



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

SECRETARY OF LABOR,

Complainant,

v.

NRG SOUND AND COMMUNICATIONS,  
LLC,

Respondent.

OSHRC Docket No. 10-2576

Simplified Proceedings

APPEARANCES:

Patrick L. DePace, Esquire  
U.S. Department of Labor, Cleveland, Ohio  
For the Secretary

Rodney Connolly, Cleveland, Ohio  
Joseph Rodojev, Cleveland, Ohio  
For the Respondent, *pro se*

BEFORE: Covette Rooney  
Chief Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Health and Safety Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (“the Act”). On October 18, 2010, the Occupational Safety and Health Administration (“OSHA”) inspected a worksite of NRG Sound and Communications, LLC (“Respondent” or “NRG”) in Uniontown, Ohio. OSHA then cited NRG for two serious and two other-than-serious violations of the scaffolds, fall protection, electrical, and safety program standards, with a total proposed penalty of \$6,000. NRG filed a timely notice of contest,

bringing this matter before the Commission. In the parties' joint pretrial statement, NRG contends that it had no employees at the Uniontown worksite and was not engaged in interstate commerce.<sup>1</sup> This case was designated for Simplified Proceedings under 29 C.F.R. § 2200.203(a), Subpart M, of the Commission's Rules. A one-day hearing was held in Cleveland, Ohio on May 17, 2011. Both parties have submitted post-hearing briefs.

### **Background**

NRG's primary place of business is in Eastlake, Ohio. NRG is in the business of installing and repairing audio/visual equipment. NRG became a registered limited liability company in June 2009. On October 18, 2010, NRG was hired to install speakers at the Lake Local Schools football stadium in Uniontown, Ohio. (Tr. 6, 9-10; Exhs. 6, 8.)

On October 18, 2010, OSHA's Cleveland Area Office received a complaint that workers on the roof at the site were exposed to falls of 35 feet without apparent fall protection. OSHA Compliance Officer ("CO") Steve Browning went to the Lake Schools worksite ("the project" or "the worksite") that same day. The CO held an opening conference with Mr. Connolly, then walked around and photographed the worksite. He interviewed Rodney Connolly, who identified himself as "the boss." He also interviewed Joseph Rodojev, who told the CO he was an employee. Mr. Connolly also told the CO that Mr. Rodojev was an employee. The CO was unable to take photographs of the workers on the roof or in the aerial lift as both Mr. Connolly and Mr. Rodojev were on the ground when he arrived. The CO obtained photographs showing the workers' exposure to fall hazards from Doug Kaple of the Ohio Bureau of Workers' Compensation.<sup>2</sup> (Tr. 45-53; Exh. 1-3.)

### **Jurisdiction**

Based upon the record and the reasons set forth below, I find that at all relevant times NRG was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(3) and (5). I also find that the Commission has jurisdiction over the parties and subject matter in this case.

### **Whether NRG was Engaged in Commerce at the Worksite**

An employer must be engaged in a business affecting commerce to be subject to the requirements of the Act. Commerce is defined as trade, traffic, commerce, transportation, or

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<sup>1</sup> NRG also denied that it had a worksite located at Lake Center and Market Avenue, NW in Uniontown, Ohio. I find that the record clearly shows that NRG was performing work at that site.

<sup>2</sup> CO Browning testified that Mr. Kaple had phoned in the complaint to the Cleveland OSHA office. (Tr. 53.)

communications among the several States or between a State and any place outside thereof. *See* section 3(4)-(5) of the Act, 29 U.S.C. § 652(4)-(5). The Commission has found that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Additionally, the Commission has found that “use of goods produced out of state . . . affect[s] interstate commerce under the Act.” *Avalotis Painting Co.*, 9 BNA OSHC 1226, 1227 (No. 76-4774, 1981) (citing to *U.S. v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975)). Here, NRG was engaged in a construction activity at the worksite, and it purchased the speakers for the project from a Pennsylvania company. (Tr. 9-11; Exh. 8.) I find that NRG was an employer engaged in a business affecting commerce under the Act.

### **Whether NRG was an Employer at the Worksite**

The Act requires each employer to provide a workplace “free from recognized hazards” and to comply with “occupational safety and health standards.” *See* section 5(a) of the Act, 29 U.S.C. § 654(a). An employment relationship must be established as only an “employer” may be cited for a violation. *See* section 9(a) of the Act, 29 U.S.C. § 650; *Don Davis*, 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (No. 87-214, 1989)(consolidated).

NRG contends that it was not an employer under the Act because it had no employees at the project. It posits that Mr. Rodojev was an owner and/or partner of NRG, not an employee. (R. Br. 1-2.) The Secretary contends that Mr. Rodojev was an NRG employee. (S. Br. 6.) For the reasons that follow, I find that Mr. Rodojev was an employee of NRG at the site.

NRG has described Mr. Rodojev in several ways: employee, silent partner, independent contractor, and team member. During the OSHA inspection, both Mr. Rodojev and Mr. Connolly initially told the CO that Mr. Rodojev was an employee. (Tr. 48, 51.) However, at the end of the CO’s interview, Mr. Rodojev indicated he was a 30 percent “silent partner.” (Tr. 51.) In a client solicitation letter dated June 11, 2009, Mr. Connolly referred to Mr. Rodojev as a part of the NRG “team.” (Exh. 11.) Both Mr. Connolly and Mr. Rodojev testified that, at one time, Mr. Rodojev had an independent contractor agreement with NRG.<sup>3</sup> (Tr. 15-17, 83-84; Exh. 7.) Mr. Connolly further testified that Mr. Rodojev became a silent partner in June 2010. (Tr. 39.)

These varied descriptions of Mr. Rodojev would seem to be contrived to avoid liability

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<sup>3</sup> According to testimony, the independent contract agreement was not in effect at the time of the OSHA inspection. Instead, Mr. Rodojev became a silent partner through an informal agreement in June 2010. (Tr. 15-18, 31, 34-35.)

under the Act. As noted above, when the CO initially spoke with Mr. Rodojev and Mr. Connolly, both said that Mr. Rodojev was an employee. The subsequent descriptions are simply not credible, especially in view of NRG's defense that it was not an employer at the worksite. Further, I observed the CO's demeanor as he testified, including his facial expressions and body language, and I found him to be a straightforward, credible, and convincing witness. I also observed Mr. Connolly and Mr. Rodojev as they testified. While some of their testimony appeared to be reliable, some of their testimony was not. Therefore, where their testimony conflicts with that of the CO, the CO's testimony will be credited.

To determine whether the Secretary has established the existence of an employment relationship, the Commission relies upon the "Darden factors." *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) ("*S&W*"). In *Darden*, the Court set forth several factors to consider when evaluating the existence of an employment relationship. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) ("*Darden*"). In following *Darden*, the Commission has noted that the critical factor in the analysis is the "right to control the manner and means by which the product [was] accomplished." *S&W*, 23 BNA OSHC at 1289 (*quoting Darden*, 503 U.S. at 323). In addition, the following factors are considered:

the skill required [for the job]; 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.

*Analysis under Darden*<sup>4</sup>

*Hiring Party's Right to Control the Manner and Means by which the Product is Accomplished*

NRG was hired to install speakers at the worksite. Mr. Connolly testified that Mr. Rodojev had no role in acquiring the project. During the inspection, both Mr. Connolly and Mr. Rodojev told the CO that Mr. Connolly was "the boss." Mr. Rodojev told the CO that Mr. Connolly directed the work and that work was not done until Mr. Connolly came to the worksite. (Tr. 10-12, 47, 51, 58-59; Exh. 8.)

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<sup>4</sup> Two factors noted above are not addressed in this analysis, that is, whether the hiring party has the right to assign additional projects to the hired party and whether the hired party has a role in hiring and paying assistants. There was no evidence in the record concerning these factors, so they are not addressed.

These facts support a finding that NRG, through Mr. Connolly, controlled the means by which the work was accomplished. Mr. Connolly prepared the bid for the project and submitted it to Lake Schools. He also paid for the rental of the aerial lift used to access the roof, and he provided and transported the speakers to the site. (Tr. 10-11, 21-23.) Furthermore, both Mr. Rodojev and Mr. Connolly told the CO that Mr. Connolly was the boss. Mr. Rodojev also said that Mr. Connolly directed the work. I find that the manner and means to complete the project rested with NRG, through Mr. Connolly. This factor weighs heavily in favor of finding an employment relationship between Mr. Rodojev and NRG. As discussed *supra*, this factor is the most significant factor of the *Darden* test.

#### *Skill Required*

The record shows that Mr. Connolly and Mr. Rodojev worked together on the project and that they had similar skills and work histories. (Tr. 7, 13-15, 28-30, 78-79). Mr. Rodojev, however, did not work independently and worked at the site only when Mr. Connolly was present. In view of this evidence, I conclude that this factor supports the finding of an employment relationship.

#### *Source of the Instrumentalities and Tools*

NRG supplied the speakers that were installed at the stadium, and Mr. Connolly delivered the speakers to the worksite. NRG also provided the aerial lift used to access the roof, and, in addition, it provided the general liability insurance. Mr. Rodojev told the CO that he supplied his own tools for work on the project. Yet, Mr. Rodojev also told the CO that some of the equipment was NRG's. (Tr. 10-12, 21-23, 51, 58-59, 64-65.) I find that NRG supplied the critical instrumentalities and tools required to complete the project. This factor supports the finding of an employment relationship.

#### *Location of the Work*

NRG's business is the installation and repair of audio/visual systems. The nature of this work requires a different location for each NRG job. Mr. Rodojev worked with Mr. Connolly at the worksite. (Tr. 13.) As indicated above, however, Mr. Connolly is the individual who acquires the projects NRG works on. Mr. Rodojev has no role in this regard. On this basis, I conclude that this factor supports the finding of an employment relationship.

#### *Duration of the Relationship between the Parties*

NRG was organized as an LLC in June 2009. Mr. Connolly testified that he offered Mr.

Rodojev a position with NRG in 2009. In a letter to potential clients dated June 11, 2009, NRG promoted the addition of Mr. Rodojev to the NRG team. Mr. Rodojev signed an independent contractor agreement with NRG in January 2010. In June 2010, there was an informal verbal agreement for Mr. Rodojev to become a “silent partner.” Mr. Rodojev told the CO that most of his work (25 to 30 hours per week) was for NRG. At the May 2011 hearing, Mr. Connolly testified that he and Mr. Rodojev still work together. Mr. Connolly further testified that he and Mr. Rodojev work as a team; they are “a small company and basically, Joe [Mr. Rodojev] and I are it.” (Tr. 13-16, 26-34, 52, 79; Exhs. 6-7, 11.)

The record shows that the business relationship between NRG and Mr. Rodojev began in 2009 and two years later, at the time of the hearing, the relationship was still in place. I find that the relationship between Mr. Rodojev and NRG is of long duration, which supports the finding of an employment relationship.

*Extent of the Hired Party's Discretion over When and How Long to Work*

CO Browning testified that Mr. Rodojev was able to set his own schedule -- “to come and go as he sees fit.” However, Mr. Rodojev also told CO Browning that he did no work on the project until Mr. Connolly arrived. (Tr. 58-59, 65.) Because he did not work unless Mr. Connolly was present, I find it of minimal importance that Mr. Rodojev set his own schedule. Therefore, this factor supports the finding of an employment relationship.

*Method of Payment*

Payment on an hourly, daily, or other regular interval can be a strong indicator of an employment relationship. Payment on a per-job basis, on the other hand, can be an indicator of an independent contractor relationship. Mr. Rodojev was paid at an hourly rate of \$25.<sup>5</sup> Mr. Connolly testified that Mr. Rodojev received payment after the completion of a project. In addition, Mr. Rodojev testified that payment was based on the number of hours estimated in the project bid, which could be more or less than the hours actually worked. (Tr. 18, 26, 82, 85-87.) For this project, Mr. Rodojev was paid on an hourly basis. I find the hourly basis for payment supports the finding of an employment relationship.

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<sup>5</sup> Testimony about Mr. Rodojev’s payment terms was inconsistent. There was testimony referring to the payment terms in the independent contractor agreement, but there was also testimony that this agreement was no longer valid at the time of the project. The signed agreement shows payment at 30 percent of profit; however, Mr. Rodojev was actually paid on an hourly basis. Both Mr. Rodojev and Mr. Connolly testified that Mr. Rodojev could receive an additional 30 percent of net profit. Yet, Mr. Rodojev did not receive that amount for the project. Much was made of the possible 30 percent net profit, but, as it was never paid, this testimony is given little weight. (Tr. 19, 81-82.)

*Whether the Work is Part of the Regular Business of the Hiring Party*

When the work done by the hired party is the same as that of the hiring party, it weighs in favor of an employment relationship. NRG's primary business is the installation and repair of audio, video, and communications equipment. The record shows that Mr. Rodojev's role at the worksite was the installation of stadium speakers. Additionally, Mr. Connolly, who formed NRG, performed the same work alongside Mr. Rodojev. (Tr. 6, 9, 13; Exhs. 6-8.) Because the work Mr. Rodojev performed at the worksite was the same as NRG's primary work, this factor supports the finding of an employment relationship.

*Whether the Hiring Party is in Business*

NRG is a registered limited liability company in the State of Ohio. (Exh. 6.) This factor supports the finding of an employment relationship.

*Provision of Employee Benefits and the Tax Treatment of the Hired Party*

The provision of employee benefits to a hired party can indicate an employment relationship. Mr. Connolly testified that NRG did not provide benefits to Mr. Rodojev. (Tr. 79.) Here, I find that the lack of employee benefits has little weight because small businesses often provide no benefits to employees.

The tax treatment of wages can also be an indicator of the nature of the employment relationship. Here, Mr. Rodojev received a 1099 form instead of a W-2 and was responsible for paying his own taxes. Further, Mr. Rodojev testified that he received a 1099 at the end of the year, not after each project. (Tr. 37, 79, 81-82.)

While the provision of employee benefits and withholding of taxes from a paycheck is usually indicative of an employment relationship, the converse is not as telling.<sup>6</sup> In light of the other evidence of an employment relationship, I find that the tax treatment and lack of benefits are not dispositive in determining whether Mr. Rodojev was an employee under the Act.

*Conclusions Based on the Darden Test*

Based on the foregoing, and in particular, the critical factor -- the control of the workplace -- I conclude that Mr. Rodojev was an employee of NRG at the worksite. In reaching this conclusion, I have considered NRG's assertion that Mr. Rodojev was a partner or owner of NRG and therefore not an employee. I am not persuaded. Both Mr. Rodojev and Mr. Connolly

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<sup>6</sup> See *S&W*, 23 BNA OSHC at 1290. (Commission found the "failure to withhold federal income and social security taxes was . . . not a bona fide reflection of an authentic independent contractor relationship.")

initially told the CO that Mr. Rodojev was an employee. I find these statements, made at the beginning of the inspection, to be more credible than those made months later, when NRG was attempting to defend against the alleged violations.

### **Citations**

NRG does not dispute the validity and characterization of the citation items in this matter. (Tr. 78.) For completeness of the record, the citation items will be addressed briefly.

#### *The Secretary's Burden of Proof*

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A violation is classified as serious under section 17(k) of the Act if “there is substantial probability that death or serious physical harm could result.” Commission precedent requires a finding that “a serious injury is the likely result should an accident occur.” *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

#### *Citation 1, Item 1*

This item alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), which states that:  
A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Note to paragraph (b)(2)(v): As of January 1, 1998, subpart M of this part (§ 1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under § 1926.502(e).

Mr. Connolly testified that NRG rented an aerial lift to access the roof and that both he and Mr. Rodojev rode in the basket of the lift to access the roof. Mr. Connolly told the CO that one harness and lanyard was provided by the aerial lift company and that he (Mr. Connolly) was told that he should wear it while in the lift. Mr. Rodojev told the CO that he and Mr. Connolly stopped using the fall protection when they were in the lift. The CO testified that Exhibit 2, one of the photographs obtained from Mr. Kaple, showed Mr. Rodojev in the aerial lift. The CO's measurement at the lower edge of the roof was over 25 feet above the ground. In addition, Mr.



Connolly testified that the height of the roof on the football stadium was between 25 and 40 feet above the ground. (Tr. 19-24, 49-54; Exhs. 2, 4.)

Based on the record, the Secretary has met her burden of proof regarding this item. She has also shown that the violation was serious. Mr. Connolly and Mr. Rodojev both used the aerial lift without utilizing the necessary fall protection, and both were exposed to falls of up to 25 feet. A fall of this distance could have resulted in serious injury or death. This item is affirmed as a serious violation.

Citation 1, Item 2

This item alleges a serious violation of 29 C.F.R. § 1926.501(b)(1), which provides:

*Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Mr. Connolly testified that both he and Mr. Rodojev installed speakers on the stadium roof at the worksite. He identified himself and Mr. Rodojev on the roof in Exhibits 2 and 3. He admitted that he was not tied off and that Mr. Rodojev was not always tied off while on the roof. Mr. Rodojev also admitted that he was on the roof without fall protection. The lower edge of the roof was over 25 feet above the ground, and the height of the roof on the football stadium was between 25 and 40 feet above the ground. (Tr. 13-14, 19-21, 24-26, 52-54; Exhs. 2-4)

The Secretary has met her burden of proof regarding this item. As found above, a fall of over 25 feet could have resulted in serious injury or death. This item is affirmed as serious.

Citation 2, Item 1

This item alleges an other-than-serious violation of 29 C.F.R. § 1926.20(b)(1), which states that:

*Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

CO Browning testified that Mr. Connolly told him that there was no safety and health program for the worksite. (Tr. 50.) The Secretary has met her burden regarding this item. This item is affirmed as an other-than-serious violation.

Citation 2, Item 2

This item alleges an other-than-serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I), which provides as follows:

Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

CO Browning testified that a photograph he took at the worksite shows an electrical cord going under a doorway at the worksite. Mr. Rodojev and Mr. Connolly used the cord, and Mr. Connolly told the CO that he knew the cord was under the door. (Tr. 55-57; Exh. 5.) The Secretary has established her burden of proof regarding this item. This item is affirmed as an other-than-serious violation.

**Penalty Assessment**

Section 17(j) of the Act (29 U.S.C. § 666(j)) requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. In *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 [citation omitted] (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 [citation omitted] (No. 76-2644, 1981).

The Secretary proposed a penalty of \$3,000 for each of the serious violations.<sup>7</sup> This penalty reflects a 40 percent reduction based on NRG's size. There was no safety and health program in place, so no adjustment was made for good faith. Additionally, there was no adjustment for history.<sup>8</sup> (Tr. 60.) I find the proposed penalties are appropriate and are assessed.

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<sup>7</sup> No penalty was proposed for the other-than-serious violations.

<sup>8</sup> CO Browning testified that OSHA policy allows a penalty reduction for history if the employer has prior inspections in which the employer has shown compliance with OSHA standards. (Tr. 61).

### **Findings of Fact and Conclusions of Law**

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

### **ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), is **AFFIRMED**, and a penalty of \$3,000 is assessed.
2. Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(1), is **AFFIRMED**, and a penalty of \$3,000 is assessed.
3. Item 1 of Citation 2, alleging an other-than-serious violation of 29 C.F.R. § 1926.20(b)(1), is **AFFIRMED**, and no penalty is assessed.
4. Item 2 of Citation 2, alleging an other-than-serious violation of 29 C.F. R. § 1926.405(a)(2)(ii)(I), is **AFFIRMED**, with no penalty assessed.

/s/  
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Covette Rooney  
Chief Judge

Date: September 9, 2011  
Washington, D.C.