

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS  
PENDING COMMISSION REVIEW

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

POINSETT HUTTERIAN BRETHERN, INC.,

Respondent.

DOCKET NO. 21-0295

Appearances:

Javier Diaz, Esq., Office of the Solicitor, U.S. Dept. of Labor, Denver, CO  
For Complainant

Reed Rasmussen, Esq., Siegel, Barnett & Schultz, LLP, Aberdeen, SD  
For Respondent

Before: Administrative Law Judge Brian A. Duncan

**DECISION AND ORDER**

**Procedural History**

This matter is before the United States Occupational Safety and Health Review Commission (“Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On September 14, 2020, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection at 46527 189<sup>th</sup> Street, Estelline, South Dakota due to a fatal accident on a farm. (Stips. 3, 4). As a result of that investigation, OSHA issued a *Citation and Notification of Penalty* (“Citation”) to Respondent. The *Citation* alleges two violations of the Act, one serious and one other-than-serious, with total proposed penalties of \$7,802.00. Respondent timely contested the *Citation*.

A trial was conducted in Vermillion, South Dakota on September 27, 2022. The parties each submitted post-trial briefs for consideration. At trial, the parties stipulated to the withdrawal of Citation 2, Item 1. (Tr. 8; Stip. 1). Therefore, only Citation 1, Item 1 remains in dispute.

Three witnesses testified at trial: (1) Levi Tschetter, Respondent's President and Minister; (2) Daniel Wollman, Respondent's Farm Manager and a member of Respondent's Board of Directors; and (3) [redacted], a fifteen-year-old colony member and resident who works in Respondent's turkey operations. (Tr. 29, 75, 85). Complainant chose not to call the investigating OSHA Compliance Officer, nor any other OSHA employees, to testify at trial. (Tr. 6, 9, 14-15, 90). The Court notes that Complainant's entire presentation of evidence at trial lasted less than two hours.<sup>1</sup> (Tr. 5, 92).

### **Jurisdiction**

The Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. Respondent produces agricultural products which are sold to national companies in interstate commerce. (Tr. 27, 34, 36, 38 ). *See Slingsluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

### **Background**

It is important to note at the outset that Respondent is *not* one of the commonly encountered (alleged) employers in cases before the Commission. It is a registered domestic, religious, nonprofit corporation under both South Dakota state law and Section 501(d) of the IRS tax code. (Stips. 12, 15). Respondent is a religious, agricultural, communal colony located near Estelline, South Dakota. (Stip. 14). The colony was founded in 1968 and incorporated in 1981. (Stip. 16). Respondent's Hutterian faith requires that colony/church members live on Respondent's land, and "devote their labors in harmony with the dictates of God's teachings." (Stip. 18). The colony

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<sup>1</sup> This includes Respondent's cross-examination of Complainant's three witnesses.

operates as a communal farm and ranch, with houses and other facilities for its member families. (Tr. 31-32; Stips. 18, 66). None of the colony/church members receive any type of monetary wages, and none of the colony/church members own any real or personal property. (Stip. 66, 68). Respondent's colony/church members attend religious services every day, do not work on Sundays, and "work together" in an agricultural communal lifestyle "to make ends meet and have a peaceful life." (Stip. 74).

Unfortunately, on September 10, 2020, a church/colony member was killed while working inside one of Respondent's grain bins. (Tr. 16). OSHA's Sioux Falls, South Dakota Area Office received a media report about the accident and opened an investigation. (Stip. 4). Compliance Safety and Health Officer ("CSHO") Jason Mundt<sup>2</sup> traveled to Respondent's farm on September 14, 2020, to conduct an onsite inspection. (Stip. 5). CSHO Mundt learned that two colony/church members were removing corn from a grain bin to prepare for the seasonal changeover to a soybean harvest. (Stip. 6). The workers entered the grain bin without taking steps to de-energize the conveyor. (Stip. 7). The workers began "walking down the grain" to clear corn away from the lower access door. (Stip. 8). While walking down the grain, one of the workers became entrapped and ultimately suffocated to death. (Stip. 9). The other worker managed to escape the grain bin and notified the farm manager, who shut the system down and called 911 when he could not locate the victim inside the grain bin. (Stip. 10). First responders arrived and found the deceased worker in the grain bin. (Stip. 11).

On March 2, 2021, OSHA issued two proposed regulatory violations to Respondent based on: (Citation 1, Item 1) its failure to implement sufficient controls to de-energize the bin sweep auger system and floor sump conveyors prior to employees entering the bins, and (Citation 2, Item 1) its failure to report a fatality accident to OSHA within eight hours. (Stip. 12). Respondent filed a timely notice of contest on March 17, 2021. (Stip. 12).

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<sup>2</sup> Mr. Mundt was promoted to Assistant Area Director of the Sioux Falls, SD OSHA office since this investigation. (Tr. 6).

The parties acknowledge that the only issue remaining in dispute in this case is whether Respondent was a covered employer under the OSH Act and therefore subject to OSHA regulations. More specifically, the parties agreed that if the employer/employee relationship was proven, Respondent committed the violation alleged in Citation 1, Item 1 in that there was a condition that presented a hazard to Respondent's employees; that Respondent recognized the hazard; that the hazard was likely to cause death or serious harm; that there was a feasible means to abate the hazard; that Respondent knew of the hazardous condition; and that Respondent's employees were exposed to the condition. (Tr. 23-25; Stip. 1). Additionally, since Respondent stipulated to Citation 1, Item 1 "as written and assessed", the Court deems that to include the proposed penalty of \$3,901. (Stip. 1).

To analyze the question of an alleged employee/employer relationship between Respondent and the two farm workers involved in the accident, it is important to first discuss the facts and circumstances surrounding the colony, its members, and their agricultural operation. At the time of the accident, there were 58 church/colony members living on Respondent's 5,600 acre property. (Stip. 33). Other than two families that moved to the Poinsett Hutterian colony from another colony, all the members of Respondent's colony are related in one way or another, and most have been church/colony members since birth. (Stip. 65). Colony/church members live and work on the farm, occasionally visiting other colonies for social gatherings. (Tr. 88). Although none of the church/colony members receive any money for their work, Respondent provides all colony members with everything they "need to survive," including food, housing, medical care, education, and transportation.<sup>3</sup> (Tr. 32, 45; Stip. 66). The colony tries to be as self-sustaining as possible, but supplemental food, clothing, and other necessities are purchased from local stores for colony/church members as needed. (Tr. 32). Members

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<sup>3</sup> It is also worth noting that church/colony members do not fill out W-4 forms, do not receive W-2 forms, do not have any taxes withheld for/from them, do not contribute to social security, nor does Respondent purchase any worker's compensation insurance. (Stip. 71-73).

testified that they choose life in the colony to “practice religion, help each other, and be there for each other.” (Tr. 70; Stip. 17).

The church/colony, and some of its adult male members, are engaged in a very successful agricultural endeavor, which exclusively benefits the church and the colony. Respondent’s agricultural operation consists of growing crops (soybeans and corn) and raising livestock (turkeys and hogs). (Tr. 49, 66; Stips. 18, 34). The corn is used primarily to feed colony livestock, and the soybeans are sold into commerce. (Stip. 35). In recent years, Respondent has typically sold approximately 10,000 hogs annually to Prairieland Pork, and 100,000 turkeys to Jennie-O Foods. (Stip. 36, 38). There are no outside, non-colony workers on the farm - church/colony members perform all of the labor required. (Stip. 29, 70). Likewise, none of the church/colony members work outside of the colony. (Tr. 48).

Of the 58 colony members living and working on the farm, only 16 of the men work in the agricultural operation.<sup>4</sup> (Stip. 65, 69, 82). The other church/colony members (e.g., seniors, young children, women) perform various other tasks consistent with their communal living arrangement. (Tr. 59, 61, 82). Young children attend on-site school taught by a colony/church member. (Tr. 33, 82).

The colony by-laws provide that “each member shall perform services and shall do such things as contribute to the welfare of the corporation and church to the extent of his ability, age, and physical condition.” (Tr. 57-58; Ex. J-2, p.9; Stip. 22). “We do not force anybody” to work, but there is always something a member can do on the colony. (Tr. 40, 59). Church/colony members contribute because they want to - “nobody wants to sit around and do nothing.” (Tr. 40, 59). “They all want to do their share, whatever they’re capable of.” (Tr. 59).

Colony members are free to leave the community at any time. (Tr. 61-62). Some, especially children raised in the colony, decide to leave the colony once they reach adulthood. (Tr. 61-62). Many

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<sup>4</sup> The Court understands that the only allegation of an employer/employee relationship in this case concerns 2 of the 16 men who worked in the agricultural operation in 2020, not the activities of the other 42 church/colony members.

of those young adults later decide to return to life in the colony. (Tr. 71). No one has ever been expelled from the colony. (Tr. 53, 68).

Respondent is governed by a Board of Directors (“Board”) that consists of four members: Levi Tschetter (President/Minister), Carl Tschetter (Vice President, Treasurer/Secretary), Danny Wollman (Farm Manager), and Kenny Wurtz (Assistant Minister and schoolteacher). Board members are also church/colony members who serve as elders, religious leaders, and managers/workers in the agricultural operation. (Tr. 36; Stips. 40-55).

While membership in the church colony is completely voluntary, members must agree to the colony bylaws. Those bylaws require, among other things, that church/colony members live and work on the colony “without pay, wages or salary in the conduct of the business of [the] corporation for the support of the Hutterian Church . . .”. (Tr. 20; Ex. J-2, pp. 9-11). Colony/church members also agree that if they withdraw from the corporation (leave the colony), they have no claim to any of the corporation’s property or funds, and that “all labors and services done and performed up to that time shall be considered as compensation for the support and keep rendered to such member by [the] corporation and further as a contribution to the church for church purposes.” (Stip. 23; Ex. J-2, pp. 9-11). Members further agree to abide by church/colony rules and can be expelled from the colony “for refusing or neglecting to give and devote all of [their] time, labor, services, earnings, and energies to the corporation or failing and refusing to do the work, labor, services and things required of him or her to be done and performed by the Board of Directors.” (Stip. 24). However, Mr. Tschetter, who has been Respondent’s President and Minister for the past 28 years, testified that they have never expelled anyone from the colony (Tr. 29, 53, 68; Stip. 25).

Complainant places particular emphasis on the church/colony member bylaw commitment above, in arguing that since Respondent can expel a church/colony member for “refusing to do the work, labor, services, and things required of him,” this is analogous to firing an employee for refusing

to perform his/her assigned duties. Thus, according to Complainant, there is an employer/employee relationship. During trial, various questions were asked on this topic.

**Q:** And what happens if a person refuses to do something in the colony, if they refuse to work?

**A:** We don't have that problem.

**Q:** That's not what I asked. I asked what happens if somebody doesn't work?

**A:** We've never had to address it. I can't answer it better than that. We've never had to address it. What would happen? I suppose me as the president and [*sic*] the board, if somebody would sit down here, we would go talk to them. What's the problem? That's what I'd do, but I've never had to."

**Q:** Can you tell me what you mean by you say you would talk to them?

**A:** I'd go talk to them and see if he's got a problem, if he's handicapped or if there's anything wrong, if something is bothering him. I don't know. Find out what's going on and just talk to him about it. That's what I'd do. I've never had to.

**Q:** And if you talk to them and that person still doesn't want to work, what would you do?

**A:** What would I do? I'd just leave him alone. I wouldn't – I would just talk to him. All you can do with people in my experience, if you be nice to a person, talk reason to them, hey, give them time. Give them time, let them think about it or go talk to them again. I'd go talk to them again, but I wouldn't do anything aggressive, if that's what you're getting at. No, never. I wouldn't – I wouldn't even think about it.

**Q:** So if somebody didn't work, if somebody just refused to work, you would talk to them and then what else would you do?

**A:** If it would happen, that's what I would do. Go talk to them and then leave them alone. You don't – what do you think I should do except talk to them...Show him that I appreciate him, I love him, be nice to him and just treat him as a human being.

(Tr. 40-42, 78-79).

...

**A:** ...When you grow up in the colony, you don't have that issue. You do not have it that somebody refuses to work. We do not have it. (Tr. 43).

Complainant also pursued a line of questioning concerning its argument that the non-monetary benefits (food, clothing, shelter, medical care, etc.) given to church/colony members were specifically provided in exchange for their work on the farm. Witnesses were asked about the theoretical

consequences to church/colony members if they refused to help with work activities needed on the farm. (Tr. 45-46).

**Q:** And don't your adult members have to work in order to receive food, clothing, shelter and all of those benefits?

**A:** Everybody that's there, if they worked or not, he gets food, clothing, and necessities. Whatever he needs to survive and make a decent living he'll be provided.

**Q:** So you're saying that anyone will get his food, clothing, shelter and benefits, even if they don't work?

**A:** Yes.

(Tr. 45-46)

...

**Q:** If a person is too young or old to work, or disabled, do they receive the same food, clothing, medical care that everybody else gets?

**A:** We don't give the old people any work.

**Q:** They get food and clothing and everything, right?

**A:** Oh, yes. Oh, yes.

**Q:** And the same thing for an old person that can't work?

**A:** If they can't work, that's that. They get food the same way. They get clothing. We take them to the doctor. They get their medication. We help them as much as we can.

(Tr. 66).

...

**Q:** Would you agree that the benefits received by the colony members are based solely on the person's status as a member of the colony?

**A:** Yes.

**Q:** What is the purpose of providing food, clothing, medical care, etc., to the members? Why do you do that?

**A:** Because we live in a colony. People have got to eat. You want to give them whatever they need...

(Tr. 69).

...

**Q:** Do you live in the colony so you can practice your religion?

**A:** Practice religion, help each other, be there for each other. My family is there. It's always been there. They are always very helpful and willing to do anything they can.

(Tr. 70).

...

**Q:** Okay. So the labor and services are considered as compensation for the food, the clothing, the shelter you provide right?

**A:** You work and then you eat. It's like a family. It's just a big family is all we are. We eat together. We have one dining

hall. Everybody eats there. We go to one church. Everybody goes to church. We don't force anybody. It's voluntary. If you're here, you want to work. People – if you've ever been there with the colony, you feel it. They are willing to do whatever has to be done.  
(Tr. 60-61).

All church/colony members, whether or not they are able and willing to work, receive the same benefits from the colony. (Tr. 66, 80; Stip. 76). The benefits received by church/colony members are based solely on a person's status as a member of the colony. (Tr. 69; Stip. 77). Young children, seniors, and disabled still get the same food, clothing, medical care, etc., as everyone else. (Tr. 66). Nor is there any increase in non-monetary benefits to church/colony members who work harder or longer than others, as is often the case in traditional employment settings.

**Q:** Now, I'm sure there are some people in the colony that work harder than others.

**A:** Always. There are always people that are a little more ambitious.

**Q:** Do the people that have a little more ambition and work harder, do they get extra food?

**A:** No.

**Q:** Or extra clothing?

**A:** No. No.

(Tr. 67-68, 84; Stip. 79).

It is important to note that Respondent's agricultural operation is not small, the colony is financially successful. For example, in 2020, Respondent reported more than \$6 million in income from its farming and livestock operations. (Stip. 27). All of Respondent's income is derived from its agricultural activities. (Tr. 28). Respondent uses that income to provide for the needs of its members, costs of the operation, and "for the common benefit of the members in carrying out and practicing their Hutterian religious faith." (Stip. 75). Respondent spends approximately \$150-200,000 per year for supplemental food for church/colony members; \$400,000 per year for medical costs; and \$8,000 per year for colony/church member clothing. (Tr. 32). Respondent also purchases and provides church/colony members with all the tools and equipment necessary to work the farm, including but not limited to vehicles, gas, insurance, tractors, combines, a planter,

drills, chisel plow, cultivator, wagons, and a disk. (Stips. 31, 32). Respondent also performs most maintenance and repairs onsite, including blacksmithing, electrical work, milling, and welding. (Tr. 49-50, 67-68).

Church/colony members' typical day depends on their responsibilities within the community. (Tr. 88; Stip. 56). Respondent's farm workers typically begin the workday around 7:45 a.m. after eating a communal breakfast at 7:00 a.m. (Tr. 68, 88; Stip. 57). Some of the colony workers take a morning break at 9:00 a.m., and an afternoon break at 3:00 p.m. (Tr. 88; Stip. 58). Lunch takes place at 11:45 a.m. (Stip. 58). Workers finish work around 5:30 p.m. for a daily church service and communal dinner. Some return to work after the church service in the summer. (Tr. 88; Stips. 59, 74).

While there may be schedule changes due to the nature of operating a farm, based on weather and/or seasonal needs, workers cannot simply leave work on a whim, and they must seek permission to take time off. (Stip. 60). If workers are sick, they notify their colony supervisor who is responsible for finding a replacement. (Stip. 61). There are no time records maintained for the work performed by church/colony members, nor is there any established system for vacation or sick leave. (Tr. 68; Stips. 78, 80). Workers in the colony typically continue to perform some type of work on the colony from childhood to late adulthood, until they are no longer physically able. (Tr. 39, 66; Stip. 63). If a church/colony member wants to try a different job on the farm, they are usually allowed an opportunity to try it. (Tr. 83).

Respondent begins exposing its young men to farm work around the ages of 8-14 years old. (Tr. 39; Stip. 62). Male children are often taught a job on the farm by going to work with their fathers or older brothers. (Tr. 38-39). [Redacted], for example, testified that he works with Respondent's turkeys, started learning when he was about 11 years old (he was 15 at the time of trial), and was taught the job duties in the turkey operation by his older brother. (Tr. 86-88).

The Court must decide whether, in the religious, communal, agricultural setting described above, the OSH Act and implementing regulations applied to Respondent as the employer of the individuals working in the grain bin on September 10, 2020.

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

OSH Act of 1970 Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck-by and caught-in hazards:

- (a) Poinsett Hutterian Brethren, Inc. at 46527 189<sup>th</sup> Street, Estelline, SD 57234: On or about and at times prior to September 10, 2020, the employer did not ensure that employees entering grain bins to perform grain removal and cleaning were protected from caught-in hazards associated with bin sweeps and unguarded floor sump conveyors. The employer did not have sufficient controls implemented to effectively de-energize the bin sweep auger system and floor sump conveyors prior to employees entering the bins. This condition exposed employees to caught-in hazards associated with the bin sweep auger and floor sump conveyors.
- (b) Poinsett Hutterian Brethren, Inc. at 46527 189<sup>th</sup> Street, Estelline, SD 57234: On or about and at times prior to September 11, 2020, the employer did not ensure that employees entering grain bins to perform grain removal and cleaning were protected from caught-in hazards associated with unguarded floor sump conveyors. The employer did not have sufficient controls implemented to effectively de-energize the floor sump conveyors prior to employees entering the bins. This condition exposed employees to caught-in hazards associated with the floor sump conveyors.

Abatement Note: Among other methods, one feasible and acceptable method to correct this hazard is to ensure that all mechanical, electrical, hydraulic, and pneumatic equipment which presents a danger to employees inside grain storage structures shall be de-energized and shall be disconnected, locked-out and tagged, blocked-off, or otherwise prevented from operating by other equally effective means or methods as in 29 CFR 1910.272(g)(1)(ii).

Abatement Note: Among other methods, one feasible and acceptable method to correct this hazard are found in the 2013 National Grain and Feed Association (NGFA) “Guidance for Sweep Auger Operations in Grain Bins,” subsection, “Overview of the Ten Points in the OSHA Enforcement Memorandum.” Under number 2, the memorandum states, “Before entering the bin to set up or dig out the

sweep auger, the subfloor auger and the grain entry points must be de-energized and lockout out.”

### **Applicable Law**

To prove a violation of the general duty clause, Complainant must show: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *K.E.R. Enters.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013); *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). Complainant must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Cranesville Block Co., Inc.*, 23 BNA OSHC 1977, 1985 (No. 08-0316, 2012) (consolidated); *Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

A violation is “serious” if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). As indicated earlier, if Respondent is found to be an employer under the Act the parties stipulated to all of the elements necessary to prove Citation 1, Item 1 “as written and assessed.” (Tr. 23-25; Stip. 1).

### **Discussion**

“[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.” *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). In order to determine whether Complainant has satisfied this burden, the Commission generally applies the factors laid out by the Supreme Court in the *Darden* case.

*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). See also *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (applying *Darden*). The Supreme Court identified the following factors to consider in determining whether an employment relationship existed:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Darden* at 323 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)).

“While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers.” *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (citing *Don Davis*, 19 BNA OSHC 1477 (No. 96-1378, 2001)).

#### Respondent's Right to Control Manner and Means by Which the Product is Accomplished

There was very little evidence in the record in general. The evidence that was presented by Complainant was often unconvincing, lacking any details regarding Respondent's interaction with the two workers in the grain bin on September 10, 2020. The Court has very little information concerning the two purported employees, or even the general level of control Respondent had over the manner and means of the production of crops and management of livestock on Respondent's farm. Senior members of Respondent's community serve as the “managers” of the farming and livestock operations, but also served as religious leaders, and community elders. (Tr. 76-77; Stips. 39, 43, 44, 46-52). They instruct the church/colony members who work in those enterprises on the farm and ranch work which needed to be done. (Tr. 77; Stips. 39, 43, 44, 46-52). However,

there are very few details about church/colony members' day-to-day work activities, or examples of direct supervision/instruction.

The record does establish that there are no specific required hours, no time records, and no system for vacation or sick leave. (Tr. 68, 76-77; Stips. 57-60, 78, 80). If a worker is sick or needs to take time off for social activities, they tell the farm or livestock manager so that someone else can perform any necessary duties. (Tr. 78-79, 88; Stips. 60, 61). No one is forced to work, each can work at their own pace, and they can try other jobs on the colony if they wish. (Tr. 40-41, 45, 60, 68, 78-79, 83). The Court finds that Complainant failed to introduce sufficient evidence to weigh this *Darden* factor in favor of an employer/employee relationship between Respondent and the two church/colony members in the grain bin on September 10, 2020.

The Court also rejects Complainant's argument that the *Stahl* case is controlling. *Stahl v. U.S.*, 626 F.3d 520 (9<sup>th</sup> Cir. 2010). While many of the facts appear to be similar, with *Stahl* also involving employment allegations in a Hutterian farming colony, there are several that are distinguishable. First, the *Stahl* decision was issued in the 9<sup>th</sup> Circuit. This case arose in the 8<sup>th</sup> Circuit.<sup>5</sup> Second, the structure of the Hutterian colony in *Stahl* had significant organizational differences. *Stahl* involved the President of a Hutterian colony claiming that his expenses for colony members' (which he considered to be his employees) food and medical expenses should be deductible from his personal income tax liability as a business expense. Third, non-colony workers were hired in *Stahl* on an as needed basis to help with farming operations. Fourth, farm managers in *Stahl* were elected through a vote which factored in an evaluation of their work performance. Fifth, the *Stahl* colony maintained a formal leave system in which members accrued vacation time of 3-4 weeks per year, and the President of the colony was required to approve their

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<sup>5</sup> Where, notably, and discussed later in this decision, the *threshold remuneration test* has been applied to similar factual situations. See *Graves v. Women's Professional Rodeo Association*, 907 F.2d 71 (8<sup>th</sup> Cir. 1990).

requests to use that vacation leave. For these reasons, the Court finds *Stahl* to be jurisdictionally and factually distinguishable from the present case.

#### Skill Required

The record has virtually no information concerning the skills required of the two church/colony members working in the grain bin on September 10, 2020. Therefore, due to a lack of evidence submitted by Complainant, the Court weighs this factor against finding an employer/employee relationship between Respondent and the two church/colony members in the grain bin on September 10, 2020.

#### Source of Instrumentalities and Tools

Providing tools to workers is typically an indication that an employment relationship exists. *See Loomis Cabinet v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938, 942 (9th Cir. 1994) (holding Commission's findings of employment relationship supported by substantial evidence, including provision of tools). Since membership in the colony requires that each person forgo owning any real or personal property, and none of the church/colony members are paid any wages, it would seem to be an impossibility that church/colony members provide their own equipment or tools. (Stip. 21, 68; Ex. J-2, p.9). And, in fact, the record established that Respondent purchased all of the necessary tools, vehicles, and equipment necessary for church/colony members to operate the farm and ranch. (Stips. 31, 32). The Court finds that this *Darden* factor does tend to support the finding of an employment relationship, although to a lesser degree than Complainant urges.

#### Location of the Work

All of the work at issue in this case is performed on Respondent's farm land. (Stip. 29). The location of the work also happens to be the same land upon which church/colony members

live – some since birth, for 60, 70, or even 90 years. (Tr. 66-67, Stips. 16-17, 65). Based on this limited record, Respondent’s farm and ranch, and the church/colony members life-long home, appear to be one-in-the-same. The Court finds that Complainant failed to introduce sufficient evidence to weigh this *Darden* factor in favor of an employer/employee relationship between Respondent and the two church/colony members in the grain bin on September 10, 2020.

#### Duration of the Relationship

As stated previously, the duration of the relationship between Respondent and church/colony members is often decades old, with many members living in the colony since birth. However, Complainant failed to introduce any evidence regarding the duration of the relationship between Respondent and the two church/colony members working in the grain bin on September 10, 2020. Therefore, due to a lack of evidence submitted by Complainant, the Court weighs this factor against finding an employer/employee relationship.

#### Respondent’s Right to Assign Additional Projects

Undoubtedly, based on this record, Respondent’s managing members could, and most likely did, request that church/colony members perform additional projects on the farm/ranch as needed. However, the relationship in this case does not appear to the Court as an employer reassigning an employee to a new project. In this case, rather, no church/colony members were ever forced to perform work. (Tr. 40). Each church/colony member has chosen, “for the benefit of the [c]olony and for the common benefit of the members of the [c]olony in carrying out and practicing their Hutterian religious faith,” to “contribute to the welfare of the [colony] and church to the extent of [their] ability, age, and physical condition” (Tr. 40, 60-61; Stip. 22, 75). The Court declines to weigh this factor in favor of an employer/employee relationship between Respondent and the two church/colony members in the grain bin on September 10, 2020.

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

First, there is no evidence that the two church/colony members in the grain bin on September 10, 2020 were “hired.” Instead, they were church/colony members working, as discussed above, to contribute to the agricultural operation of their religious community. Additionally, as also discussed above, there was no evidence of any established work hours, dictated work breaks, dictated work performance levels, dictated pace of work, or other similar controls. Although the record is sparse, it appears that church members varied their work hours based upon the seasonal needs of the farm, the specific tasks each member was asked to perform at any given time, variations in skills and abilities among colony members, scheduled group religious worship, and their practice of communal dining. (Tr. 88-89; Stips. 56-59, 74). Ultimately, the Court finds that Complainant failed to establish that Respondent controlled when or how long the two church/colony members worked in the grain bin on September 10, 2020. Accordingly, the Court declines to weigh this factor in favor of an employer/employee relationship.

### Method of Payment

It is undisputed that church/colony membership is completely voluntary, and no member received any monetary wages for their work on the farm. (Stip. 20, 21). Church/colony members did receive non-monetary benefits, such as food, housing, transportation, education, and medical care. (Stip. 66). All church/colony members, regardless of whether they worked in the farm and ranch operation,<sup>6</sup> performed other tasks within the colony community, or did not perform any work at all, still received the same benefits. (Stips. 63, 64, 76, 77, 79). Even among church/colony members who worked the farm and ranch, no one received any additional benefits for working harder than another. (Stip. 79). Similarly, as discussed in detail above, church/colony members

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<sup>6</sup> The Court notes again that only 16 of the 58 church/colony members work in the farm and ranch operation.

continued to receive those same benefits if they (theoretically) refused to work, or became unable to work. Complainant's argument that the non-monetary benefits of food, housing, transportation, education, and medical care were dependent upon working the farm or ranch is REJECTED. The record clearly establishes the opposite.

Respondent provided all 58 members of the colony these non-monetary benefits based solely upon their status as members of the community, not for their work in the farm and ranch operation. Accordingly, the Court weighs this factor against finding an employer/employee relationship between Respondent and the two church/colony members in the grain bin on September 10, 2020.

#### Hired Party's Role in Hiring and Paying Assistants

As stated earlier, there was no "hired" party in this record. On that basis alone, the Court would find this factor does not weigh in favor of an employer/employee relationship. However, the Court notes that the parties agree that church/colony members did not have the ability to hire non-colony workers. Only Respondent's Board of Directors could do that. (Stips. 30, 70). Therefore, analysis of this *Darden* factor may weigh slightly in favor of finding an employer/employee relationship, though not as significantly as Complainant urges.

#### Whether the Work is Part of the Regular Business of Respondent

The work at issue in this case was inside a grain bin on a farm. Respondent's Articles of Incorporation for their religious non-profit indicate that "[t]he purpose of this corporation is to promote the Hutterian religious faith and church. It is a central part of the beliefs of the Hutterian Church that members should live together in a farming community, without individual ownership of personal or real property and that they should devote their labors in harmony with the dictates of God's teachings; and further, that this corporation shall provide the facilities and means to the

members of said Hutterian Church practice and observe their faith.” (Ex. J-1, pp. 1-2). The agricultural work at issue was part of the regular business of Respondent, but was also the regular business of the individual church/colony members. The Court declines to weigh this factor in favor of an employer/employee relationship.

#### Provision of Employee Benefits and Tax Treatment

The parties agree that Respondent did not provide church/colony members any wages, did not withhold nor contribute any taxes on their behalf, did not require nor provide W-4 or W-2 forms, did not contribute to social security, and did not maintain worker’s compensation insurance. (Stips. 66, 71,72, 73). Respondent did, however, provide medical care for church/colony members. Respondent paid approximately \$400,000 annually in medical expenses. As discussed earlier, this benefit was received by all colony members, whether they worked in the farm/ranch operation, worked in other aspects of the religious community, were young children, or were non-working seniors. In this situation, the Court finds that the evidence relevant to this *Darden* factor weighs against finding an employer/employee relationship between Respondent and the two colony members working in the grain bins on September 10-11, 2020.

In conclusion, weighing all of the *Darden* factors discussed above, noting that none of the factors are singularly dispositive, the Court concludes that Complainant failed to present sufficient evidence to prove that Respondent was an employer of the two church/colony members working in the grain bin on September 10, 2020.

#### Alternative Threshold Remuneration Test Urged by Respondent

Respondent argues that neither the *Darden* analysis, nor the *economic realities test* (applied in other past cases), are appropriate in this case. *See Loomis Cabinet Company*, 1989 WL 223447 (No. 88-2012, 1989). Respondent argues that those two tests/cases deal with the legal difference

between an employee and an independent contractor, which is not at issue here. Instead, Respondent argues that the correct test for determining whether an employer/employee relationship existed in this particular case is the *threshold remuneration test*, as colony members were more akin to volunteers than employees. See *Graves v. Women's Professional Rodeo Association*, 907 F.2d 71 (8<sup>th</sup> Cir. 1990).<sup>7</sup>

Under this alternative analysis urged by Respondent, the Court would reach the same ultimate conclusion that Complainant failed to prove that the colony/church members working in the grain bin on September 10, 2020 were Respondent's employees. The facts in this record reveal that there was no direct or indirect remuneration to church/colony members for their agricultural work. It is undisputed that church/colony members were paid no monetary wages of any kind, nor shared in the financial proceeds of Respondent's operation. Complainant's argument that the housing, food, clothing, medical care, etc., that Respondent provided to them were non-monetary, job-related benefits is REJECTED. The record is clear that those non-monetary benefits were provided to all 58 church/colony members, regardless of whether they worked in the farming operation or not, regardless of age, regardless of status, regardless of productivity or effort, and regardless of their position. Simply stated, church/colony members did not receive food, clothing, shelter, etc., because of their work on the farm, but rather because they were members of this religious community. Accordingly, those non-monetary benefits were not remuneration for services provided.

“Compensation by the putative employer to the putative employee *in exchange for services* is not a sufficient condition, but it is an *essential* condition to the existence of an employer-employee relationship.” (emphasis added) *Graves* at 73. Pursuant to the test outlined in *Graves*,

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<sup>7</sup> The Court reiterates that this worksite was in South Dakota, within the geographic boundaries of the U.S. Court of Appeals for the Eighth Circuit.

when there is no finding of direct or indirect remuneration, the analysis need not proceed any further. No finding of an employer/employee relationship was established.

### **Conclusion**

As noted above, it is Complainant's burden to establish that an employment relationship existed between Respondent and the two employees working in Respondent's grain bin on September 10, 2020. Considering the totality of the facts and circumstances discussed above, based on a very limited record, under both a *Darden* analysis, and the *threshold remuneration test* urged by Respondent, the Court finds that Complainant failed to meet its burden. Accordingly, the Act and implementing regulations did not apply to Respondent in this situation. The citation items proposed in this case will be VACATED.

### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1, and Citation 2, Item 1,<sup>8</sup> are hereby VACATED.

SO ORDERED.

*/s/ Brian A. Duncan*

Date: February 13, 2023  
Denver, Colorado

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**Judge Brian A. Duncan**  
U.S. Occupational Safety and Health Review Commission

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<sup>8</sup> Citation 2, Item 1 is vacated based upon the parties' stipulation. (Tr. 8; Stip. 1).