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| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>DON DAVIS, d/b/a DAVIS DITCHING<br><br>and<br><br>DAVIS DITCHING, INC.,<br><br>Respondents. | : | OSHRC Docket No. 96-1378 |

***DECISION***

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

This case arises out of an inspection conducted by the Secretary of Labor ("Secretary") in Colorado Springs, Colorado, where Don Davis, a sole proprietor doing business under the name Davis Ditching, was excavating a trench and installing sewer pipe. For purposes of this work, Davis leased excavation equipment from a corporation, Davis Ditching, Inc., of which he is the president. The Secretary issued a citation alleging that both the sole proprietorship and the corporation committed serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act" or "OSH Act") by failing to comply with provisions of the Secretary's construction safety standards in 29 C.F.R. Part 1926. The only issue before us is whether, at the time the violations were alleged to have occurred, Don Davis as a sole proprietorship was the employer of any of the three persons

who were working at the site and was therefore subject to the requirements of the Act. Administrative Law Judge Sidney J. Goldstein concluded that Davis had sufficient control over the workers to be held responsible for the hazards to which they were exposed. In accordance with the parties' stipulation that the violations existed as alleged in the event Davis were found to be an employer under the Act,[1] he affirmed the citation and assessed a penalty of $7000. We reverse and vacate the citation.

## I. BACKGROUND

The relevant facts are not in dispute. Don Davis for many years had been a friend and business acquaintance of Jerry Ringler, an individual who owned and operated a sewer cleaning business known as "Reliable Sanitation," in which he employed one of his two brothers, Bobby. Ringler's other brother, Ernest, similarly owned and operated a septic tank cleaning service, "Pike's Peak Sanitation." The two companies—Reliable and Pike's Peak—shared common office space. In addition to running his sewer cleaning service, Jerry Ringler occasionally engaged in property development. He testified that he entered into a fixed-price oral contract with Davis to dig a trench and install the water, sewer, gas, and electric lines for an industrial park Ringler was constructing on the land where he and his brother Ernest maintained the offices of their respective businesses. The price agreed upon was $180,000,

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[1]The judge's decision apparently affirmed the citation as to both Davis as sole proprietor and Davis Ditching, Inc. On review, the Commission specifically requested that the parties address in their briefs whether each entity was a statutory employer. In her brief before us, however, the Secretary expressly stated that a determination of whether Davis Ditching, Inc. was an employer under the Act is not necessary to the disposition of this case and presented no argument with respect to that entity. In accordance with our usual practice, we treat the Secretary as having abandoned her contention that the citation should be affirmed against Davis Ditching, Inc. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1938, 1999 CCH OSHD ¶ 31,932, p. 47,371 (No. 97-1676, 1999). We therefore set aside the judge's decision with respect to Davis Ditching, Inc., and we vacate the citation as to the corporate entity. *See Power Fuels, Inc.*, 14 BNA OSHC 2209, 2215, 1991-93 CCH OSHD ¶ 29,304, p. 39,348 (No. 85-166, 1991) (Commission vacates previously affirmed citation item that Secretary had abandoned on review).

with Davis using equipment rented from Davis Ditching, Inc. Ringler and Davis estimated that this particular project would take between six and nine months.

Two compliance officers for the Secretary, Jack Cain and Michael Kelly, were assigned to conduct an inspection based on an anonymous complaint which did not identify by name the individual or business against whom the complaint was made. Cain testified that on March 19, 1996 he observed three workers in a trench that was approximately 8 feet deep and did not appear to have any protection against cave-in. Davis, who was standing at the top of the trench, stated that he did not have the authority to consent to an inspection and directed Cain to the Ringlers' office. Cain spoke to Jerry Ringler, who told him that "Mr. Davis was in charge of the operation." Ringler, however, also stated that he was refusing permission to inspect.

Cain and Kelly returned two days later with an inspection warrant. This time, they saw two individuals, subsequently identified as Bobby and Ernest Ringler, setting pipe in the trench. Another worker, Levi Haswell, was standing nearby at the top of the trench. Bobby Ringler told Kelly that he was employed as a truck driver by Reliable Sanitation, his brother's sewer cleaning business, and had about 10 years' experience in excavation work.[2] Both Ringler brothers gave written statements to the compliance officers. Bobby Ringler's statement said as follows: "I'm employed by Reliable Sanitation. I was not doing anything today so I decided to come over here and see if I could be of any help. I'm not being payed [sic] & don't expect to be payed [sic]." Ernest Ringler wrote on his statement, "I own Pikes Peak Sanitation. When I am not pumping septic tanks I am not receiving any money for what I am doing on this job site." Both said that when they had free time they came over to "help out," or, as Jerry Ringler stated in his testimony, "they was just killing time."

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[2]Because its employee was exposed to the violative conditions, a citation alleging the same violations was also issued to Reliable Sanitation. That citation was settled, but the terms of the settlement were not divulged.

Furthermore, there is evidence that Davis could perform the job himself. Ringler testified that so long as Davis was using plastic pipe, Davis could accomplish all the tasks—excavating with the backhoe, putting in the gravel bed with the front end loader, and installing the pipe—without any assistance whatever and further said that Davis "always" worked this way. Similarly, Davis testified that on the day the inspectors first came to the worksite, he had been working alone in the excavation for several hours before Ernest and Bobby Ringler appeared.[3]

Jerry Ringler denied that he instructed his brothers to assist Davis, and he insisted that he did not know how his brothers came to be in the excavation. As Ringler put it, his brothers did not "need authority" to be at the worksite. For his part, Davis testified that he too did not know why the Ringler brothers came to the worksite, and he testified that he had no knowledge of "what their deal is with their brother" and did not "get involved in it." Both he and Jerry Ringler surmised that the other Ringler brothers may have gone into the excavation because they were curious about the laser Davis was using to grade the trench. It is undisputed that neither Bobby nor Ernest Ringler was paid or otherwise compensated for whatever work they did.

Levi Haswell, who owned his own truck, advised the compliance officers as follows: "I am self-employed as a truck driver under the name of Levi Haswell Enterprises."[4] In a subsequent interview, Haswell also stated that he had worked for Davis "on and off" for 30

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[3]Compliance officer Cain testified that Don Davis gave a statement to the effect that he "on occasion hired casual labor or temporary-type labor." The Secretary issued a subpoena to Davis Ditching, Inc. to disclose the identity of and payroll records for all employees working at the trench. The corporation did not respond to this subpoena, and the Secretary apparently did not pursue the matter. There is no indication that the Secretary attempted to ascertain whether Davis as sole proprietor had ever hired labor, or that any such hiring would be relevant to the time period at issue here.

[4]The Secretary in her review brief concedes that Bobby Ringler was employed by Jerry Ringler and that Ernest Ringler and Levi Haswell are self-employed in their own businesses.

years and that he operated the front-end loader at the site because he was one of the few individuals whom Don Davis trusted with his equipment.[5] The decision to hire Haswell, however, was made by Jerry Ringler, not Davis, because Ringler thought the job was progressing too slowly and wanted to give Davis some assistance. Ringler selected Haswell because he had known Haswell for the past 20 years and was aware that Davis would allow Haswell to use Davis' equipment. If for some reason Ringler became dissatisfied with Haswell's work, he had the authority to tell Haswell that his services were no longer required. Davis, on the other hand, could not have dismissed Haswell. If he did not want Haswell on the job, Davis would have to speak to Ringler, who would make the decision whether or not to terminate Haswell's services.

Haswell's involvement at the worksite here was on an occasional basis; he worked at the trench a few times for short periods and only when needed to deliver or move material. Haswell was paid by Jerry Ringler, not by Davis, and was responsible for his own taxes and insurance. Haswell would submit to Ringler his claim for the number of hours worked except during those times when Ringler was not present at the site. Ringler did not tell Haswell how to perform his assigned tasks, and Haswell would have been free to hire someone else to help him if he wished. During the time that Ringler assigned Haswell to assist Davis, Ringler also gave Haswell permission to perform work at other locations using Davis' front end loader. Notwithstanding Ringler's intention that sending Haswell to the site would expedite the work, Davis testified that the interruptions when Haswell went to other sites occasionally resulted in delays on Davis' project. Davis also testified that he had no ability to compel Haswell to come to work at any particular time. Haswell did not always report for work

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[5]Don Davis testified that he had employed Haswell some 35 years earlier, at which time he taught Haswell how to operate construction equipment, and that for a 5-year period Haswell worked for Davis' brother. There is no indication, and the Secretary does not argue, that these prior relationships are relevant to the events in question here.

when, or stay as long as, Davis wanted him to, and sometimes Haswell did not show up at all. Both Davis and Ringler considered Haswell an independent contractor.

Although Bobby and Ernest Ringler informed the compliance officers that they too were completely free to come and go as they wished, and that Davis could not instruct them to report for work, they also stated that Don Davis was in charge of the excavation and directed the work. Haswell similarly stated that Don Davis was in charge of the job. Jerry Ringler likewise testified that Davis directed the operation of the backhoe and the placement of the pipe. Although Davis emphasized that the work tasks at the site were so routine and well-established that little if any direction or instruction was required, Davis conceded that after the Ringler brothers had set the pipe in the excavation he would check to make sure they had placed it properly.

## II. APPLICABLE CASE LAW

The sole issue before us is whether Don Davis is an employer as the Act defines that term. As the Commission noted in *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD ¶ 29,775, p. 40,495 (No. 88-1745, 1992), "only an 'employer' may be cited for a violation of the Act," although the bare minimum of one single employee is sufficient to invoke coverage under the Act. *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727, 1979 CCH OSHD ¶ 23,888, p. 28,968 (No. 76-4026, 1979). If Davis was not the employer of at least one of the three workers at the site, he cannot be held liable under the Act, for the Secretary does not claim that Davis had any other employees. Although the evidence supports the judge's finding that Davis controlled the performance of the work itself, control over the "means and methods" by which a task is accomplished is not dispositive of employment status under the Act.

Section 3 of the Act, 29 U.S.C. § 652, defines an "employer" as "a person engaged in a business affecting commerce who has employees" and defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." As the Ninth Circuit pointed out in *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938,

941 (9th Cir. 1994), such unhelpfully circular definitions, which are found in several other statutes as well as the OSH Act, have led the Supreme Court to look beyond the statutory language for guidance on the meaning of those terms. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 326 (1992), 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." *Id.* at 322-23 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The exercise of, or the right to exercise, control over those performing service determines whether a master-servant relationship exists at common law. Under the so-called "control" test, the master, or employer, has the right, not only to specify the objectives of a subordinate's service, but also "to control the physical conduct of the other in the performance of the service." RESTATEMENT (SECOND) OF AGENCY § 2. The Supreme Court in *Darden* set out the following test for the existence of a common law employment relationship:

> 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.

503 U.S. at 323-24.

The *Darden* test originates in the common law, which looks to the element of control by the hiring party over the hired party. The test also includes within the rubric of "control" factors that address the economic and financial aspects of the relationship between the parties, such as matters of compensation, taxation, working hours, and provision of tools and equipment. As the Court noted, "[s]ince the common-law test contains 'no shorthand formula

or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Id.* at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)) (ellipsis in original). The Commission's approach to determining the existence of an employment relationship is consistent with *Darden*. Under Commission case law, the alleged employer must exercise control over the workers, but the element of control extends to economic factors as well as the "means and methods" by which the work is performed. *Vergona Crane*, 15 BNA OSHC at 1784, 1991-93 CCH OSHD at p. 40,496 (citing *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 (No. 87-214, 1989)). As the Commission has observed with respect to the Supreme Court's opinion in *Darden*, "many of the factors in the Commission's economic realities test appear in the *Darden* test as well. . . . [and] the inquiry central to both tests is the question of whether the alleged employer controls the workplace." *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1638, 1991-93 CCH OSHD ¶ 29,689, p. 40,256 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). Likewise, the Tenth Circuit, where this case arises, recognizes *Darden* as the test for determining whether employment status exists under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, which contains definitions of "employer" and "employee" similar to those of the OSH Act. *Lambertsen v. Utah Dept. of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996).[6]

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[6]Several circuits in addition to the Tenth Circuit in *Lambertsen* have analogized *Darden* to a "hybrid" which combines the common law element of control with an inquiry into the economic realities of the relationship, with the Tenth Circuit noting that "there 'is little discernible difference between the hybrid [approach] and the common law agency [approach].'" 79 F.3d at 1028 (quoting *Frankel v. Bally*, 987 F.2d 86, 90 (2d Cir. 1993)) (ellipses in original). *See Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 & n.3 (9th Cir.), *cert. denied*, 528 U.S. 816 (1999); *Mangram v. General Motors Corp.*, 108 F.3d 61, 62-63 (4th Cir. 1997); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994); *see also Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979) (concluding that in addition to control over the means and methods of performing the work, a number of factors, including elements of an economic nature, determine employment status under Title VII of the Civil Rights Act).

Based on the evidence regarding Davis' control over the work environment, including control over the economic aspects of the relationship between Davis and the three workers, we conclude that the Secretary, who has the burden of proof, *Timothy Victory*, 18 BNA OSHC 1023, 1027, 1995-97 CCH OSHD ¶ 31,431, p. 44,450 (No. 93-3359, 1997), has failed to establish that Davis is the employer of Haswell or the two Ringler brothers, Bobby and Ernest.

## III. ANALYSIS

With respect to Haswell, the record plainly shows he had specialized skill both as an equipment operator and a truck driver and that he utilized these skills in working not only with Davis but on other jobs for which Ringler permitted him to take time off from his work on the trench. In terms of the relevant criteria, Davis lacked any control whatever over significant aspects of Haswell's work activities. Davis could not assign additional projects, Haswell had discretion over his work hours and was empowered to hire his own assistants if he so desired, and Ringler—not Davis—would approve Haswell's requests to leave the site to do work elsewhere. *See Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1146, 1153 (10th Cir. 1999) (employment relationship cannot be found where putative employer lacks the right to designate and assign a worker and has no control over the worker's schedule). Ringler not only paid Haswell but determined how much Haswell should be paid, and Davis provided no insurance for Haswell nor withheld or otherwise paid any taxes on behalf of Haswell. *See Zinn v. McKune*, 143 F.3d 1353, 1357 (10th Cir. 1998) (discussion of compensation and other benefits as bearing on the employment relationship); *Spirides v. Reinhardt*, 613 F.2d 826, 833 (D.C. Cir. 1979) (benefits such as leave and retirement and payment of social security taxes as material factors in determining the existence of an employment relationship). While Davis provided the tools and equipment, Haswell—with Ringler's consent—was free to take the front-end loader to other work sites. It is clear that Haswell could and did increase his income by using initiative and independent judgment. The casual nature of Haswell's attachment to the workplace; Davis' inability to control his time; and the fact that Ringler—not Davis—hired Haswell, paid him, and had the ability to fire him

outweigh the factors that argue for an employment relationship: that Davis supplied the tools, directed the tasks at the worksite, and was in the excavation business. Accordingly, we conclude that the Secretary has not established that Davis is an employer of Haswell for determining coverage under the Act.

As in the case of Haswell, Davis had not requested the assistance of Bobby or Ernest Ringler. Moreover, the evidence establishes that the brothers did nothing more than help out on an occasional basis at their own discretion. The record does not establish specifically how or for what reason they came to be working in the trench. Other than Bobby Ringler's statement that he had prior experience in excavation work, the record is silent as to whether he or his brother brought any particular skill or expertise to the work. Furthermore, except for the compliance officers' brief observation of Bobby and Ernest Ringler, there is no evidence to show the extent or duration of the services they performed for Davis.[7] Moreover, not only did Davis not hire the Ringler brothers, but he could not fire them or modify their working conditions. He had no control over the duration of the Ringler brothers' work or their daily work hours, as they were free to come and go as they pleased. Nor are there any other indicia of an employment relationship. The Ringlers were not paid for their work, and there is no evidence that they were otherwise compensated.

The Secretary argues that Davis' control over the performance of the work overrides all other considerations. In the Secretary's view, because Davis controlled the "manner and means" of accomplishing the pipe-laying project, he necessarily is the statutory employer of the others who did the work. We are aware of no case that goes this far, and we think the Secretary misunderstands *Darden* and the common law of agency. Control over the "manner and means of accomplishing the work" must include control over the *workers* and not just the results of their work. One who cannot hire, discipline, or fire a worker, cannot assign him

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[7]Davis testified that on March 19, when the compliance officers first came to the trench, the Ringler brothers returned from one of their regular plumbing service calls and came over to the trench approximately 90 minutes after Davis had started working, and they had been in the trench intermittently for no more than 15 or 20 minutes before the compliance officers appeared.

additional projects, and does not set the worker's pay or work hours cannot be said to control the worker. Accordingly, we reject the Secretary's argument, and we conclude that on the facts established in this record, none of the three workers was an employee of Don Davis.

For the reasons stated, the judge's decision is reversed, and the citation is vacated.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: July 30, 2001

SECRETARY OF LABOR,

Complainant,

v.

DON DAVIS d/b/a DAVIS DITCHING and DAVIS DITCHING, INC.,

Respondent.

OSHRC DOCKET NO. 96-1378

APPEARANCES:

For the Complainant:
Dewey P. Sloan, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri.

For the Respondent:
William G. Webb, Esq., Strand, Meadows and Webb, LLP, Colorado Springs, Colorado.

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm six items of a serious citation issued to the Respondent by the Occupational Safety and Health Administration. The matter arose after two compliance officers for the Administration inspected a worksite of the Respondent, concluded that it was in violation of the regulations and recommended that the citation be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

The basic facts in this controversy are not in substantial dispute and may be briefly summarized. Don Davis is in the business of underground construction; he also is president, chief stockholder and manager of Don Davis Ditching, Inc. The corporation owns construction equipment, including a backhoe and front end loader. This equipment was leased to Don Davis as an individual.

Mr. Davis entered into a contract with the owner of a land tract whereby, in consideration of $180,000.00, Mr. Davis was to perform underground construction for a period of approximately seven months.

During an inspection of the worksite, compliance officers for the Administration observed two people working in a trench approximately 8 feet deep and 25 feet long. The trench was not shored or otherwise supported although in type C soil. It is undisputed that the trench proportions were in violation of the trenching regulations adopted under the Occupational Safety and Health Act of 1970. A third person operated the front end loader. There were five other safety violations related to construction.

Citations for the alleged infractions of the standards were issued to the landowner, Mr. Davis, and Don Davis Ditching, Inc. The former settled with the Administration, but the latter two units filed a notice of contest which led to this hearing.

It is admitted that the violations of the OSHA regulations occurred, but the Respondents deny they were employers within the meaning of OSHA regulation and therefore not subject to penalties for any violations.

The main issue in this case is whether Don Davis as general contractor who created the hazard was responsible for ensuring that workers in the excavation were protected.

The question whether a contractor may be held in violation of a safety regulation although it had no employees at the jobsite has been before the Commission in the past. On this point the Commission rejected the idea that liability under the Occupational Safety and Health Act of 1970 should be based solely on the employment relationship. And in the case of *Brennan v. Occupational Safety and Health Review Commission (Underhill Construction Corporation),* 513 F2d 1032, the court held that employer's specific duty to comply with the Secretary's standards is in no way limited to situations where a violation of a standard is linked to exposure of his employees to the hazard. It is a duty over and above his general duty to his own employees.

General contractors normally have the responsibility and means to assure that other contractors fulfill their obligations with respect to employee safety. The Commission has stated that it will hold a general contractor responsible for safety standard violations which it could have reasonably have been expected to prevent or abate by reason of supervisory capacity. The duty of a general contractor is not limited to the protection of its own employees from safety hazards, but it extends to the protection of all employees engaged at the worksite. Both the Commission and the courts have held that overall responsibility for the safety of all workers on the project is in the general contractor's province.

In the current matter, the three individuals performed services for Don Davis. Whether he is described as the general contractor or subcontractor to the owner of the land is immaterial. It is undisputed that the workers in the trench and the operator of the front end loader were performing services for Don Davis who was under contract to perform trenching operations. Also there is no doubt that Mr. Davis had control over the work and decided who could perform services in the trench. Since the workers in the trench performed services for Mr. Davis, and since they were subject to his direction and control, he was responsible for assuring them a safe workplace. This he did not do, and therefore the citation is AFFIRMED.

As previously noted, Don Davis Ditching, Inc. also denies that it had any employees. The facts disclose that Don Davis is the president, chief stockholder and principal official of the corporation which owned the equipment. According to Mr. Davis, he, on behalf of the corporation, leased equipment to himself as an individual proprietor. Someone in the corporation had to represent it in these dealings. Since Mr. Davis is the only person with authority to act on its behalf in the leasing of the equipment, he was an employee of the corporation. Also, he was the only person authorized to represent the corporation in receipt of payment for the leasing arrangement. Since Mr. Davis was the only person with authority to lease the equipment and to collect the rental fee, he performed services for the corporation and therefore was an employee of Don Davis Ditching, Inc.

In sum, I find that the Respondent was in violation of the six regulations as shown in the citation, and it is therefore AFFIRMED.

The parties agreed that if the citation were affirmed, the penalty should be assessed at $7,000.00. I find no reason to dispute this suggestion. A penalty of $7,000.00 is therefore assessed.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: April 2, 1998