United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. NGUYENS GOAL INC., Respondent.	OSHRC Docket No. 19-1028

DECISION AND ORDER

Attorneys and Law firms

Schean G. Belton, Attorney, Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Complainant.

Tripp Watson, Attorney, The Watson Law Firm, Birmingham, AL, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

The United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), investigated an accident at a worksite owned and operated by Nguyens Goal Inc. ("Nguyens") and subsequently issued two citations on June 6, 2019, under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678.[1] The combined proposed penalty for the citations totaled $10,798.00. Citation 1 involved two items alleging "serious" violations of 29 C.F.R. § 1926.501(b)(13), one of OSHA's fall protection standards, and

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

29 C.F.R. § 1926.503(a)(1), OSHA's fall protection training standard.[2] Citation 2 involved two items alleging "other-than-serious" violations of 29 C.F.R. § 1904.39(a)(2), OSHA's reporting requirement standard, and 29 C.F.R. §1910.134(k)(6), OSHA's respiratory protection standard. A bench trial was held in Birmingham, Alabama, under the Commission's Simplified Proceedings.[3]

Based upon the record, the Court finds that at all relevant times Nguyens was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. (Am. Pretrial Order, Ex. C, p. 13.) Further, the Court concludes the Commission has jurisdiction over the parties and subject matter in this case. (*Id.*) Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 661(j) of the Act. 29 U.S.C. § 661(j).[4] For the reasons indicated *infra*, the Court concludes all the elements necessary to prove the alleged violations have been established by the Secretary, and therefore, the citations are **AFFIRMED**.

II. BACKGROUND

Ms. Binh "Sandy" Nguyen is the sole owner of Nguyens, which operates as an eclectic business with various services offered in real estate investment, construction, remodeling, and nail and spa services. (Tr. 20, 22, 24, 47; Ex. C-9). Although the Nguyens business card advertised that Nguyens provided real estate investment, construction, remodeling services, and nail and spa services, Ms. Nguyen asserted the business card was not an accurate statement of what her business did, and asserted Nguyens did not provide construction or remodeling services (Tr. at 20, 24, 47; Ex. G-9). Weighing the credibility of Ms. Nguyen's testimony against that of the other witnesses, the Court does not find her testimony credible as to the scope of her business.

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[2] The Act contemplates various grades of violations of the statute and its attendant regulations—"willful"; "repeated"; "serious"; and those determined "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. § 666. A serious violation is defined in the Act; the other grades are not. *See* 29 U.S.C. § 666(k).

[3] Simplified Proceedings provides simplified procedures for resolving contests under the Occupational Safety and Health Act of 1970, so that parties before the Commission may reduce the time and expense of litigation while being assured due process and a hearing that meets the requirements of the Administrative Procedure Act, 5 U.S.C. 554. *See* 29 C.F.R §§ 2200.200-2200.211.

[4] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

Nguyens owns and maintains several properties, including one located at 3311 16th Ave N., Birmingham, Alabama ("Worksite"). Under the direction of Mike Tran, Ms. Nguyen's boyfriend at the time of the accident, Nguyens was in the process of remodeling an apartment at the Worksite on December 11, 2018, when a worker, Francisco Bravo Valdez, fell from the attic to the ground floor while installing insulation in the attic of apartment 3325 sustaining a serious injury. (Tr. 32-33, 55-56, 79-80, 80-83, 105, 125-126; Dep. Tr. 5-6; Ex. J-1 ¶¶C(1)-(4)). While Valdez was blowing in the insulation, he had no safety harness or fall protection to prevent him from falling over 8 feet to the floor. (Tr. 81-83). Valdez suffered a serious injury from the fall and was rushed to the hospital where he spent several days due to his injuries. (Tr. 20-22, 81-82128-129; *see also* Ex. J-1 ¶¶C1 - C3). Nguyen Goal did not report the in-patient hospitalization of the worker to OSHA. (*Id.* at ¶C4).

Compliance officer Jennifer McWilliams testified that she conducted an opening conference with Ms. Nguyen at her nail salon and Ms. Nguyen admitted Tran was responsible for the job site and any work that was being done (Tr. at 121-122). McWilliams also testified that Ms. Nguyen admitted she and Tran hired Valdez to do clean-up work for the different companies (Tr. at 122). McWilliams spoke to Tran a few days after the opening conference and Tran told her that the jobsite was Ms. Nguyen's project and that he was just helping her (Tr. at 127). Tran admitted to McWilliams that they would pay Valdez with cash and that the company could not afford to carry insurance (Tr. at 127). McWilliams also interviewed Valdez a few months after the accident and testified there were several factors that led her to believe that he was Nguyens' s employee, and particularly, that he was not in business for himself; he had been at the site doing odd jobs for two or three months; he had no particular skills; he didn't own any specialized tools for the trade; and that Tran would text him to inform him of the locations for other jobs. (Tr. 153-156). McWilliams also obtained copies of the text messages that Tran sent to Valdez and confirmed that addresses where he was sent were properties owned by Ms. Nguyen or by Nguyens (Tr. at 158-159; *see also* Ex. GX- 7 and Ex. GX -8). Much of McWilliams testimony was confirmed by other witnesses.

Valdez stated in his deposition Tran told him what work to perform at the worksite (Valdez Dep. at 8). He also testified in his deposition that not only did he work at the apartment complex where he was injured, he also worked at other apartments owned by Tran (*Id.* at 9). He testified that Tran set his hours and if he wanted to come in late, he would have to ask Tran (*Id.* at 11).

Valdez also testified that he believed that Tran Mike and Ms. Nguyen worked together because if he was working at some apartments she would arrive to supervise (*Id.* at 13). Valdez testified that he was not in business for himself in the months leading up to his accident and that he did not work for anyone else but Tran (*Id.* at 14-15). He testified that he would work normally six days per week at different properties, that Tran would tell him where to show up for work each day by sending him a text, and that Tran told him the amount he would be paid to work for Tran (*Id.* at 15, 24).

James Besky owned an air conditioning and refrigeration business, Veterans United Heating and Cooling, LLC, and was hired as a HVAC contractor by Tran to install new air conditioning units at the apartments located at the worksite (Tr. at 69). Besky initially brought the contract for the work to Tran's home but after Ms. Nguyen requested an amendment to add a specific date to the contract, Besky re-wrote the contract as requested and brought it to Ms. Nguyen's nail salon where she signed the contract, and wrote a check for the work that was to be done (Tr. 69-72; *see also* Ex. GX-10). (Tr. at 71). The contract listed Tran as the "General Contractor." (Ex. GX-10). While Besky worked at the apartment worksite he witnessed Tran directing Frank to conduct various jobs and also saw Frank working for Tran at other apartments and believed Tran was Nguyens' s general contractor (Tr. at 73-74, 76).[5] Besky also testified that Tran paid Frank hourly (Tr. at 75). Besky also worked at other apartments for Tran and Tran would send a text message that would indicate which apartment needed to have an AC united repaired (Tr. at 87-88). Although Tran would send the text about the job, Besky would go to Ms. Nguyen's Nail Salon to receive payment for the jobs (Tr. at 87).

Besky testified that Ms. Nguyen told him that before she married Tran, she had her own contractors and was unhappy with how Tran was handling the work (Tr. at 77). She told Besky that she was ready to divorce and leave Tran[6] (Tr. at 77). Besky testified that Ms. Nguyen always deferred to Tran on decisions and that Tran did not own his own business (Tr. at 78). After Valdez fell through the attic the morning of December 11, 2018, Besky called 911 and then Tran showed up later (Tr. 82-83). Tran told Besky not to talk to anyone about the accident including OSHA (Tr. at 84).

[5] While Besky's "belief" is not dispositive, it is cumulative evidence corroborated by his contract with Ms. Nguyen, which listed "Mike" Tran as the "General Contractor." (Ex. GX-10).

[6] It is not clear from the record whether Ms. Nguyen and Mike Tran were ever married but there is no dispute at the time of the accident they were a "couple."

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). Thus, "[t]he Act's purpose is straightforward: 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Sec'y, U.S. Dep't of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1333 (11th Cir. 2017) (*quoting Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994) (*quoting* 29 U.S.C. § 651(b)). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standard at issue in this case was promulgated.[7]

Under the law of the Eleventh Circuit where this case arose,[8] "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (citing *id.* at 1308).

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[7] As indicated *supra*, the Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health. The Assistant Secretary has promulgated the occupational safety and health standards at issue.

[8] The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable that the case will be appealed.

At trial, Nguyens agreed to "stipulate to the citations and accept them if there is an employment relationship found[.]" (Tr. 170-71.) Nguyens' s post-trial brief also did not address the merits of the alleged violations; instead, it focused the entirety of its brief on whether it was properly characterized as Valdez's employer at the worksite. The Court concludes there is no dispute the Secretary has met his burden of proof as to each element of his case in chief as to both citations (including the characterization of the violations as "serious" and "other-than-serious"). However, Nguyens did not stipulate to the appropriateness of the penalty amounts (Tr. 171). Therefore, the Court's analysis *infra* will be limited to the employer – employee relationship and the proposed penalties.

A. Employer-Employee Relationship

The Secretary bears the burden of showing that the cited respondent is the employer of the exposed workers at the site. *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016). The Act defines an employee as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6). This "nominal definition of 'employee' . . . is completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). "[W]hen 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." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989). Nguyens argues that Valdez admitted in a subsequent civil lawsuit against Nguyens that he was not an employee of Nguyens under the Alabama Workers' Compensation Act. (Ex. Rx-3 ¶ 7; Rx-4 ¶ 7.)

The Court concludes this admission is not dispositive since the Supreme Court has admonished that when "Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). Thus, "[t]o determine whether the Secretary has established the existence of an employer-employee relationship, the Commission relies upon the "*Darden* factors." *A.H. Sturgill Roofing*, Inc., 2019 WL 1099857, at *37 (No. 13-0224, 2019) (quoting *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010)).

In *Darden*, the Court adopted a common-law test for determining who qualifies as an "employee":

> 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 323–24 (quoting *Reid*, 490 U.S. at 751–752).

Ms. Nguyen admitted that in the time leading up to the accident she and her boyfriend Mike Tran discussed the work she needed to be done at her properties, such as trimming bushes, cleaning gutters, changing locks, painting rooms, repairing sheet rock, and other maintenance things, and Tran would then secure the workers for her, and Ms. Nguyen would give Tran the money to pay the workers (Tr. at 26-27, 34, 38). Nguyen also signed contracts listing Tran as the "General Contractor." (*See e.g.*, Ex. GX-10). The Court concludes Tran acted as Nguyens's agent when he secured workers on its behalf and conducted supervisory work on behalf of and for the benefit of Nguyens.

Valdez was told by Tran what work to perform at the worksite and Tran set his hours and if he wanted to come in later, he would have to ask Tran (Valdez Dep. at 8, 11). Valdez not only worked for Tran at the worksite where he was injured, but also worked at other apartments owned by Tran (*Id.* at 9). Valdez was not in business for himself in the months leading up to his accident and did not work for anyone else but Tran (*Id.* at 14-15). Normally, Valdez worked six days per week at the different properties (*Id.* at 15). Tran would tell Valdez where to show up for work each day by sending him a text and Tran told Valdez the amount he would be paid to work (*Id.* at 15, 24).

Considering all the elements of the relationship between Nguyens and Tran and Valdez, the Court finds the relationships were more akin to that of an employer-employee rather than of a self-employed independent contractor. Analyzing all the *Darden* factors, especially the significant control Respondent had in obtaining and assigning work, paying on an hourly basis (in cash), and

providing the essential tools and supplies to complete the work, the Court finds that Tran was an agent of Nguyens and both he and Valdez were its employees for purposes of the Act.

B. Penalty Determination

The Act provides that an employer who commits an "other-than-serious" violation or a "serious" violation may be assessed a civil penalty in an amount not to exceed $7,000 but assessment of a civil penalty of some amount is obligatory "for serious" violations. *See* 29 U.S.C. § 666(b), (c). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, requires the Department of Labor to annually adjust its civil money penalty levels for inflation no later than January 15 of each year. Therefore, at the time of the issuance of the citations, the maximum penalties for both serious and other-than-serious was $13,260. *See* 29 C.F.R. § 1903.15(d)(3), (4). For Citation 1, the Secretary proposed a penalty of $3,978 for each item. For Citation 2, the Secretary proposed a penalty of $2,842 for Item 1 and no penalty for Item 2.

"Regarding penalty, "the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to 'the size of the business of the employer . . ., the gravity of the violation, the good faith of the employer, and the history of previous violations.'" *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 446 (1977) (*quoting* 29 U.S.C. § 666[j]). These factors are not necessarily accorded equal weight[. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (citation omitted). "The gravity of the violation is the 'principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.'" *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1114 (No. 11-2559, 2016) (quotation omitted).

For both Citations 1 and 2, since Nguyens had fewer than ten employees, the Secretary proposed a 70% reduction for the size of the company, which the Court finds appropriate. The Secretary did not propose any reduction for good faith, which the Court finds appropriate, since there is no evidence in the record that Nguyens had a written safety and health program, had provided any training, or had provided any fall protection. The Secretary also did not propose any reduction for history, which the Court also finds appropriate, since there were no previous inspections in the last five years.

As to the gravity of Citation 1, Items 1 and 2, the Secretary assessed them as "high." (Tr. 171-174; Ex. R-5). Citation 1, Item 1 was a serious violation of section 1926.501(b)(13), OSHA's fall protection standard applicable to residential construction activities, which Nguyens violated when it exposed Valdez to fall hazards of approximately 9 feet from the attic walk board to the apartment hardwood floor. Citation 1, Item 2 was a serious violation of section 1926.503(a)(1), OSHA's fall protection training standard, which Nguyens violated when it failed to train Valdez to recognize fall hazards. As to the gravity of those two violations, the Court agrees with the Secretary that both were of a "high" gravity nature based on the likelihood of injury. The Court also concludes both had a "greater probability" rating because of the duration of the exposure. Further, there is no evidence of any precautions taken against injury. Giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds, based upon the record, the appropriate civil penalty for each Item in Citation 1 is $3,978.

As to the gravity of Citation 2, Items 1 and 2, although indicating conditions that have a direct and immediate correlation to the safety and health of employees, the Secretary deemed them as minimally severe. (Tr. 171-174). Citation 2, Item 1 was an "other-than-serious" violation of 29 C.F.R. § 1904.39(a)(2), OSHA's reporting requirement standard, which Nguyens violated when it "did not report an employee hospitalization resulting from an accident that occurred on 12/1 1/2018 in the mid-morning hours." (Compl., Ex. A.) Citation 2, Item 2 was also an "other-than-serious" violation of 29 C.F.R. § 1910.134(k)(6), OSHA's respiratory protection standard, which Nguyens violated when it failed to provide the basic advisory "information required in Appendix D for an employee voluntarily wearing a filtering facepiece (dust mask) respirator while blowing loose blown-in insulation." (*Id.*) As to the gravity of those two violations, the Court agrees with the Secretary that both were of a "minimal" gravity nature based on the likelihood of injury. Giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds, based upon the record, the appropriate civil penalty for Citation 2, Item 1 is $2,842 and no civil penalty for Item 2. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Items 1 and 2 are both **AFFIRMED** as serious violations and Nguyens is **ASSESSED** and directed to pay to the Secretary a civil penalty of $3,978 for each item.

IT IS FURTHER ORDERED THAT Citation 2, Items 1 and 2 are both **AFFIRMED** as other-than-serious violations and Nguyens is **ASSESSED** and directed to pay to the Secretary a civil penalty of $2,842 for Item 1 and no civil penalty is assessed for Item 2.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: July 17, 2020
Washington, D.C.