



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

SIP Insulation Professionals, LLC,

Respondent.

OSHRC Docket No. **19-1770**

Representatives:

Emily O. Roberts, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for Complainant

Brian Von Allworden, SIP Insulation Professionals, LLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

On May 28, 2019, construction workers were erecting a building in Hoover, Alabama, using structural insulated panels. A structural insulated panel (SIP) is a precut panel composed of an insulating foam core sandwiched between two layers of engineered wood. A compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration drove past the worksite and saw what he believed were unsafe conditions. He stopped and conducted a safety inspection of the worksite. He interviewed Zachary (Zac) von Allworden, whom the CSHO believed worked for SIP Insulation Professionals, LLC (SIP, LLC). The Secretary issued a three-item Citation and Notification of Penalty to SIP, LLC, on October 9, 2019.¹

¹ A structural insulated panel is referred to as a "SIP." For clarity's sake, the undersigned will refer to respondent as "SIP, LLC." Respondent's name is an initialism, for which each letter is pronounced ("S-I-P"), rather than an acronym, which is pronounced as a word ("sip") (Tr. 8).

On October 31, 2019, Brian von Allworden, a partner in SIP, LLC, (and father of Zac), sent a letter to OSHA stating the Secretary had issued the Citation incorrectly to SIP, LLC, who was not an employer on the worksite. The Secretary construed the letter as a notice of contest, and the Commission docketed the case on November 13, 2019. Whether SIP, LLC, was an employer at the Hoover, Alabama, worksite on May 28, 2019, within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 (Act), is the central issue in this case.²

The undersigned held a hearing via videoconference in this matter on October 7 and 8, 2020. Brian von Allworden represented SIP, LLC, at the hearing. The parties have filed post-hearing briefs. For the reasons that follow, the Secretary failed to establish SIP, LLC, was an employer of the affected employees at the Hoover, Alabama, worksite at the time of the inspection. Accordingly, Items 1, 2, and 3 of the Citation are **VACATED** and no penalties assessed.

JURISDICTION

SIP, LLC, timely contested the Citation and Notification of Penalty on October 31, 2019. The parties stipulate the Commission has jurisdiction over this action (Tr. 8). Based on the stipulation and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act.

STIPULATIONS

The parties stipulate the following facts:

1. SIP, LLC, “is a perpetual member-managed limited liability company, organized on January 19, 2019[,] by its Statutory Agent, Brian von Allworden.”
2. SIP, LLC’s, “business address is 9160 S Rural Road, Tempe, AZ 85284.”

² Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) for failing to ensure an employee wore a body belt and attached lanyard when working from an aerial lift. The Secretary proposes a penalty of \$3,978 for this item.

Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(1) for failing to provide fall protection to an employee working on a roof with an unprotected side. The Secretary proposes a penalty of \$3,978 for this item.

Item 3 alleges a serious violation of 29 C.F.R. § 1926.602(c)(1)(ii) for making a modification or addition which affects the capacity or safe operation of equipment without the manufacturer’s written approval. The Secretary proposes a penalty of \$3,410 for this item.

3. SIP, LLC, “has four members: Jeff Beason, Phil Ligon, Zac von Allworden, and Brian von Allworden.”

(Joint Prehearing Statement, p. 5, ¶ IV; Tr. 8)

BACKGROUND

The U.S. Forest Service began developing SIPs as an alternative construction material in the mid-1940s (Tr. 13). Brian von Allworden started working with SIPs in 1994: “Building them, designing them, engineering them, and testing them[.]” (Tr. 13) He believes that “in the majority of situations for anything five stories or less,” SIPs are “a very, very valid building material.” (Tr. 14)

SIPs are stronger than conventional wooden construction and provide better insulation. Because they are precut and are of standard sizes, SIPs can be assembled faster and by fewer workers than conventional construction (Tr. 14). Construction with SIPs does not require “skilled laborers to put them together. You only need one skilled laborer and the others can follow directions. So, the construction site is a lot easier and a lot faster.” (Tr. 15)

In May 2019, a construction crew was in the process of building a restaurant in Hoover, Alabama, using SIPs and structural steel. The panels were provided by Premier Building Systems, for which SIP, LLC, partners Phil Ligon and Jeff Beason are regional managers. SIP, LLC, partner Brian von Allworden designed the structural engineering (in his capacity as an employee of Wright Engineering) for the SIPs on the project. SIP, LLC, partner Zac von Allworden worked onsite and instructed the crew in the installation of the panels on the worksite (Tr. 18-20).

Zac von Allworden was responsible for hiring the construction crew. He went to the temporary staffing agency Staff Zone in Birmingham, Alabama, and met with agency personnel. He hired three employees for the Hoover project and completed the paperwork for the transaction. He also arranged for the rental of the heavy equipment required to install the SIPs (Tr. 18-20, 58, 118).

On May 28, 2018, a CSHO for OSHA’s Birmingham area office drove past the construction worksite in Hoover, Alabama, a little before 11:00 a.m. (Tr. 156-57). He observed “a forklift hanging with suspended material underneath the forks” and what he perceived as “fall hazards in the construction area.” (Tr. 108)

The CSHO stopped and took photographs of the worksite from the public road. He then approached the worksite and saw four men working there—one in an aerial lift, one operating the forklift, one on the flat roof of the structure being erected, and one near the work truck. The CSHO first went to the general contractor’s trailer but no one was inside. As he left the trailer, a man, whom the CSHO assumed represented the general contractor, pulled up in a truck and spoke with him. The man told the CSHO that SIP, LLC, was the employer of the crew currently working on the site (Tr. 108-12, 157).

The CSHO next met with Zac von Allworden, whom he had observed in the aerial lift. Zac von Allworden told the CSHO he needed to call his father and Bill Smith, owner of W.W. Smith Construction (Smith). While Zac made his calls, the CSHO took more photographs of the worksite. He interviewed two of the laborers on the worksite (Tr. 116).

Based on his inspection, the CSHO recommended the Secretary cite SIP, LLC, for serious violations of §§ 1926.453(b)(2)(v), 501(b)(1), and 602(c)(1)(ii). The Secretary issued the recommended Citation to SIP, LLC, on October 9, 2019.

WITNESS TESTIMONY

Four witnesses testified at the hearing: Brian von Allworden, Zac von Allworden, Theodus Sanders Jr., and the CSHO. Their testimonies relating to the issue of the employment relationship between SIP, LLC, and the workers on the Hoover, Alabama, worksite are summarized below.

Brian von Allworden

Brian von Allworden testified he has been involved in the use of SIPs for 27 years (Tr. 13). He is a structural engineer and designs structures built using SIPs. He gives talks and provides training on the use of SIPs (Tr. 13-14). He is the statutory agent for SIP, LLC. He testified he organized SIP, LLC, to provide specialized assistance to contractors using SIPs (Tr. 16). SIP, LLC, partners Phil Ligon and Jeff Beason work for Premier Building Systems who supplies SIPs to contractors (Tr. 11-12). SIP, LLC, partner Zac von Allworden works in the field providing installation expertise to contractors using SIPs. SIP, LLC, partners benefit from promotion of the use of SIPs.

Brian von Allworden explained the business model of SIP, LLC:

SIP, LLC, is not a contractor. It is organized to provide a SIP expert to a contractor who will hire the SIP expert as far as part of his crew. Also SIPs sometimes require equipment that some contractors don’t have access to, a large

forklift for instance, you need to have a contract with an equipment supplier, to actually rent one of those big forklifts. So, somebody off the street can't go in and say I want one of those. So, SIP, LLC, contracts [with] the big equipment suppliers so they can supply that type of equipment to contractors that don't have access to them.

(Tr. 16)

The expert may undertake hiring unskilled laborers for the project, especially in the southeastern United States, where SIP, LLC, had not done as much business.

[O]n the West Coast, we have independent people that we can call and say, ["H]ey, do you want to come up for three weeks[?"] And they can get hired by the contractor on-site. Out in Alabama, we don't have that resource, so we would go to a local labor source such as Staff Zone and say, ["H]ey, Staff Zone we have a client that needs three laborers. Can you provide the laborers to them[?"] And they say, ["Y]es.["] They will charge \$5,000 a week and we say, ["O]kay.["] So, we turn around to our client and say, ["H]ey, it's going to cost you \$5,000 a week for laborers. \$8,000 a week for the equipment. \$1,000 a week for the expert. So, it's going to cost you that much,["] and then we contact, like, Staff Zone and say, ["H]ey, can three guys come to this job site for this contractor[?"]

(Tr. 17-18)

Brian von Allworden designed the part of the building at the Hoover worksite that was to be constructed with SIPs. He testified he created the plans as an employee of Wright Engineers, who own the plans (Tr. 22). Wright Engineers had "a contract to do the structural engineering for this project before we started. . . . Wright Engineers got paid for producing these plans just like any other project anywhere else." (Tr. 23)

Brian von Allworden testified Smith was the framing contractor on the project, responsible for installing both the SIPs and the structural steel. He stated another entity was the general contractor for the project, but he could not remember its name (Tr. 20). Brian von Allworden maintains SIP, LLC, did not assign Zac von Allworden to provide SIP expertise on the Hoover worksite, but contends Zac "was hired by Smith, who sent him out there. . . . SIP recommended him. . . . [Zac] works independently, as an independent contractor, just like any other partner in any other firm." (Tr. 21)

Brian von Allworden contends Zac³ had the option of declining to work for Smith:

He could. He's done that before. It depends on the contractor. He doesn't get along with some contractors and he says, ["N]o, I'm not going to work for them

³ Where necessary for ease of reading, Zac von Allworden and Brian von Allworden are referred to by their first names. The use of first names is not intended to imply familiarity or lack of respect.

ever again.[”] So, if that contractor has a project and hires SIP[, LLC] to provide structural or SIP expertise, then we’ll talk to Zachary and the other partners and decide who might go out there, and what type of expertise, and how long they’ll stay, and what the services would be.

(Tr. 26) Brian von Allworden argues that when a SIP, LLC, partner is on a project providing SIP expertise, “He’s just an employee, and he can quit.” (Tr. 27)

Brian von Allworden testified that Zac von Allworden called him to discuss work issues (including the OSHA inspection at issue) because of their familial relationship, not because Zac works for Brian. “[Zac] might call me because I’m his father. But he doesn’t call me because of SIP[, LLC]. It has nothing to do with SIP[, LLC]. If he walks off a project, says I’m done with this project, for any reason, that doesn’t have to do with SIP[, LLC] because he’s not working for SIP[, LLC].” (Tr. 27)

Brian von Allworden stated SIP, LLC, had nothing to do with worksite safety. “I’m a resource provider. I did not run the job. I was not in charge of Zachary, his means or methods. . . . That would be the . . . job of the contractor which was W.W. Smith Construction. . . . [Fall protection is] means and methods and it has absolutely nothing to do with me.” (Tr. 36)

At the hearing, the Secretary’s counsel read from the notice of contest filed by SIP, LLC (Exh. C-17). Brian von Allworden testified the quoted language from the notice of contest was accurate:

[SIP, LLC] is a personnel supply company that supplies construction workers with Structural Insulation Panels experience. If the project is not in Arizona we supply one, two, or three workers with Structural Insulated Panel experience to act as [team] leaders and hire the rest from a local construction personnel supply company to complete the crew.

For the project in Hoover, Alabama, SIP[, LLC,] supplied labor to W.W. Smith Construction. W.W. Smith Construction was hired by the owner to supply and install the structural steel and Structural Insulated Panels. SIP provided Zac von Allworden and hired four local workers from Staff Zone to complete the crew that SIP supplied to W.W. Smith Construction.

SIP[, LLC,] was not a contractor on the project and was not in charge of the work site.

...
SIP[, LLC,] has never had any contact with the owner/developer for this project or anyone else connected to the project except for W.W. Smith Construction. All consulting fees made to SIP, [LLC,] were received from W.W. Smith Construction. All payments to Zac von Allworden were from W.W. Smith Construction through SIP[, LLC].

(Tr. 39-42)

Brian von Allworden testified Smith paid SIP, LLC, three payments in the amounts of \$10,000, \$20,000, and \$17,000 (Tr. 48-49). Brian von Allworden testified these payments included wages for Zac von Allworden and the Staff Zone laborers, equipment rental, and payments for the profit and overhead of SIP, LLC (Tr. 49).

Zac von Allworden

Zac von Allworden testified he identified himself to the CSHO as the site foreman “only for installing the panels.” (Tr. 59) When workers were not installing SIPs, Zac von Allworden assisted the crew with installing the structural steel under the supervision of Smith owner Bill Smith. Zac von Allworden stated, “[Bill Smith] came out five or six times at Alabama for a couple of days each time just to install steel. And he would use me or the -- the rest of the crew in order to install steel for those couple of days, then we go back to SIPs.” (Tr. 59) Bill Smith directed Zac’s work during steel installation (Tr. 59). Zac explained the bifurcated nature of his duties: “[W]hen [it] came to the SIPs, I was the foreman. I gave them their direction. When it came to the steel, I was just another laborer and I took direction.” (Tr. 70-71)

The construction project lasted approximately six weeks. Zac von Allworden testified he did not set the hours for working during that time. “[T]hat was kind of set by Staff Zone. . . . [T]heir workers arrived in a van and left in a van, so I don’t have their time. . . . [T]hat’s what they told me their hours were, and that’s what we took.” (Tr. 71-72)⁴

On May 28, 2019, Zac von Allworden met with the CSHO. He testified, “I stepped up as who would be in charge out there.” (Tr. 63) When asked if he told the CSHO that he worked for SIP, LLC, Zac testified, “Well, I gave him both. I wasn’t sure what the legal proceeding would be. So I told him I worked for W.W. Smith for this project, but also we’ve made our company called SIP, and I didn’t know how to proceed from there, so I just gave him both answers. . . . We don’t have any employees, I guess, because we’re all partners.” (Tr. 63)

Zac von Allworden stated he called his father and Bill Smith when the CSHO arrived at the worksite and told both that an OSHA inspection was underway (Tr. 64-65). He testified he

⁴ This testimony appears inconsistent with Zac von Allworden’s statements to the CSHO during the inspection and one employee statement taken by the CSHO. Both prior statements indicate Zac picked up the workers “from downtown.” (Exhs. C-12, p. 3; C-12) The record does not clarify whether this “downtown” location was the drop off point for the van or whether Zac had arranged for pick up with the workers independently.

called Brian von Allworden because he is his father. “[T]his is my first experience with something like this. So I just called him, kind of as my father, just to get guidance.” (Tr. 64)

Zac von Allworden testified that Smith could have fired him from the Hoover project, but SIP, LLC, partners Phil Ligon, Jeff Beason, and Brian von Allworden could not fire him (Tr. 243). Zac described the negotiation he engaged in with Bill Smith when Smith wanted to hire him for the Hoover project. “Bill told me what he expected to pay me and then I told him what I expected to be paid and there was a bit of a negotiation there, and then just kind of handshake on -- there was no -- nothing signed, nothing written. It was just a handshake agreement.” (Tr. 249)

Theodus Sanders Jr.

Theodus Sanders Jr. worked on the Hoover worksite in June or July of 2019 (Tr. 210, 221). At the time of the hearing, he was working with Zac von Allworden on another project (Tr. 220). Sanders testified regarding his observations of the exercise of authority between Zac and Bill Smith on the Hoover worksite.

Q.: Did you ever witness Bill Smith . . . being in charge of the laborers?

Sanders: Oh, yes, he did. Like I said, a couple of time he told me to go do something else. He took another laborer that was out there that was working under Zac, I believe his name was Calvin. He took him a couple of times to go do some things. So, to me, he was the big boss of the whole crew and I was working for Zac, unless he needed me to go do something else.

Q.: So, Bill Smith could take you away from Zac at any time?

Sanders: Yes, sir.

Q.: And Bill Smith could take any of the other workers away from Zac at any time, according to what you've seen?

Sanders: Yes, sir.

(Tr. 214-15)

Q.: Is the foreman in charge of the workers?

Sanders: In my -- to my knowledge, yes, Zac, my foreman he was -- he was in charge of that job under -- I was working under, but Bill was the bigger foreman, I would say. He was my boss under Zac, I would -- as I can say it like that. I don't know how to say it. Bill was the bigger boss, Zac was the guy who introduced me to the SIPs installation. He was there as foreman and that's who I worked with over there, but Bill was over all of us.

Q.: In your time at the job site, did you ever see Zac overrule Bill Smith?

Sanders: Negative.

Q.: Did you ever see Bill Smith overrule Zac?

Sanders: Yes.

(Tr. 216)

Sanders performed work installing the SIPs under Zac von Allworden's direction. (Tr. 212). He had not been hired through Staff Zone but was brought to the worksite to perform concrete work by Bill Smith (Tr. 211-12). Zac von Allworden set his rate of pay and paid him in cash every Friday (Tr. 218).

The CSHO

The CSHO testified he observed possible safety violations as he drove past the Hoover worksite on May 28, 2019 (Tr. 108). After he stopped and checked inside the general contractor's trailer, a man who represented himself as the general contractor for the project pulled up in his truck. The CSHO testified the man told him SIPS, LLC, was performing the work currently being done on the building and "he walked me over to the worksite." (Tr. 110)

The CSHO testified he assumed Zac von Allworden was the subcontractor's foreman because the man he assumed was the general contractor "pointed me to his direction and said, '[T]hat's the foreman for this project.'" (Tr. 116) According to the CSHO, Zac von Allworden "stated that he worked for SIPS. He was the only employee. That his dad and other individuals were—I don't know the exact words, but were partners in the company but he was the only employee." (Tr. 117)

The CSHO faced extensive cross-examination regarding the OSHA-1A or Safety Narrative he completed for this inspection. Safety Narratives are used by CSHOs to document information gathered during the inspections they conduct. Exhibit C-2 is a copy of the Safety Narrative the CSHO completed for the inspection at issue. The CSHO completed the form approximately four and a half months after the May 28, 2019, inspection date (Tr. 161, 186). It is undisputed that none of the following statements from the CSHO's Safety Narrative is true:

Under *Opening Conference Notes and Findings*, the CSHO wrote, in pertinent part:

It was explained to Mr. Zac [v]on Allworden, foreman[,] that his employees were observed painting a window while standing on a porch overhang without any fall protection. Mr. Zac [v]on Allworden, foreman, stated that Mr. Samuel Rosales, painter[,] and Mr. Eddie Coterias, painter[,] did not speak English and he would translate for me.

(Exh. C-2, p. 2)

Under *Compliance Programs*, the CSHO wrote:

No fall protection was used while working from heights during the installation of shingles.

(Exh. C-2, p. 2)

Under *Findings/Comments*, the CSHO wrote:

At the time of the inspection, employees were observed painting while standing on a porch overhang at approximately ten feet one inch above ground level without fall protection.

(Exh. C-2, p. 4)

Under *Closing Conference Notes*, the CSHO wrote:

A closing conference was held on April 12, 2019[,] with Mr. Zac [v]on Allworden, foreman for Vera Home Builders[,] and a second closing was held with the Owner of SIP Insulation Professionals, LLC[,] over the phone on April 15, 2019.

(Exh. C-2, p. 4)⁵

Upon cross-examination, the CSHO confirmed there were no shingles or windows on the Hoover worksite the day of his inspection. No workers were painting the day of the inspection (Tr. 162). He acknowledged Zac von Allworden did not tell him he would translate for two workers who were not present on the worksite (Tr. 179). The CSHO attributed the discrepancies to “a clerical error on my behalf. Probably from copy and paste.” (Tr. 177-78) He testified,

I rewrite narratives, and we use -- instead of writing a whole new narrative over and over and over, because it -- there could be four pages, is I've taken narrative that's similar to what I have done, and put the information in. And with this narrative, I -- I know what inspection that this narrative came from, and I see the mistakes that I made.

(Tr. 182)

⁵ Zac von Allworden denied there was any factual basis for each of the CSHO's quoted statements. He stated he did not know the employees named in the narrative; he did not offer to translate for employees; no window installation or painting was being performed on May 28, 2019, and no shingles were used on the project; closing conferences were not held in April (the month before the inspection); and he was not a foreman for Vera Homebuilders, a business with which he was unfamiliar (Tr. 239-41). The undersigned finds Zac von Allworden's denials of the accuracy of these Safety Narrative statements to be credible. The CSHO testified the closing conference was held with Zac von Allworden on May 28, 2019 (Tr. 185-86). He conceded he had not held a closing conference with owner or Brian von Allworden and that the April 12, 2019, date was incorrect.

When asked if he had proofread the form before submitting it to his supervisor, the CSHO responded, “I did, but it—obviously, I missed some things.” (Tr. 180) He conceded his supervisor also failed to catch the clerical errors (Tr. 180).

After acknowledging he had conflated two separate inspections in his Safety Narrative for this case, the CSHO was asked how one could tell which part related to the Hoover worksite at issue and which part related to the other inspection. The CSHO replied, “Well, by reading it, the information that is incorrect is the information from the other site, and the information that applies to SIPs is the information for SIPs. . . . [T]he only way you know is me telling you it hasn’t been modified for . . . the complete inspection.” (Tr. 182-83) This testimony does not assist readers of the Safety Narrative in discerning what is and is not accurate information for the May 28, 2019, inspection of the Hoover worksite.

The CSHO contended SIP, LLC, was acting as a subcontractor for Smith on the Hoover worksite. When asked the basis for this contention, the CSHO responded, “The only evidence I have is the foreman at the time, Mr. Zac Von [sic] was stating that he was a subcontractor of W.W. Smith.” (Tr. 163) Unlike other parts of his hand-written inspection notes, the conclusion that SIP, LLC, was a subcontractor for Smith is not attributed to a statement from Zac von Allworden (Exh. C-12, p. 4).⁶ The CSHO also wrote that SIP, LLC, was the framing contractor on the project (Exh. C-2, p. 1). When asked who Smith was, the CSHO stated it was the contractor who subcontracted the framing work to SIP, LLC. He had “no idea” what work Smith was contracted to perform (Tr. 173).

The undersigned does not attribute the errors in the Safety Narrative to deliberate deception or fraud on the CSHO’s part and notes the CSHO was candid in admitting his errors. But the errors cast doubt on the reliability of the CSHO’s testimony. The CSHO had trouble recalling specific details of his inspection. He referred to his flawed Safety Narrative and his inspection notes to refresh his memory (Exhs. C-2 & C-12; Tr. 110-13). His reliance on this inaccurate document compromises the reliability of his testimony. Accordingly, the undersigned gives weight to the CSHO’s testimony only where it is corroborated by other witnesses in this proceeding. The CSHO’s testimony that Zac von Allworden told him SIP, LLC, was the framing

⁶ Compare to Exh. C-12 pp. 2-4 in which the CSHO consistently prefaces information obtained from Zac von Allworden with “The foreman Zac von Allworden stated...”

contractor and was the employer of the laborers working at the Hoover site on May 28, 2019, is given no weight.

Bill Smith

Neither party called Bill Smith, owner of the framing contractor, W. W. Smith Construction, to testify. SIP, LLC, argues the court should draw an adverse inference from the Secretary's failure to call Bill Smith. SIP, LLC, does not specify the adverse inference it seeks to have the court draw.

Factual questions remained unanswered in this matter due to a lack of record evidence. Testimony from Bill Smith may well have resolved those questions. But the court is unable to draw any inferences from the lack of this testimony. A party's failure to call a witness raises an inference their testimony would not support its position only where the witness is under the party's control. *Capeway Roofing Systems, Inc.*, No. 00-1968, 2003 WL 22020485, at *12 (OSHRC August 26, 2003) (citations omitted); *see also Regina Constr. Co.*, No. 87-1309, 1991 WL 104227, at *6 (OSHRC May 15, 1991). Bill Smith is a third party to this litigation and not under the Secretary's control. The court can make no assumptions or draw any inferences from either parties' failure to call him as a witness.

DISCUSSION

The Employment Relationship Between SIP, LLC, and the Exposed Employees

SIP, LLC, as represented by partner Brian von Allworden, has consistently maintained it has no employees and was not a subcontractor on the Hoover worksite. It contends Zac von Allworden was acting as an independent contractor who was hired by Smith as its foreman on the Hoover worksite and not as an employee of SIP, LLC.

Only an "employer" may be cited for a violation of the Act, see 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site. . . . In determining whether the Secretary has satisfied that burden, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992) ("*Darden*").

Allstate Painting & Contracting Co., Nos. 97-1631 & 97-1727, 2005 WL 682104, at *2 (OSHRC March 15, 2005) (consolidated).

It is undisputed Zac von Allworden was acting as the foreman overseeing the installation of the SIPs on the Hoover project. The Secretary contends "Zac von Allworden represented SIP,

LLC at the worksite and the laborers he hired were SIP, LLC employees under the OSH Act.” *Complainant’s Posthearing Brief* at pp. 13-14. The Secretary concludes Zac von Allworden was an employee of SIP, LLC, under the test set out by the Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) and the test set out in *Darden*. He concludes the workers onsite during the inspection were employees of SIP, LLC, under the test set out in *Darden*. For the foregoing reasons, the undersigned finds the record insufficient to meet the Secretary’s burden to establish either Zac von Allworden or the workers on site were employees of SIP, LLC, under either test.

The Clackamas Test

In *Allstate Painting*, the Commission quoted with approval language from *Clackamas*, regarding the definition of *employee*. The issue in *Clackamas* was whether a physician-owner of a professional corporation who engaged in a medical practice could also be an employee under the American with Disabilities Act of 1990 (ADA). *Id.* at 441-42. The Commission has yet to address the specific question presented here of whether a member of a member-managed LLC is an employee under the Act. The undersigned finds that, if the Commission applied the *Clackamas* test in its proceedings, the Secretary here would fail to establish Zac von Allworden was acting as an employee of SIP, LLC, at the Hoover worksite.

In addressing this question in *Clackamas*, the Supreme Court relied on the common law for guidance. The Court adopted the six-factor test put forth by the EEOC to determine “whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control.” *Id.* at 449.

The six factors are:

1. The ability of the organization to hire, fire, or establish rules of employment for the individual;
2. The extent, if any, of the organization’s supervision of the individual’s work;
3. Whether the individual reports to someone higher in the organization;
4. The extent of the individual’s influence over the organization;
5. Indicia of intent that the individual be an employee, such as a written agreement or contract; and
6. The manner in which the individual is compensated by the organization.

Id. at 449-50.

The Court found the “common-law element of control was the principal guidepost that should be followed.” *Id.* at 449.

Analysis under the Clackamas Test

1. The Ability of the Organization to Hire, Fire, or Establish Rules of Employment for the Individual.

No evidence was adduced regarding SIP, LLC’s, ability to hire individuals. Zac von Allworden testified Bill Smith had the authority to fire him from the Hoover project. SIP, LLC, partners Brian von Allworden, Phil Ligon, and Jeff Beason did not have the ability to fire Zac (Tr. 243). Brian von Allworden testified SIP, LLC, established no rules of employment for Zac regarding the Hoover project. The project had “nothing to do with SIP, LLC. If [Zac] walks off a project, says I’m done with this project, for any reason, that doesn’t have to do with SIP because he’s not working for SIP[, LLC]” (Tr. 27)

The Secretary has not met his burden to establish SIP, LLC, has the ability fire or establish rules of employment for Zac von Allworden.

2. The Extent, if any, of the Organization’s Supervision of the Individual’s Work.

The Secretary states,

SIP, LLC is located in Tempe, Arizona, while the worksite was in Hoover, Alabama. No one from SIP, LLC was onsite other than Zac von Allworden. When Zac von Allworden was leading the crew to install SIP panels, he directed the work and supervised the laborers (Tr. 70, 117-18, 121-22). There is no evidence that SIP, LLC directly supervised Zac von Allworden’s day-to-day work at the Hoover site, though he would have had to ask permission from Brian von Allworden if he made certain structural changes (Tr. 25).

Complainant’s Posthearing Brief at p. 23.

The Secretary is correct that there is no evidence SIP, LLC, supervised work on the Hoover worksite. His statement that Zac von Allworden would have to receive permission from Brian to make structural changes is somewhat misleading. As Brian von Allworden testified, any contractor on a worksite using plans he had designed would have to contact him before making changes that could compromise the structural integrity of a building.

Q.: [I]f [Zac were] in Hoover and installing SIPs according to the plans that you designed, he couldn't go to that project and then say, [“H]ey, I think we ought to make this wall a little longer to make this a more spacious dining room, or something like that, could he?

Brian von Allworden: He could. Just like any other contractor. I get calls from contractors all the time who want to make changes to the plans, whether they're SIP plans, or SIC plans, or other plans, it doesn't matter. . . . They can call. Officially, they have to do an RFI. There's paperwork that goes into it. They have to contact the architect and say, hey, we want to make this wall longer to make a bigger dining room. The architect has to approve it. Then an RFI comes to me, I have to -- that's a piece of paper, in this case, electronic, typically. I have to answer that officially. Now, I can answer them unofficially on the phone, so they can keep going or we can talk about the solution and get something that works before it's an RFI. But there's a whole process on making changes in the field, you can't just make a change.

Q.: Right. He's -- exactly. And you'd have to be involved in approving that change, right?

Brian von Allworden: Only if the change involves structural elements. If they're going to increase the length of a wall, that typically does not involve structural elements. If they are going to make a huge hole in a wall, that does involve structural elements.

Q.: And the structural insulated panel though, that -- those involved structural elements, correct?

Brian von Allworden: Not necessarily. Like I said, if you want to make a wall longer, I don't have to be involved. We also have rules on the plans that say a contractor can cut so-big-a hole anywhere he wants without engineer's permission. If it's bigger than that, then he has to get my permission. So it just depends on what change they want to make.

(Tr. 24-25)

The testimony of Brian von Allworden does not support the Secretary's contention that SIP, LLC, supervises the work of Zac von Allworden. Rather, it establishes that any contractor wishing to change the structural plans must get approval from the structural engineer before altering the plans. It is an issue of structural safety, not supervision of an LLC member.

The Secretary did not present sufficient evidence to establish SIP, LLC, exercised any supervisory control over Zac von Allworden on the Hoover worksite.

3. Whether the Individual Reports to Someone Higher in the Organization.

The record contains no evidence addressing whether Zac was required to provide information regarding the work being performed at the Hoover worksite to any SIP, LLC, partner. There is no evidence he needed approval from SIP, LLC, partners for any decisions he made regarding the Hoover worksite.

The Secretary argues that if Zac von Allworden quit his job at the Hoover project, the SIP, LLC, "partners would have to decide together who else to send into the field in his place. . .

. This implies that Zac von Allworden would be required to report his decision to quit to his father and/or the other partners.” *Complainant’s Posthearing Brief* at p.23. For the Secretary, Zac’s hypothetical notification to his father that he quit is the equivalent of reporting to his father. Notifying one’s partners as a courtesy is not, however, the same as reporting to someone higher in the organization. To the extent Zac von Allworden shares information with Brian, it appears to be a function of their father/son relationship and not of SIP, LLC’s, business hierarchy.

The undersigned finds Zac von Allworden was not required to report to someone higher in SIP, LLC’s, organization.

4. The Extent of the Individual’s Influence Over the Organization.

There is no evidence that Zac von Allworden exercised influence over the organization.

The undersigned finds this factor is neutral. While it does not show Zac von Allworden takes part in managing SIP, LLC, it does not establish he is subject to its control.

5. Indicia of Intent that the Individual Be an Employee, Such as a Written Agreement or Contract.

There is no evidence of a written agreement between SIP, LLC, and Zac von Allworden regarding the relationship between him and the partnership.

The undersigned finds this factor in neutral. There is no written agreement or contract demonstrating the intent that Zac von Allworden is either an employee or an equal partner of SIP, LLC.

6. The Manner in Which the Individual Is Compensated by the Organization.

As noted previously, when Zac von Allworden worked for Smith on the Texas project prior to the formation of SIP, LLC, Bill Smith paid him by depositing money into Zac’s personal account (Tr. 249-50). For the Hoover project, Smith paid SIP, LLC, three payments in the amounts of \$10,000, \$20,000, and \$17,000 (Tr. 48-49). Brian von Allworden testified these payments included wages for Zac von Allworden and the Staff Zone laborers, equipment rental, and payments for the profit and overhead of SIP, LLC (Tr. 49).

The Secretary argues this evidence “supports a conclusion that Zac von Allworden was an employee of the organization, as he did not simply share in the company’s profits, but was paid by SIP, LLC, for the labor he provided at the worksite.” (Secretary’s brief, 25-26) The money paid to Zac did not come from SIP, LLC, however, but from Smith. It is probable Smith dispersed lump sums to SIP, LLC, for administrative ease in paying Zac’s wages and other

expenses. It is as likely Smith would have paid the lump sum payments to SIP, LLC, whether Zac von Allworden was an employee of SIP, LLC, or an equal partner in the company.

This factor is neutral.

Conclusion Regarding the Clackamas Factors

The undersigned finds analysis of the *Clackamas* factors does not support the conclusion that Zac von Allworden was an employee of SIP, LLC, when he was working at the Hoover worksite on May 28, 2019. SIP, LLC, lacked the control over Zac that is the principal element in proving an employment relationship.

The undersigned finds Zac von Allworden was acting as an independent contractor when Smith hired him as the foreman over the SIPs installation on the Hoover project.

The Darden Test

The Commission has consistently applied the factors enunciated by the Supreme Court in *Darden* in analyzing whether a cited entity is the employer for the workers on a worksite. The Secretary applies that same analysis in his brief with regard to both Zac von Allworden and the three workers on site, arguing the factors weigh in favor of finding SIP, LLC, was the employer of both. The court finds to the contrary, the record is insufficient to meet the Secretary's burden.

The Supreme Court has identified twelve factors to be considered when determining an employment relationship exists:

[T]he skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party.

Darden at 323-24 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

The Commission has addressed the relative weight of the *Darden* factors:

[T]he [Supreme] Court has emphasized that all of these factors must be considered, and no one factor is decisive. [*Darden*] at 324. Yet, as reflected in the Supreme Court's most recent analysis of the common law meaning of "employee" in the context of a federal labor statute, the control exercised over a worker remains a "principal guidepost." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003) (issue of whether physician-shareholders of

an employer could be counted as “employees” for purposes of small employer exemption of the Americans With Disabilities Act, 42 U.C.S. §12101 et seq.). Further, *Clackamas* teaches that the relational context in which the issue arises has a bearing on how the multiple factors derived from the common law are to be applied.

Allstate Painting, at *2.

The Eleventh Circuit has noted it has not explicitly affirmed the application of the *Darden* test to cases involving OSHA violations but has applied the test when the parties have not disputed its application:

Three other circuits have affirmed the application of the *Darden* test to OSHA violations. See *Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 867–69 (10th Cir.2005); *IBP, Inc. v. Herman*, 144 F.3d 861, 865 (D.C.Cir.1998); *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938, 941–42 (9th Cir.1994). One circuit has ruled that *Darden's* reasoning is not directly applicable to the Act. See *Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 402 (3d Cir.2007) (“[*Darden*] was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition.”). The parties here assume in their briefs that the *Darden* test applies. Therefore, we apply the *Darden* test here without deciding explicitly whether the Commission's interpretation of 29 U.S.C. § 652(6) is permissible.

Quinlan v. Sec'y, U.S. Dep't of Labor, 812 F.3d 832, 837 (11th Cir. 2016). Here, the Secretary assumes the *Darden* test applies.⁷

Analysis Under the Darden Test

1. The Skill Required

Brian von Allworden testified the use of SIPs “allowed less skilled laborers to put them together. You only need one skilled laborer and the rest can follow directions.” (Tr. 15) Zac von Allworden learned to install SIPs from his father Brian. The Secretary argues this factor “weighs in favor of finding that Zac von Allworden represented SIP, LLC, at the worksite and the laborers were SIP, LLC, employees.” *Complainant’s Posthearing Brief* at p. 14.

⁷ Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer’s principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). “[I]n general, ‘[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.’” *Dana Container, Inc.*, No. 09-1184, 2015 WL 7459426, at *52, n.10 (OSHR Nov. 19, 2015), *aff’d*, 847 F.3d 495 (7th Cir. 2017). This case arose in Alabama, located in the Eleventh Circuit. Therefore, the Court applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed.

The undersigned disagrees. There are gaps in the evidence between the fact that Zac von Allworden had specialized knowledge and skill regarding the use of SIPs and the conclusion that his expertise establishes he was employed by SIP, LLC, at the worksite along with the laborers. Nothing in the record forecloses the equally probable conclusion that Smith hired Zac von Allworden as an independent contractor because of his experience working with a material Smith wanted to use on the project. The undersigned finds this factor is neutral.

2. The Source of the Instrumentalities and Tools

Zac von Allworden rented the heavy equipment required to install the SIPs (Tr. 253). Brian von Allworden testified SIP, LLC, owned the specialized small equipment used on the Hoover worksite. SIP, LLC, “owns its small equipment that is unique to SIP installation; basically, like mastic guns and some nail guns and a compressor.” (Tr. 253) He noted, “A lot of self-employed contractors have their own equipment because they can’t rely on the contractor to have it. And SIPs install is slightly different than wood. So a lot of wood framers do not have this type of equipment.” (Tr. 253-54) The record contains no evidence regarding the supply of building materials, including the SIPs. No building material costs were included in payments made by Smith to SIP, LLC.

The Secretary argues this factor weighs in favor of finding SIP, LLC, was an employer at the Hoover worksite. The undersigned does not find Zac von Allworden’s rental of the heavy equipment for the Hoover project to be significant. As the person hired to oversee the installation of the SIPs on the worksite, he was in the best position to know what equipment to rent. An independent contractor hired by Smith could be expected to do the same.

The undersigned does find, however, that SIP, LLC’s, ownership of the small tools used on the project weighs in favor of finding SIP, LLC, was an employer on the Hoover worksite.

3. The Location of the Work

The Secretary states, “Laborers in construction typically work in the field, rather than at the office of their employer. This factor is neutral.” (Secretary’s brief, pl. 15) The undersigned agrees with this assessment.

4. The Duration of the Relationship Between the Parties

Zac von Allworden’s relationship with Smith is older than his relationship with SIP, LLC. The Hoover project was the second one on which Smith hired Zac to oversee the SIP installation (Tr. 92, 248-49). Zac von Allworden had previously worked for Smith on a project in

Texas. SIP, LLC, was formed between completion of the Texas project and the start of the Hoover project.⁸

This factor weighs in favor of finding that Zac von Allworden was an independent contractor when he was hired by Smith, for the second time, to act as foreman for the SIP installation on the Hoover project. SIP, LLC, did not exist the first time Smith hired Zac to work on one of its projects. There is no indication in the record that the newly-formed LLC exerted control over Zac von Allworden or the laborers on the Hoover project so that it was the employer.

Similarly, the workers on site had no long-term relationship with SIP, LLC. They were hired for a discrete project. This factor weighs against finding an employer/employee relationship.

5. The Right to Assign Additional Projects to the Hired Party

Bill Smith came to the site five to six times over the course of the project and oversaw the installation of steel framing (Tr. 59, 88). When Bill Smith was onsite, Zac and the other laborers installed steel under Smith's direction "for those couple of days;" afterwards, they returned to SIP installation under Zac von Allworden's direction (Tr. 59-60). "When [it] came to the SIPs, I was the foreman. I gave them their direction. When it came to the steel, I was just another laborer and I took direction." (Tr. 70).

The record does not establish Zac von Allworden had the right to assign additional projects to the laborers. It is undisputed that Zac only instructed the laborers in the installation of SIPs and that Bill Smith's instructions took precedence over Zac's (Tr. 70-71; 214-16).

The undersigned finds this factor weighs in favor of finding SIP, LLC, was not an employer on the Hoover worksite.

⁸ Zac von Allworden testified,

[W]e had this project in Texas before and we hadn't made this LLC yet. It was kind of the project in Texas gave us like, the confidence that we could move forward and make a business out of it and so then we moved forward and made it, and then that was what led into Alabama. There [were] two projects back-to-back with Bill [Smith], one in Texas one in Alabama. We made the company in-between those.

(Tr. 249)

6. The Extent of the Hired Party's Discretion Over When and How Long to Work

The only testimony regarding this factor is from Zac von Allworden: “[T]hat was kind of set by Staff Zone. . . . [T]heir workers arrived in a van and left in a van, so I don’t have their time. . . . [T]hat’s what they told me their hours were, and that’s what we took.” (Tr. 71-72)

There is no record evidence about the sequencing and timing of the framing and SIPs installation. There is no record evidence regarding who set the construction schedule. The record does not support a conclusion either Zac or SIP, LLC, had any discretion over when and how long to work. This factor indicates SIP, LLC, was not an employer on the Hoover worksite.

7. The Method of Payment.

When Zac von Allworden worked for Smith on the Texas project prior to the formation of SIP, LLC, Bill Smith paid him by depositing money into Zac’s personal account (Tr. 249-50). For the Hoover project, Smith paid SIP, LLC, three payments in the amounts of \$10,000, \$20,000, and \$17,000 (Tr. 48-49). Brian von Allworden testified these payments included wages for Zac von Allworden and the Staff Zone laborers, equipment rental, and payments for the profit and overhead of SIP, LLC (Tr. 49). When Zac von Allworden needed cash for materials or to pay workers on the Hoover project, Bill Smith deposited money to the account of SIP, LLC. Zac would use a debit card linked to the SIP, LLC, account to withdraw the cash he needed (Tr. 243-44).

The only evidence regarding how Zac von Allworden’s compensation was set was Zac’s own testimony. He stated he agreed to an amount with Bill Smith in a “handshake agreement.” (Tr. 249) Smith then deposited money into the SIP, LLC, account based upon this agreed amount. Zac drew his salary from the SIP, LLC, account. Zac’s rate of pay was not set by SIP, LLC, but he was paid through SIP, LLC. He testified there were times when Smith paid him directly (Tr. 61-62). This factor weighs in favor of finding SIP, LLC, was the employer of Zac von Allworden on the Hoover project because his pay came from SIP, LLC.

Part of Smith’s payments to SIP, LLC, were for the hired labor. From those payments, SIP, LLC, paid Staff Zone, who in turn paid two of the workers onsite. As the Secretary points out, SIP, LLC, was unable to produce a work order from Staff Zone for the third exposed worker. There is no documentary evidence in the record establishing how that individual was paid. Neither employee statement taken by the CSHO identify how the individual was paid.

Because the record establishes only that the workers were paid by Staff Zone, this factor weighs against a finding SIP, LLC, was the employer of the exposed workers.

8. The Hired Party's Role in Hiring and Paying Assistants

Zac von Allworden determined the number of laborers he would need to assemble the SIPs on the Hoover project, and he hired them through Staff Zone (Tr. 70).⁹ SIP, LLC, paid the laborers from money deposited by Smith in SIP, LLC's, account (Tr. 49). The unskilled laborers hired through Staff Zone had no role in hiring or paying any additional workers.

Zac von Allworden acted independently in determining the number needed and hiring the laborers required for the project for Smith. He assumed responsibility for paying them with SIP, LLC, funds. This factor is neutral with regard to Zac von Allworden.

This factor weighs in favor of a finding the exposed workers were employees and not independent contractors but is neutral with regard to a determination whether SIP, LLC, was their employer.

9. Whether the Work Is Part of the Regular Business of the Hiring Party

Brian von Allworden testified, "The purpose of the company is to provide resources to builders to make the use of SIPs more attractive. These resources include SIP expertise, SIP design, SIP supply and onsite installation experience in the form of . . . a self-employed SIP installation expert that the builder can hire as part of this crew. . . . SIP, LLC, is not a subcontracting company. SIP, LLC, does not have any employees." (Tr. 252)

Here, Zac von Allworden's presence on the Hoover worksite comports with Brian von Allworden's description of the business model of SIP, LLC. According to Brian von Allworden, the regular business of SIP, LLC, is to provide information on the benefits of the use of SIPs in construction. Brian gives talks and provides training in SIPs in seminars throughout the country (Tr. 13-14). The partners of SIP, LLC, benefit from this because they are part of other businesses that manufacture SIPs and design structures using SIPs (Tr. 12, 19). SIP, LLC, fosters the use of SIPs by recommending people experienced in the installation of the panels to contractors (Tr. 13-14).

⁹ Theodus Sanders appears to be the exception on this issue. He was hired by Bill Smith for other work and reassigned to SIPs installation for which he was paid by Zac von Allworden in cash from SIP, LLC's, account. Sanders was not on site at the time of the inspection and not an exposed employee. The nature of his relationship with SIP, LLC, is not dispositive of the issues before the court.

This factor weighs in favor of finding SIP, LLC, was not an employer on the Hoover worksite.

10. Whether the Hiring Party Is in Business

Brian von Allworden registered SIP, LLC, with the Arizona Secretary of State as a perpetual member managed limited liability company (Tr. 7). It is not in the business of construction. It “does not have [a] contracting license in any state. It is not bonded and it does not carry any liability insurance.” (Tr. 252)

The fact SIP, LLC, is in business weighs in favor of finding it is an employer. The fact it is not bonded and does not have a contracting license or liability insurance weighs against finding SIP, LLC, was an employer of the workers on the Hoover worksite on May 28, 2019.

11. The Provision of Employee Benefits

SIP, LLC, does not provide health insurance, 401(k) payments, or any other benefits to Zac von Allworden and did not provide any benefits to the laborers on the Hoover worksite.

This factor weighs against finding SIP, LLC, was an employer on the Hoover worksite.

12. The Tax Treatment of the Hired Party

SIP, LLC, paid Zac von Allworden directly and not by a 1099 (Exhs. C-18 & C-19; Tr. 42). There is no evidence regarding the tax treatment of the laborers working at the Hoover worksite.

This factor weighs in favor of finding SIP, LLC, was not an employer on the Hoover worksite.

Conclusion Regarding Darden Factors

Of the twelve *Darden* factors, only two (the source of the instrumentalities and tools and the method of payment) favor finding SIP, LLC, was the employer of Zac von Allworden. Only one factor (the source of the instrumentalities and tools) weighs in favor of finding SIP, LLC, was the employer of the workers on the Hoover worksite.

The Commission has accorded less weight to the factors regarding payment, benefits, and tax treatment of workers, especially when they are hired using a temporary staffing agency.

The pay/benefits/taxes factors all show a direct connection between the agencies and temp workers, but also show indirect involvement by Froedtert, as the agencies' costs were passed on to the hospital in the rates the agencies charged. The Commission and some courts have discounted the effect of this factor on evaluating the employer status of a using employer. *MLB Industries, Inc.*, 12 BNA OSHC at 1529, 1984-85 CCH OSHD at p. 35,511 (characterizing supplying

employer as merely “conduit for labor”); *Richardson v. Century Products, Inc.*, *supra*, 163 F. Supp. 2d at 775 (even though employment agency was responsible for paying the worker and withholding all taxes and deductions, this was not conclusive that worker was solely the agency's employee; the court noting that the employing customer company paid agency enough to compensate for the employee's wage and for additional fee); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 611 F. Supp. at 349 (payment by temp agency found not conclusive that worker was solely temp agency's employee). *Cf. N.L.R.B. v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1267 (7th Cir. 1987) (finding using employer and temp agency joint employers, court characterized agency's pay/benefits/taxes responsibilities as “administrative”).

In Re Froedtert Mem'l Lutheran Hosp., Inc., No. 97-1839, 2004 WL 2308763, at * 9 (OSHRC Jan. 15, 2004).

Darden places greater significance on the element of control than any other factor. The Eleventh Circuit Court of Appeals focuses on the difference between control over the manner and means of the actual work performed and control over compensation.

Control is the most important factor in the common law. [*NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912 (11th Cir. 1983)]. The test for control “takes into account the degree of supervision, the entrepreneurial interests of the agent and any other relevant factors.” *Id.* at 919–20. It also distinguishes between “control over the manner and means of the agent's performance and the details of the work,” which is relevant, and “mere economic control or control over the end result of the performance,” which is not. *Id.* at 920.

Crew One Prods., Inc. v. N.L.R.B., 811 F.3d 1305, 1311 (11th Cir. 2016).

Here, there is no evidence SIP, LLC, exercised any supervisory control over the work being done on the Hoover worksite through the agency of Brian von Allworden, Phil Ligon, or Jeff Beason. Zac von Allworden supervised the laborers regarding installation of the SIPs, but that supervision is consistent with an independent contractor serving as foreman for Smith.

Bill Smith had greater authority than Zac von Allworden when he was on the site. Bill Smith could override Zac’s orders and could remove laborers from Zac’s supervision and assign them to other tasks (Tr. 214-16). It was Bill Smith, and not Zac von Allworden, who manifested greater control over the laborers’ performances and the details of their work. It is also telling that when Bill Smith was supervising the installation of structural steel, Zac became part of the crew and Bill Smith supervised him in the same manner as he did the other laborers. Zac’s willingness to subordinate himself to another contractor and perform laborer’s work is inconsistent with his purported role as SIP, LLC’s, sole representative as a subcontractor on the worksite.

On the paramount issue of control, the undersigned finds the Secretary failed to prove SIP, LLC, exercised sufficient control over the manner and means of the laborers' work to establish it was the employer of Zac von Allworden or the laborers on the Hoover worksite on May 28, 2018. The factors weighing in favor of finding an employment relationship are of lesser significance than the factor of control.

The undersigned finds the Secretary has not met his burden to establish SIP, LLC, was an employer on the Hoover worksite on May 28, 2019.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

Items 1, 2, and 3 of the Citation are **VACATED** and no penalties are assessed.

SO ORDERED.

Dated: April 26, 2021
Atlanta, GA

/s/

Heather A. Joys
Administrative Law Judge, OSHRC