

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

JMT SERVICES, INC.,

Respondent.

Docket No. 23-1483

Appearances:

Boyce Richardson, U.S. Department of Labor, Office of the Solicitor, Kansas City, MO
For Complainant

Joni Troyer, *pro se*, Jamesport, MO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). On March 30, 2023, the Occupational Safety and Health Administration (OSHA) conducted a worksite inspection at the Chillicothe Municipal Airport in Chillicothe, Missouri. As a result of that inspection, OSHA issued a Citation and Notification of Penalty (Citation) to Respondent JMT Services, Inc. (JMT Services). The Citation alleged three serious violations, two repeat-serious violations, and one other-than-serious violation of the Act, with total proposed penalties of \$30,675.00. JMT Services timely contested the Citation.

A trial was conducted on June 11, 2024, in Kansas City, Kansas. The following individuals testified: (1) Tyler Laughlin, an OSHA Compliance Safety and Health Officer (CSHO); (2) Joni Troyer, Owner of JMT Services; and (3) Levi “JR” Yoder, a worker at the Chillicothe Municipal Airport project. The Secretary timely submitted a Post-Trial Brief for consideration. JMT Services did not file a brief.

Stipulations & Jurisdiction

Before trial, the Parties stipulated to many facts underlying the alleged violations in this case. (*See Pre-Hearing Statement*). The stipulations were introduced into the record at trial and accepted by the Court.^{1,2} (Tr. 17). *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was “plain error” to not accept parties’ stipulation). With the exception of an employer-employee relationship, the parties stipulated to the *prima facie* elements required to prove each of the six alleged violations of the Act:

1. Serious violation of 29 C.F.R. § 1926.102(a)(1) (Citation 1, Item 1).
2. Serious violation of 29 C.F.R. § 1926.451(c)(2)(v) (Citation 1, Item 2).
3. Serious violation of 29 C.F.R. § 1926.602(c)(1)(ii) (Citation 1, Item 3).
4. Repeat-Serious violation of 29 C.F.R. § 1926.501(b)(13) (Citation 2, Item 1).
5. Repeat-Serious violation of 29 C.F.R. § 1926.1051(a) (Citation 2, Item 2).
6. Other-than-Serious violation of 29 C.F.R. 1910.178(1)(6) (Citation 3, Item 1).

¹ In lieu of reproducing the stipulations in their entirety, the Court will refer to the specific stipulation when referencing it as “J. Stip.”).

² The parties also stipulated to the Commission’s jurisdiction over the case. The Commission obtained jurisdiction under section 10(c) of the Act upon JMT Services’ timely filing of a Notice of Contest. 29 U.S.C. § 659(c); *see also Atlas Roofing Co. v. OSHRC, U.S. Dep’t of Lab.*, 518 F.2d 990, 995 (5th Cir. 1975) (describing “Enforcement Structure of OSHA”) *aff’d*, 430 U.S. 442 (1977).

See CF & T Available Concrete Pumping, Inc., No. 90-329, 1993 WL 44415, at *4 (OSHRC, Feb. 5, 1993) (the Commission accepted the parties' stipulation of the alleged violation, if any, was serious).

As stated, JMT Services' defense to the Citation items is that it was not the employer of the workers at the jobsite. In addition, JMT Services disputes the penalty amounts proposed by the Secretary. Accordingly, the Court's decision is limited to the following issues:

1. Did the Secretary prove, by a preponderance of the evidence, that JMT Services was the employer of the employees exposed to the hazardous conditions, within the meaning of the Act?
2. If JMT Services was the employer of exposed employees, what penalty should be assessed for the stipulated violations?

Factual Background

JMT Services

JMT Services was a construction company that specialized in framing and roofing work. (Tr. 156). It is no longer in business. (Tr. 169, 188). Mr. Troyer was the sole owner of JMT Services. (Tr. 156). At the time of this inspection, JMT Services performed construction work as a subcontractor for Generational Buildings, a separate company co-owned by Mr. Troyer and his brother. (J. Stip. 8; Tr. 74). Generational Buildings' practice was to sell a building project to a customer, then oversee the project and hire subcontractors to complete the construction work. (J. Stip. 9). In recent years, every project completed by JMT Services was subcontracted from Generational Buildings. (J. Stip. 14).

Mr. Troyer personally selected the workers for each of JMT Services' projects. (J. Stip. 19). However, not every worker contacted by Mr. Troyer always accepted the project work offered. (Tr. 161). In fact, two of the top workers he had used on projects in the past rejected this particular job. (Tr. 161-62). So, Mr. Troyer had to offer work on this project to other individuals. (Tr. 162).

Workers on his list were free to refuse a project, but Mr. Troyer was less likely to offer project work to those who repeatedly turned him down. (Tr. 161; Stip. 80).

When a project was ready for construction, Mr. Troyer would call workers, determine who wanted the work, and give them information about the project site. (Tr. 179). Neither JMT Services nor Mr. Troyer set a daily work schedule for workers who accepted the projects. (Tr. 179). Instead, workers usually began at daylight and, depending on the time of year, would continue for eight to nine hours. (Tr. 201, 203). Project workers generally arrived and left at the same time. (Tr. 201). If someone consistently arrived late or left early, Mr. Troyer would be notified by Mr. Yoder, and that worker might not be selected to work on future projects. (Tr. 179, 207). However, Mr. Troyer did not supervise any of the work at any jobsites, and he only periodically visited jobsites while the construction project was ongoing to examine the quality of the work. (Tr. 162-64, 166). Some jobsites he never visited at all. (Tr. 162). He testified that for some jobs, he did not travel to the jobsite until the project was completed. (Tr. 162). Instead, he simply provided the workers with plans or schematics and relied on them to complete the project accordingly. (Tr. 214).

In 2022, prior to this inspection, JMT Services had changed its relationship with its workforce. (Tr. 149). Specifically, it changed from a traditional employment relationship to an independent contractor relationship, and JMT Services asked employees to execute independent contractor agreements. (Tr. 148-50; Exs. 10-14). Mr. Troyer testified that workers preferred the change for tax purposes because they “[m]ade more money.” (Tr. 149). The independent contractor agreements had a one-year term, and the rates of compensation for each worker was set as a percentage of the project’s labor cost.³ (Tr. 150). JMT Services paid workers under these independent contractor agreements by check, which the workers collected at the Generational

³ JMT Services retained approximately one-third of the project’s total labor cost. (Tr. 150).

Buildings' office. (Tr. 180). The percentage of pay was determined by Mr. Troyer and based on a worker's level of experience. (J. Stip. 74, 75). Under the terms of the independent contractor agreements, the workers agreed to furnish their own vehicles, equipment, and tools to perform the necessary project work. (Ex. C-10 at 1). The workers were responsible for paying all applicable state and federal taxes, and JMT Services did not withhold Social Security or Medicare taxes from the workers' paychecks. (Ex. C-10 at 2). Workers were not entitled to fringe benefits, such as a pension, health benefits, or sick or vacation pay. (Ex. C-10 at 2). The workers were responsible for securing their own liability, workers' compensation, and automobile insurance. (Ex. C-10 at 3; Exs. R-1, R-2). While Mr. Troyer discussed the job percentages for each worker, the terms of the independent contractor agreements were not negotiated. (Tr. 149-150; J. Stip. 73). The worker's share percentage varied by worker, based on experience and quality of work, and ranged from 9% to 15%. (Tr. 149-151).

Chillicothe Airport Hangar Project & the Workers

In this instance, Generational Buildings sold a building project to construct an airplane hangar at Chillicothe Airport (Airport Hangar Project or Worksite). (Tr. 157). It then secured the requisite permits and subcontracted the framing, erecting, and roofing work to JMT Services. (J. Stip. 34; Exs. C-3, C-4). In February 2023, before construction began, Mr. Troyer visited the worksite to confirm that the grading portion of the job was complete and to ensure the site was ready for building construction. (J. Stip. 36). He determined the site was a "mud hole" and requested that additional grading work be done before starting construction. (J. Stip. 37). The record is unclear as to which entity or workers were responsible for pre-construction grading. (Tr. 166).

Mr. Troyer then solicited five workers for the Airport Hangar Project, all of whom had independent contractor agreements in effect with JMT Services: (1) Levi “JR” Yoder; (2) Ammon Hershberger; (3) Timothy Graber (4) Jacobi Welch; and (5) Andrew Lee. (J. Stip. 16). Mr. Troyer selected these workers based on the quality of their past work and their acceptance and availability to do the job within the necessary time frame. (Tr. 159, 162). As stated earlier, Mr. Troyer had contacted other workers (Jacob Stutzman and Enos Swartzentruper) for the Airport Hangar Project, but they declined because they were working on projects with other companies at that time. (Tr. 162). At trial, Mr. Troyer ranked Mr. Stutzman as his number three choice for working a job, and Mr. Swartzentruper was his number four choice. (Tr. 161).

Mr. Yoder had worked for JMT Services for approximately 9 years, before and after the change to independent contractors, completing about 25 projects per year. (J. Stip. 21, 22). After the change, Mr. Yoder was involved with all JMT Services projects in 2023, and Mr. Troyer could not recall Mr. Yoder ever turning down a potential project for JMT Services. (J. Stip. 25, 26). Mr. Yoder was usually the most experienced worker on a crew, and Mr. Troyer considered Mr. Yoder to be his “go-to-guy.” (J. Stip. 23, 24). Mr. Troyer would sometimes ask Mr. Yoder about the performance of other workers on job sites, and that information would impact whether Mr. Troyer would offer them future project work. (J. Stip. 82, 83). Workers on JMT Services crews generally turned to Mr. Yoder for project guidance because he was usually the most experienced worker onsite. (J. Stip. 24). Mr. Yoder knew JMT Services’ expectations regarding quality of work. (Tr. 202). There were workers Mr. Yoder liked working with, but he had no control over who Mr. Troyer selected for jobs. (Tr. 211-212, 217). Mr. Yoder testified that he and Mr. Hershberger did not have a supervisor, but that the two of them “probably” supervised the less-experienced workers. (Tr. 216). Approximately 75% of Mr. Yoder’s earnings came from JMT Services

projects, as he also earned income from other activities and remodeling projects. (Tr. 197; Stip. 27, 28).

Mr. Hershberger had worked for JMT Services for approximately 5 years, so before and after the change to independent contractors. (J. Stip. 20). Mr. Troyer considered Mr. Hershberger to be “good at what he does” and could not recall Mr. Hershberger ever turning down a project offered by JMT Services. (Tr. 159). Mr. Hershberger completed approximately 25 projects for JMT Services per year, and 75% of Mr. Hershberger’s income was earned through JMT Services projects. (Tr. 159; Stip. 31). He also did framing and construction work for other companies. (Tr. 170).

The Airport Hangar Project took six days to complete. (J. Stip. 33). Each worker was responsible for all aspects of the project, including framing, erecting, and roofing. (Tr. 214, 216; J. Stip. 35). Each day, based on progress and the blueprint, each worker just “kind of figures out what needs to be done.” (Tr. 214). Workers brought their own tools to perform the required work, including pneumatic nail guns, saws, and nails, to the worksite. (J. Stip. 61). Generational Buildings provided the lumber and materials required for the Airport Hangar Project. (J. Stip. 15; Tr. 162-68). JMT Services provided a van and a work trailer, which was left at the worksite and available to the crew if they wanted to store their personal equipment overnight. (J. Stip. 60, 61). In addition, JMT Services provided an air compressor at the worksite, which was available to the workers when operating their pneumatic nail guns. (Stip. 54, 55). JMT Services also owned and provided two rough terrain forklifts for use at the worksite, along with a truss attachment and a platform attachment. (J. Stip. 41, 42, 44). JMT Services did not train anyone to use the rough terrain forklift. (J. Stip. 47).

OSHA Inspection & Citation

On March 30, 2023, CSHO Laughlin, CSHO Timothy Bell, and Assistant Area Director (AAD) Joseph Foderaro (collectively, officers) were in a vehicle traveling on Highway 36 in Missouri when CHSO Laughlin observed workers working on a newly framed wooden structure without visible fall protection at or near the Chillicothe Airport. (Tr. 58-59). The officers approached the worksite in accordance with an OSHA directive stating that if a plain view potential hazard was observed, the CSHO was required to investigate it. (Tr. 59). The officers observed several workers engaged in framing activities on a wooden structure while another worker operated a powered industrial forklift. (Tr. 61). The workers were not using fall protection in the form of guardrail systems, safety net systems, or personal fall arrest systems. (J. Stip. 63).

AAD Foderaro spoke with Mr. Yoder, who explained that he and the other workers were independent contractors. (Tr. 64). Mr. Yoder refused to provide AAD Foderaro with any other information. (Tr. 66). One of the workers was wearing a Generational Buildings t-shirt. (Tr. 64). Shortly after the officers arrived at the site, all the workers packed their belongings into a van and left the worksite. (Tr. 66). The officers proceeded to take measurements and photographs. (Tr. 67). After the inspection, CSHO Laughlin learned that JMT Services was the entity responsible for construction of the building, and he spoke with Mr. Troyer. (Tr. 75). Mr. Troyer informed CSHO Laughlin that the workers onsite were independent contractors, not JMT Services employees. (Tr. 81).

CSHO Laughlin researched OSHA's history with JMT Services and found several previous inspections and resulting citations. (Tr. 86; Exs. C-36, C-37). CSHO Laughlin concluded that fall protection and point of access violations that were cited after a previous OSHA inspection in 2021 were the same or substantially similar to the fall protection and point of access violations being

considered in the current inspection. (Tr. 88-90). The 2021 citation resulted in a final order of the Commission. (Tr. 91; Exs. C-36, C-37, C-38, C-39).

As a result of the March 30, 2023 inspection, OSHA issued a Citation and Notification of Penalty, alleging three serious violations, two repeat-serious violations, and one other-than-serious violation. (Citation, Ex. C-8). The total proposed penalty for all six violations was \$30,675.00.

Discussion

The primary issue in this case is whether JMT Services was the employer of the workers at the worksite. “Only an ‘employer’ may be cited for a violation of the OSH Act.” *Vergona Crane Co.*, No. 88–1745, 1992 WL 184539, at *1 (OSHR, July 22, 1992). The Secretary bears the burden to establish JMT Services was the “employer” at the time of the inspection. *Allstate Painting and Contracting Co., Inc.*, No. 97-1631, 2005 WL 682104, at *2 (OSHR, Mar. 15, 2005). In order to determine whether the Secretary has satisfied this burden, the Commission generally applies the factors laid out by the Supreme Court in the *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). *See, e.g., Freightcar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *2 (OSHR, Mar. 3, 2021) (applying *Darden*); *All Star Realty Co., Inc., d/b/a All Star Realty & Constr., Co.*, No. 12-1597, 2014 WL 533165, at *2 (OSHR, Feb. 3, 2014) (applying *Darden*); *Sharon & Walter Constr. Co.*, No. 00-1402, 2010 WL 4792625, at *3 (OSHR, Nov. 18, 2010) (applying *Darden*).

The Supreme Court identified the following factors to consider in determining whether an employment relationship existed:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the

hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323. "While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers." *Allstate Painting and Contracting Co., Inc.*, *supra*; *S. Scrap Materials Co.*, No. 94-3393, 2011 WL 4634275, at *16 (OSHRC, Sept. 28, 2011) (holding that in the context of the Act, the control exercised over a worker is the "principal guidepost"). For example, "[o]ne who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker." *Don Davis d/b/a Davis Ditching*, No. 96-1378, 2001 WL 856241, at *6 (OSHRC, July 30, 2001).

JMT Services' Right to Control Manner and Means
by Which the Product is Accomplished

The degree of control is the primary focus of the *Darden* analysis. To establish an employment relationship, the Secretary bears the burden of proving, by a preponderance of the evidence, that JMT Services had "control over the workers and not just the results of their work." *Don Davis*, 2001 WL 856241, at *6.

Here, Mr. Troyer offered the Airport Hangar Project to a number of individuals he had worked with in the past and had performed quality work. Then, he notified those who accepted the project work when the worksite was ready. He did not supervise the crew, nor did he visit the construction site during construction. He was also not on site when the OSHA officers conducted their inspection. This is because Mr. Troyer generally did not visit worksites until the building was completed.

For the Airport Hangar Project, Mr. Troyer provided the crew with blueprints and schematics, and the crew was expected to complete the construction without any additional

guidance. Mr. Yoder testified that they knew how to construct the pole barn for the Airport Hangar Project and did not require, nor did they receive, any direction from Mr. Troyer. (Tr. 212-214). He also testified that at the jobsite, Respondent did not direct the workers in their daily tasks. (Tr. 214). Instead, each worker just “figures out what needs to be done” because they were experienced workers who “kn[e]w what they were doing.” (Tr. 214). To the extent any of the less-experienced workers needed supervision, it fell to Mr. Yoder or Mr. Hershberger. (Tr. 213). But Mr. Yoder denied that Mr. Troyer was his supervisor. (Tr. 213).

The evidence in this record suggests neither JMT Services nor Mr. Troyer exercised control over the manner and means by which the Airport Hangar Project was completed. *Cf. R & S Roofing, LLC*, No. 12-2427, 2014 WL 901286, at *5 (OSHR CALJ, Jan. 28, 2014) (finding respondent substantially controlled the workplace and workers because respondent’s agent was identified to CSHOs as “the boss” in charge of the site, supervised workers, set work hours, and fixed safety and worksite issues). Accordingly, this factor weighs in favor of finding independent contractor status rather than an employer-employee relationship.

Skill Required

Generally, the less skill a worker has, the more likely it is that the worker is an employee. *See Absolute Roofing & Constr.*, 580 F. App’x 357, 361 (6th Cir. 2014) (holding a high level of skill suggests that the worker is an independent contractor while a low level of skill suggests an employer-employee relationship). Here, Mr. Troyer testified that a framer is a highly skilled position. (Tr. 181-82). No evidence was presented to the contrary.

Moreover, the Secretary failed to introduce evidence to help the Court determine whether the workers obtained their skills due to their work with JMT Services, or whether the skills were obtained elsewhere and JMT Services hired them as independent contractors precisely because of

their experience and skill in roofing and framing. *See Mulzet v. R.L. Reppert, Inc.*, 54 F. App'x 359, 360-61 (3d Cir. 2002) (finding the skill to hang drywall was based on years of independent experience in the field rather than learning from the purported employer); *see also FreightCar Am.*, No. 18-0970, 2021 WL 2311871 at *2-3, (OSHRC 2021) (emphasizing Complainant has burden to establish employment relationship).

There is, however, evidence that the Airport Hangar Project workers required no supervision. They only required the plan or schematic to build the structure. *See Ireland Contracting, LLC*, No. 20-0560, 2023 WL 6836531, at *16 (OSHR CALJ, Sept. 12, 2023) (finding independent contractor status where roofing work required a moderate level of skill, and the worker required no supervision). And, although some workers (namely, Mr. Yoder and Mr. Hershberger) primarily worked on JMT Services projects, other workers refused JMT Services jobs because they were working other projects for other companies. *See Don Davis*, 2001 WL 856241, at *5 (holding that a worker with specialized skills was likely an independent contractor if those skills were utilized in jobs for both the respondent and other companies). The total lack of supervision by JMT Services and competition with other companies to secure workers for JMT Services projects weighs in favor of finding independent contractor status, rather than an employer-employee relationship.

Source of Instrumentalities and Tools

The source of materials and tools is relevant to determining whether an employment relationship exists. *See Sharon & Walter Constr.*, 2010 WL 4792625, at *3 (Commission found that worker was not an independent contractor where the hiring party supplied the construction materials, as well as set the worker's hours, controlled worker's assignments, provided all equipment for the worksite, and provided a vehicle and fuel reimbursement for travel to the

worksite). Here, the general contractor, Generational Buildings, supplied the building lumber and materials. The Airport Hangar Project workers supplied their own ladders, pneumatic nail guns, nails, and saws. JMT Services provided two rough terrain forklifts with attachments, a van, a work trailer, and an air compressor. The air compressor was essential for workers to operate their pneumatic nail guns. (J. Stip. 55). However, there was testimony that the forklifts, van, and work trailer were not essential to the project. (Tr. 203). Specifically, Mr. Yoder testified that the forklifts made the work easier but were not required to complete the job. (Tr. 203). The Secretary did not introduce any evidence to the contrary. Mr. Yoder also said that the crew liked to use JMT Services' van to get to the worksite because it kept their personal vehicles clean, but that it was not necessary. (Tr. 204). And, the crew appreciated using the work trailer to secure and store their tools at the worksite rather than carrying their tools back and forth from home. (Tr. 203-04).

In sum, both the workers and JMT Services contributed tools and equipment at the worksite. However, the workers seemingly provided the tools that were essential to completing the actual work (except for the air compressor) while JMT Services provided the crew with some conveniences that made working conditions more favorable. Accordingly, this factor weighs slightly in favor of independent contractor status rather than an employer-employee relationship.

Location of the Work

The location of the worksites was determined by Generational Buildings, who would then subcontract work to JMT Services. Mr. Troyer would offer the job to various workers and inform them of the project's location. Although this indicates some degree of control by JMT Services, the project location itself was within the control of the general contractor, Generational Buildings, not Respondent JMT Services. And, the worker could always refuse the job. *See Ireland Contracting, LLC*, No. 20-0560, 2023 WL 6836531, at *17 (OSHR CALJ, Sept. 12, 2023)

(“Although Respondent primarily controlled the location of work, Integrity’s right to refuse means this factor is not dispositive to a determination of the existence of an employer-employee relationship.”). Since it is the Secretary’s burden to prove an employment relationship and there is no other location-of-work evidence favoring an employer-employee relationship, the Court weighs this factor in favor of finding independent contractor status.

Duration of the Relationship Between Workers and JMT Services

Mr. Yoder and Mr. Hershberger had worked on JMT Services projects consistently for many years, before and after the independent contractor agreements were signed, and a significant portion of their annual income came from those projects. While this would generally strongly favor finding an employment relationship, there is evidence that both men did other work—such as home remodeling and other construction work—that also generated separate income. In addition, both men were subject to independent contractor agreements that was limited in duration to one year. *See Absolute Roofing* 580 F. App’x at 362 (indefinite duration and indefinite nature of relationship favors employee status).

Mr. Troyer testified about how highly he valued Mr. Yoder’s presence on jobsites, that Mr. Yoder was his “go-to guy,” and most notably, his reliance on Mr. Yoder to report on other workers’ performance and other issues. Mr. Troyer also relied on Mr. Yoder for quality control information at worksites. While the evidence on this issue is close and conflicting, the Court finds that it weighs slightly in favor of an employer-employee relationship, rather than an independent contractor.

JMT Services’ Right to Assign Additional Projects

The record contains virtually no evidence concerning JMT Services’ right to assign additional projects to workers at its worksites. Clearly, additional projects could be offered. The record establishes that some workers accepted other project offers, and some did not. The Secretary

bears the burden of proof in this case. In the absence of any additional evidence in support of this factor, the Court weighs this factor against a finding of an employer-employee relationship.

Extent of Workers' Discretion over When and How Long to Work

JMT Services' independent contractor agreements expressly provided that the contractor had the sole right to control the means, manner, and method by which work was performed under the contract. (Ex. C-10 at 2). However, it also expressly stated that the contractor shall select the routes taken, starting and quitting times, days of work, and order in which the work was performed. (Ex. C-10 at 2). At trial, Mr. Troyer and Mr. Yoder confirmed that JMT Services never set worker hours or assigned daily tasks. Rather, it was in the workers' interests to complete a project quickly so they could be paid, since they were paid as a percentage of the project rather than by the hour. *Cf. Sharon & Walter Constr.*, 2010 WL 4792625, at *3 (finding an employer-employee relationship when the worker "was not free to leave if he completed a job early but had to return to [respondent's] headquarters for another job assignment or to perform maintenance work"). Mr. Yoder testified that it was understood among workers that the usual start time for any construction project—whether for JMT Services or not—was daylight. The fact that Mr. Troyer would not select a worker for future projects if that worker was consistently late or failed to work a full day does not mean Mr. Troyer controlled work hours. In the Court's view, it seems reasonable for a company to re-engage a contractor, or not, based on past work quality and consistency of time/appearance on past projects. Accordingly, the Court weighs this factor in favor of independent contractor status rather than an employer-employee relationship.

Method of Payment

Payment on a commission basis is indicative of a hired party's status as an independent contractor while a set hourly rate weighs in favor of employment status. *Absolute Roofing*, 580 F.

App'x at 363; *see also FM Home Improvement, Inc.* No. 08-0452 2009 WL 565082, at *8 (OSHR CALJ, Jan. 21, 2009) ("Payment by the job generally indicates that the worker is an independent contractor."). Here, JMT Services paid workers on a commission basis, i.e., a percentage of the project's total labor cost, and that percentage was set by the independent contractor agreement with that worker. (*See, e.g., Ex. C-10*). The worker rates varied from 9% to 15% for each project. (Tr. 149-57). Moreover, JMT Services did not reimburse workers for travel expenses, insurance premiums, meals, or other expenses. (*Ex. C-10 at 1*). The Court finds that the evidence in this record weighs in favor of finding independent contractor status rather than an employer-employee relationship.

Workers' Role in Hiring and Paying Assistants

A hired party's ability and discretion to hire and fire his own assistants is indicative of independent contractor status, whereas a hired party's lack of authority to hire or fire anyone is indicative of employee status. *Absolute Roofing*, 580 F. App'x at 381. Here, the independent contractor agreements signed by JMT Services and each worker expressly provided that the contractor "has the right to hire assistants as subcontractors or to use employees to provide the services required by this agreement." (*Ex. C-10 at 2*). Mr. Troyer testified that he determined the number of workers required for each project, and he personally offered the Airport Hangar Project to each worker. There was no testimony concerning whether workers ever actually exercised their contractual right to hire assistants or other subcontractors. The evidence in this record weighs in favor of independent contractor status, rather than an employer-employee relationship.

Whether the Work is Part of the Regular Business of JMT Services

Often, when the hiring party and hired party are in the same business, it is indicative of a traditional employer-employee relationship. *See, e.g., Slingluff v. OSHRC*, 425 F.3d 861, 869

(10th Cir. 2005) (stucco contractor that hired worker to help with stucco work was the employer of the worker in question). JMT Services was a construction company hired by Generational Buildings to perform framing and roofing work. JMT Services then sent workers with those construction skills to the jobsite to complete the work. This factor thus favors a finding of an employer-employee relationship.

Provision of Employee Benefits and Tax Treatment

Benefits, such as leave and retirement, and payment of social security taxes are material factors in determining the existence of an employment relationship. *Spirides v. Reinhardt*, 613 F.2d 826, 833 (D.C. Cir. 1979). Here, JMT Services did not offer leave or retirement benefits, nor did it withhold any taxes. (See Ex. C-10 at 2). It did not carry workers' compensation or liability insurance for the workers, instead requiring workers to provide their own. (Ex. C-10 at 2; Exs. R-1, R-2). Accordingly, this factor weighs in favor of finding an independent contractor status rather than an employer-employee relationship.

Conclusion

The Secretary does not believe that JMT Services' 2022 change to independent contractors rather than employees was legitimate. The Secretary maintains that the relationship between JMT Services and its workers continued to be one of employer and employee. However, it is the Secretary's burden to prove that. Based on the testimony elicited at trial, the stipulations of the parties, and the supporting exhibits, the Court finds that most of the *Darden* factors counted in favor of independent contractor status. There are certainly some indicators of an employer-employee relationship in the record. However, weighing all of the evidence in this record in totality, this Court concludes that the Secretary failed to establish, by a preponderance of the

evidence, that the exposed workers were JMT Services' employees. On the contrary, the preponderance of the evidence in this record favors a finding of independent contractor status.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is Ordered that Citation 1, Items 1, 2, and 3, Citation 2, Items 1 and 2, and Citation 3, Item 1, are hereby **VACATED**.

/s/ Brian A. Duncan

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: February 5, 2025
Denver, Colorado