United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. EHLE, INC. Respondent.	OSHRC DOCKET NO. 10-2097

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an Ehle, Inc. ("Respondent") worksite at Lot 5 on the 100 block of Sater Street in Orfordville, Wisconsin ("worksite") on September 9, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty to Respondent alleging two (2) serious violations of the Act and proposed a total penalty of $1,200.00. Respondent filed a timely notice of contest, bringing this matter before the Commission.

Complainant filed a complaint on November 8, 2010, which is also the date that this case was designated for Simplified Proceedings. The Administrative Law Judge ("ALJ") previously assigned to this case, Judge Benjamin R. Loye, discontinued Simplified Proceedings in light of Respondent's

defense that it was not an "employer" pursuant to 29 U.S.C. § 652(5). On March 10, 2011, the case was reassigned to ALJ Sidney J. Goldstein. On April 26, 2011, Complainant moved for partial summary judgment, which was denied by Judge Goldstein on May 9, 2011. On February 6, 2012, the case was again reassigned to this Court. On February 15, 2012, Complainant resubmitted her motion for partial summary judgment. This Court denied the motion on April 12, 2012. A trial was held on May 22, 2012, in Madison, Wisconsin. Both parties have submitted post-trial briefs.

Factual Background

Respondent owns rental apartment properties, which are constructed through the hiring of subcontractors. (Ex. J-1). Once the apartments are built, Respondent hires a management company to maintain the property and collect rent. (Tr. 86). Robert Ehle ("Robert") is Respondent's president and Randy Ehle ("Randy") is Respondent's vice-president, and both of them make all corporate decisions. (J-1). Randy and Robert each own a fifty percent share of Respondent. (J-1). Neither Randy nor Robert draws a salary for the work that they perform. (Tr. 82, Ex. R-1).

At the time of the OSHA inspection, Respondent was installing roof sheathing on one of its apartment buildings that was in the process of construction. (Tr. 21, 84–85, J-1). Roof sheathing involves installing oriented strand board onto trusses. (Tr. 21). The sheathing materials are hoisted onto the roof with a forklift and then carried across the roof to the point of installation. (Tr. 21). Compliance Safety and Health Officer ("CSHO") Dan Calverley observed a worker on the roof of one of the apartment buildings as he was driving by the rear of the worksite. (Tr. 19–20, C-4). Upon making this observation, the CSHO drove around to the front of the worksite and observed additional workers on the roof. (Tr. 20, C-5). One of the workers on the roof was Randy Ehle. (Tr. 20). The CSHO could not identify the other two workers he observed. (Tr. 23). None of the workers were wearing fall protection. (Tr. 21, C-4, C-5, C-6).

The CSHO asked who was in charge and was directed to Robert Ehle. (Tr. 22). The CSHO identified himself and stated his intent to perform a safety and health inspection. During the opening conference, the CSHO asked about Respondent's safety and health programs. (Tr. 24). Robert indicated that they did not have any safety and health programs. (Tr. 24). After the opening conference, the CSHO conducted interviews with Randy and a worker named Chuck Brandau ("Brandau"). (Tr. 24–26). Randy signed a statement indicating that he was installing sheathing on the roof and that he had not been trained on fall protection requirements. (C-7). Brandau provided information regarding his status as an independent contractor and also signed a statement. (Tr. 26, C-8).

At the conclusion of his interviews, the CSHO took additional photographs and measured the roof. (Tr. 30–31). The roof was sloped and measured 8.8 feet above the ground in the front and back of the building. (Tr. 32–33). As a result of his observations and interviews, the CSHO cited Respondent for two violations of the Act.

Jurisdiction

Based on the record, the Court finds that Respondent was engaged in a business affecting commerce as that term is defined in Section 3(3) of the Act. 29 U.S.C. § 652(3). Respondent is engaged in construction, which has repeatedly been upheld as a business affecting commerce even when the activities of a particular business are purely local. *See, e.g., Clarence M. Jones d/b/a/ C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983); *Slingluff v. OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005) (holding that economic activity of construction as an aggregate affects interstate commerce).

According to the Act, an "employer" is defined as "a person engaged in a business affecting commerce who has employees . . . ." *Id.* § 652(5). "The term 'person' means one or more individuals,

partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *Id.* § 652(4). "The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce." *Id.* § 652(6).

Respondent has argued that it is not an "employer" as that term is defined in Section 3(5) of the Act. 29 U.S.C. § 652(5). Respondent's primary argument is that neither of the Ehle brothers are employees because they are both equal—in terms of ownership and authority—co-owners of the company and that neither of them draws a salary for the work that they perform. Respondent also argues that the workers it hired to perform construction work were not employees but independent contractors. Complainant argues that the CSHO properly concluded that, in light of the work that they were performing, both Randy and Brandau were employees of Respondent. It is imperative for Complainant to establish that Brandau or Randy are employees of Respondent, otherwise Respondent is not an employer covered by the Act. The Court shall address the arguments with respect to both.

Brandau

Brandau is a carpenter by trade and operates under the business name of RC Construction. (Tr. 28, C-8). He heard about Respondent's construction project from a fellow contractor. (C-8). Brandau had worked for Respondent on a previous apartment project approximately two to three years prior. (Tr. 27, C-8). During his interview with the CSHO, Brandau stated that he anticipated working on the project for approximately one week, during which time he would assist with installing sheathing and cutting the wood pieces that were to be installed. (Tr. 27, 29, 47, 67 C-8). No agreement was reached as to what Brandau was going to be paid; however, he and Robert discussed how long the project would take. (Tr. 86, C-8). Although Brandau could not state how much he would be paid, he did indicate that he would tell Robert how many hours he had worked and that Robert would pay him

based upon those hours. At the conclusion of the job, Respondent would provide Brandau with a 1099 form for tax purposes. (Tr. 42).

Brandau provided his own tools; however, Respondent provided the heavy equipment and materials. (Tr. 27, J-1, C-8, C-9). Brandau told the CSHO that his work schedule lasted from 6:30 a.m. to 3:30 p.m.; however, the record is unclear as to whether that schedule was self-imposed or required by Respondent. At one point during his first day on the job, Brandau informed Robert that he was not going to work on the roof due to windy conditions. (Tr. 46–47, C-9). Brandau left the worksite and Respondent did not require him to perform any additional duties. (Tr. 47, C-8). Brandau told the CSHO that he shared decision making responsibilities with Robert and Randy regarding the roof sheathing project. (C-8).

The Secretary has the burden of proving that Respondent is the employer of the affected workers at the worksite. *Allstate Painting & Contracting Co., Inc.*, 21 BNA OSHC 1033 (97-1631, 2005). As noted above, an "employer" is a "person . . . who has employees." 29 C.F.R. § 652(3). The Commission and multiple circuit courts, relying on the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 326 (1992), have held that the Act's definition of 'employee' is "unhelpfully circular." *See, e.g., Davis*, 19 BNA OSHC 1477 (No. 96-1378, 2001). In the face of such unhelpful definitions, the Court reiterated its prior precedent that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322–23. The Court further stated that:

> 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.

Id. at 323–24. The Commission noted that this test "looks to the element of control by the hiring party over the hired party. *Davis*, 19 BNA OSHC 1477; *see also Vergona Crane*, 15 BNA OSHC 1782, 1784 (No. 88-1745, 1992).

Based on the foregoing, the Court finds that Complainant failed to establish that Brandau was an employee of Respondent. There are factors that indicate Brandau was an employee: (1) the CSHO testified that the level of skill associated with roof sheathing is relatively low; (2) Respondent provided the heavy equipment and materials for the project; and (3) Brandau did not have authority to hire or pay assistants. There are also some factors that the Court finds do not aid the determination one way or the other. The location of the work, although owned by Respondent, is a construction site. Although the location allows Respondent to exert a certain degree of control over the work performed, construction sites are generally associated with the work of multiple contractors. Even though the CSHO observed multiple individuals working at the worksite, very little testimony or evidence was introduced to identify the relationship between the various workers the CSHO observed and Respondent. Further, Respondent is clearly in business; however, in light of the other factors discussed, the Court finds that this particular factor does not tip the balance one way or the other. Finally, it is unclear whether the particular activity of roof sheathing is a regular part of Respondent's business. To be sure, Respondent hires contractors to build the apartment buildings that it uses for rental income, but its regular business is the income it receives from the leasing of those buildings. Very little testimony was provided regarding who is hired for these construction projects or how often they occur.

Notwithstanding the foregoing, the Court finds that the weight of the evidence suggests that Brandau was not an employee. First, although Complainant argues that the duration of the parties' relationship suggests an employee-employer relationship, the Court disagrees. Brandau had worked for Respondent on one project two to three years prior to the project at issue in this case. Complainant interprets this as a working relationship lasting two to three years. Although Respondent and Brandau may have had a relationship during this period of time, the Court does not believe that the factor elicited by the Supreme Court was aimed at a relationship wherein the putative employee worked on two isolated projects separated by two to three years. Had Brandau worked for Respondent during that entire period of time, the Court would be more inclined to find that an employee relationship existed. But, considering that Brandau's relationship with Respondent is sporadic and limited in scope, the Court finds that this factor tends toward a finding that Brandau is an independent contractor. Second, there was no evidence to suggest that Respondent had the authority to assign additional projects to Brandau; he told Robert that he did not feel safe working on the roof during windy conditions, and he was not required to perform any additional tasks. Further, as noted above, Brandau told the CSHO that he and the Ehle brothers shared decision making responsibilities with respect to the roof sheathing project. This factor also related to Brandau's discretion over when and how long to work. Brandau told Robert that he was not going to work on the roof and left the worksite for a while; he did not ask for permission to do so. Third, although Brandau was to be paid hourly, which suggests an employee relationship, his pay was contingent upon the hours that he reported to Respondent. Although he told the CSHO that he had a 6:30 to 3:30 schedule, it does not appear that his job was dependent upon him strictly adhering to that schedule. Fourth, Brandau was not provided with benefits. Fifth, both Brandau and Respondent both understood that he would be provided with a 1099 form for tax reporting purposes.

On balance, the factors listed above suggest that Brandau was not an employee of Respondent because Complainant failed to show that Respondent exerted any significant amount of control over Brandau in the execution of the roof sheathing project.

Randy Ehle

With respect to Randy, who was working on the roof at the time of the inspection, Complainant contends that he was an employee of Respondent on two separate bases. First, Complainant contends that application of the *Darden* factors establishes that Randy was an employee. Second, Complainant contends that, prior to the Commission's adoption of *Darden*, Commission ALJs have repeatedly held that corporate officers are covered under the Act when they are performing work for the corporation. Respondent contends that Randy cannot be an employee because he is a 50% co-owner of Ehle, Inc., exercises joint corporate decision making with Robert, and he does not draw a salary for services that he performs. The Court previously denied Complainant's motion for summary judgment because there were not sufficient undisputed facts to establish, as a matter of law, that Randy was an employee of Respondent. After reviewing the record and the parties' briefs, the Court finds that Complainant failed to establish that Randy Ehle was an employee of Respondent.

Complainant cites a number of cases, including *Darden*, in support of her arguments that Randy is an employee of Respondent. With respect to *Darden*, the Court finds that the factors elicited by the Supreme Court do not clarify the matter. The key issue in applying the *Darden* factors is to determine the "hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323–24. Or, in the words of the Commission, the test "looks to the element of control by the hiring party over the hired party." *Davis*, 19 BNA OSHC 1477. The

problem with this test, at least with respect to this particular situation, is that Randy Ehle is the hiring party. As 50% co-owner and joint decision maker with his brother Robert, Randy is one of the individuals that exercises control over the manner and means by which the product is accomplished. The Court is mindful of the fact that, on paper, the corporate form of Ehle, Inc. "employs" a president (Robert) and a vice-president (Randy); however, Complainant has failed to establish that there is a meaningful difference between Randy Ehle as employee and Randy Ehle as controlling employer. When either Randy or Robert carries out a particular function, it is based upon a plan of action agreed upon by both of them; thus, in a sense, Randy and Robert are asserting control over themselves. Due to the fact that Randy and Robert are equals in terms of their ownership and decision making, neither of them asserts control over the other in a way that would indicate an employer-employee relationship.

Further, it is also important to note the nature of Respondent's business and the manner in which Randy and Robert receive compensation. Respondent hires contractors to perform construction of apartment complexes. The units are then rented out through the use of a management company. Respondent's earnings come in the form of rental income from those properties. Respondent's tax returns do not indicate that either Randy or Robert receives a salary for the work that they perform; rather, although there was no testimony regarding this fact, it appears that each of them shares in the net income gained from the rental of those properties. Ultimately, there is no indication that the Respondent corporation pays either of them for the work that they perform, which is a strong indication that neither Randy nor Robert is an employee.[1] Complainant failed to show, at least in terms of *Darden*, how Randy and Robert were controlled by the corporation when they are the ones that are doing the controlling. In terms of how the Respondent corporation functions, the Court sees no difference between it and a self-employed individual or, for that matter, the owner of a particular

1. The Court would also point out that there is a strong possibility that, in any given year, the company may not turn a profit, in which case, the owners of Respondent would receive no compensation whatsoever.

piece of property. Without paid employees, Respondent is no more subject to the Act than a self-employed carpenter or property owner who pays others to perform contracting work.

In addition to *Darden*, Complainant cites a number of Commission ALJ cases wherein company owners or corporate officers were held to be employees pursuant to Section 3(6) of the Act. Because the cases cited are not from the Review Commission, they are not binding on this Court; however, they may serve as persuasive precedent. After reviewing the cases, the Court finds that Complainant has failed to prove that either Robert or Randy is an employee under Section 3(6) such that Respondent is subject to the requirements of the Act.

The first case cited by Complainant is *Madison Slacks, Inc.*, 1979 CCH OSHD ¶ 23,583 (No. 78-5818, 1979) (ALJ Cutler). With very little in the way of explanation, the ALJ held that, because the self-styled owner and manager was an officer of the corporation, he was therefore an employee within the meaning of the Act. *Id.* In support of this proposition, the ALJ in *Madison Slacks* cited to *Kensington Elec. Prods. Co., Inc.*, 1 BNA OSHC 3095 (No. 1424, 1973) (ALJ Gold). In *Kensington*, the ALJ cited with approval to a Fourth Circuit case, wherein the circuit court ruled that "officers of a corporation receiving no salaries or other compensation for very nominal services were not employees for purposes of [the Federal Unemployment Tax] Act." *Kensington*, 1 BNA OSHC 3095, 1973 WL 4128 at *5 (citing *U.S. v. Bernstein*, 179 F.2d 105 (4th Cir. 1949)). ALJ Gold reiterated the broad reach of the Act as regards employees and found that the president and plant superintendent of the company, both of whom were "major stockholders", were employees pursuant to Section 3(6) because they "regularly contribute[d] substantial services by directing and supervising the operation at the plant, their workplace." *Id.*

Complainant also cites *D&H Pump Service, Inc.*, 5 BNA OSHC 1485 (No. 16,246, 1976) (ALJ Blythe), wherein the ALJ held that the vice-president performing excavation work was an employee.

The problem with this case, however, is that the vice-president admitted that this activity was a regular part of his job. *Id.* The evidence also showed that he had the choice of three separate job titles—vice-president, general manager in charge of day-to-day operations, and working foreman—which suggests that his elevated status within the corporation was nothing more than a token title *Id.* The ALJ did not discuss whether the vice-president was also an owner of the company or how he was paid; however, in light of the fact that the vice-president admitted that he regularly spent 40 hours a week performing excavation work, reaching the conclusion that he was an employee of the respondent was not a difficult task. In reaching his conclusion, the ALJ in *D&H Pump Service* relied on *FEC, Inc.*, 1 BNA OSHC 3043 (No. 17, 1972), which held that the president of a company performing on-site electrical work was an employee. However, the ALJ made sure to note that the president of FEC, Inc. received a $300.00 weekly salary. *FEC, Inc.* 1 BNA OSHC 3043.

First, the Court is unwilling to say that merely because an individual is a corporate officer of a company he is automatically an employee of that company, nor does the Court believe that is the import of the above-cited cases. The ALJ in *Kensington* was careful not to say that shareholders or corporate officers are *ipso facto* employees; rather, the ALJ determined that the individuals in question were employees because they directed and supervised the workforce at the plant. *Id.* In all of the cited cases, the ALJs were responding to the respondents' contention that corporate officers and shareholders could not be employees merely because they were owners and officers. Rather than focus on their title, the ALJs focused on the work that was performed and the manner in which the individuals were paid. In *Kensington*, the fact that the president and plant superintendent were "major shareholders" implies that they were not the only shareholders and, thus, remained accountable to the corporation as an entity separate and distinct from themselves. Further, in most of the cases referenced above, the purported employees received compensation for the work that they performed.

In the case of Randy and Robert, they were the only shareholders of the Respondent corporation. Although the Court agrees with the ALJ in *Kensington* that "[h]olding stock in a corporation is not necessarily inconsistent with being an employee thereof," the Court finds that the manner in which Respondent was owned and controlled by Robert and Randy is inconsistent with either of them being an "employee" pursuant to the Act. As noted above, neither of them receives compensation for the work that they perform on a construction project. Further, as the corporation's only co-owners and officers, Randy and Robert are beholden only to the directions that they give themselves.[2] Complainant has expressed concerns about the legitimacy of relying on the corporate form for the purposes of civil liability and then "disregarding" the corporate form by directing the corporation not to pay them a salary so that they can avoid liability under the Act. (Compl't Brief at 10). Based on the record, it is unclear why Respondent is structured in this manner or why Randy and Robert, as co-owners, have opted not to pay themselves a salary, and the Court expresses no opinion about their reasons for doing so.[3]

Most, if not all, of the above-cited decisions are couched in terms of the broad reach of the Act, the stated purpose of which is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). That said, the Court also finds that it is important to recognize that the obligation to provide a safe and healthful working environment flows from the employer to the employee. *See* 29 U.S.C. § 654(a)–(b). The reason for

2. It is possible that Respondent could be employers pursuant to *Kensington* insofar as they directed workers to perform the activity of roof sheathing. However, Complainant has failed to prove that any of the individual workers were under the control of Respondent. The CSHO focused his energy on Brandau, whom the Court found was not an employee; however, there were also two other unidentified workers on the roof with Randy at the time of the inspection. Complainant failed to address the status of these individual workers and their relationship to Respondent.

3. In fact, it is curious why Complainant did not pursue this particular issue. As it stands, the record illustrates that Respondent's primary business is the ownership and rental of apartments. (Tr. 80–81). Virtually no evidence was introduced to suggest the level of Randy's or Robert's contribution during the construction process on this or other jobs versus the amount of work done by the contractors that are hired to build them. *See Kensington*, 1 BNA OSHC 3095 (holding that regular contribution of substantial services by a salaried officer is sufficient to qualify that individual as an employee).

this, of course, is that the employer occupies a position of power over its employees and is in a position to control the conditions under which its employees work. The reason that self-employed individuals are not covered is because the obligation to maintain a safe and healthful working environment flows from themselves to themselves. In terms of Randy and Robert vis-à-vis the Respondent company, Complainant has failed to establish any meaningful distinction between their situation and that of a self-employed individual or property owner that hires outside contractors to perform work on their behalf. Accordingly, the Court finds that Complainant has failed to prove that either Randy or Robert is an employee of Respondent.

Conclusion

Ultimately, the Court's decision is premised on Complainant's failure to meet its burden of proof. There were numerous avenues that Complainant could have pursued in order to establish Respondent's status as an employer, i.e., examination of the unidentified workers on the roof at the time of the inspection and a deposition or examination of Chuck Brandau. With respect to those individuals, Complainant's evidence fell short of establishing that Respondent exerted the sort of meaningful control that would justify a finding that any of them were employees instead of independent contractors. Similarly, the Court is unconvinced by Complainant's argument that either Randy or Robert should be considered employees under the Act simply because other ALJs have held that, in one scenario or another, corporate officers have been considered to be employees under the Act. As the ALJ in *Kensington* noted, "[A]n officer of a corporation may or may not be an employee of a corporation, depending upon the facts and circumstances of his particular relationship to the corporation." *Kensington*, 1 BNA OSHC 3095, 1973 WL 4128 at *5 (citing *U.S. v. Bernstein*, 179 F.2d 105 (4th Cir. 1949)). These particular facts and circumstances are important because they allow the Court to determine whether the purported employer-employee relationship is captured by the

definitions provided by the Act and Commission precedent. The evidence introduced by Complainant has failed to persuade the Court that the facts and circumstances of Randy Ehle's relationship to Respondent is that of an employee. Accordingly, the Court does not find that Respondent is an employer pursuant to Section 3(5).

Because Complainant has failed to prove that Respondent is an employer under Section 3(5) of the Act, the Court need not address the merits of the underlying violations. Accordingly, the subject citations are hereby VACATED.

ORDER

Based upon the foregoing, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.
2. Citation 1, Item 2 is VACATED.

SO ORDERED.

/s/
JOHN H. SCHUMACHER
Judge, OSHRC

Dated: November 5, 2012