

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

SECRETARY OF LABOR,

Complainant,

v.

PETTENGILL FAMILY RESTORATION,
LLC,

Respondent.

Docket Nos. 23-1249, 23-1380, 23-1656 &
24-0353 (Consolidated)

Appearances:

Quinlan Moll & Megan McGinnis, U.S. Department of Labor, Office of the Solicitor, Kansas City, MO
For Complainant

John Bragg, The Law Office of John C. Bragg, P.C., Independence, MO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

These matters are 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). Between January 11, 2023 and October 3, 2023, the Occupational Safety and Health Administration (OSHA) conducted four worksite inspections at Respondent Pettengill Family Restoration (PFR) jobsites. As a result of those inspections, OSHA issued four sets of violations to PFR. The *Citation and Notification of Penalty* arising out of the January 11, 2023 inspection (First Inspection) alleged one serious violation and two repeat-serious violations, with total proposed penalties of \$20,090.00. The *Citation and Notification of Penalty*

arising out of the April 21, 2023 inspection (Second Inspection) alleged one serious violation and one repeat-serious violation, with total proposed penalties of \$13,393.00. The *Citation and Notification of Penalty* arising out of the April 25, 2023 inspection (Third Inspection) alleged two serious violations and one repeat-serious violation, with total proposed penalties of \$12,724.00. The *Citation and Notification of Penalty* arising out of the October 3, 2023 inspection (Fourth Inspection) alleged two repeat-serious violations, with total proposed penalties of \$32,494.00. PFR timely contested all four Citations.

A trial was conducted on September 3-5, 2024, in Kansas City, Kansas. The following individuals testified: (1) Compliance Safety and Health Officer (CSHO) Travis Stein; (2) CSHO Scott Maloney; (3) CSHO Fanny Bowers; (4) CSHO Kellee Remmenga; (5) CSHO Joseph Herdliska; (6) Rebecca Hart-Schmidt, Assistant Area Director (AAD) of the OSHA Kansas City Area Office; (7) Zachery Pettengill, a worker at some of the worksites at issue; (8) Tyler Pettengill, a worker at some of the worksites at issue; and (9) Jennifer Pettengill, Owner of PFR. The parties timely submitted Post-Trial Briefs for consideration.

Stipulations

Before trial, the Parties stipulated to many facts underlying the alleged violations in this case. The parties introduced a *Joint Stipulation Statement* into the record at trial, which was accepted by the Court.¹ (Tr. 18). *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).

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

Jurisdiction

The Commission obtained jurisdiction of these cases under section 10(c) of the Act upon PFR's timely filing of the four Notices of Contest. 29 U.S.C. § 659(c); *see also Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995 (5th Cir. 1975) (describing "Enforcement Structure of OSHA"), *aff'd*, 430 U.S. 442 (1977). Moreover, the parties stipulated to the jurisdiction of the Commission over this proceeding and the parties before it. (*See* J. Stip. 1). However, in its Post-Trial Brief, PFR claims there was no evidence that PFR was a business affecting commerce and, as a result, PFR was beyond the reach of the Act. (*See* Resp't Post-Trial Brief at 5). The Court disagrees.

"In enacting the Occupational Safety and Health Act, Congress intended to exercise the full extent of the authority granted by the commerce clause of the Constitution." *Burk Well Serv. Co.*, No. 79-6060, 1985 WL 44776, at *1 (OSHRC, Dec. 12, 1985) (citations omitted). "Accordingly, an employer comes under coverage of the Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce." *Id.* "Nevertheless, the Secretary bears the burden of establishing the threshold jurisdictional fact." *Id.*

The Commission has consistently held that "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Clarence M. Jones d/b/a Jones Co.*, No. 77-3676, 1983 WL 23870, at *2 (OSHRC, Apr. 27, 1983) (*Jones*) (citing *NLRB v. Int'l Union of Operating Eng'rs, Local 571*, 317 F.2d 638, 643 n.5 (8th Cir. 1963) (taking judicial notice that construction industry affects interstate commerce)). Even small construction companies affect interstate commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005); *Jones*, 1983 WL 23870, at *2 ("even if [the employer's] contribution to this stream of commerce was small and his activity and purchases were purely local, they necessarily had an effect on interstate commerce when aggregated with the similar activities of others").

PFR is a company engaged in the business of providing “remodeling, construction, carpentry, and building.” (J. Stip. 5). PFR was hired to perform residential construction services at each of the jobsites at issue in these consolidated cases. (J. Stip. 6, 15, 40). Residential construction work is an activity that falls within the Act’s definition of “construction work,” which includes “work for construction, alteration, and/or repair . . .” 29 C.F.R. § 1926.32(g). Accordingly, the Court finds PFR was engaged in a business affecting commerce.

Factual Background

Pettengill Family Restoration

PFR is a construction company that specialized in framing panelized or “kit” houses.² (Tr. 547). Jennifer Pettengill filed PFR’s articles of incorporation in April 2019 and is the sole owner of the company. (J. Stip. 2, 3). PFR was hired as a subcontractor by Framing Specialists, Inc., to frame and assemble kit houses at various construction sites. (J. Stip. 16, 17, 41, 42; Tr. 549-50; Ex. R-3; *see, e.g.*, Ex. C-46). Framing Specialists would deliver the materials for the kit house and blueprints to a jobsite, and PFR would contact workers who were available to assemble the kit house. (Tr. 453, 549-50, 631).

Once a kit house was constructed, Framing Specialists inspected and approved the construction, gave workers the details for subsequent jobs, if any, and sent a corresponding work order to Jennifer Pettengill for signature. (Tr. 533-34, 604). Conversations about worksite issues or changes to an existing work order would be discussed between Framing Specialists supervisors and PFR workers without the involvement of Jennifer Pettengill. (Tr. 607-08).

² A panelized house, also called a “kit house,” is a prefabricated house in which all the materials are precut to length and ready for assembly upon delivery. (Tr. 453). Zachery Pettengill compared the assembly of these panelized homes to putting together “Legos.” (Tr. 453).

PFR entered into an independent contractor agreement with Framing Specialists in May 2019, shortly after PFR was formed. (Tr. 612-14; Ex. R-3). This independent contractor agreement was indefinite in duration. (Ex. R-3 at 1). Framing Specialists did not withhold local income tax or payroll tax with respect to services performed by PFR. (Ex. R-3 at 1). Framing Specialists did not provide any pension, health, or other fringe benefits to PFR. (Ex. R-3 at 1). And, Framing Specialists required PFR to carry workers' compensation insurance covering any workers on the projects. (Ex. R-3 at 1).

PFR's workers who constructed the Framing Specialists kit houses signed independent contractor agreements with PFR. (Tr. 616; *see, e.g.*, Ex. R-6). Those independent contractor agreements were standing agreements of indefinite duration. (J. Stip. 11, 21, 46; Tr. 617). PFR had no records of safety-related rules, policies, or practices that applied to workers who signed independent contractor agreements. (J. Stip. 22, 23, 49, 55). PFR did not provide benefits, such as health insurance or retirement benefits, to workers who signed independent contractor agreements. (Tr. 637; Ex. R-6). PFR did, however, purchase workers' compensation insurance that covered workers at PFR construction sites because it was required by Framing Specialists. (J. Stip. 52; Tr. 559). PFR also reimbursed some workers who provided their own heavy equipment (such as forklifts or boom trucks) used on jobsites, including some equipment repair expenses, and fuel. (Tr. 566).

PFR paid workers by check, generally on a weekly basis. (J. Stip. 13, 25, 50). Upon completion of a kit house, each individual worker would send a text message to Jennifer Pettengill with the number of hours worked and the amount due from PFR for work performed. (Tr. 520, 556-57; Ex. C-41). Jennifer Pettengill would then issue a check to each worker in the amount requested. (Tr. 558). She did not set the hours worked on each project, and she did not question

the amount each worker charged. (Tr. 557, 632-33; Ex. C-24). PFR workers set their own schedules and often showed up to work whenever they wanted to. (Tr. 635-36). Several of the framers at issue in this case also occasionally took jobs with other construction companies to generate additional income. (Tr. 634-35).

Pettengill Construction, LLC

Pettengill Construction, LLC (the company issued violations previously, upon which the alleged “repeat” violations in these current cases were based) was a company established in August 2009 to provide commercial and residential construction services, such as general contracting, framing, and home rehabilitation and renovation. (Ex. C-7). It was 100% owned by Jennifer Pettengill until February 2024, when she dissolved the company. (J. Stip. 54; Ex. C-7).

OSHA had an inspection history with Pettengill Construction that predated the inspections at issue in these current consolidated cases issued to PFR. On March 25, 2022, OSHA issued a *Citation and Notification of Penalty* citing serious violations of an eye protection standard (29 C.F.R. § 1926.102(a)(1)), a fall protection standard (29 C.F.R. § 1926.501(b)(13)), and a ladder safety standard (29 C.F.R. § 1926.1053(b)(1)). (Ex. C-1). Pettengill Construction never contested the Citation, and it became a final order of the Commission on May 10, 2022. (Tr. 367-68); *see* 29 U.S.C. § 659(a) (if an employer fails to contest a citation, the citation and assessment “shall be deemed a final order of the Commission and not subject to review by any court or agency”).

On September 14, 2022, OSHA issued another *Citation and Notification of Penalty* to Pettengill Construction following a worksite inspection on May 17, 2022. (Ex. C-9). It cited Pettengill Construction for a serious violation of a scaffolding standard (29 C.F.R. § 1926.451(c)(2)(iv)) and a repeat-serious violation of a fall protection standard (29 C.F.R.

§ 1926.501(b)(13)). (Ex. C-9). Pettengill Construction never contested the Citation, and it became a final order of the Commission on October 11, 2022. (Tr. 372); *see* 29 U.S.C. § 659(a).

Inspections at Issue in these Consolidated Cases

1. First Inspection (Inspection No. 1648137)

On January 11, 2023, CSHO Bowers was driving home at the end of the workday when she observed two workers on the roof of a residential construction located at 421 Redbud Court, Lot 44, in Blue Springs, Missouri. (Tr. 145; Ex. C-21 at 2). She pulled over to take some photographs from a distance and then approached the jobsite. (Tr. 145-46, 149, 165; Ex. C-20 at 1-2; Ex. C-21 at 2). She observed workers on the roof that were not wearing fall protection. (Tr. 145-46, 149, 165; Ex. C-21). She also observed one of the workers nailing plywood onto the rafters with a pneumatic nail gun without wearing any form of face or eye protection. (Tr. 152-53; Ex. C-20 at 12, 14). She also observed workers without head protection walking under other workers on an elevated platform using tools. (Ex. C-19 at 1).

CSHO Bowers spoke with Zachery Pettengill, one of the workers, upon arriving at the jobsite. (Tr. 158; Ex. C-21 at 2). He told CSHO Bowers that all of the workers were independent contractors but would not talk with her further. (Tr. 158). CSHO Bowers testified that Zachery Pettengill seemed hostile and “got pretty close to [her] face,” which made her feel uncomfortable. (Tr. 158; Ex. C-21 at 2). As a result, CSHO Bowers left the worksite without taking measurements or conducting any interviews. (Tr. 158-59). Meanwhile, the rest of the workers “scattered” and left the jobsite. (Tr. 159; Ex. 21 at 1).

CSHO Bowers later spoke with the builder,³ who directed her to Aaron Pettengill. (Tr. 161-62). When contacted, Aaron Pettengill told CSHO Bowers that his wife solely owned PFR, the

³ The builder was Ashlar Homes. (Tr. 195).

subcontractor at the jobsite, and that all the workers onsite were PFR's independent contractors. (Tr. 162; Ex. C-21 at 2). He identified the workers onsite to include his sons, Tyler and Zachery Pettengill, as well as Chase Good and Jason Hoff. (Tr. 162-63). The workers were using a generator at the jobsite that belonged to Tyler Pettengill. (Tr. 477; Ex. C-20 at 20). Tyler Pettengill also owned the two forklifts and crane that were being used at the jobsite. (Tr. 477-78).

CSHO Bowers conducted a history search after the First Inspection and discovered that Pettengill Construction had been previously cited by OSHA for violations of 29 C.F.R. §§ 1926.102(a)(1) and 1926.501(b)(13). (Tr. 172; Ex. C-19 at 4, 7). She concluded that Pettengill Construction and PFR must be the same company because they had the same ownership and business address (Tr. 172, 288).

CSHO Bowers also concluded, based on her discussion with Aaron Pettengill, that his sons (Tyler and Zachery) were in control of the jobsites. (Tr. 175; Ex. C-19 at 3). And, she concluded that PFR was the employer of the workers onsite because Aaron Pettengill owned some of the vehicles parked at the jobsite, the crane was owned by Tyler Pettengill, and the home address listed on Tyler and Zachery Pettengill's 1099 tax forms was the same as the business address of Pettengill Construction and PFR. (Ex. C-19 at 3). She conceded, however, that she did not speak to any of the workers onsite and that she had no proof that the tools, equipment, or materials at the jobsite were provided by PFR or Pettengill Construction. (Tr. 184-88).

On June 23, 2023, OSHA issued a *Citation and Notification of Penalty* to PFR, alleging one serious violation of 29 C.F.R. § 1926.100(a), one repeat-serious violation of 29 C.F.R. § 1926.102(a)(1), and one repeat-serious violation of 29 C.F.R. § 1926.501(b)(13), with total proposed penalties of \$20,090.00. (Ex. C-18). The employer identified in the Citation was "Pettengill Construction LLC, dba Pettengill Family Restoration." (Ex. C-18). The repeat

violations were based on prior substantially similar violations of §§ 1926.102(a)(1) and 1926.501(b)(13) issued to Pettengill Construction. (*See* Ex. C-18 at 7, 8). PFR timely contested the Citation, and it was assigned Case Number 23-1249 upon being filed with the Commission.

2. Second Inspection (Inspection No. 1664991)

On April 21, 2023, CSHO Herdliska, along with CSHO Corey Hopkins, observed three individuals at a construction site located at 27200 East Cedar Grove Drive, Lake Lotawana, Missouri, standing on a pallet that was supported by an all-terrain forklift. (Tr. 270-71; Ex. C-24 at 2; Ex. C-21 at 2-4). It appeared the individuals were performing some type of framing work at a height exceeding 13 feet.⁴ (Tr. 270, 286). They also observed workers without head protection walking in close proximity to the workers standing on then pallet above them. (Tr. 282). The CSHOs took photographs and walked over to the jobsite to initiate an inspection. (Tr. 270-71; Ex. C-23; Ex. C-24). They conducted an opening conference with Zachery Pettengill, who initially said that he was the site “lead” but then said he and the other workers were independent contractors and there really was no “lead.” (Tr. 279; Ex. C-24 at 2). He also explained that the company for which he was an independent contractor—PFR—was owned by his mother, Jennifer Pettengill. (Tr. 280). The CSHOs observed a crane truck at the jobsite, and they later discovered it was registered to one of the workers onsite—Tyler Pettengill. (Tr. 275-76; Ex. C-23 at 8; Ex. C-24 at 2).

The CHSOs interviewed two of the workers at the jobsite: Kenneth Puckett and Tyler Pettengill. (Tr. 273, 280). Both men told the CSHOs that they were self-employed. (Ex. C-24 at 2). Tyler Pettengill told the CSHOs he owned his own tools, saws, and nail guns used at the jobsite.

⁴ The CSHO testified the men were not wearing fall protection. (Tr. 277). However, no citation for lack of fall protection was issued. (Tr. 277).

(Ex. C-24 at 2). Similarly, Kenneth Puckett stated he owned the tools he used at the worksite, that he had no supervisor, and that he received no training from PFR. (Ex. C-24 at 2). Kenneth Puckett also stated that he received hourly pay for his work on PFR construction projects and that he could show up to and leave the worksite whenever he wished. (Ex. C-24 at 2).

On August 11, 2023, as a result of the Second Inspection, OSHA issued a *Citation and Notification of Penalty* to PFR, alleging one serious violation of 29 C.F.R. § 1926.100(a) and one repeat-serious violation of 29 C.F.R. § 1926.451(c)(2)(iv), with total proposed penalties of \$13,393.00. (Ex. C-22). The employer was listed as “Pettengill Construction LLC, dba Pettengill Family Restoration.” (Ex. C-22). The repeat classification was based on a prior substantially similar violation of § 1926.451(c)(2)(iv) issued to Pettengill Construction. (Tr. 288). The CSHOs noted that “The [prior] inspection was listed under Pettengill Construction LLC, but the business and mailing addresses were the same as those provided to the CSHO[s] during the current inspection for Pettengill Family Restoration.” (Ex. C-24 at 3).

PFR timely contested the Citation, and it was assigned Case Number 23-1380 upon being filed with the Commission.

3. Third Inspection (Inspection No. 1665830)

On April 25, 2023, CSHO Kellee Scott Remmenga was driving when he observed three workers working at a height that appeared to exceed six feet. (Tr. 219, 222). The workers were conducting framing activities at the same jobsite (27200 East Cedar Grove Drive, Lake Lotawana, Missouri) as the Second Inspection, which took place just four days prior. (Tr. 219-21; Ex. C-22). CSHO Remmenga took photographs for 15 minutes before approaching the worksite. (Tr. 227; Ex. C-28). He observed that the workers in the rafters were not wearing fall protection, and, below

them, other workers cutting wood were not wearing head protection. (Tr. 227-28). He also observed a forklift, a work trailer, and a crane truck at the jobsite. (Tr. 230; Ex. C-28 at 5).

CSHO Remmenga conducted an opening conference with Zachery Pettengill, who told CSHO Remmenga that the jobsite had already been inspected the week before. (Tr. 233-34). Zachery Pettengill said everyone at the jobsite “was their own boss” and that they were subcontractors for PFR. (Tr. 235). The other workers onsite were Kenneth Puckett, Chase Good, and Andrew Baker. (Tr. 237). The workers gave CSHO Remmenga their names and phone numbers and left the jobsite shortly thereafter, so he did not interview anyone. (Tr. 238). He did not know who owned the tools, materials, or equipment at the jobsite. (Tr. 254). He did not inquire about the ownership of the vehicles at the jobsite. (Tr. 263).

CSHO Remmenga reviewed the 1099 tax forms and independent contractor agreements provided by PFR and determined the workers did not meet the “necessary requirements” in his opinion, to be considered subcontractors.⁵ (Tr. 244; Exs. R-6, R-14, R-15, R-16, R-17, R-18). As a result of the Third Inspection, OSHA issued a *Citation and Notification of Penalty* on September 28, 2023, alleging one serious violation of 29 C.F.R. § 1926.100(a), one serious violation of 29 C.F.R. § 1926.501(b)(1), and one repeat-serious⁶ violation of 29 C.F.R. § 1926.102(a)(1), for a total proposed penalty of \$12,724.00. (Ex. C-27). The employer was listed as “Pettengill Construction, LLC, dba Pettengill Family Restoration LLC and its successors.” (Ex. C-22).

PFR timely contested the Citation, and it was assigned Case Number 23-1656 upon being filed with the Commission.

⁵ The Secretary did not elicit testimony on what those necessary requirements were.

⁶ Neither party elicited any testimony from CSHO Remmenga regarding the basis for the repeat citation. The violation worksheet noted that “Pettengill Construction has been cited for this violation previously and is aware of the need for eye protection.” (Ex. C-30 at 9).

4. Fourth Inspection (Inspection No. 1700768)

On October 3, 2023, CSHO Herdliska and CSHO Zachary Dapron were traveling in a car when they observed workers working from a height greater than six feet without fall protection. (Tr. 301-02). They stopped the car, took photographs, and approached the jobsite located at 27419 Cedar Grove Drive, Lake Lotawana, Missouri 64086. (Tr. 302; Ex. C-33). They conducted an opening conference with Zachery Pettengill, who explained that he and the other workers were independent contractors. (Tr. 308). Zachery Pettengill also stated that he owned the truck onsite and that PFR owned an onsite trailer. (Tr. 305, 308). He explained that none of the workers received training from PFR before performing work, that there was no schedule, that each worker worked off a blueprint provided by Framing Specialists, and that there were no worksite rules. (Ex. C-35 at 2). Zachery Pettengill also told the CSHOs that he did not usually perform work for any other companies besides PFR. (Ex. C-35 at 2).

The CSHOs interviewed Kenneth Puckett and Chase Good, who explained that they had signed independent contractor agreements with PFR. (Tr. 316). They stated they owned their own fall protection equipment, and the decision of whether to use it was based on the pitch of the roof. (Tr. 314). They also brought their own tools to perform work but were allowed to store them in a PFR trailer. (Tr. 317). Kenneth Puckett further told the CSHOs that about 70% of his work came from PFR, and Chase Good said about 60% of his work came from PFR. (Tr. 315). They also worked for other companies on unrelated jobs. (Tr. 555). They told the CSHOs that at the end of each week, they would submit their hours and amounts due to Jennifer Pettengill. (Tr. 318). They told the CSHOs that PFR provided no training and had no safety rules in place at the jobsite. (Tr. 317, 322).

On February 8, 2024, OSHA issued a *Citation and Notification of Penalty* for the Fourth Inspection to PFR, alleging one repeat-serious violation of 29 C.F.R. § 1926.102(a)(1) and one repeat-serious violation of 29 C.F.R. § 1926.501(b)(13), for a total proposed penalty of \$32,494.00. (Ex. C-32). The repeat classifications were based on prior citations issued to Pettengill Construction, which had the same owner and business address as PFR. (Tr. 328; Ex. C-34 at 3). The employer listed on the Citation was “Pettengill Family Restoration LLC and its successors.” (Ex. C-32).

PFR timely contested the Citation, and it was assigned Case No. 24-0353 upon being filed with the Commission.

Discussion

The primary issue in this case is whether PFR was the employer of the workers at the worksites at issue in these cases. “Only an ‘employer’ may be cited for a violation of the Act.” *Vergona Crane Co., Inc.*, No. 88-1745, 1992 WL 184539, at *1 (OSHRC, July 22, 1992). The Secretary bears the burden to establish PFR was the “employer” at the time of the inspections. *Allstate Painting & Contracting Co., Inc.*, Nos. 97-1631 & 97-1727, 2005 WL 682104, at *2 (OSHRC, Mar. 15, 2005) (*Allstate*). 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) (*Darden*). *See, e.g., Freightcar Am., Inc.*, No. 18-0970, 2021 WL 2311871, at *2 (OSHRC, 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 (OSHRC, Feb. 3, 2014) (*All Star*) (applying *Darden*); *Sharon & Walter Constr., Inc.*, No. 00-1402, 2010 WL 4792625, at *3 (OSHRC, 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 (citations omitted). "While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers." *Allstate*, 2005 WL 682104, at *2; *see also 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).

In *Sharon & Walter Construction, Inc.*, the Commission found an employment relationship between the respondent and workers because the respondent set workers' hours and assigned jobs each morning, could direct workers to hire assistants, and did not require workers to bring any equipment to jobsites other than a toolbelt. 2010 WL 4792625, at *3. In addition, workers were not free to leave if they completed jobs early; instead, they were assigned another task by the respondent. *Id.* Workers were also not able to perform work for other companies. *Id.* And, workers drove the respondent's vehicle to jobsites and used the respondent's charge card to buy fuel for that vehicle, incurring no travel expenses. *Id.* In contrast, PFR workers in this record used their

own tools and equipment at jobsites, set their own schedules, worked from a blueprint provided by Framing Specialists without supervision, and coordinated with Framing Specialists, not PFR, to correct any issues with the work or to make a change to the scope of work. (317, 348, 350, 501-02, 534-35, 607-08, 634-35). As will be discussed more thoroughly below, the record fails to demonstrate that PFR exercised any significant control over the workers at the jobsites at issue here.

PFR's 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 PFR had “control over the workers and not just the results of their work.” *Don Davis*, 2001 WL 856241, at *6.

Here, there is little, if any, evidence in the record that PFR controlled the manner or means by which the work at jobsites was completed. Instead, Framing Specialists, the entity subcontracting the kit-home construction work to PFR, provided on-site workers with blueprints and all necessary building materials, and inspected the quality of work on the job as it progressed. (Tr. 431, 442, 452, 628-29, 635). Then, once the job was completed, Framing Specialists would tell the PFR workers if there were additional houses on which they could work, and if so, the location. Framing Specialists would then submit a corresponding work order for Jennifer Pettengill's signature. (Tr. 442, 520-21, 604). Jennifer Pettengill would sign those work orders, but, even though she was the sole owner of PFR, she did not go to the jobsites nor direct or monitor the actual work of the subcontractors PFR used. (Tr. 554-58). She primarily served as PFR's bookkeeper. (Tr. 554). *See Warzala Constr.*, No. 19-0265, 2020 WL 7711146, at *7 (OSHR CALJ,

Nov. 16, 2020) (finding independent contractor status where the respondent “had no further involvement in the day-to-day of the job” after the worker was hired).

In addition, none of the workers used by PFR held a supervisory role. Although Jennifer Pettengill considered Zachery Pettengill to be her “go to person,” there is no evidence that he was in charge at any jobsites or in any way directed the work of others. (Tr. 551-52). In fact, he testified that he and the other workers simply followed a blueprint without requiring additional instruction. (Tr. 454). Workers showed up on the jobsite whenever they wanted to, and did whatever they thought was needed. If something was done incorrectly, Framing Specialists supervisors would occasionally visit the jobsite to address the issue directly with the on-site PFR workers. (Tr. 501-02). Jennifer Pettengill did not instruct the workers on any of their tasks, set any hours or schedules, discipline the workers, supervise the workers, or otherwise get involved in how the actual framing work was completed. (Tr. 635-36).

The evidence in this record suggests neither PFR nor Jennifer Pettengill exercised control over the manner and means by which any PFR jobs were 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). This record establishes that PFR accepted a dollar amount from Framing Specialists to get a kit house built, secured subcontract framers who were available to do the job, paid them a lesser amount to frame the kit house, and kept the difference in profits. 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) (*Absolute*) (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, Zachery Pettengill testified that materials for kit houses were precut, so the work was “like Legos putting it together.” (Tr. 453). When asked about how workers built the kit houses, he answered: “I don’t want to be rude, but it’s pretty common sense.” (Tr. 453). It seems that, according to Zachery Pettengill, the work was so simple that no coordination was needed to put the kit houses together. *See Daniel Crowe Roof Repair*, No. 10-2090, 2011 WL 4824454, *11 (OSHR, Aug. 25, 2011) (finding that where the skill level required to perform roofers’ tasks was minimal it indicated the roofers were employees).

However, there is also evidence in the record that PFR workers required little to no supervision at jobsites, and that the framers interpreted the blueprints to decide on their own what work needed to be done each day, which indicates a higher skill level, leaning in favor of finding independent contractor status. *See Ireland Contracting, LLC*, No. 20-0560, 2023 WL 6836531, at *16 (OSHR, Sept. 12, 2023) (*Ireland*) (finding independent contractor status where roofing work required a moderate level of skill, and the worker required no supervision). Moreover, Zachery Pettengill testified that he would do the “fine work detail” on the houses, implying a higher level of skill was required for some of his tasks. (Tr. 423). And, the fact that some PFR workers were also hired by other companies indicates a higher skill level. (Tr. 555-56). *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). Kenneth Puckett, Chase Good, and Tyler Pettengill derived between 20% and 40% of their incomes from work for other companies or side projects. (Tr. 315, 516-17).

On balance, the Court finds that this factor weighs slightly 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 an employee where the hiring party supplied the construction materials, reimbursed the worker for screws and nails, provided all equipment required at the worksite, and reimbursed the worker for expenses related to travel). Here, PFR provided none of the tools, materials, or equipment required at jobsites. (Tr. 332, 496, 633-34). Framing Specialists supplied all of the building materials. The workers supplied their own tools necessary to construct the houses. Tyler Pettengill provided any required heavy equipment—such as forklifts and a boom truck—to the jobsites. He owned the heavy equipment, and PFR would simply reimburse him for maintenance and expenses of equipment used on PFR jobsites. (Tr. 515). PFR provided only an air compressor and work trailer for workers to store their personal tools and equipment at jobsites. *See G-MAC Constr. Co., Inc.*, No. 96-1770, 1997 WL 603007, at *3 (OSHR CALJ, Sept. 18, 1997) (finding the fact that the crew provided their own tools and the respondent had minimal presence on the jobsite favored a finding of independent contractor status).

Since PFR did not provide the necessary tools, equipment,⁷ or materials necessary to build the kit houses, this factor weighs in favor of independent contractor status rather than an employer-employee relationship.

⁷ The fact that Jennifer Pettengill's son provided the heavy equipment at jobsites is not relevant to

Location of the Work

The location of the jobsites was determined by Framing Specialists, which would then subcontract the work to PFR, which purportedly subcontracts each house to a group of individual framers. At the end of each job, Framing Specialists would inspect the work, tell the workers the location of the next available job, if any, give them the blueprints, and send a work order for the job total amount to PFR's signature. There is no evidence that Jennifer Pettengill was involved with or even aware of the location of jobsites beyond signing work orders. 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 PFR

PFR filed its articles of incorporation in April 2019. It then entered into independent contractor agreements with several workers, including Zachery Pettengill on August 22, 2019 (Ex. R-6), Tyler Pettengill on August 22, 2019 (Ex. R-7), Kenneth Puckett on December 1, 2020 (Ex. R-8), and Chase Good on September 13, 2021 (Ex. R-9). These independent contractor agreements were standing agreements of indefinite duration, specifically stating that the agreements "would continue to apply to any services rendered until terminated by either party." (*See, e.g.*, Ex. R-6; J. Stip. 11, 21, 46). *See Absolute Roofing*, 580 F. App'x at 362 (indefinite duration and indefinite nature of relationship favors employee status). Moreover, prior to the establishment of PFR, Tyler and Zachery Pettengill worked for their mother's other company, Pettengill Construction, for

the Court's analysis. There is no legal barrier to a family member working as an independent contractor. And, there is nothing in the record indicating that PFR—not Tyler Pettengill—in fact owned the heavy equipment and provided it on the jobsite. OSHA places significant emphasis on the fact that two of the purported independent contractors also shared the last name "Pettengill." However, this does not change the analysis for the purposes of determining an employer-employee relationship.

several years doing framing and construction work. (Tr. 426, 511). Largely due to the indefinite duration of the independent contractor agreements, this evidence favors a finding of an employer-employee relationship.

Additionally, the fact that PFR generally hired from the same small pool of workers favors a finding of an employment relationship. PFR had hired Tyler Pettengill, Kenneth Puckett, Zachery Pettengill, and Chase Good to perform work at approximately 100 construction sites between April 2019 and January 2024. (J. Stip. 28-32). The Court notes, however, that Jennifer Pettengill testified that PFR had hired other subcontractors for kit house construction. (Tr. 555-56). Nevertheless, it appears PFR generally used Zachery Pettengill, Kenneth Puckett, Chase Good, Tyler Pettengill, Jason Hoff, and Andy Baker to perform construction work for its projects, which suggests a relationship and consistency of work that tends to indicate an employment relationship. The Court finds this factor slightly favors an employer-employee relationship rather than independent contractor status.

PFR's Right to Assign Additional Projects

When a company has the right to assign additional projects to workers, this tends to support an employer-employee relationship. However, workers having the ability to reject the additional work supports a finding of independent contractor status. *Absolute Roofing*, 580 Fed. App'x. at 362. Here, Framing Specialists would visit the jobsites and discuss any changes to the scope of work directly with PFR's workers. Then, if PFR workers agreed to the change, Framing Specialists would submit a corresponding change order to Jennifer Pettengill. (Tr. 607). Once a job was completed, Framing Specialists would "basically tell us where we're going on the next one if we want it." (Tr. 521). PFR workers often accepted the additional job because "it's steady work," but not always. (Tr. 437). Tyler Pettengill, Kenneth Puckett, and Chase Good told CSHOs that 20%

to 40% of their incomes came from work at other companies. (See Tr. 499-500, 634-35; Ex. C-37 at 5, 7). Accordingly, this factor weighs in favor of independent contractor status.

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

The evidence demonstrates that Jennifer Pettengill was not involved in the day-to-day operations at PFR jobsites. She did not set work hours or otherwise dictate the duration of work. (Tr. 633-35). Instead, PFR workers' profit or loss is determined how often they choose to work on a particular project. (Tr. 634). Tyler Pettengill testified that PFR did not set any work schedules, stating: "I can come and go as I please." (Tr. 530-31). Zachery Pettengill testified that there was no work schedule, and some workers "d[id]n't even show up." (Tr. 492). Kenneth Puckett told CSHO Herdliska that he worked up to nine hours per day, with no certain hours: "[j]ust whenever I get here . . . to when I leave." (Ex. C-37 at 2). Chase Good told CSHO Herdliska that PFR did not tell him when to come to the jobsite and that he knew what is to be done at the jobsite because "[t]here's a [blue]print." (Ex. C-37 at 8). CSHO Hart-Schmitt was told that "the individuals could show up and leave when they determined" and that PFR did not have a schedule in place. (Tr. 350). In short, there is no evidence in the record suggesting that PFR had control over when or how long workers worked. See *AAA Delivery Servs., Inc.*, No. 2005 WL 2181672, at *2 (OSHRC, Sept. 1, 2005) (finding no employer-employee relationship where the respondent "did not tell the vendors how long to work or how to sell," nor did the respondent require that vendors sell every day or on any particular day); see also *SIP Insulation Professionals, LLC*, No. 19-1770, 2021 WL 2333100, at *17 (OSHR CALJ, Apr. 26, 2021) (finding no employment relationship where workers reported their hours, which were accepted without question, and there was no evidence of a construction schedule). Accordingly, the Court weighs this factor in favor of independent contractor status.

Method of Payment

Payment “by the hour” suggests an employment relationship while payment “by the job” supports a finding of independent contractor status. *All Star*, 2014 WL 533165, at *3. Here, PFR seems to combine these methods of payment. PFR paid workers a fixed hourly rate. Each worker would text Jennifer Pettengill the hours worked on a project, and she would issue a check for the amount the worker claimed to be owed. Jennifer Pettengill testified that she trusted the numbers sent by the workers and never questioned the amount.

In practice, workers were paid on Fridays, in part because kit house construction took a week to complete, and in part to “keep [workers] coming back for other jobs.” (Tr. 450-51, 558). The hourly nature of payment suggests an employer-employee relationship, but a worker notifying the company of the amount of work they did and the amount the company owed him is suggestive of an independent contractor.

Reimbursement for expenses can also suggest an employment relationship. Here, there is no evidence that PFR reimbursed workers for travel expenses, insurance premiums, or meals. PFR did, however, reimburse Tyler Pettengill for costs associated with the use of his heavy equipment, including fuel and maintenance, which could indicate an employment relationship. (Tr. 566). Yet, the workers sent the amount they believed they were owed each week and submitted that demand to PFR—basically by weekly texted invoice—and PFR paid the amount billed. *Ireland*, No. 20-0560, 2023 WL 6836531, at *18 (payment based on the amount invoiced by the subcontractor at the end of the job weighs against finding an employer-employee relationship). On balance, the Court weighs this factor in favor of independent contractor status.

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 additional subcontractors is indicative of employee status. *Absolute Roofing*, 580 F. App'x at 363. Here, there is evidence that Kenneth Puckett and Zachery Pettengill hired and paid their children to help them on some PFR jobs. (Tr. 432, 500). PFR did not hire or pay these assistants. They were paid by Kenneth Puckett and Zachery Pettengill. The workers' ability to hire their own assistants weighs this factor in favor of independent contractor status.

Whether the Work is Part of the Regular Business of PFR

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*, 425 F.3d at 869 (stucco contractor that hired worker to help with stucco work was the employer of the worker in question). PFR was a construction company hired by Framing Specialists to frame kit houses. (Tr. 626). PFR did not do other work on houses, like plumbing, electrical work, or heating. (Tr. 626). PFR hired expert subcontractors so that "they can do the work and do it correctly." (Tr. 554-55). The sole owner of PFR, Jennifer Pettengill, testified: "I don't understand framing. I just understand how to do the bookkeeping. So because that's what I've always done is bookkeeping. So I have to rely on the experts to do their job." (Tr. 554). PFR admitted that the construction services provided by the workers it hires were "integral to PFR's business purposes." (J. Stip. 10, 20, 44). But, the work was also a regular part of the workers' business as well; they are framers. (Tr. 437-38, 531, 635). This factor weighs slightly in favor of 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, 832 (D.C. Cir. 1979). Here, PFR maintained a workers' compensation policy covering the construction workers who performed construction services under contract for PFR.⁸ (J. Stip. 52). The workers' compensation policy was purchased because Framing Specialists required PFR to purchase one to get construction jobs. (Tr. 559; Ex. R-3). PFR did not provide annual or sick leave, nor did it provide retirement benefits. (Tr. 637). It did not withhold state, federal, or local taxes on behalf of the workers. (Tr. 636; *see* Ex. R-6). On balance, this factor weighs slightly in favor of finding independent contractor status rather than an employer-employee relationship.

Considering the entire record, particularly with regard to control of the workers at issue, the Court's analysis of this record in relation to the *Darden* factors weighs in favor of finding independent contractor status rather than an employment relationship.

Employer Knowledge of Cited Conditions

Even if the Court were to conclude PFR was the employer and reach the *prima facie* elements of the alleged violations, it would have determined that the Secretary failed to meet her burden on the required element of employer knowledge of violative conditions. *See Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *3 (OSHRC, Mar. 16, 2000) (holding "the Secretary bears the burden of proof on each element of a violation of a standard, including that the employer had actual or constructive knowledge of the cited conditions").

⁸ The Court notes that this conflicts with the language of each worker's independent contractor agreement with PFR, which required each worker to procure his own workers' compensation insurance coverage. (Ex. R-6 at 2).

The standard for knowledge is whether PFR knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, No. 82-928, 1986 WL 53522, at *4 (OSHRC, July 30, 1986) (citations omitted). Here, there is no evidence that Jennifer Pettengill had direct knowledge of any of the violative conditions alleged in the citation items or that she failed to exercise reasonable diligence. *Cf. AJP Constr., Inc., v. Sec’y of Labor*, 357 F.3d 70, 73-74 (D.C. Cir. 2004) (even if employer lacked actual knowledge of the unlawful condition, general contractor’s testimony supported ALJ’s finding that reasonable diligence would have revealed it). She did not visit or supervise the jobsites because she had contracted with experienced workers who could complete the jobs by reviewing blueprints and taking direction from Framing Specialists representatives, all without her involvement. *See Connecticut Light & Power Co.*, No. 85-1118, 1989 WL 223325, at *6 (OSHRC, Apr. 26, 1989) (holding that an employer is justified in placing a great deal of reliance on the judgment of highly experienced employees). There was no evidence in this record that PFR or Jennifer Pettengill ever directed any work on a job, supervised any worker or worksite at issue in this case, set any hours, schedules, or conditions of work, or in any way monitored or inspected—or even visited—actual construction sites where work was being done by the framers. Additionally, PFR did not have any supervisors onsite such that knowledge could be imputed to PFR. Accordingly, as an alternative basis for this decision, the Court would have vacated the citations for failure to prove employer knowledge of the cited conditions.

Conclusion

The Secretary maintains that the relationship between PFR and its workers was 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—

weighing all the evidence in this record in totality—finds that more of the *Darden* factors weigh in favor of independent contractor status than an employer-employee relationship. The Secretary failed to establish, by a preponderance of the evidence, that the exposed workers were PFR’s employees. Further, as stated above, the Secretary also failed to prove that PFR had actual or constructive knowledge of the violative conditions.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is Ordered that all the Citation items alleged in Docket Nos. 23-1249, 23-1380, 23-1656, and 24-0353 are **VACATED**.

/s/ Brian A. Duncan

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: May 5, 2025
Denver, Colorado