UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. J. COOK ENTERPRISES, INC. and its successors, Respondent.	DOCKET NO. 13-0136

Appearances:

Virginia Fritchey, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas
For Complainant

Andrea Brock, Esq., Andrea Brock, P.A., Forrest City, Arkansas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On September 6, 2012, the Occupational Safety and Health Administration ("OSHA") inspected a worksite located at 6204 S. Caraway in Jonesboro, Arkansas. (Tr. 31). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleges two serious, and one other-than-serious, violations of the Act, with total proposed penalties of $7,600.00. Respondent timely contested the Citation. A trial was conducted in Memphis, Tennessee on February 12, 2014. The parties each submitted post-trial briefs for consideration.

Seven witnesses testified at trial: (1) David Brian, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Luis Valverde, an alleged employee of Respondent; (3) Alejandro Valverde Zuniga, an alleged employee of Respondent; (4) David Inman, the general contractor for the worksite; (5) Randy Pearson, insurance agent for Respondent; (6) Esther Witcher, Respondent's Certified Public Accountant; and (7) Joey Cook, owner of Respondent.

Jurisdiction

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act. (Tr. 16). The Court also finds that Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). Respondent is a small residential and commercial construction company with at least two employees. (Tr. 242–243).

Background

On August 25, 2012, Javier Valverde[1] died after falling 11.5 feet during the construction of a home located at 6204 S. Caraway in Jonesboro, Arkansas ("worksite"). (Tr. 16). After learning about Javier's death, Complainant conducted an investigation of the fatality, and charged Respondent with three separate violations of the Act. (Tr. 31). In response, Respondent contends that Javier Valverde and his crew, which included Luis Valverde (Javier's brother) and Freddy Martinez, were not Respondent's employees but were instead independent contractors. The primary disputed issue in this case is whether Complainant has properly characterized Respondent as the employer of Javier, Luis, and Freddy for the purposes of liability under the Act.

1. For the purposes of clarity, due to common last names, the Court shall hereinafter refer to the carpenters/framers at the site as "Javier, Luis, and Freddy."

CSHO Brian arrived at the worksite on September 6, 2012, twelve days after the accident, to begin his investigation. (Tr. 31, 81). CSHO Brian contacted David Inman, the general contractor for the worksite, discussed the purpose for his visit, and began examining the worksite. (Tr. 31–32). During the course of his investigation, CSHO Brian took photos of the worksite and conducted multiple witness interviews. (Tr. 34). Through his conversations with Mr. Inman, CSHO Brian learned that Respondent was also involved in the construction project. (Tr. 40–41). CSHO Brian ultimately concluded that Respondent was the framing crew's employer and issued the following three proposed violations of the Act.

Citation 1, Item 1

> Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:
>
> 29 C.F.R. § 1926.20(b)(2): The employer did not initiate and maintain programs for frequent and regular inspection of the job site, material and equipment to be made by a competent person(s).
>
> On or about August 25, 2012, and at times prior thereto, at the jobsite located at 6204 S Caraway in Jonesboro, Arkansas where employees were framing a single family residence. The employer did not ensure frequent inspections of the jobsite were conducted by a competent person. As a result an employee was not wearing fall protection and fell approximately 11 ½ feet to his death.
>
> The cited standard provides:
>
> Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

29 C.F.R. § 1926.20(b)(2).

Citation 1, Item 2

> Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:
>
> 29 C.F.R. § 1926.501(b)(13): Each employee(s) engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b)

On or above August 25, 2012, at the job site located at 6204 S Caraway, in Jonesboro, Arkansas. The employer did not ensure employees working 6 feet or more above a lower level were protected from falling 11 ½ feet to the ground below. As a result, an employee slipped and fell to his death.

The cited standard provides:

Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

29 C.F.R. § 1926.501(b)(13).

Citation 2, Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 1 as follows:

29 C.F.R. § 1904.39(a): The employer did not orally report the death of an employee or the in-patient hospitalization of three or more employees because of a work-related incident:

On or about August 25, 2012, at 6204 S Caraway in Jonesboro, Arkansas, the employer did not report to OSHA, a work-related death, within the 8 hour requirement.

The cited standard provides:

Within eight (8) hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. You may also use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742).

29 C.F.R. § 1904.39(a).

Applicable Law

To prove a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Discussion

As an initial matter, the Court notes that Respondent's post-trial brief did not address the merits of the alleged violations; instead, Respondent focused the entirety of its brief on whether it was properly characterized as the employer of Javier, Luis, and Freddy, the affected workers at the worksite. For jurisdictional purposes only, the Court found above that Respondent is generally an "employer" pursuant to Section 3(5) of the Act. However, the Court must further

determine whether Respondent was the employer of the specific framing/carpenter employees who were allegedly exposed to the hazards identified in the Citation items.

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). In order to determine whether Complainant has satisfied this burden, the Commission applies the factors laid out by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). *See Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (applying *Darden*). The Supreme Court identified the following factors for determining whether an employment relationship exists:

> 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.

Id. at 323 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)). "While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers." *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (citing *Don Davis*, 19 BNA OSHC 1477 (No. 96-1378, 2001)).

Respondent's Right to Control Manner and Means by Which the Product is Accomplished

The story of this case is based primarily on oral evidence, and is fraught with the typical problems and uncertainties that arise when doing business with friends and acquaintances without formal, written agreements. General Contractor David Inman agreed to build a small home for a woman that worked with his wife and with whom he attended church. (Tr. 166). Mr.

Inman orally offered the framing and carpentry work on the house to Joey Cook, Respondent's owner. (Tr. 166-168). To keep the homeowner's costs as low as possible, Mr. Inman would only pay $2.50 per-square-foot, which was apparently much lower than the $3.00-$4.50 per-square-foot rate common in this area. (Tr. 167-168, 239, 262).

Mr. Cook testified that he could not accept the job, because the price was too low. (Tr. 262–263). Instead, he agreed to pass along the job to Javier Valverde and his crew (with whom he had on ongoing business relationship from other jobs). (Tr. 263-265). There was not a lot of framing work available at the time, and Javier told Mr. Cook during a phone conversation that he would take the job, even at the lower rate. (Tr. 263-265). Mr. Cook then arranged a meeting between himself, Javier, and Mr. Inman, during which the blueprints for the house and details of the job were discussed. (Tr. 263-265). Mr. Inman testified that, although no written agreements were ever signed, he believed Mr. Cook to be the framing contractor, but that the work was simply been further subcontracted to Javier – as that was the common practice in his industry. (Tr. 170, 182-183).

When Mr. Inman came to the worksite during the first few days to check on the framing progress, Javier, Luis, and Freddy were there, as well as (at least during the first four days) Zach Cook (Joey Cook's son). (Tr. 103, 172). According to Luis and Mr. Inman, Zack participated in some of the framing work on the home, kept track of materials, and discussed changes to the blueprints with both Mr. Inman and Luis. (Tr. 103, 174). After those first few days, Zack left the worksite and moved on to work on another project. (Tr. 103, 108).

Although Zack Cook's presence during the first few days of work was the only evidence of Respondent's physical presence during work at the jobsite, neither party called Zack Cook as a witness at trial. As a result, there were more questions raised by the testimony concerning

Zack Cook, than there were answers given during the trial. Even Luis, whose credibility is somewhat called into question due to his pending litigation against Respondent on behalf of his brother's estate, referred to Zack Cook as "the boss" at one point, then corrected himself and said "the boss' son" at a later point. (Tr. 92, 125-126). Mr. Inman testified he was under the impression that Zack was acting as an "overseer", but also saw him "cutting some lumber, helping stand a wall, measuring, [and] carrying some lumber." (Tr. 173). Mr. Inman also discussed the details of framing the home, and some changes to the framing plans, with both Zack and Luis.[2] (*Id.*).

It is unclear what Zack Cook's actual position and role was at this worksite; how long he was there each day; who asked him to go to the worksite in the first place; what he was doing while he was there; whether he was directing work or being directed; whether he was just there to earn some money since there was no other work at the time; whether he was to be paid while on site; how he was to be paid while he was there; or by whom he was to be paid. Complainant argues in its post-trial brief that it was Respondent's responsibility to call Zack Cook to testify at trial, and that Respondent's failure to do so should weigh against them. The Court disagrees. Complainant bears the burden of proof in this case. The Court will not speculate on what Zack Cook would have testified to had he been called as a witness. *See Don Davis d/b/a Davis Ditching and Davis Ditching, Inc.*, 19 BNA OSHC 1477 (No. 96-1378, 2001) (citing *Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997)).

The only other evidence of Respondent having a representative at this jobsite was on the day before the accident. Joey Cook visited the site and asked Javier if his crew would be done by the following Sunday, because there was another project Joey Cook needed him to work on.

2. It is also worth noting that Mr. Inman testified that he had trouble communicating with the Spanish-speaking workers, which could explain why he included Zack Cook in jobsite discussions. (Tr. 174).

(Tr. 110). Yet, even considering the limited information concerning Zack Cook's presence at this site on certain days, and Joey Cook's visit the day before the accident, there is simply not enough information in the record for the Court to conclude that Respondent asserted control over the manner and means of the framing work being performed by Javier, Luis, and Freddy at this jobsite. Therefore, analysis of this *Darden* factor weighs against finding an employer/employee relationship between Respondent and Javier, Luis, or Freddy.

Skill Required

Javier, Luis, and Freddy were all experienced carpenters/framers—and according to Luis— had been framing for 14 years. (Tr. 85). He further testified that he did not need instruction on *how* to frame a house; rather, he only needed directions about *what* needed to be framed and then carried out those instructions based on his experience and expertise. (Tr. 127). CSHO Brian also testified that the affected workers were skilled framers, and Complainant has conceded as much in his brief. *See Compl't Br.* at 6. Therefore, analysis of this *Darden* factor weighs against finding an employer/employee relationship between Respondent and Javier, Luis, or Freddy. *See Southern Scrap Materials Co., Inc.*, 23 BNA OSHC 1596 (No. 94-3393, 2011) (noting level of skill and amount of experience of workers).

Source of Instrumentalities and Tools

The framing materials and supplies were provided directly by the homeowner. (Tr. 76). However, Respondent provided most of the tools that were used by the framing crew at the worksite. (Tr. 89, 248). Joey Cook testified that Javier and his crew had some of their own tools, but they were old and worn out, so he allowed them to borrow tools and equipment on this and other jobs prior to this one.[3] (Tr. 248). On this particular job, Respondent allowed Javier and his

3. Joey Cook testified that he did this for other subcontractors that he worked with as well. (Tr. 248). In some instances, he allowed subcontractors to ultimately purchase the tools that they had been borrowing. (Tr. 249).

crew to take the tools home with them so that they could drive directly from their homes to the worksite, rather than having to stop by Respondent's home to collect them each day. (Tr. 104). Joey Cook testified that the practice of allowing subcontractors to borrow tools is common in his business practice and the industry in general. (Tr. 249).

Providing tools to workers is typically an indication that an employment relationship exists. *See Loomis Cabinet v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938, 942 (9th Cir. 1994) (holding Commission's findings of employment relationship supported by substantial evidence, including provision of tools). The Court finds that this *Darden* factor does tend to support the finding of an employment relationship, though, in light of Joey Cook's undisputed testimony regarding his and the industry's practice, perhaps not as strongly as Complainant argues.

Location of the Work

The worksite in this case was a home construction site located in Jonesboro, Arkansas, which was controlled by Mr. Inman and the homeowner. (Tr. 31). The location of this worksite does not, in and of itself, weigh heavily in terms of a possible employment relationship, because it was not Respondent's place of business. However, it is worth noting that on *past projects* in which Respondent worked with Javier and his crew, the framers would frequently report to Joey Cook's home each morning and then be transported as a group to a jobsite location. (Tr. 90, 253–254, 269–270). On this particular job, the framers did *not* report to Mr. Cook's house each morning, nor were they transported there as a group each day. (Tr. 104). Javier, Luis, and Freddy traveled directly to the jobsite at issue in this case each day in their own personal vehicle. (Tr. 104). This fact is consistent with Joey Cook's testimony describing this job as a unique project, which he passed along to Javier and his crew so they could have some work. Therefore,

analysis of this *Darden* factor weighs against finding an employer/employee relationship between Respondent and Javier, Luis, or Freddy on this job.

Duration of the Relationship

According to Luis, he and Javier had worked exclusively for Respondent on various jobs for the year-and-a-half period prior to the accident. (Tr. 86–87). An exclusive relationship of this duration can give rise to a reasonable inference that an employment relationship exists. However, it is common in the construction industry to frequently use the same subcontractors with whom a positive business relationship has been established. (Tr. 167, 219). While Javier and his framing crew worked only with Respondent for the previous year-and-a-half, it is important to note that Respondent had also worked with approximately 15 other subcontractors on various projects during that same period. (Tr. 237). The ongoing business relationship between Respondent, Javier, Luis, and Freddy for a significant period of time weighs in favor of an employment relationship.

Respondent's Right to Assign Additional Projects

There was very little testimony regarding any purported right Respondent had to assign additional projects to Javier and his crew. After Javier died, Luis and Freddy never went back to the worksite and never received any further communications from Respondent regarding the job – which was only 90-percent complete. (Tr. 86, 138-139).

Complainant argues that Respondent could, and did, assign additional projects to Javier and his crew. Complainant points to Joey Cook's visit to the jobsite the day before the accident to tell Javier that he needed them on another job the following Monday. (Tr. 110). This undeveloped testimony is problematic for a couple of reasons: (1) there was no evidence to suggest whether Respondent and Javier had previously agreed on the upcoming project, thus

calling into question whether the project was something that was assigned, or merely offered as an additional opportunity for work; and (2) there is no evidence to suggest that Respondent had any control over the work being performed at this site, and whether this visit was intended for Joey Cook to determine whether Javier's crew could be available to work on the other project, or whether Respondent needed to find another subcontractor.

The lack of convincing evidence with respect to this factor leads the Court to conclude that Complainant failed to prove that Respondent had the right to assign additional projects to Javier and his crew, as opposed to offering them the opportunity for new jobs as subcontractors.

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

Complainant's evidence on this particular factor was also unclear. Luis Valverde's testimony often overlapped between work on this particular site, and work on other past jobs obtained through the crew's relationship with Respondent. Complainant elicited testimony about numerous past jobs to establish historical evidence of an employer/employee relationship. The record, however, indicates that this particular project, due in large part to the low pay offered by the general contractor, was handled differently than other past projects. It was difficult in some instances, especially during Luis's testimony, to determine whether he was testifying about events on this jobsite or past jobsites.

For example, Luis testified that Zack Cook decided when Javier's crew could leave at the end of each day. (Tr. 92). But he went on to say that when Zack was not there, Paul (a third party painting subcontractor) would decide when Javier's crew would leave each day. (Tr. 90-92). However, Zach worked with Respondent and Javier's crew on this project (on certain days) and regularly on other past jobs. (Tr. 92, 152, 269-270). It was unclear whether Paul worked at this particular project. Luis also testified that Paul drove Javier's crew to the worksite, and

described ongoing payments from Joey Cook by check, but in that same line of testimony, acknowledged that Javier payed Luis's wages out of lump sum project checks received from Joey Cook, and that he, Javier, and Freddy drove themselves to this jobsite in their own vehicle. (Tr. 90, 93-95, 104, 152). Luis's testimony, at several points, was simply unclear. Ultimately, the Court finds that Complainant failed to establish that Respondent controlled when or how long Javier and his crew worked at this site.

Method of Payment

There are two things to consider with respect to this particular factor: (1) the payment history between Respondent and Javier's crew on past projects; and (2) the payment for this particular project. The parties dispute how Respondent historically paid Javier and his crew on past projects. Luis testified that sometimes they were paid by the hour and sometimes they were paid by the project. (Tr. 94–95). In either case, Luis said that they were paid consistently on a bi-weekly basis.[4] (Tr. 140). Joey Cook, on the other hand, testified that he only paid Javier lump sum amounts by the project. (Tr. 238, 245). Javier, in turn, paid Luis and the other framers. (Tr. 95). The financial records introduced in evidence supports Respondent's version of events. (Ex. R-8).

The checks were not issued to Javier in any discernible temporal pattern. There were some days on which Javier was issued three different checks, each with a different amount and a memo reference to the project for which payment was being made. (Ex. R-8). Although some checks were issued two weeks apart, there were occasions when as little as two days, and

4. Luis claimed that Zack kept a log of the hours worked by each framer. (Tr. 94). Without the log itself, which was not introduced in evidence, it is unclear whether that was in fact true; whether Luis was once again overlapping in his testimony between this particular project and other past projects; and is also inconsistent with the financial records introduced in the records which indicated lump sum payments to Javier per project.

sometimes up to three months, would pass between checks.[5] (*Id.*). To the extent that Luis perhaps received payment every two weeks suggests more about the employment relationship between Javier and Luis than it does about the relationship between Respondent and Javier or his crew.

Second, with respect to this particular job, Javier and his crew were not paid at all by Respondent. (Ex. R-6). Instead, payment for their framing work was issued directly by the homeowner through a check made out to Javier Valverde. (Tr. 186-187; Ex. R-6). Respondent did not receive any payment for this particular project, nor was there any evidence that Zack Cook was paid for the time he spent working at the jobsite. (Tr. 187-188). The evidence relating to this factor weighs against a purported employment relationship between Respondent and Javier, Luis, or Freddy, and also tends to support Joey Cook's testimony that this particular job was handled differently than previous projects.

Hired Party's Role in Hiring and Paying Assistants

Complainant contends that Respondent played a significant role in Javier's decisions to hire and pay assistants. While Joey Cook may have had some input on the number of workers that would be necessary to complete particular jobs within the timeframe agreed upon, the responsibility to recruit and pay individual workers fell to Javier. (Tr. 137, 241, 245). He specifically decided who to hire on particular jobs, which often ended up being his own relatives and friends. (Tr. 136–137; 241–242). Joey Cook testified that, on past jobs,[6] he paid Javier the same amount regardless of how many framers Javier decided to have on his crew. (Tr. 241-242).

There was also no indication in the record that Respondent had any authority to fire the

5. It is also important to note that Joey Cook testified that Javier and his crew were often paid in full for jobs where their portion of the work was complete, yet work continued to be performed by Respondent's other subcontractors. (Tr. 258–259; Ex. R-8).

[6] Again, Respondent did not pay Javier or his crew for this job. Javier and his crew were paid by the homeowner.

workers that Javier chose to bring with him to this, or other, worksites. For example, after the accident on this site, Luis and Freddy did not do any further work through Respondent. (Tr. 86, 121, 139, 144, 247, 274). They were not fired, nor did they quit; they simply ended their working relationship with Respondent. It is also worth noting that neither Luis nor Freddy made claims for unemployment benefits at the conclusion of their working relationship with Respondent. (Tr. 274). Therefore, analysis of this *Darden* factor also weighs against finding an employer/employee relationship between Respondent and Javier, Luis, or Freddy on this job.

Whether Work is Part of the Regular Business of Respondent

Respondent is in the business of residential and commercial construction. (Tr. 217–218). Depending on the job, Joey Cook testified that he works as a general contractor or subcontractor. (*Id.*). When he works as a general contractor, Mr. Cook stated that he generally subcontracts out most of the work. (Tr. 218). Even when he acts as subcontractor, he testified that he often further contracts the work out to other subcontractors. (Tr. 219). This includes carpentry/framing work. (*Id.*).

Citing to an ALJ decision, Complainant contends that "when a party is hiring workers to perform work that is part of its regular business, the implication is that the persons hired are employees rather than independent contractors." *Daniel Crowe Roof Repair*, 23 BNA OSHC 2001 (No. 10-2090, 2011) (citation omitted). While that might be true in some cases, both Mr. Inman and Mr. Cook testified that it is a typical practice in the industry for subcontractors to further contract work out to other subcontractors. Further, it is important to note that Cook testified that he has worked with multiple framing contractors over the last couple of years. (Tr. 219). The work on this project is typical of the kind of work Respondent subcontracts on a

regular basis. However, that fact does little to prove or disprove the existence of an employment relationship in this particular case.

Provision of Employee Benefits and Tax Treatment

The parties agree that Respondent did not provide any employee benefits to the affected workers, nor did it deduct any taxes from the checks issued to Javier. (Tr. 242-243). As noted by Complainant, the Commission has found that the absence of federal income tax documentation is not dispositive as to a worker's status as employee or independent contractor. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (00-1402, 2010) ("[F]ailure to withhold federal income and social security taxes was imply an attempt to hide [the worker's] true status, not a bona fide reflection of an authentic independent contractor relationship . . . ."). The Commission's conclusion in that case must also be viewed in light of the numerous other factors that clearly support a finding of an employment relationship. *See id.* (worker's hours were specifically set, specific jobs assigned each morning, etc.). In this case, Respondent's financial records support Joey Cook's testimony that Javier and his crewmembers were independent contractors, and Complainant produced no records which could contradict that fact.

Also, Javier purchased his own worker's compensation policy to cover the individual framers he used on this and other projects. (Tr. 205-206, 214; Ex. R-4). Although not definitive, this is certainly persuasive evidence to suggest that Javier was the employer of the framers on this project, rather than Respondent.[7] Analysis of the evidence relevant to this *Darden* factor weighs against finding an employer/employee relationship between Respondent and Javier, Luis, or Freddy.

[7] Complainant argues only that Respondent was Javier's and his crews' employer. No argument of alternative liability under a multi-employer, controlling employer theory was asserted.

Conclusion

As noted above, it is Complainant's burden to establish that an employment relationship existed between Respondent and Javier Valverde, Luis Valverde, and Freddy Martinez. A lack of any documentation memorializing the business relationships on this particular project, as well as the failure to elicit trial testimony from a key witness created a record full of unanswered questions. Considering the totality of the circumstances discussed above, the Court finds that Complainant failed to meet its burden. Accordingly, the Citation items proposed in this case will be VACATED.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Items 1 and 2; and Citation 2, Item 1 are hereby VACATED.

SO ORDERED.

/s/ Brian A. Duncan

Date: July 22, 2014
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission