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United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Secretary of Labor,

Complainant,

v.

Richard Hargrove d/b/a R. H. Construction,

Respondent.

OSHRC Docket No. **14-1219**

Appearances:

Richard M. Moyed, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

J. W. (Don) Johnson, Esquire, J. W. (Don) Johnson, P.C., Houston, Texas
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Richard Hargrove d/b/a R.H. Construction (hereinafter Respondent) is a framing contractor. On March 31 through April 1, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Darren Beck conducted an inspection of Respondent's worksite at 1198 Jones-Butler Road in College Station, Texas. Based upon CSHO Beck's inspection, the Secretary of Labor, on July 18, 2014, issued a Citation and Notification of Penalty with five items to Respondent alleging repeat violations of the standards at 29 C.F.R. § 1926 involving failure to use personal protective equipment, unsafe scaffold construction, and lack of training. The Secretary proposed a total penalty of $17,600.00 for the Citation. Respondent timely contested the Citation. All the alleged violations are at issue.

The undersigned held a hearing in this matter on June 10 and 11, 2015, in Houston,

Texas. The parties filed post-hearing briefs.[1] The Court has considered all the evidence presented at the hearing and the arguments of the parties as set forth in their post-hearing briefs.

For the reasons discussed below, the Citation is VACATED.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 10).

Background

Respondent is a framing contracting company owned by Richard Hargrove (Tr. 102-03). It works primarily in College Station, Texas. According to Hargrove, the company is a sole proprietorship owned by him (Tr. 103). He testified Respondent has no employees (Tr. 103). Rather, Respondent contracts with general contractors to perform framing work on various projects and utilizes a "labor coordinator" to supply workers who are paid by Respondent in cash through that labor coordinator (Tr. 104-05, 126).

On March 31, 2014, while driving in the area, CSHO Beck observed two individuals performing framing work from what he believed to be an unsafe scaffold platform at a townhome construction site in College Station, Texas (Tr. 61, 77). He stopped to address the situation and initiate an inspection. CSHO Beck testified he did not know the identity of the contractors on site at the time he stopped (Tr. 77). He took photographs of the conditions from the street prior to entering the worksite (Tr. 61). Upon entering the worksite, CSHO Beck was told by a worker that John Jett of Starlite was the general contractor in charge of the site (Tr. 18). CSHO Beck called Jett who later arrived at the site (Tr. 18). Jett informed CSHO Beck that N.T.[2] was in charge of the individuals performing the framing work (Tr. 18).

CSHO Beck had observed a worker performing framing work utilizing a pneumatic nail gun while standing on a scaffold elevated by a forklift (Tr. 23; Exh. C-1 pp. 1, 4, 7, 30). He later

[1] By Order of July 14, 2015, the parties were given until August 24, 2015, to file simultaneous post-hearing briefs. Respondent's brief was received by the Court on August 19, 2015. The Secretary's brief was received on August 24, 2015. To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

[2] Initials have been used throughout this decision to protect the identities of the individuals involved in the inspection and those who testified.

identified this individual as A.M. (Tr. 18, 22). He observed another worker on the ground, handing materials up to A.M. (Tr. 22; Exh. C-1 pp. 1, 30).[3] Neither had on hard hats (Tr. 22-23; Exh. C-1 pp. 1, 30). A.M. did not have on protective eye-wear (Tr. 26; Exh. C-1 pp. 1, 3, 4, 7, 30). The platform on which A.M. was working was elevated approximately 9 feet, 10 inches off the ground (Tr. 30-31; Exh. C-1 p. 16). A.M. stood on a 12-inch platform attached to the outside of a man-basket (Tr. 28-29; Exh. C-1 pp. 1, 6, 7, 8, 19, 20, 23). He was not using fall protection (Tr. 17; Exh. C-1 pp. 3, 4, 7, 30). Upon closer inspection, CSHO Beck observed the platform was not secured to the forklift because it was missing the pin used to secure it (Tr. 32-35; Exh. C-1 pp. 25, 26).

CSHO Beck testified he conducted an opening conference with N.T. (Tr. 63). He asked N.T. to call his supervisor, and N.T. called Hargrove (Tr. 64-65). Hargrove admitted he received this call but did not come to the worksite that day because he had "just had" back surgery (Tr. 136). CSHO Beck then interviewed A.M. "somewhat away from where all the work was going on." (Tr. 70). When he returned to the work area, CSHO Beck found all the other employees had left, including N.T. (Tr. 70-71). CSHO Beck testified N.T. informed him the following day that Hargrove had told him to leave (Tr. 19-20, 65).

According to N.T., he encountered CSHO Beck as he was leaving for lunch (Tr. 145). CSHO Beck was taking photographs of the license plates of the trucks on site in order to ascertain to whom they belonged. CSHO Beck testified he wanted to run the license plate numbers through a police database to obtain the names of the owners in order to determine who was working on site (Tr. 175, 178). CSHO Beck informed N.T. he could be found liable for the violations if he were the employer and if he did not cooperate with the inspection (Tr. 176).[4] It was at that point N.T. agreed to speak with CSHO Beck and told him he worked for Respondent

[3] In his testimony, CSHO Beck identified that individual as N.T. (Tr. 22). N.T. denied the individual in the photograph was him. In his brief, the Secretary appears to have abandoned his position that this alleged exposed employee was N.T.

[4] Respondent elicited testimony from N.T. suggesting CSHO Beck threatened to call the police or have N.T. arrested if he tried to leave. CSHO Beck denied making such threats. On this, the undersigned credits CSHO Beck's version and attributes the discrepancy to a misunderstanding resulting from N.T.'s limited English language skills. In so doing the court notes CSHO Beck was otherwise a straightforward witness. Respondent's counsel accused CSHO Beck of other misconduct. CSHO Beck credibly denied this misconduct and the accusations were not corroborated by any witness.

(Tr. 168-69).

The following day, CSHO Beck returned to the site to conduct an interview of N.T. According the CSHO Beck, it was during that interview and the previous day's discussions that N.T. and A.M. informed him they worked for Respondent (Tr. 73, 174-75). Specifically, they told him they were paid by Respondent (Tr. 18-19, 73). N.T. also told CSHO Beck the man-basket and forklift were provided by Respondent (Tr. 64, 73).[5] CSHO Beck reduced his interview with N.T. to a written statement which CSHO Beck testified he provided to N.T. for signature (Tr. 69; Exh. R-1). CSHO Beck had written information on the top of the statement and the contents of the statement. He then had N.T. sign it. In that statement N.T. stated he had "worked for Rick at RH Construction for about 10 years." (Exh. R-1). CSHO Beck wrote in the statement N.T. told him he had six people working for him on the site, all of whom left with him the previous day. The statement reads, "I left the site yesterday because the boss told me to." (Exh. R-1). It also states N.T. was A.M.'s supervisor and directed him to work on the gable. With regard to Hargrove's presence onsite, the statement reads, "Rick does not come out here, he has other jobs." (Exh. R-1).

No written statement was submitted into the record for A.M.'s interview. According to CSHO Beck, A.M. told him he was paid by and worked for Respondent (Tr. 18-19, 174-75). He also informed CSHO Beck he had not been trained in scaffold hazards or fall protection (Tr. 38). In N.T.'s written statement, he concedes A.M. did not have previous fall protection training (Exh. R-1).

Beck testified he interviewed both N.T. and A.M. in English and admitted both workers had "broken English." (Tr. 63, 75, 179). He also wrote "broken English" on N.T.'s statement (Exh. R-1). He testified, however, neither asked him to explain or repeat any of his questions. From that, CSHO Beck inferred N.T. and A.M. understood his questions. With regard to his written statement, although admitting a likeness of his signature appears on the document, N.T. did not recall signing it and testified he cannot read or write English (Tr. 142, 149, 165). During the hearing, N.T. testified through an interpreter after the Court determined his ability to communicate in English was too limited to create a clear record.

[5] CSHO Beck's testimony states, "I questioned [N.T.] who operates the Genie and he said that his company does." (Tr. 64).

CSHO Beck later issued a subpoena to Respondent requesting training records, safety programs, and any disciplinary records (Tr. 39). Respondent provided no documents in response to the subpoena (Tr. 39). Hargrove testified he did have a fall protection program he had downloaded from the internet (Tr. 117, 129). He testified he went over it with N.T. (Tr. 118). He admitted he did not know who wrote it and he had not provided it to OSHA in response to the subpoena (Tr. 129-30).

Hargrove testified he did not employ N.T. or any of the individuals performing the framing work at the worksite at issue in this matter. He testified he "secures" the jobs and then contacts N.T. to obtain the workers to perform the work (Tr. 104-05). He considers N.T. an "independent entity" and issues him a "1099"[6] for the jobs he performs for Respondent (Tr. 104, 137). According to Hargrove, he does not have any input into how many workers N.T. brings to a job or who those workers are (Tr. 106). He does not tell them when to come to the job, when to leave, or how much time a job should take (Tr. 104). He provides no tools or safety equipment to the workers (Tr. 109, 111). He does not train them (Tr. 108). The general contractor provides all the materials (Tr. 138). Hargrove also testified the forklift and scaffold being used at the worksite were the equipment of the general contractor (Tr. 110). Hargrove did admit to visiting the jobs he has hired N.T. to complete and to verbally reprimanding workers he sees engaged in unsafe work practices (Tr. 108-09, 120-21). He testified he would not fire a worker for a safety violation (Tr. 121). As he stated, "I need these guys more than they ever need me." (Tr. 121).

Based upon his inspection, CSHO Beck recommended five citation items be issued to Respondent. CSHO Beck recommended citations for a violation of 29 C.F.R. § 1926.100(a) for failure of A.M. and N.T. to wear hard hats; a violation of 29 C.F.R. § 1926.102(a)(1) for failure of A.M. to use protective eye wear while using the pneumatic nail gun; a violation of 29 C.F.R. § 1926.451(b)(2) for allowing A.M. to work on a 12-inch scaffold platform; a violation of 29 C.F.R. § 1926.451(c)(2)(v) for failure to secure the platform to the forks of the fork-lift; and a

[6] The Court takes judicial notice the term "1099" refers to IRS Form 1099-MISC which is used to "report payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business." *See http://www.irs.gov/Help-%26-Resources/Tools-%26-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-%26-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099-MISC-%26-Independent-Contractors/Form-1099-MISC-%26-Independent-Contractors.*

violation of 29 C.F.R. § 1926.454(a) for failure to train A.M. on fall protection. All five of the citations items were proposed as repeat violations. Respondent had received citations for violations of the same standards in 2009 (Exh. C-3) and 2010 (Exh. C-2). Those citations had become final orders of the Commission pursuant to a formal settlement agreement signed on behalf of Respondent by Hargrove in 2011 (Exhs. C-4; C-5). Hargrove testified he settled the prior matters rather than contest his status as a covered employer due to his declining health and because it was more expedient to do so (Tr. 123). He admitted he never complied with the terms of the settlement other than the payment of the reduced penalties.

Respondent timely contested the Citation at issue, asserting it was not an employer covered under the Act.

DISCUSSION

Coverage

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co*., 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). Respondent has consistently contended it is not an employer. It is the Secretary's burden to prove **coverage under the Act**[7] by demonstrating that the cited entity is an employer. *Allstate Painting & Contracting Co*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005); *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC 1477 (No. 96-1378, 2001), *citing, Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997).

Section 3 of the Act defines an "employer" as "a person engaged in a business affecting commerce[8] who has employees" and defines "employee" as "an employee of an employer who is

[7] The issues of jurisdiction and coverage are often muddled in the case law. A timely notice of contest establishes jurisdiction with the Commission pursuant to § 10(c) of the Act. *Sharon & Walter Constr. Inc*., 23 BNA OSHC 1286, 1288, n. 2 (No. 00-1402, 2010). Whether an entity is an employer under the Act is not a question of jurisdiction, but of coverage. *StarTran, Inc*., 21 BNA OSHC 1730, 1732 (No. 02-1140, 2006), *citing Arbaugh v. Y&H Corp*., 126 S.Ct. 1235, 1244 (2006). The undersigned finds the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act. The issue to be resolved is whether Respondent is an employer covered under the Act.

[8] Respondent did not contend it was not engaged in interstate commerce. Nevertheless, the Secretary has the burden to establish this element of coverage as well. The use of the term "affecting commerce" indicates a congressional intent to "exercise fully its constitutional authority under the commerce clause." *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976); *U.S. v. Dye Construction Co*., 510 F.2d 78 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); *see also Piping of Ohio, Inc*., 16 BNA OSHC 1236 (No. 91-3481, 1993). Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Following the Ninth Circuit in *Usery v. Franklin R. Lacy*, 628 F.2d 1226 (9th Cir. 1980), the Commission has held a business may be found to engage in interstate

employed in a business of his employer which affects commerce." 29 U.S.C. § 652. As the Commission noted in *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC at 1480, this definition is "unhelpfully circular." In determining whether the Secretary has satisfied his burden to establish a cited entity is an employer under the Act, the Commission has applied the common law agency doctrine enunciated in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992).[9] *See, e.g.*, *All Star Realty Company, Inc., d/b/a A All Star Realty & Construction, Co.*, 24 BNA OSHC 1356 (No. 12-1597, 2014); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010); *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting*, 21 BNA OSHC at 1035; *Sharon and Walter Construction, Inc.*, 23 BNA OSHC 1286 (No. 00-1492, 2010); and *AAA Delivery Service, Inc*., 21 BNA OSHC 1219 (No. 02-0923, 2005). In *Darden*, the Court considered primarily "the hiring party's right to control the manner and means by which the product is accomplished." *Id*. at 323. Other factors relevant to the 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

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commerce where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co.*, 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce*." Id., citing NLRB v. Int'l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce.

[9] Prior to 1992, the Commission applied the "economic realities test" to such cases. *Griffin and Brand of McAllen, Inc.*, 6 BNA OSHC 1702 (No. 14801, 1978). In applying that test, questions to be considered are: 1) Whom do the workers consider their employer; 2) Who pays the workers' wages; 3) Who has the responsibility to control the workers; 4) Does the alleged employer have the power to control the workers; 5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers; 6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and 7) How are the workers' wages established. *Griffin and Brand*, 6 BNA OSHC at 1703. In *Griffin and Brand*, the Commission found a farm owner was the employer of a crew of migrant workers, overturning the judge's finding that the crew leader was an independent contractor. In so holding, the Commission drew a distinction between an entity's "legal right" to control the workers, and its "practical power" to do so. *Id*. Where an entity has the power to control the workers as to the manner in which they accomplish their work, that entity may be found the employer under the economic realities test.

Following the Supreme Court's decision in *Darden*, the Commission modified its prior position that the term "employer" is not limited to common law principles but may take into account the economic realities of the relationship. *See Timothy Victory,* 18 BNA OSHC at 1026, *citing Vergona Crane*, 15 BNA OSHC at 1784. Current Commission precedent holds the term "employee" should be interpreted consistent with common law principles. The Commission has also noted those common law principles are less inclusive than the economic realities test. *Timothy Victory*, 18 BNA OSHC at 1026, n. 3. Even applying the more inclusive economics realities test, the Court would find the Secretary has failed to meet his burden to establish Respondent was an employer.

> 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.

Id. at 232-24, n. 3, *citing, Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

The Secretary argues both the individuals performing the framing work and N.T. are employees of Respondent. The Secretary need only show Respondent has one employee to establish coverage. *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725 (No. 76-4026, 1979), *citing Elmer Vath, Painting Contractor*, 2 BNA OSHC 1091 (No. 773, 1974). The record establishes there are differences between the nature of the relationship between N.T. and Respondent and Respondent and the workers performing the framing work. Therefore, the Court will consider whether the Secretary has established either or both are employees of Respondent.

The record establishes Respondent's role at the instant project, and most other similar projects, is to secure the contract to complete framing work and then to hire someone to supply workers to complete the job. Hargrove testified,

> My responsibility is I secure framing jobs to do. And if I'm successful in that, then I take plans and specifications and present them to someone such as [N.T.] and he goes over it.
>
> If he has any questions, we clarify any issues, conflicts, what have you, and he executes the job, he constructs the building.

(Tr. 105)

Hargrove considers the individual in N.T.'s role to be an "independent entity" with which Respondent has a contractual relationship (Tr. 104). Hargrove conceded he and N.T. do not have a written contract for this, or any other, project (Tr. 137). It was undisputed Respondent and N.T. had a long-term relationship. The record contains no evidence regarding the length of Hargrove's relationship with any of the other workers on site. However, neither N.T. nor the other workers worked exclusively for Respondent. Rather, both worked for Respondent on a per project basis. When a project was complete, N.T. and the workers he supplied were free to work for other contractors (Tr. 107, 169). The Court concludes although Hargrove and N.T. had a long-term relationship which tends to support a finding of an employment relationship, other

considerations weigh in favor of finding their relationship was a contractual one.

The Court also finds the evidence regarding the establishment of wages, the manner in which wages were paid, the provision of benefits, and the tax treatment of both N.T. and the workers on site weighs in favor of finding Respondent was not an employer. Hargrove determined a basic rate he would pay per day for labor on a given job (Tr. 105-06). N.T. determined how many workers were needed to complete the job, located, and hired the workers without input from Hargrove (Tr. 106). At the end of each week, Hargrove gave N.T. a "draw" in cash which N.T. distributed to the workers (Tr. 106, 138, 172). N.T., not Hargrove, decided how much each worker was paid (Tr. 146).[10] Hargrove specifically denied any input into the distribution of wages to individual workers (Tr. 126). This testimony was uncontested.[11] Because N.T. determined the number of workers and their wages, N.T. had control over his own distribution of the lump sum given to him by Hargrove.

The Secretary presented no evidence of payroll records or other documentation regarding payment of the workers at the site. There is no evidence of record establishing Respondent pays the workers in any other manner than described by Hargrove and N.T. There is no evidence workers performing the framing work were provided any benefits or treated as employees for tax purposes. Hargrove testified he provides N.T. with a 1099 (Tr. 137). The Court finds CSHO Beck's testimony that A.M. and N.T. told him they were paid by Respondent, while credible, does not establish Respondent treated the workers as employees for compensation purposes. Given the ambiguity of the statement and the limited English language skills of N.T. and A.M., the Court finds these statements establish only that the cash the workers received every Friday came first from Hargrove. The Court concludes the totality of the evidence regarding compensation weighs in favor of finding Respondent was not a covered employer.

The Secretary presented little evidence regarding day-to-day control of the workers performing the framing work. Hargrove testified he does not direct the workers as to the hours or days they work (Tr. 104). He did not visit the site regularly. The Secretary presented no

[10] The record is silent as to the determination of the distribution of wages to the individual workers. Whether an individual worker could increase his share of that distribution through initiative is an unanswered question on this record.

[11] The Court notes Hargrove's demeanor on the stand was often hostile and he was prone to be argumentative. However, his testimony was consistent and was not contradicted. [Redacted] The undersigned has taken that into consideration and found Hargrove to be generally credible.

evidence showing how the workers were trained. Nor did the Secretary present evidence sufficient to establish Respondent had authority to discipline the workers on site. The only evidence of discipline is the testimony of Hargrove. Hargrove's testimony does suggest workers considered him to have some disciplinary authority over the worksite. He stated,

> Now, I can raise an issue. I can draw attention to a problem when I see it and absolutely make it clear that I expect people to comply.
>
> And I can almost guarantee you that when they see that white truck come along, that if they've set down their hard hat, they pick it up and put it on because I've made that point very clear. (Tr. 120-21).

Hargrove also testified he would not fire a non-compliant employee because it is not in his economic interest to do so, suggesting he had the authority to do so (Tr. 121). Although this evidence tends to support a finding Hargrove had some perceived control over the workers, it falls short of establishing actual control. This is particularly true given Hargrove's lack of input into the composition of N.T.'s crew, and the limited direction regarding completion of the framing work. The evidence of record establishes Hargrove spent little time on this worksite and was not present on the day of the inspection. The Court finds the Secretary presented insufficient evidence Hargrove had, or exercised, the authority to control the day-to-day activity of either N.T. or the workers. *See All Star Realty Company, Inc., d/b/a A All Star Realty & Construction, Co.*, 24 BNA OSHC 1356 (No. 12-1597, 2014) (Finding Respondent not an employer because it lacked control over the activities observed by the CSHO).

The Secretary also presented insufficient evidence Respondent had any input into the methods or materials used to complete the framing work. Hargrove testified he did not need to be on the site regularly because he relied on "the talent of [N.T.] and the labor that he provides." (Tr. 113). Respondent did not prescribe or provide the materials to be used on the project (Tr. 138-39). The workers brought their own tools. CSHO Beck testified N.T. told him the forklift was operated by "his company" (Tr. 64) and the man-basket was made and owned by Hargrove (Tr. 73). However, that statement is not corroborated anywhere in the record.[12] Even if credible, the Court finds this statement, standing alone, insufficient to establish Respondent controlled the instrumentalities needed to complete the work.

[12] The undersigned notes the Secretary submitted into the record (without objection) the operator's manual for the forklift (Exh. C-6). However, the record is silent as to how CSHO Beck obtained the manual.

In support of his position Respondent was a covered employer, the Secretary points to N.T.'s testimony in which he stated Hargrove tells him what jobs to go to and when to be there (Tr. 168). There is no evidence, however, Hargrove mandated a particular day-to-day schedule for either N.T. or the workers. Hargrove's direction to N.T. as to where a project was and when it was to be completed was based on the terms of the contract and not necessarily indicia of an employer/employee relationship. The Court affords this testimony little weight because the framing work would be done at this location at this time, regardless of the status of N.T. or the workers.

The Secretary also relies on admissions by A.M. and N.T. during the inspection. A.M. was not called to testify. Rather, the Secretary relies on A.M.'s statement to CSHO Beck to which CSHO Beck testified. The sum of that testimony is as follows:

> Q: Do these employees identify with Richard Hargrove as their employer?
> A: Yes.
> Q: Who paid them?
> A: Mr. Hargrove.
> Q: How do you know?
> A: They told me in the interview.
> (Tr. 18-19)
>
> Q: And you spoke also to [A.M.]?
> A: Yes.
> Q: Did he tell you – did [A.M.] tell you that he worked for Richard Hargrove?
> …
> The Witness: Yes.
> (Tr. 174-75).

Given CSHO Beck's admission A.M. spoke broken English and the statements' lack of specificity, the Court gives this evidence little weight.

According to CSHO Beck's testimony, N.T. made similar admissions.[13] Although the

[13] N.T. contradicted much of CSHO Beck's testimony and did not recall CSHO Beck taking a written statement from him (Tr. 141, 149). The undersigned found N.T. to be a less than credible witness. When testifying in English on direct examination he appeared to be more conversant in English than when on cross examination. Even with the aid of an interpreter, N.T. was evasive in his answers on cross examination. N.T. repeatedly testified to a lack of memory of the written statement taken by CSHO Beck (Tr. 165, 171). However, he admitted the signature on the statement looked like his signature (despite counsel's repeated attempt to have N.T. deny it was his signature) (Tr. 141-42, 165). The name written by CSHO Beck on the top of the document is Noel, while the signature is NT's

Court found CSHO Beck to be a credible witness, the Court gives CSHO Beck's testimony regarding N.T.'s admissions during the inspection little weight. CSHO Beck admitted, and noted on Exhibit R-1, NT used "broken English." Like A.M.'s admissions, the statements attributed to N.T. are so vague as to lack probative value. With regard to N.T.'s written statement (Exh. R-1), the Court declines to give it weight.[14] The Court credits N.T.'s testimony he did not and could not read the statement before signing it. Therefore, the Court cannot conclude the words used by CSHO Beck were the words used by N.T., or that N.T. understood their meaning. To the extent the Secretary relies on this evidence, the Court finds it wanting.

In his brief, the Secretary notes Respondent's sole business is framing and both N.T. and the workers performing the framing work are integral to that business. The Court agrees the fact N.T. and his crew performed the entirety of the work for which Respondent contracted with the general contractor weighs in favor a finding of an employer/employee relationship. However, this factor is not dispositive, nor is it given as much weight as the factors related to control of the workers.

Finally, the Secretary argues Respondent conceded it is an employer when it identified N.T. as Respondent's "labor coordinator" and referenced the need for Hargrove and N.T. to "inspect and monitor the activities of workers on the jobsite." With regard to Respondent's use of the label "labor coordinator," the Court is unaware of any recognized definition or legal significance to the use of that label and the Secretary has offered none. The statement Hargrove and N.T. "inspect and monitor the activities of workers on the jobsite" is not inconsistent with Hargrove's testimony regarding his authority over the workers previously discussed. The Court does not find these representations sufficient to meet the Secretary's burden to show actual control.

Considering all of the factors set out by the Supreme Court in *Darden*, the Court finds the

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actual first name. N.T. admitted much of the factual content was accurate. To believe N.T., the Court would have to find CSHO Beck engaged in a complex fraud whereby, among other things, he closely matched N.T.'s signature. The undersigned declines to ascribe such devious motives to CSHO Beck or find he engaged in such an elaborate ruse. The Court finds the statement at Exhibit R-1 was taken by CSHO Beck and signed by N.T. and contains a recitation of CSHO Beck's understanding of N.T.'s responses to his questions.

[14] The Secretary did not identify, nor seek to admit N.T.'s written statement taken by CSHO Beck. Indeed, the Secretary objected to its admission (Tr. 67-68). It was admitted over that objection. Despite Respondent having offered the document and arguing for its admissibility at trial, Respondent argued it should be given little weight in its post-hearing brief.

Secretary has not established by a preponderance of the evidence Respondent was an employer within the meaning of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Items 1, 2, 3, 4, and 5, Citation 1, alleging repeat violations of the standards at 29 C.F.R. § 1926, are hereby vacated.

SO ORDERED.

/s/

Date: September 8, 2015

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia