the residence. (Tr. 364; GX-17; GX-

[11] Mr. Miller's deposition testimony about the roof's pitch relates to the slope in inches per foot. (Tr. 232-33; GX-9 at 7; JX-2 at 41-42). For example, OSHA's fall protection definitions state that a "[s]teep roof means a roof having a slope greater than 4 in 12 (vertical to horizontal)." 29 C.F.R. § 1926.500.

18). Two platforms of the ladder jack scaffolds rested on a single bracket. (Tr. 366; GX-17; GX-18; GX-100).

Photographs show a crew member using a nail gun without eye protection. (Tr. 269-70; GX-11; GX-12; GX-13). Mr. Miller was photographed operating one of Ireland Contracting's Equipters. (Tr. 166, 282; JX-2 at 32-34; GX-4; GX-5). Photographs show the workers on the roof and on the scaffold with no guardrails, personal fall arrest equipment, or safety net systems in use. (Tr. 277; JX-2 at 42; GX-14; GX-17).

Mr. Miller admitted there was no fall protection in use on October 9, 2019. (JX-2 at 42). WMC had four sets of fall protection available at the time of the inspection. (JX-2 at 42).

Prior to the inspection, no one from Ireland Contracting had ever requested fall protection be used at a worksite. (JX-2 at 42). When Ireland Contracting previously filmed the WMC crew for a television advertisement, Mr. Ireland did not request that the crew wear fall protection. (JX-2 at 44). After the OSHA inspection the WMC crew wore fall protection more often depending on the roof's height and pitch. However, Mr. Miller stated that he decided if the crew used fall protection, not Ireland Contracting. (JX-2 at 43-44, 62).

IV. DISCUSSION & ANALYSIS

The Secretary asserts three theories by which Ireland Contracting is liable for the safety of the employees engaged in roofing at the two worksites. First, the Secretary asserts Respondent is the direct employer of the roofers at the 4108 Worksite and the 4115 Worksite under the common law agency test set forth in *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322-23 (1992) (*Darden*). Second, the Secretary asserts Respondent is a direct employer under the theory that the subcontractors and Respondent operate as a single employer. Finally, the Secretary asserts Respondent is responsible for the safety of the subcontractors' employees as a controlling employer under the multi-employer worksite doctrine. As discussed below, the undersigned rejects the Secretary's arguments regarding liability and finds that Respondent is not an employer of either subcontractor under any of the theories advanced by the Secretary. Therefore, Respondent is not responsible for the safety of the employees at the two worksites cited.

1. *Darden* Analysis

The Secretary asserts there is a direct employment relationship between Respondent and the roofers at its worksites under the *Darden* test. (S. Br. 24). "[T]he Secretary has the burden of proving [the] cited respondent is the employer of the affected workers at the site." *All Star Realty*

Co., Inc., 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) (citation omitted). For the following reasons, the Secretary's argument that Respondent is the employer of Integrity and WMC under the *Darden* test is rejected.

The Act defines an employee as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6), § 3(6) of the Act.[12] In its analyses of similarly worded statutes, the Supreme Court has relied on the common law for guidance in determining whether an individual is an employee, or alternatively, the kind of person the common law would consider to be an employee. *See Darden,* 503 U.S. at 322-23.

The Commission applies the *Darden* factors to determine if an affected worker is an employee of the cited employer. *Sharon & Walter Constr., Inc.,* 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (*S&W*). The common-law agency doctrine set forth in *Darden* focuses on the company's "right to control the manner and means by which the product" is accomplished. *S&W,* 23 BNA OSHC at 1289 (citation omitted). The company's control over the worker is a "principal guidepost" to determine the existence of an employment relationship. *Froedtert Mem'l Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (citations omitted). Additional factors relevant to the analysis include:

> 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; [and] the provision of employee benefits and the tax treatment of the hired party.

S&W, 23 BNA OSHC at 1289 (citing *Darden*, 503 U.S. at 323-24).

Even though some factors considered here favor finding the existence of an employer-employee relationship, ultimately the key factor–control over the means and manner of work–does not. The determination of whether a common law agency relationship exists rests upon finding "whether the putative employer controls the workers." *Allstate Painting,* 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated); *see also FreightCar Am., Inc.,* No. 18-0970, 2021 WL

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[12] The Act defines an employer as a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). Person means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *Id.*

231187, at *4 (OSHRC, Mar. 3, 2021) (*FreightCar*) (finding putative employer had little, if any, actual control over the workers). Here, Respondent does not have control over the workers engaged in roofing.

A. Control over the manner and means of accomplishing work

"Control over the 'manner and means of accomplishing the work' must include control over the *workers* and not just the results of their work." *Don Davis,* 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001) (emphasis in original).

Respondent's role at a project was to establish the contract with the homeowner, purchase supplies, and provide customer service. Respondent's business model separated the labor of re-roofing a residence from the rest of the services it provided to its customers. Ireland Contracting believed customer service set its company apart from other roofing contractors. (Tr. 240). Thus, the salesperson focused on selling the job to the homeowner, answering questions, or solving problems for the homeowner, and documenting the finished roofing work so that warranties offered by the manufacturer could be honored. The role of the roofing subcontractor was to provide the labor, including a foreman, to remove the old roof and install the new roof. Integrity's foreman was either Mr. Detwiler or Mr. Byler. WMC's foreman was Mr. Miller. Respondent could not direct the roofing work itself and could not control which worker was assigned to a worksite. Respondent's control was limited to the choice of which roofing subcontractor to hire at a particular worksite.

Respondent's salesperson met the roofing crew at the site on the first day to provide a job detail sheet and an overview of the project's contracted scope. The salesperson usually did not return to the worksite until after the roofing work was completed.

During the roofing work, the subcontractor had control over the employees performing the roofing work. The subcontractor provided and paid for transportation to and from the worksite for the employees. The subcontractor determined the daily schedule at the site and the number of days they worked on the project. The subcontractor was paid based on the subcontractor's pricing sheet, not the price the homeowner paid Respondent for the project. The subcontractor's foreman directed the work of the roofers, not Respondent.

Nonetheless, the Secretary asserts that Respondent had sufficient control to be considered the roofers' employer under *Darden's* test in four ways. The Secretary asserts that 1) Respondent dictated the steps of roofing a residence, 2) Respondent specified the practice to use when

unanticipated problems arose, 3) Respondent had direct, extensive involvement at the worksite during the roofing work, and 4) Respondent could require its subcontractors to use fall protection at the worksite. (S. Br. 26-33).

First, the Secretary relies on an Ireland Contracting promotional video as proof that Respondent dictated the steps the roofers used at the site. (GX-102; GX-106). For example, the video states that an ice and water barrier is installed with the new roof. The Secretary asserts this example shows that Ireland Contracting directed the roofer's work. (S. Br. 27). This statement in the video does not demonstrate Respondent's control over the work. The steps outlined in the video are typical of a residential re-roofing job. (Tr. 243, 250-51, 256, 347). Further, there was no evidence that either subcontractor had ever seen this video. (Tr. 346-47). Thus, it could not have served as an instruction to the subcontractor.

The Secretary asserts the video's promise to the customer, that the work will be done properly, also demonstrated control. (S. Br. 27). This promise to the customer was not a demonstration of control over the subcontractor but a representation that Ireland Contracting was ultimately responsible for resolving the customer's problems. The homeowner for the 4108 Fairway Worksite had not viewed this video, and no evidence was presented that any other customer had viewed the video. (Tr. 321). The promotional video is not evidence that Ireland Contracting dictated the steps in roofing process to its subcontractors; instead, the video was a marketing product that included a general description of the roofing process for the customer.

Second, the Secretary asserts that because it was the subcontractor's practice to contact Ireland Contracting when issues arose during the roofing work, this demonstrated Respondent's control over the roofing work. (S. Br. 28-29). The subcontractor notified Ireland Contracting of issues that were outside the project's original scope of work, such as replacement of rotted wood decking, so that Respondent could order additional materials and notify the homeowner of increased costs. After all, Ireland Contracting had to notify the owner and renegotiate the updated scope of work. Ireland Contracting also had to provide any additional materials, if needed. This practice reflected Ireland Contracting's role of managing the sales, service, customer payment issues, and contract with the homeowner while the subcontractor managed the roofing work.

Third, the Secretary asserts that Respondent was directly and extensively involved during the roofing work itself. (S. Br. 29-33). As an example of direct involvement in the roofing work, the Secretary points to an issue with a ventilation pipe that arose at the 4108 Fairway worksite. (S.

Br. 28-29). Integrity's crew determined that the standard method for removing a ventilation pipe could not be implemented. (Tr. 256-58). Mr. Detweiler called the salesperson, Mr. Dunder, to inform him of the problem and the method the crew planned to use to fix the problem. (Tr. 256-58). Mr. Detweiler informed Mr. Dunder because the change could affect the scope of work. Ireland Contracting's salesperson verified with the homeowner the modification was acceptable and Integrity's crew proceeded with its work. This interaction between the salesperson and the subcontractor's foreman does not demonstrate direct or extensive control over the workers to accomplish the roofing work. Instead, it reflects the salesperson's role of managing the scope of work as defined in the customer's contract with Ireland Contracting.

The Secretary asserts that the salesperson's activities before and after the roofing work also show direct involvement in the roofing work. (S. Br. 29-30). Prior to the roofing work, Mr. Dunder's tasks were cost estimates and customer sales, plus ordering the roofing materials when the sale was completed. (Tr. 222, 339, 346). After the roofing work was completed, Mr. Dunder contacted the customer to collect the final payment. (Tr. 223). The undersigned finds that these tasks, prior to and after the roofing work, do not show that Ireland Contracting was directly involved in the roofing work, but rather that it had a separate and distinct role from the roofing subcontractors.

As an additional example of Ireland Contracting's direct involvement in the roofing work, the Secretary points to problems that occurred at the 4108 Worksite. (S. Br. 31). After Integrity completed its roofing work, Ireland Contracting hired a subcontractor to install the gutters on the home. (Tr. 330). After the gutter installation, the customer notified Ireland Contracting there was damage to the fascia and problems with the gutter installation. (Tr. 300-35). To resolve the problems, Ireland Contracting replaced the fascia board and hired a subcontractor to make the repairs to the gutter. (Tr. 332-35).

The undersigned finds that the repairs, after the gutter installation and after the roofing work was completed, do not demonstrate control over a subcontractor's employees, but rather the need for additional subcontractors with skills different from those of the roofing subcontractors. It is clear that Respondent has duties directly related to the worksite–it sells the product to the homeowner, it secures the roofing materials, and handles customer services issues–that reflect its marketing and sales role, specifically its role as the representative to the homeowner, rather than control over the roofing work. The work at issue here is Integrity's roofing of a residence, which

Ireland Contracting did not direct or control after the subcontractor began its work at the site. The Secretary's assertion that Respondent was directly and extensively involved during the roofing work is not supported by the evidence.

Fourth, the Secretary asserts that Ireland Contracting's request to Integrity and WMC to have the roofer's wear fall protection after the inspection demonstrates control over the subcontractors' employees. (S. Br 33-34). However, only Integrity and WMC had the authority to require their workers to use fall protection as a condition of their employment. The owners, Mr. Miller and Mr. Byler, made clear that it was their choice whether these employees would be required to use fall protection at a worksite. The request to use fall protection reflected Ireland Contracting's ability to set the terms of its agreements with its subcontractors, not its control over the employees' use of fall protection during the roofing work.

Ireland Contracting had a role at the worksite with respect to the homeowner's contract for services, the roofing subcontractor it hired, and the materials used. Ireland Contracting's physical presence at the worksite was limited to before and after the roofing work. Integrity and WMC controlled the workers and the roofing work at the two worksites. *See generally Don Davis,* 19 BNA OSHC at 1482 (emphasis in original) ("Control over the 'manner and means of accomplishing the work' must include control over the *workers* and not just the results of their work."). The evidence supports a finding that the subcontractors maintained control over the means and manner of roofing work, not Ireland Contracting.

B. Hours worked, hiring or paying of assistants, and right to assign additional projects

The evidence, previously cited, reveals that each subcontractor determined and controlled the hours its roofers worked at an Ireland Contracting worksite. On one occasion, Ireland Contracting attempted to tell the Integrity crew the hours they were allowed to work, to which Mr. Byler stated that he set the hours of work, not Ireland Contracting. Further, Ireland Contracting did not dictate the number of days a subcontractor had to complete a roofing project.

The hiring of employees or assistants at a worksite was solely under the control of each subcontractor. Ireland Contracting could not specify which of a subcontractor's employees worked at a site, that choice belonged solely to the subcontractor. Only the subcontractor controlled whether its employees could work at another worksite or be assigned additional projects. For example, the Integrity crew might help the WMC crew finish a project (and vice versa) based on the decision of that crew's foreman.

The undersigned finds that Respondent's lack of control over hours worked, hiring assistants, and assignment of additional work reveals that Respondent was not the employer of the roofers working at the 4108 Worksite and the 4115 Worksite.

C. Skill required

Roofing work requires a moderate level of skill and experience. Respondent performed no roofing work and did not supervise the roofers. Respondent relied completely on the skills of the subcontractor, not only to do the roofing work itself but to also provide a foreman to supervise the work. *See generally Mulzet v. R.L. Reppert, Inc.,* 54 F. App'x 359, 360–61 (3d Cir. 2002) (unpublished) (finding the skill to hang drywall was based on years of independent experience in the field rather than learning from the purported employer).

The evidence related to this factor weighs against finding an employer-employe relationship between Respondent and the roofing workers.

D. Source of tools

The entity supplying the roofing materials may be relevant to determining whether an employment relationship exists; however, other aspects of the relationship must be considered as well. *Cf. S&W*, 23 BNA OSHC at 1289 (Commission found that worker was not an independent contractor where the hiring party supplied the construction materials, set the worker's hours, controlled worker's assignments, provided all equipment for the worksite, and provided a vehicle and fuel reimbursement for travel to the worksite); *see also A.C. Castle Constr. Co v. Sec'y,* 882 F.3d 34, 39-40 (1st Cir. 2018) (*A.C. Castle*) (even though the subcontractor supplied some tools for the job, finding the relationship was that of an employer-employee where the workers wore the general contractor's t-shirts, the general contractor provided interest-free loans, the general contractor controlled the timing, scope, and details of how the work was performed, and controlled internal operations such as the management of personnel and equipment).

Here, each subcontractor provided the tools used for the roofing work, including ladders and scaffolds. These tools were transported to the worksite in a tool trailer owned by each subcontractor. The tool trailers were stored at a facility rented by each subcontractor. Further, the subcontractors leased vans and hired drivers to transport the workers from their homes to the worksite. Moreover, the evidence reveals that Respondent did not control the internal operations of either of the two subcontractors.

Ireland Contracting supplied and arranged for delivery of the roofing materials to the worksite and for the dumpsters used at a worksite. However, this does not outweigh the fact that the subcontractors provided the means necessary to complete the job by supplying all the tools to do the work and the means to get the roofers to the worksite.

Both the subcontractors and Ireland Contracting contributed needed tools and supplies at the worksite. This factor is not dispositive in determining whether an employer-employee relationship exists here.

E. Location of work

The location of the roofing work changed with each project and was primarily determined by Ireland Contracting. The Secretary asserts that when Respondent provided the address of a roofing job directly to Mr. Detweiler, Integrity's foreman, this was proof that Respondent controlled Integrity's crew rather than Integrity's owner, Mr. Byler, having control. (S. Br. 37).

The Secretary compares the facts here to the employer-employee relationship in *Daniel Crowe Roof Repair,* 23 BNA OSHC 2001, 2010 (No. 10-2090, 2011) (ALJ). This comparison is inapt. In that case the employer hired two workers through an advertisement on Craig's List for a single roofing job. *Id.* Here, Integrity's foreman called Ireland Contracting to get an address for the next roofing job. Integrity accepted the work location and transported their employees to the worksite along with the tool trailer. Providing the address to Integrity's foreman was not an indication of Respondent's authority here because Integrity retained the right to refuse the job.

Although Respondent primarily controlled the location of work, Integrity's right to refuse means this factor is not dispositive to a determination of the existence of an employer-employee relationship.

F. The work was a regular part of Respondent's business

Both Respondent and the subcontractors were in the roofing business. Often when the hiring party and hired party are in the same business it is indicative of a traditional employer-employee relationship. *See generally Slingluff v. OSHRC,* 425 F.3d 861, 869 (10th Cir. 2005) (stucco contractor that hired worker to help with stucco work was the employer of the worker in question). Here, Respondent did not have employees that performed roofing labor. Its employees were primarily engaged in sales and administrative work.

The fact the subcontractors and Respondent are both in the roofing industry is not dispositive.

G. Duration of the relationship

Both Integrity and WMC worked with Respondent for several years and a significant portion of their annual work was with Ireland Contracting. However, both subcontractors were free to refuse any project presented by Respondent, work for other contractors, or work for homeowners directly. The right to work for other companies weighs in favor of the subcontractors' independent status. However, the significant percentage of work along with the duration and open-ended nature of the relationship here is more like that of a traditional employer-employee relationship. *See Absolute Roofing v. Sec'y,* 580 F. App'x 357, 362 (6th Cir. 2014) (citations omitted) (indefinite duration and indefinite nature of relationship favors employee status).

This factor weighs slightly in favor of an employer-employee relationship.

H. Method of payment

The subcontractors paid their employees every two weeks regardless of when the subcontractor received payment from Ireland Contracting. Respondent paid the subcontractor when the job was completed, based on the amount invoiced by the subcontractor.

This factor weighs against finding an employer-employee relationship.

I. Tax treatment and employee benefits

The subcontractors received IRS 1099-MISC forms for the 2019 tax year from Ireland Contracting. (Tr. 387; GX-35; GX-36). The subcontractors provided workers' compensation benefits to their employees. Ireland Contracting provided 401K benefits and worker's compensation to its own employees but did not provide any benefits to the subcontractors' employees.

This factor weighs against finding an employer-employee relationship.

J. Conclusion

Considering all aspects of the relationship between Respondent and the subcontractors, Integrity and WMC, the undersigned finds it is not an employer-employee relationship. The subcontractors had significant independence in selecting employees, determining work hours, and directing work. The subcontractors provided most of the tools to do the work along with the work trailers and the means of transportation to the worksite.

Even though Respondent had control over the contract with the homeowner and the choice of which subcontractor to use to complete the work, Respondent's control did not extend to the employees doing the roofing work at the sites. As set forth in Commission precedent, Respondent's control over the workers is key to determining whether a common law agency relationship existed. *See Allstate Painting,* 21 BNA OSHC at 1035 (focus on whether "the putative employer controls the workers"); *FreightCar*, 2021 WL 231187, at *4 (finding no employer relationship where there was little, if any, actual control over the workers).

The Secretary's assertion that the roofers were the employees of Ireland Contracting under the common law agency doctrine set forth in *Darden* is rejected. *See Darden*, 503 U.S. at 322-23 (1992).

2. Single Employer Theory

The Secretary also asserts that Respondent and the subcontractors operated as a single employer. (S. Br. 44-45). Commission precedent recognizes that under certain conditions separate entities may be regarded as operating as a single entity. *See Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358-59 (No. 02-1174, 2011 (citation omitted) (finding two affiliated health care facilities were not operated as a single employer), *aff'd*, 692 F.3d 65 (2d Cir. 2012). The three elements required to establish a single employer relationship between separate entities are whether they 1) share a common worksite, 2) are interrelated and integrated with respect to operations, and 3) share a common president, management, supervision, or ownership. *Altor, Inc.,* 23 BNA OSHC 1458, 1463 (No. 99-0958, 2011); *see also, FreightCar*, 2021 WL 2311871, at *5; *Southern Scrap Materials Co.*, 23 BNA OSHC 1596, 1627 (No. 94-3393, 2011). For the following reasons, the Secretary's single employer argument is rejected.

First, Ireland Contracting does not share the worksite with its subcontractors during the roofing work. Ireland Contracting's salesmen worked with the homeowner before and after the roofing work, occasionally going to the worksite during the roofing project. The roofers and Ireland Contracting's salesperson were at the worksite together for a brief time at the start of the roofing work to discuss the scope of the customer's contract. Even so, they did not share the hazards associated with roofing work due to the different duties of the salesperson and the roofers.

Second, Ireland Contracting and the subcontractors were not interrelated and integrated in their operations. The companies had separate payrolls and no shared administrative space. The subcontractors rented a separate facility to store tool trailers. The subcontractors provided

transportation to the worksites and provided workers' compensation insurance for their employees. None of the worksite foremen worked for Ireland Contracting.

The Secretary relies on *Penntech* to assert that Ireland Contracting was integrated with the subcontractors because there was not an arm's length relationship between them. (S. Br. 48-49 citing *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18 (1st Cir. 1983) (*Penntech*)). In *Penntech,* the two entities, Penntech and Kennebec, were separated only by their payrolls and bank accounts, in all other respects they were interrelated. *Id*. Penntech purchased all of Kennebec's production. *Id.* at 25. Penntech purchased all of Kennebec's supplies, processed Kennebec's payroll, controlled Kennebec's sales, customer relations, credit, and billing. *Id.* at 25. Here, there was no total reliance between the two entities. Ireland Contracting used subcontractors other than WMC and Integrity. WMC and Integrity worked for other contractors and homeowners. None of their administrative operations were integrated. The subcontractors purchased their own tools, tool trailers, and transportation. The subcontractors had separate billing and payment. The comparison to *Penntech* is inapt.

The Secretary points to several other items that it believes show an interrelated relationship: Respondent's state contractor's license, advice from Respondent at the site, doughnuts brought to the site by a salesperson, and the subcontractors' non-detailed billing invoices. (S.Br. 48-50). None of these support finding an interrelated relationship. With respect to Ireland Contracting's state contractor's license, the record is silent on whether the subcontractors relied on this license or whether a license was required for roofing work. Occasional advice on how the subcontractors' work should look was not a sign of interrelated operations. A salesperson taking doughnuts to a worksite was also not a sign of an interrelated business relationship. Additionally, the lack of detailed billing by the subcontractors to Ireland Contracting is not an indication of interrelated operations, but rather reveals the casual nature of their business relationship.

The undersigned recognizes that there was a mutually beneficial business relationship between these companies. Ireland Contracting allowed the subcontractors to use the Equipters at the worksite and the subcontractors allowed Ireland Contracting to advertise on their tool trailers. However, this was not extensive enough to signify interrelated and integrated operations. The evidence reveals that the operations of Ireland Contracting, and the subcontractors were significantly separate and not integrated or interrelated.

Third, there was no shared management, supervision, or ownership between Ireland Contracting and Integrity or WMC. Notably, there was no financial relationship, such as loans or ownership between Ireland Contracting and the subcontractors.

The worksite's foreman did not work for Ireland Contracting. Mr. Detweiler worked for Integrity. Mr. Byler owned, operated, and also functioned as the foreman of the Integrity employees. Mr. Miller owned, operated, and functioned as the foreman of the WMC employees. No one from Ireland Contracting supervised the workers. Mr. Byler, Mr. Detweiler, and Mr. Miller were not acting as supervisors on behalf of Ireland Contracting.

Further, the Secretary's comparison to *A.C. Castle* and *C.T. Taylor* is inapt. In *A.C. Castle,* the circuit court noted an unusual degree of integration where the general contractor provided the subcontractor's safety plan, paid for the subcontractor's training and the subcontractor was a supervisory employee for the general contractor; the court held the two entities operated as a single employer. *A.C. Castle,* 882 F.3d at 43. Here, there was no provision of a safety plan or training, and the foremen did not function as supervisors on behalf of Ireland Contracting. In *C.T. Taylor,* the Commission held the two entities operated as a single employer where Taylor controlled and directed Esprit's employees, provided equipment to Esprit, intervened in the safety of Esprit's employees, and dictated the Esprit employee's days of work. *C.T. Taylor Co., Inc.,* 20 BNA OSHC 1083, 1087 (No. 94-3241, 2003) (consolidated) (*C.T. Taylor*). There was no such control of the subcontractor's employees by Ireland Contracting here.

Here, there was not a shared worksite between the subcontractors and the Ireland Contracting salesperson (other than a few minutes at the beginning of the project), the entities were not interrelated and integrated nor did they share management, supervision, or ownership. Accordingly, the assertion that Ireland Contracting and the subcontractors operated as a single employer is rejected.

3. Controlling Employer Theory

The Secretary asserts that Ireland Contracting is liable for the violations at the 4108 Fairway Worksite and the 4115 Fairway Worksite as a controlling employer under OSHA's multi-employer citation policy. (S.Br. 51). *See* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy (Dec. 10, 1999); *Summit Contractors, Inc.,* 22 BNA OSHC 1777, 1781 (No. 03-01622, 2009) (*Summit 2009*) (stating "[t]he Secretary's multi-employer citation policy is to the same effect" as Commission precedent) *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011).

Under Commission precedent, "[a]n employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *3 (OSHRC, March 8, 2021) (citations omitted). The multi-employer citation policy addresses "the peculiar needs of preventing hazards at construction sites, which 'often entail different employees being exposed to hazards created by more than one employer."' *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1724 (No. 95-1449, 1999) (citations omitted) (*Access Equip*). For the following reasons, the undersigned finds that Respondent was not a controlling employer at these two worksites.

A. Was Respondent on notice of potential controlling employer liability

Respondent asserts that it did not receive adequate notice that the Secretary was pursuing a theory of liability under the multi-employer worksite citation policy. (R. Br. 47). Respondent states it was prejudiced because this theory of liability does not arise from the same facts as the Secretary's other theories of employer liability, and it was deprived of the opportunity to hire an expert to address this theory. (R. Br. 48).

Specifically, Respondent asserts the citations did not describe the nature of the violation with the particularity that is required by section 9 of the Act, depriving it of adequate notice of multi-employer liability. (R. Br. 47). Respondent claims the citation's text was required to indicate that Respondent was being considered liable under controlling employer case law.[13] (R. Br. 47). Respondent's argument fails.

[13] At the hearing, the Secretary stipulated that "none of the citations or items for 4115 place Ireland Contracting on notice that it was considered to be a multi-employer site or that it was exposed for violations as a controlling employer" and that the same stipulation applied to the citations issued for the 4108 Worksite. (Tr. 383-84). As an example of the text in the issued citations, Citation 1, Item 2 of the 4108 Fairway Citation stated that:

> 29 CFR 1926.501(b)(13): Each employee(s) engaged in residential construction activities 6 feet (1.8m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b): (a) Jobsite: On or about October 9, 2019, at least two employees were not protected from falling from the roof while working on a low sloped roof. The fall hazard to the employees was approximately 9 feet 7 inches to the ground.

(RX-8 at 7). The Secretary's stipulation at the hearing served to acknowledge the written text of the citation items. Each cited violation within the 4108 Fairway Citation and 4115 Fairway Citation asserted that employees were exposed to a particular worksite hazard and Respondent was cited as the responsible entity for those employees. *See* RX-4; RX-8. The undersigned finds the Secretary's stipulation during the hearing provides no additional information beyond what was already conveyed in the text of the issued citations.

Section 9 states that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 29 U.S.C.A. § 659(a), § 9(a) of the Act.

> "The Commission has held consistently that the purpose of the particularity requirement in section 9(a) of the Act is to put the employer on notice as to the nature of the alleged violation so that an informed decision regarding whether to contest the citation can be made. . . . In addition to the language of the citation, the Commission looks to other factors, including circumstances of the inspection and the employer's familiarity with its own work practices, as well as the pleading, discovery, hearing and decisional stages of the case, to determine whether the employer had adequate notice."

Brabham-Parker Lumber Co., 11 BNA OSHC 1201, 1202 (No. 78–6060, 1983) (citations omitted).

Here, each citation item sets forth the date, location, description of violative conduct, and the applicable OSHA standard. (RX-4; RX-8). The citations named Respondent as the entity responsible for safety at the worksites. The undersigned finds the citations were adequately particular and thus met the requirements of section 9 of the Act. *See Del Monte Corp.,* 4 BNA OSHC 2035, 2037 (No. 11865, 1977) (*Del Monte*) (The citation is not required to set forth the elements of the cause of action nor details of how the condition must be abated.)

Further, "a citation will only be dismissed for being insufficiently particular where it appears from the full record that the employer was prejudiced in the preparation and presentation of its case." *Andrew Catapano Enterprises, Inc.*, 16 BNA OSHC 1949, 1951 (No. 89-1681, 1994). The Commission has recognized that a change in legal theory, as alleged by Respondent here, is permissible at any time as long as the employer has not suffered prejudice. *See Morrison-Knudsen Co.,* 16 BNA OSHC 1105, 1112-13 No. 88-572, 1993) (Commission relied on Second Circuit's holding in *Usery v. Marquette Cement Mfg. Co*., 568 F.2d 902 (2d Cir. 1977), "that a change in legal theory is permissible even after the hearing is completed as long as the employer has not suffered any prejudice" to find that the judge's *sua sponte* amendment to change the standard cited did not amount to prejudice because the underlying facts at issue were the same for either standard); *see also Avcon, Inc.*, 23 BNA OSHC 1440, 1451 (No. 98-0755, 2011) (consolidated) ("The Commission has recognized that amendments, including those made *sua sponte*, are routinely permissible where they merely add an alternative legal theory, but do not alter the essential factual allegations contained in the citation.") (citations omitted); *A.L. Baumgartner Constr.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (Commission affirmed judge's *sua*

sponte amendment and held that amendments are permissible where they merely add an alternative legal theory but do not alter the essential factual allegations).

"To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried." *Conagra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992). "[A] party cannot normally show that it suffered prejudice simply because of a change in its opponent's legal theory." *N.Y. State Elec. & Gas Corp. v. Sec'y*, 88 F.3d 98, 104-05 (2d Cir. 1996) (*NYSEG*) (finding there was no dispute the material facts were the same with or without invocation of general duty clause as the basis for the citation); *see generally FreightCar,* 2021 WL 231187, at *5 n.6 (Commission commenting that judge could have exercised discretion to apply single employer theory as the legal framework to analyze the employment relationship at issue); *C.T. Taylor Co.*, 20 BNA OSHC 1083, 1086-88 & n.5 (No. 94-3241, 2003) (consolidated) (holding that, in raising *sua sponte* and applying single employer test, judge properly relied on longstanding Commission precedent, "[t]he judge here merely recognized that the facts pleaded and shown by the Secretary led to the legal conclusion that [the two companies] functioned as a 'single employer' under Commission precedent").

Respondent was not deprived of fair notice to defend against the Secretary's multi-employer theory. In its answers to the Secretary's complaints, Respondent set forth defenses that indicate it was aware that liability for another employer's employees was at issue. For docket no. 20-0561 (4115 Fairway Citation), Respondent included in its answer:

> [ ] Respondent asserts an affirmative defense that William Miller and his employees were not common law employees of Respondent at all times material and relevant hereto.
> [ ] Respondent asserts as an affirmative defense that the wrong employer was cited by the Secretary.

See Answer, Docket No. 20-0561. And for docket no. 20-0560 (4108 Fairway Citation) Respondent stated:

> [ ] Respondent asserts an affirmative defense that Adam Byler and his employees were not common law employees of Respondent at all times material and relevant hereto.
> [ ] Respondent asserts as an affirmative defense that the wrong employer was cited by the Secretary.

See Answer, Docket No. 20-0560. Respondent's answers reveal that it was aware long before the hearing that the Secretary was pursuing a theory of liability where Ireland Contracting was

responsible for the safety of the subcontractor's employees. The multi-employer citation policy is a theory of employer liability just as the *Darden* or single employer theories also pursued here. Each theory sets forth a test to determine whether Respondent is an employer responsible under the Act for the exposed employees. The same underlying facts are examined to support or reject each theory.

Most importantly, Respondent states in its post-hearing brief that it knew the Secretary was pursuing a theory under the multi-employer worksite citation policy "shortly before these matters were originally set for hearing."[14] (R. Br. 46). Respondent's admission that it was aware of this theory prior to the hearing undercuts its claim of late notice and prejudice. A motion could have been submitted to the undersigned with a request for relief and a suggested remedy to cure any possible disadvantage. *See Del Monte,* 4 BNA OSHC at 2037 *(*Even if a citation does not meet the Act's particularity requirements, it can be cured later in the proceedings.) Respondent made no such request. The undersigned finds Respondent had an opportunity to further pursue its defense and was not prejudiced.

Finally, the sole case law Respondent relies on for support, *D.R.T.G. Builders, LLC v. Sec'y*, 26 F.4th 306 (5th Cir. 2022), is inapt. At issue in *DRTG* was whether OSHA properly served a citation where it was delivered via UPS rather than certified USPS mail. *DRTG*, 26 F.4th at 311. There is no comparison between the facts of *DTRG* and these consolidated cases because Respondent is not alleging an issue with delivery of the citation, but rather with its contents.

Respondent's assertion that it lacked proper notice of the Secretary's "controlling employer" theory of liability and suffered prejudice in presenting its case is rejected.

B. Ireland Contracting was not a controlling employer

The Commission's application of the multi-employer worksite doctrine is well established. *See, e.g., McDevitt Street Bovis, Inc.,* 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000). Under this doctrine, a controlling employer is liable if "it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Stormforce,* No. 19-0593, 2021 WL 2582530, at *6 (citations omitted); *see also Summit*

[14] It is unclear from this statement the precise date Respondent became aware the Secretary was pursuing this theory. This matter was initially set for a hearing date in 2021. Subsequently, the hearing was re-scheduled three additional times until the hearing ultimately took place in October 2022. Respondent does not clarify which scheduled hearing date it refers to.

Contractors, Inc., 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) (*Summit 2010*), *aff'd*, 442 F. Appx. 570 (D.C. Cir. 2011); *Centex-Rooney Constr. Co*., 16 BNA OSHC 2127, 2129-30 (No. 92-0851, 1994) (*Centex-Rooney*); *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185, 1188 (No. 12775, 1976).

As Respondent acknowledges, an employer may be liable where its own employees were not exposed if it could have reasonably been expected to prevent a safety violation because of its supervisory capacity at the worksite. (R. Br. 50 citing *Jordan v. NUCOR Corp*., 295 F.3d. 828, 837 (8th Cir. 2002)). Respondent asserts that because it was not on site when the violations occurred and did not supervise the roofing employees, or their work, it did not have the requisite supervisory capacity to have controlling employer status. (R. Br. 50).

By contrast, the Secretary asserts that Ireland Contracting's broad authority over the worksite is demonstrated through its provision of the roofing supplies, its salesperson's initial meeting with the subcontractor on the first day of roofing work, and the interaction between Ireland Contracting and the homeowner when unexpected issues arose during the roofing process. (S. Br. 53-56). However, the undersigned finds Ireland Contracting's authority did not extend to control over the worksite conditions for the roofing workers and, therefore, it was not a controlling employer.

The evidence, previously cited, reveals that Ireland Contracting did not have sufficient authority to prevent or detect and abate safety violations. Prior to the roofing work, Ireland Contracting provided a cost estimate to the homeowner, had the roofing materials delivered, and had a dumpster delivered. With respect to the roofing work, Ireland Contracting's role was limited to the initial meeting between Ireland Contracting's salesperson and the subcontractor's foreman to go over the scope of the work based on a job detail sheet that set forth the basic description of the work contracted for and to explain any special conditions applicable to the home or homeowner. After this brief meeting, the salesperson left the site and Ireland Contracting had no duties related to the roofing work. The subcontractor's foreman supervised the roofing crew and managed the roofing work. Ireland Contracting had no control over how the roofing work was completed, including the hours worked in a day or the length of time for the project.

The Secretary asserts that a subcontractor's practice of notifying Ireland Contracting when unexpected problems arose demonstrated control over the worksite conditions. For example, at the 4108 Worksite, Mr. Detweiler notified the salesperson, Mr. Dunder, of their non-standard

method to seal an old roof pipe. This example does not support the Secretary's assertion of control. To the contrary, it demonstrates Mr. Detweiler's control over the method used to resolve an unanticipated problem without guidance from Ireland Contracting. Mr. Detweiler's call to Mr. Dunder was related to Ireland Contracting's role as the homeowner's primary contact. This customer service role did not provide Ireland Contracting with sufficient authority to control the work of the subcontractor. *But see Summit 2009,* 22 BNA OSHC at 1780-81 (Summit was controlling employer where its contract provided it with exclusive authority to direct and control the worksite; where it had the authority to terminate a subcontractor for safety violations; and where subcontractors had previously complied with requests to correct safety violations); *McDevitt,* 19 BNA OSHC at 1109 (finding general contractor was a controlling employer where it had two superintendents and a project manager onsite; they walked the worksite twice a day; and, McDevitt had the authority to demand a subcontractor's compliance with safety requirements, could stop the subcontractor's work, and could remove the subcontractor from the worksite).

The Secretary compares the facts here to those in *Stormforce*, 2021 WL 2582530, at *3. However, that comparison is inapt. In *Stormforce*, the Commission found that Stormforce was the controlling employer because it had the requisite supervisory authority and control over the worksite conditions based on its written contract with the subcontractor (FRE), Stormforce's practice of providing an onsite foreman to monitor and inspect FRE's roofing work while it was in progress, and the worksite practices FRE was required to follow. *Stormforce,* 2021 WL 2582530, at *5-6. FRE was required to wear certain clothing at the worksite, was prohibited from using profanity, called the general contractor's assigned onsite foreman if the subcontractor arrived late, and called before leaving the site. *Id.* Additionally, FRE had to contact Stormforce's foreman if the homeowner was angry or if additional materials were needed. *Id.* FRE was prohibited from communicating with the homeowner or mentioning the name of any company other than Stormforce while on site. *Id.* at *5-6. In addition, Stormforce's onsite foreman inspected the roof after the shingles were removed and observed the roofers at several stages during installation. *Id.* at *5. The contract also provided that when a Stormforce employee observed an unsafe practice, it was required to notify FRE's management and FRE was required to take care of the issue. *Id.* at *4-5.

By contrast, after the Ireland Contracting salesperson provided the information to the subcontractor, Ireland Contracting had no further duties at the site. Even though Ireland

Contracting maintained its role as the contact for the homeowner and purchaser of supplies, it had no presence at the site. Ireland Contracting did not have sufficient supervisory authority and control over the worksite conditions to expect it to prevent or detect and abate safety violations. *See Id.* at *3. Unlike the general contractor in *Stormforce*, Ireland Contracting did not have a foreman assigned to the worksite and did not inspect or observe the subcontractor while it was engaged in roofing at the site. Integrity and WMC worked independently to control the conditions and practices during roofing. Ireland Contracting no mechanism or authority to detect and abate safety violations during the roofing work. Further, there was no contract or agreement in place that provided Ireland Contracting with the authority to control worksite conditions as was the case in *Stormforce. Id.* at *4-5.

The Secretary asserts that because a subcontractor called Ireland Contracting about rotted wood or another unexpected problem, this also demonstrated Ireland Contracting's supervisory authority and control of the worksite conditions. (S. Br. 52-53). The evidence reveals that Ireland Contracting did not conduct worksite inspections or have the oversight to detect a hidden problem such as rotted wood. In this example, the subcontractor discovered a problem and notified Ireland Contracting of the additional work. Ireland Contracting's role was to notify the customer of the cost for additional work. Rather than directing the subcontractor's work, it was responding to the subcontractor's notification. This example reflects the subcontractor's control over the working conditions and Ireland Contracting's reliance on the subcontractor to discover problems during the roofing work.

The Secretary also asserts that use of the Equipters, which were located at Ireland Contracting's office, demonstrates its control over the worksite. (S. Br. 54). The undersigned disagrees. The record shows that a subcontractor had the option to go to Ireland Contracting's office location to pick up an Equipter and then transport it to the worksite. Ireland Contracting did not require the subcontractor to use the Equipter and, based on the record, was not even notified when a subcontractor was using an Equipter. Here, the subcontractor determined when to use this piece of equipment and required no permission from, or notice to, Ireland Contracting to do so. The use of the Equipters does not demonstrate control over the worksite conditions but serves as another example of the casual working relationship between Respondent, Integrity and WMC.

Additionally, the Secretary asserts that Ireland Contracting's yard sign demonstrated its general control of the worksite. The undersigned finds this advertising does not demonstrate that

Ireland Contracting had control over the roofing crew's work conditions. Instead, this reflected its approach to marketing and sales, not the roofing work.

Finally, Mr. Ireland's request to the subcontractors, after the inspection, to have the roofers wear fall protection does not demonstrate Ireland Contracting's control over worksite conditions. It is unclear from the record whether this post-inspection request was a requirement for WMC and Integrity to continue working at Ireland Contracting sites. Mr. Ireland recalled that the owners of WMC and Integrity were agreeable to this request; however, Mr. Byler and Mr. Miller maintained their crews would only use fall protection at their direction, not the direction of Ireland Contracting. Thus, this post-inspection request is not dispositive.

The undersigned finds that the record does not establish that Ireland Contracting had sufficient control over Integrity or WMC to be a controlling employer with respect to the roofers' working conditions at the 4108 Worksite or the 4115 Worksite. The Secretary did not meet its burden to show Ireland Contracting had the necessary control related to the roofers at the two worksites. Therefore, it had no duty relative to the employees of the subcontractors, Integrity and WMC.

The Secretary failed to establish Ireland Contracting's liability under the *Darden* analysis, the single employer theory, or as a controlling employer. Accordingly, all citation items are vacated.

VI. 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 findings of fact and conclusions of law, it is **ORDERED** that:

Docket 20-0560 (4108 Fairway)

1. Citation 1, Item 2 of Docket No. 20-0560, alleging a Serious violation of 29 C.F.R. § 1926.501(b)(13), is VACATED.

Docket 20-0561 (4115 Fairway)

1. Citation 1, Item 1 of Docket 20-0561, alleging a Serious violation of 29 C.F.R. § 1926.102(a)(1), is VACATED.

2. Citation 1, Item 2 of Docket 20-0561, alleging a Serious violation of 29 C.F.R. § 1910.178(l)(1)(i), is VACATED.

3. Citation 1, Item 3 of Docket 20-0561, alleging a Serious violation of 29 C.F.R. § 1926.451(g)(1), is VACATED.

4. Citation 1, Item 4 of Docket 20-0561, alleging a Serious violation of 29 C.F.R. § 1926.452(k)(5), is VACATED.

5. Citation 1, Item 5 of Docket 20-0561, alleging a Serious violation of 29 C.F.R. § 1926.501(b)(13), is VACATED.

/s/ Keith E. Bell
Keith E. Bell
Judge, OSHRC

Dated: September 12, 2023
Washington, D.C.