UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. RG DESIGN EXPRESS INC. Respondent.	OSHRC DOCKET NO. 15-1131

Peter Nessen, Esq. and Jing Zhang, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL
For Complainant

Igor Gluzman*, pro se*
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the Act). The Occupational Safety and Health Administration (OSHA) commenced an inspection of a RG Design Express, Inc. (Respondent) worksite at 34420 North Converse Lane, Ingleside, Illinois (Worksite) on April 23, 2015. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (Citation) to Respondent alleging three serious violations of the Act[1] with a penalty of $4,400.00. The Citation was issued on May 27, 2015. Respondent filed a timely *Notice of Contest* on June 5, 2015. This case was designated as a Simplified Proceeding, where the filing of a Complaint and Answer are not required. *See* 29 C.F.R. § 2200.200(b). A hearing was conducted in Chicago, Illinois on November 20, 2015. The parties have filed post-hearing briefs/statements with the Court.[2]

[1] The first serious citation has two items and alleges a violation of 29 C.F.R. § 1926.304(f). The second serious citation has one item that alleges a violation of 29 C.F.R. § 1926.501(b)(13).

[2] Respondent filed a post-hearing statement with attachments that were not offered during the hearing and were not admitted as evidence. Even though the exhibits were not timely submitted, the Court will discuss those attachments

Factual Background

RG Design Express, Inc. is a corporation owned and operated solely by Igor Gluzman. (Tr. 91–92). Respondent serves as a general contractor licensed to build homes in Chicago. (Tr. 92). OSHA initiated the inspection at the Worksite after receiving a complaint alleging that there were fall hazards at the Worksite. (Tr. 26, 70). Compliance Safety and Health Officer Gary Weil (CSHO) was assigned to conduct the inspection which commenced on April 23, 2015. (Tr. 24–26).

The CSHO arrived at the Worksite on the morning of April 23, 2015. (Tr. 26, 72). As the CSHO was approaching the house, a man, who was later identified as Marcin Dabrowski, was walking out of the garage. (Tr. 27–28). The CSHO introduced himself, explained the nature, scope, and purpose of the inspection and presented his credentials. (Tr. 28). Mr. Dabrowski could understand and communicate in English and graduated from high school in the United States. (Tr. 107–108, 110–111). The CSHO asked to speak to the Project Manager. (Tr. 28). Mr. Dabrowski identified himself as the "foreman" for Respondent. (Tr. 28, 29, 47, 57-59, 72, 85). Mr. Dabrowski also informed the CSHO that another employee of RG Design, Mr. Vitali Doutka, was also at the Worksite. (Tr. 29). According to Dabrowski, Respondent was engaged in cabinetry work that day. (Tr. 28). At no time during the inspection did either Mr. Dabrowski or Mr. Doutka indicate to the CSHO that they were independent contractors of Respondent. (Tr. 29–30 and 58).

The CSHO observed two portable table saws, a DeWalt saw and a Bosch saw, in the garage. (Tr. 33; Ex. C-4, C-8). Neither saw was equipped with the proper guarding for the rotating saw blade. (Tr. 33; Ex. C-6, C-8). The DeWalt saw was connected to an extension cord that had its power light on, indicating that it was energized. (Tr. 36; Ex. C-4). The DeWalt saw had a splitter but was missing an adjustable hood or anti-kickback fingers for the blade. (Tr. 34–35, 37; Ex. C-6). The Bosch saw was five or six feet away from the DeWalt saw and had a splitter but was also missing an adjustable hood and anti-kickback fingers.[3] (Tr. 38–39, 43–44; Ex. C-8). The CSHO observed wood pieces[4] and saw dust around the two saws, which were

in this Decision as the tendering of those attachments does not alter the Court's conclusions, which are supported by the evidence adduced at hearing.

[3] Exhibit C-8 does not show the Bosch saw was energized. The CSHO testified he did not test the saw to determine if it was energized. (Tr. 38). The CSHO speculated that the employees may have been switching the two saws to the extension cord and that is why it does not show that it was energized. The CSHO testified that this is common practice in the construction industry. (Tr. 43).

[4] Exhibit C-6 shows a piece of cabinetry trim that had been ripped. The CSHO testified that this wood material is

consistent with the type of wood that was being cut for cabinetry. (Tr. 36, 44–45 and 52; Ex. C-4, C-8).

Dabrowski stated to the CSHO that: (i) they had been using both saws to do "finish trim cabinetry work" that day; (Tr. 46); (ii) they did not have guards for the saws at the Worksite; and (iii) the guards would not allow them to cut the trim pieces that they needed because of the narrowness of the cuts. (Tr. 45–46, 47, 89). When the CSHO requested to see what work Doutka and Dabrowski were doing that day, Dabrowski led him inside the house where Doutka was installing cabinetry with the trim pieces. (Tr. 52; Ex. C-9).

The CSHO was next shown the second floor balcony that was the subject of the complaint to OSHA. (Tr. 53; Ex. C-10). The second floor balcony had an unfinished railing system that consisted only of a top rail. (Tr. 57; Ex. C-10, C-11). Dabrowski informed the CSHO that they had installed the partial railing system the day before the inspection. (Tr. 57, 82). Dabrowski stated that they did not use any fall protection when installing the railing the previous day. (Tr. 57). Dabrowski informed the CSHO that there were no fall protection systems at the Worksite, and the CSHO did not observe any fall protection systems during the course of the inspection.[5] (Tr. 57). The second floor was more than six feet above the first floor, and the railing system was missing a mid-rail halfway between the deck and the top rail. (Tr. 55–56, 66–67; Ex. C-10; C-11). Dabrowski informed the CSHO that the morning of the inspection that they had glued the stairs and the deck and therefore the second floor could not be accessed. (Tr. 81).

The CSHO conducted a closing conference with Gluzman over the phone on the same day of the inspection after the inspection had been concluded. (Tr. 62). Gluzman was at Home Depot to buy a new blade for the DeWalt saw when he held this conversation with the CSHO. (Tr. 10, 78, 100-101, 103, 105). During the closing conference, Gluzman was informed of the nature, purpose, and scope of the inspections, as well as the hazards observed by the CSHO. Gluzman and the CSHO discussed how those hazards could be abated. (Tr. 62). Gluzman stated that he did not have any guards at the Worksite but would obtain and install them. (Tr. 62–63,

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the same wood cabinet material that was being installed inside the home. (Tr. 39–40). This information undermines the testimony of Mr. Gluzman that the workers were doing no finishing work and the saw blades that are shown in the pictures are not the proper blades for cutting cabinetry finishing. The Court can infer based upon the evidence the saws were utilized to cut the cabinetry trim and when the employees could not get the trim correctly cut that is when Mr. Gluzman went to Home Depot to purchase the correct blade. Thus, while Mr. Gluzman argues the blades shown are not the "right" blades to cut the cabinetry trim does not mean that they were not used to attempt to cut the cabinetry trim before it was concluded a different blade was needed. *Okland Constr. Co.,* 3 BNA OSHC 2023, 2024 (No. 3395, 1976) (reasonable inferences can be drawn from circumstantial evidence).

[5] This conflicts with testimony that the torn down scaffolding was in the garage. (Tr. 120–122).

65, 103; Ex. C-3). Gluzman told the CSHO until that had been done he would instruct the workers not to use the equipment until he obtained the guards. (Tr. 62, 101–103). Gluzman also stated he would instruct the workers not to go up to the second floor balcony until the spindles were installed. (Tr. 63). During the closing conference, Gluzman did not claim that any of the workers at the Worksite were independent contractors nor that the workers owned the two saws at issue. (Tr. 63–64). Neither the CSHO nor Gluzman provided testimony that would suggest OSHA did not have Respondent's permission to be on the property—a position taken by Respondent for the first time at the hearing. (Tr. 9–10).

Jurisdiction

The Commission has jurisdiction over this action pursuant to section 10(c) of the Act by the filing of Respondent's *Notice of Contest*. 29 U.S.C. § 659(c).

Respondent Is Engaged in Interstate Commerce

The Court finds Respondent is engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See Slingluff v. OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005) (noting that economic activity of construction as an aggregate affects interstate commerce). Complainant has the burden to establish this element of coverage. 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, 1015 (9th Cir. 1976); *U.S. v. Dye Constr. Co*., 510 F.2d 78, 83 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027, 1030 (2d Cir. 1974); *see also Piping of Ohio, Inc*., No. 91-3481, 1993 WL 119649, at *3-4 (O.S.H.R.C.A.L.J. Apr. 5, 1993). Commerce, according to section 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, 1228-29 "commerce" means 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 *Jones Co.*, the Commission found "[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 Eng'rs, 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 as established by Complainant, the Court finds it is engaged in a business affecting interstate commerce. (Tr. 34, 97).

Respondent Is an Employer

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 argues it is not an employer. (Tr. 9). Respondent argues that all the individuals working at the Worksite were subcontractors that had their own company and insurance. (Tr. 16). Respondent's position that Dabrowski and Doutka were independent contractors was raised for the first time at hearing. The CSHO was never informed by Dabrowski, Doutka or Gluzman during the inspection that there was no employer/employee relationship.

It is Complainant's burden to prove coverage under the Act by demonstrating that the cited entity is an employer. *Allstate Painting & Contracting Co*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005)(holding that an employer controls manner and means of production); *Don Davis d/b/a/ Davis Ditching*, 19 BNA OSHC 1477, 1481 (No. 96-1378, 2001) (citing *Timothy Victory*, 18 BNA OSHC 1023, 1027 (No. 93-3359, 1997)). CSHO Weil testified that Dabrowski and Doutka viewed themselves as employees of Respondent. Dabrowski repeatedly affirmed to the CSHO that he was the foreman of Respondent and that he "worked for RG Designs." (Tr. 28–29). Dabrowski informed the CSHO that there was another employee (Doutka) at the Worksite on the day of the inspection doing cabinetry work. (Tr. 29). Testimony indicated that there was no language barrier with Dabrowski—he communicated and understood English and finished high school in the United States. (Tr. 107–108, 110–111). Gluzman affirmed that it is unlikely that Dabrowski and the CSHO would have a misunderstanding as Dabrowski finished high school and knew English. (Tr. 111).

The Act places duties on "employers" to protect the health and safety of "employees." 29 U.S.C. § 654(a). The Act requires each employer to comply with occupational safety and health standards and regulations promulgated under the Act. *Id*. An employer is a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). "Person" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). An employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(3). As the Commission noted in *Davis Ditching*, this definition is "unhelpfully circular." *See* 19 BNA OSHC at 1480.

The Act's definitions of "employer" and "employee" incorporate longstanding master-servant principles that were developed under the common law of agency. *See Froedtert Mem'l Lutheran Hosp.*, 20 BNA OSHC 1500, 1505 (No. 97-1839, 2004) (citing *Nationwide Mut. Ins.*

Co. v. Darden, 503 U.S. 318 (1992)). Those principles, as applied to the determination of whether a person is an owner or an employee, focus on the person's legal and actual ability to exert control over the organization. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)("[T]he common-law element of control is the principal guidepost that should be followed . . . ."). "Being remedial and preventative in nature, the [OSH] Act must be 'construed liberally in favor of the workers whom it was designed to protect[.]' " *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979) (internal citation omitted).

In determining whether Complainant has satisfied his burden to establish a cited entity as an employer under the Act, the Commission has applied the common law agency doctrine enunciated in *Darden*.[6] *See, e.g., All Star Realty Co., Inc., d/b/a All Star Realty & Construction, Co.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) (applying *Darden* factors and noting that the Secretary carries the burden of proof) ; *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1204 (No. 05-0839, 2010)(discussing *Darden* factors as a function of muti-employer liability) *aff'd.*, 442 Fed.Appx. 570 (unpublished) *Sharon & Walter Constr. Co*., 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (reciting *Darden* factor application); *AAA Delivery Servs., Inc*., 21 BNA OSHC 1219, 1220 (No. 02-0923, 2005)(same). In *Darden*, the Court considered primarily "the hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323. *See also Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC at 1506 (citing *Clackamas*, 538 U.S. at 448) (recognizing the company's control over the worker is the "principal guidepost" to determine the existence of an employment relationship). Other factors

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[6] 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: (i) whom do the workers consider their employer; (ii) who pays the workers' wages; (iii) who has the responsibility to control the workers; (iv) does the alleged employer have the power to control the workers; (v) does the alleged employer have the power to fire, hire, or modify the employment condition of the workers; (vi) does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and (vii) 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. Applying the "economic realities test" to this set of facts, the Court would still find Respondent was an "employer" under the Act.

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

A. Respondent and Work Location

RG Design Express, Inc. is a corporation owned and operated solely by Igor Gluzman. (Tr. 91-92). Respondent serves as a general contractor licensed to build three-story homes in Chicago. (Tr. 92). Mr. Gluzman has been a general contractor for over thirty years and has been serving in that role in the United States since 2001. (Tr. 93). Gluzman served as the general contractor for the work being done at the Worksite. Respondent provided the workplace for Dabrowski and Doutka to perform their duties. The work performed by Dabrowski and Doutka is an integral part of the regular business of Respondent, which is a long-standing corporate entity that has provided general contracting services in the Chicago area for 15 years. That Respondent has continuously provided the place where the work must be performed during that time supports a finding that the professional working relationship between Respondent and Dabrowski and Doutka was that of employer-employee.

B. Duration of Business Relationship with Dabrowski and Doutka

Respondent considers Dabrowski and Doutka each to be an "independent entity" or "independent contractor" with which Respondent has a contractual relationship. Gluzman testified that if it is a big job like the one at the Worksite he would do a contract. (Tr. 97). However, at the hearing and given the opportunity to provide a copy of that contract after hearing in conjunction with its post-hearing submission, Respondent failed to produce the contract. It is undisputed that Respondent, Dabrowski and Doutka had a long-standing professional working relationship. Gluzman testified that Dabrowski and Doutka work for Respondent nine to ten months every year. (Tr. 94). He testified that Doutka has worked for Respondent for seven years. (Tr. 97). Dabrowski has worked for Respondent for nine or ten years. (Tr. 114). Dabrowksi and Doutka were free to work on other non-Respondent projects when Respondent does not have any work for them to perform. (Tr. 95-96). So in this regard,

they were not exclusive to Respondent. However, the Court finds that Dabrowski and Doutka had a long-term relationship with Respondent, which supports a finding that their professional working relationship was that of employer-employee.

C. Selection, Payment, Benefits and Tax Treatment

There was no testimony at the hearing regarding the establishment of wages, *i.e.*, what factors determined their rate of pay and whether any benefits were paid to Dabrowski and Doutka by Respondent. Dabrowski and Doutka were hired and selected by Gluzman to perform finishing, flooring, drywall, and cabinetry work at the Worksite—jobs which they were hired to perform over the years at other Respondent projects. (Tr. 94, 99-101). Gluzman testified that he would write checks to the company of Dabrowski[7] and Doutka and every year he would do a 1099[8] for them. (Tr. 94–97). Respondent determined the rate and amount of payment which Dabrowski and Doutka would receive under their arrangement. Dabrowski and Doutka received their compensation only from Respondent for the work performed at this Worksite. (Tr. 95-96).

The Court notes Respondent was provided the opportunity to address the independent contractor issue by providing a copy of the contract with them which defines their contractual relationship as it relates to this Worksite and to provide copies of Form 1099 issued to Dabrowski and Doutka. When Respondent submitted its post-hearing statement, it did provide copies of Form 1099's issued for 2012 – three years before the year in which this inspection took place. The production of 2012 Form 1099s for Dabrowski and Doutka does not convince the Court that this same type of arrangement was in place in 2015 when the inspection occurred. The Court gives the 2012 Form 1099s no weight as they do not bear on the type of relationship which existed in 2015. Employment arrangements and relationships change over time. It could well be the relationship of Dabrowski and Doutka started out as independent contractors in 2012; however, there is no evidence except Mr. Gluzman's testimony that this relationship continued to exist in 2015. *See, e.g., KSP Enters., Inc.*, 24 BNA OSHC 2250, 2259 (No. 13-0647, 2014) (ALJ Calhoun) (holding 1099 forms were inconclusive on matter of employment relationship because, amongst other things, respondent did not submit 1099 forms for the time period at issue in the case).

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[7] Respondent provided a letter in its post-hearing submission which established an EIN number for Mr. Dabrowski which did not indicate he had a separate business entity from his individual status. This letter from the IRS does not provide any new information on which is can be concluded that Dabrowski was not an employee of Respondent.

[8] The Court takes judicial notice of the term "1099" as referring to IRS Form 1099-MISC which is used to "report payments made in the course of trade or business to a person who is not an employee or to an unincorporated business." *See* www.irs.gov.

Respondent's failure to provide a contract on which to assess its business relationship with Dabrowski and Doutka and its failure to provide the most recent Form 1099 that would have been issued to Dabrowski and Doutka for 2014 undermines its claim of an independent contractor relationship.[9] At the time of the inspection, Dabrowski and Doutka viewed themselves as employees of Respondent and were paid directly by Respondent. Dabrowski repeatedly affirmed to the CSHO that he was the foreman of Respondent and that he "worked for RG Designs." (Tr. 28–29). Dabrowski informed the CSHO that there was another employee (Doutka) at the Worksite on the day of the inspection doing cabinetry-type of work. (Tr. 29) (emphasis added). Testimony indicated that there was no language barrier with Dabrowski—he communicated and understood English and finished high school in the United States. (Tr. 107–108, 110–111). Gluzman affirmed that it is unlikely that Dabrowski and the CSHO would have a misunderstanding as Dabrowski finished high school and spoke English. (Tr. 111). Respondent's tax treatment of Dabrowski and Doutka does not establish the existence of an independent contractor relationship. Dabrowski and Doutka were selected and paid according to the terms established by Respondent. These facts support a finding that their professional relationship was that of employer-employee.

D. Source of Instrumentalities and Tools

Gluzman testified Respondent does not own tools, nor did it provide tools to Dabrowksi or Doutka. (Tr. 97). Respondent argues that, as independent contractors, Dabrowski and Doutka owned their own tools, drove their own cars, and bought their own gas. (Tr. 95–96). Those arguments are not persuasive upon close examination of the evidence. All witnesses testified that on the morning of the inspection Gluzman was at Home Depot buying a new blade for the DeWalt saw. (Tr. 10, 78, 100–101, 103, 105). Dabrowski, whom Gluzman testified owned the DeWalt saw, did not pay him back for the blade.[10] (Tr. 97, 110). Based on these facts, the Court finds that it is reasonable to infer that Dabrowski did not own the saw—not only did Gluzman pay for the new saw blades, but he also told the CSHO that he would outfit both saws with the required guards. Accordingly, the Court finds that Respondent provided the DeWalt and Bosch saws used by Dabrowski and Doutka.

In a true independent contractor relationship, the skilled tradesman provides all the tools

[9] While Dabrowski and Doutka could have started out as independent contractors, due to the length of time of their relationship with Respondent, it may have changed over time to an employer-employee relationship.

[10] Normally a businessman purchasing supplies on behalf of another expects that he will be repaid, unless, of course, the individual making the purchase owns the equipment for which the supplies were intended.

and equipment necessary to do their job. The record is replete with Respondent providing Dabrowski and Doutka tools and equipment to do their work. Gluzman testified that the scaffold used to secure the top railing and spindles was provided and owned by Respondent. (Tr. 122). Respondent ordered and provided the wood and cabinets used by Dabrowski and Doutka to perform their jobs. (Tr. 102). Gluzman told the CSHO that he would buy guards for the two saws. (Tr. 62-63, 65, 103; Ex. C3). Again, in a true independent contractor relationship, a general contractor usually does not purchase tools and equipment for use by the independent contractor. Respondent bought and owned equipment that it controlled and permitted Dabrowski and Doutka to use in the course of their employment. This arrangement supports a finding that the relationship was employer-employee.

E. Assignment of Additional Duties

The Court turns its attention to the conflict between Dabrowski's statement to the CSHO that he was the foreman on the Worksite and Respondent's contention that he was not a foreman. If Dabrowski was Respondent's foreman, this suggests that Respondent was authorized to assign additional duties to Dabrowski, which is not the case in a typical independent contractor relationship, wherein the duties of the independent contractor are defined by contract.[11] Dabrowski repeatedly told the CSHO he was the foreman. (Tr. 28, 29, 47, 57–59, 72 and 85).[12]

When an OSHA inspection is commenced, the CSHO typically requests to speak to the superintendent, project manager, foreman, or other person with authority on the worksite. The CSHO in this case followed that procedure after he introduced himself to Dabrowski, who represented that he was the foreman. Dabrowski showed knowledge of the Worksite, the tools being used, other employees on the Worksite, and work that had been performed. Skilled tradesman contracted for one specific job would normally not be knowledgeable on these matters. Yet, Dabrowski illustrated extensive knowledge of the project and was able to answer the questions of the CSHO.

Gluzman, responding to whether or not he could offer a reason why Dabrowski would hold himself as the foreman, indicated that Dabrowski had worked for Respondent for five or six

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[11] Also, establishing whether Dabrowski was the foreman at the Worksite will assist in the resolution of issues to be discussed *infra* on knowledge and consent to the inspection.

[12] As part of Respondent's post-hearing statement a purported unwitnessed statement signed by Dabrowski attempts to convince the Court that Dabrowski did not make these statements and was not the foreman. The Court gives no weight to the unwitnessed statement as it contradicts the CSHO's testimony, which the Court finds credible on this issue. The statement also is undermined by Gluzman's own testimony about Dabrowski's ability to deal with inspectors discussed in the narrative.

years, and that he knew from past jobs that inspectors would come to the worksite to inspect work for permits. In those instances, Gluzman testified that he gave Dabrowski permission to deal with the inspectors, show the inspector the blueprints, what work had been done, and take the inspector wherever he wants. Based upon Dabrowski having this role in the past, Gluzman concluded that is why Dabrowski stated to the CSHO that he was the foreman. (Tr. 107–108).

Clearly, Dabrowski was assigned additional duties to deal with inspectors in the past. This grant of authority to deal with inspectors was not revoked, and Dabrowski exercised that authority in the present case just as he had done in the past. The authority to speak and act on behalf of Respondent is indicative of an employee-employer relationship, because these types of duties are normally not given to contractors hired for one specific job aspect. Accordingly, the Court finds Dabrowski was Respondent's foreman.

F. Ability of Respondent to Control and Discretion over When and How Long to Work

As *Darden* and its progeny underscore, it is the ability to control work that is the most important consideration in determining whether an employer/employee relationship exists. The Court concludes Respondent retained significant and close control over Dabrowski and Doutka to render them employees. Respondent, through Gluzman, during the closing conference with the CSHO, demonstrated control. Gluzman said he would instruct the workers not to use the equipment until he obtained the guards. (Tr. 62). In addition, Gluzman testified that if he saw them (Dabrowski or Doutka) doing anything unsafe on the Worksite he would stop the job. (Tr. 98–99). While Respondent did not mandate a specific start and end time for the workday, *i.e.*, from 8:00 a.m. to 5:00 p.m., it did establish a preferred starting time (no later than 8:00 a.m.) and a maximum daily hour total (no more than six hours), because completion of the project was time sensitive. Gluzman testified that he needed the "term of their time". (Tr. 97–98).

The Court finds that Respondent exercised significant control over Dabrowski's and Doutka's work. Gluzman testified that sometimes he relies on the expertise of subcontractors to do their work without direction and sometimes he does not. (Tr. 112). This last comment undermines the finding of an independent contractor relationship since in most contractual relationships, the general contractor does not question the expertise of the individual to interfere in the end work product. Nevertheless, Gluzman made the call on the appropriate types of blades to do the finishing job that would normally be left to the tradesman. In addition, Gluzman bought new blades for saws he claimed not to own, promised to purchase new guards for those saws, and ensured that the scaffolding was used to place the spindles on the second floor. These

actions are more indicative of an employer exerting control over the manner and means of how his employees carry out their respective job duties than that of a general contractor relying on the judgment and expertise of hired tradesmen to do the job.

For the foregoing reasons, the Court finds that Dabrowski and Doutka were employees of Respondent for the purpose of coverage under the Act.

Consent Was Provided For the Inspection

Respondent contends the CSHO had no right to be on his property and he did not consent to the inspection.[13] (Tr. 9–10). The Supreme Court has held that provisions of the Act violate the Fourth Amendment to the extent that they purport to authorize warrantless inspections over the refusal of an employer. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). To determine whether a party has consented to a search, a court must look to the circumstances surrounding the event. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). No one factor is necessarily decisive, but the Supreme Court has held that knowledge by the party challenging the search of its right not to consent is "highly relevant" to the evaluation. *United States v. Mendenhall*, 446 U.S. 544, 559 (1980). The manifestation of assent, no matter how casual, can reasonably be accepted as waiver of a warrant. *U.S. v. Thriftimart*, 429 F.2d 1006, 1010 (9th Cir. 1970). *See also Kropp Forge Co. v. Sec'y of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) ("Since Kropp's representatives were present at all times during those inspections and did not raise any objections when informed of the intended sampling, any Fourth Amendment objection to those surveys was waived."); *Marshall v. W. Waterproofing Co., Inc.*, 560 F.2d 947, 950-951 (8th Cir. 1977) (finding valid consent given); *Dorey Elec. Co. v. OSHRC*, 553 F.2d 357, 358 (4th Cir. 1977) (noting permission to inspect given by foreman).

Upon arriving at the Worksite, the CSHO introduced himself; stated the nature, purpose, and scope of the inspection; and asked to speak to the project manager. Dabrowksi identified himself as the foreman, proceeded to answer questions of the CSHO, and accompanied the CSHO around the Worksite. (Tr. 28–29, 45–48). Dabrowski had the opportunity to object to the inspection, as he had dealt with inspectors in the past. There was no testimony that the CSHO warned Dabrowski of his right to insist upon a warrant, and there is the possibility that Dabrowski was not aware of the precise nature of Respondent's rights under the Fourth Amendment. However, the lack of such evidence does not render Dabrowski's consent unknowing or involuntary.

[13] This argument was raised by Respondent for the first time at the hearing. (Tr. 9–10).

Also, in the present case the violations discovered were in plain sight and at no time during or after the inspection did Dabrowski question the inspection. Likewise, Gluzman did not question the inspection or the authority of the CSHO during the closing conference after the inspection, at which time Gluzman indicated what actions he would take to abate the violations.

To the extent that Respondent is alleging a violation of its rights under either section 8(a) of the Act or the Fourth Amendment, such arguments are foreclosed by Respondent's consent to OSHA's inspection and failure to allege that the inspection exceeded the scope of its consent. *Cody-Zeigler Inc*., 19 BNA OSHC 1410, 1412 (No. 99-0912, 2001) (consolidated) (holding employer's consent to inspection precluded any probable cause challenge under Fourth Amendment, and finding it unnecessary to address selection issue because "section 8(a) does not require the Secretary to obtain evidence of any particular sort to support his decision to seek a consensual inspection") (citation omitted), *aff'd per curiam*, No. 01-1236, 2002 WL 595167 (D.C. Cir. March 15, 2002) (unpublished).

Controlling Case Law Applicable to Citations

To establish a prima facie violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991). Proof of a hazard in most instances is unnecessary because the promulgation of a standard presupposes the existence of a hazard when its terms are not met. *Duane Smelser Roofing Co.,* 9 BNA OSHC 1530, 1532 (No. 4773, 1981).

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" if an accident occurred. 29 U.S.C. § 666(k); *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). Substantial probability "refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result." *Ill. Power Co. v. O.S.H.R.C.*, 632 F.2d 25, 28 (7th Cir. 1980). If the harm the regulation was intended to prevent is "death or serious injury, a violation of the regulation is serious *per se*." *Phelps Dodge Corp. v. O.S.H.R.C.,* 775 F.2d 1237, 1240 (9th Cir. 1984).

1. <u>Citation 1, Item 1</u>

Citation 1, Items 1a and 1b allege serious violations of 29 C.F.R. § 1926.304(f), which

states that "[a]ll woodworking tools and machinery shall meet other applicable requirements of American National Standards Institute, 01.1-1961, Safety Code for Woodworking Machinery." 29 C.F.R. § 1926.304(f). Citation 1, Item 1a alleges Respondent did not comply with section 4.1.2(a) of ANSI 01.1-1961, which requires hand-fed rip saws to be guarded by an automatically adjusting hood which completely encloses that portion of the saw above the table and above the material being cut. Citation 1, Item 1b alleges Respondent did not comply with section 4.1.2(c) of ANSI 01.1-1961, which requires circular hand-fed rip saws to have non-kickback fingers or dogs so located as to oppose the thrust or tendency of the saw to pick up the material and throw it back toward the operator.

For the following reasons the Court finds both the DeWalt saw and Bosch saw violated these two ANSI standards because both were missing the automatic adjusting hood (hood guard) and non-kickback fingers (anti-kickback fingers).

i. DeWalt Saw

a. Standard Applies and was Violated

The standard applies because Respondent was engaged in construction. (Tr. 97). The DeWalt saw is a woodworking tool or machine that was used to cut trim pieces for cabinetry being installed in the residence. (Tr. 46).

The CSHO observed the DeWalt saw without and adjustable hood guard or anti-kickback fingers in the garage. (Tr. 33; Ex. C-4). Dabrowski informed the CSHO that they did not have guards for the saw at the Worksite. (Tr. 46). When the CSHO spoke to Gluzman during the closing conference, he also stated that there was no guard for the saws and that he would get some as soon as he could. (Tr. 62–63, 103). Because the DeWalt saw was missing the adjustable hood and anti-kickback fingers, it did not meet the requirements of ANSI 01.1-1961 and 29 C.F.R. § 1926.304(f).

b. Employees Were Exposed to the Hazard

Dabrowski informed the CSHO that employees at the Worksite had been using the DeWalt saw the day of the inspection to cut trim pieces for cabinetry. (Tr. 46). He stated that they could not use the guards on the blade because a guard would not allow them to cut the narrow trim pieces that they needed. (Tr. 46). The CSHO also observed pieces of wood trim and saw dust around the DeWalt saw. He determined that the wood pieces and saw dust around the saw was consistent with the type of wood being cut for cabinetry at the time of the inspection. (Tr. 36; Ex. C-4). The CSHO also observed that the DeWalt saw was energized because it was

plugged into a power cord. (Tr. 36; C-4). The power cord was powered on as indicated by a shining light on the power cord. (Tr. 36; C-4). The Court finds that employees were exposed to the hazardous conditions.

c. Respondent had Knowledge

Both Mr. Gluzman, the owner of Respondent, and Dabrowski, the foreman, had actual knowledge. Both individuals knew the saw was missing hood guards and anti-kickback fingers. Dabrowski told the CSHO that using the guards would not allow them to cut the narrow pieces required for the trim. (Tr. 46). Gluzman also advised the CSHO that he had seen the condition of the saw that day, which led him to go out and buy a new blade for the DeWalt saw. (Tr. 101-102). The Court finds that Respondent had actual knowledge of the hazard.

d. Violation was Serious

The Court finds the violation is properly classified as serious. In the event of an accident resulting from the violation, there is a substantial probability of serious injuries, including lacerations, amputations and internal injuries. (Tr. 48–49).

ii. Bosch Saw

a. Standard Applies and was Violated

The standard applies to the Bosch saw as Respondent was engaged in construction and employees were using the Bosch saw to cut trim pieces for cabinetry being installed in the new residence. (Tr. 46, 97). The Bosch saw also violated the cited standard because it was missing a hood guard and anti-kickback fingers for the blade. The CSHO observed during the inspection the absence of a hood guard or anti-kickback fingers on the Bosch saw. (Tr. 33; C-8). Gluzman and Dabrowski stated during the inspection and the closing conference that there were no guards at the Worksite for the Bosch saw. (Tr. 46, 62–63).

b. Employees Were Exposed to the Hazard

The Court finds employee exposure to the hazard. Dabrowski stated employees had used the unguarded Bosch saw that day to cut trim pieces for cabinetry. (Tr. 46). The Bosch saw was approximately five or six feet away from the DeWalt saw and was also surrounded by saw dust and wood pieces. (Tr. 36, 44). The pieces of wood and the saw dust around the Bosch saw was consistent with the type of wood Respondent used for cabinetry at the worksite on the day of the inspection.

c. Respondent had Knowledge of the Hazard

Gluzman and Dabrowski had actual knowledge that the Bosch saw was missing a hood

guard and anti-kickback fingers. Dabrowski used the Bosch saw on the day of the inspection to cut pieces of trim that he claimed were too narrow to cut while using the guard. (Tr. 46). Gluzman also observed the unguarded blade of the Bosch saw earlier in the day and determined that the blade was not properly installed. (Tr. 101).

d. Violation was Serious

The Court finds the violation is properly classified as a serious citation. In the event of an accident resulting from the violation, there is a substantial probability of serious injuries, including lacerations, amputations and internal injuries. (Tr. 48–49).

The Court AFFIRMS Citation 1, Item 1a and Item 1b as a serious violation of the Act.

ii. Citation 1, Item 2

a. Standard Applies

Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.501(b)(13), which states that 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 systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(13).

Respondent's employees were engaged in residential construction activities and were exposed to falls more than six feet above the first floor level when they worked on the second story floor deck. (Tr. 55, 57; C10). The CSHO testified that based upon his observation and experience the second floor was in excess of six feet above the first floor. (Tr. 55-56; C10). The Court finds that the standard applies.

b. Employees were Not Exposed on the Date of the Inspection

The second floor balcony had an unfinished railing system that consisted only of a top rail. (Tr. 57; Ex. C10, C11). Dabrowski informed the CSHO that they had installed the partial railing system the day before the inspection. (Tr. 57, 82). Dabrowski informed the CSHO that the morning of the inspection that they had glued the stairs and the deck and therefore the second floor could not be accessed. (Tr. 54-55, 81).

In Citation 1, Item 2, Complainant specifically alleges that, on the date of the inspection, "Employees were exposed to the hazard of falling where a guardrail on a second story deck was not equipped with a mid-rail." The narrative of the citation item does not include an allegation that the standard was violated at any time prior to the date of the inspection. Accordingly, the Citation must be read to allege that Respondent violated the standard on the date of the inspection. The evidence is unconverted that on the day of the inspection, employees were not

engaged in a work activity which exposed them to a fall hazard. On the morning of the inspection, Dabrowski told the CSHO they had glued the stairs and the deck, which prevented access to the second floor. Thus, on the day of the inspection, employees could not install deck railing as alleged in the Citation.

To support the allegation that employees were exposed to a fall hazard, the CSHO testified that the work on the deck was done the day prior to the commencement of the inspection. There was absolutely no testimony, however, that the work performed the morning of the inspection placed the employees in the zone of danger. The evidence indicates no one was on the second story on the day of the inspection. (Ex. C-10). The stairs, which are shown in Exhibit C-10, are enclosed within two walls and would not expose an employee to falls hazards of six feet. (Ex. C-10). While there was testimony that the deck was glued there is no testimony: of (i) how the deck was glued; (ii) whether the employees worked near the rail to put them in the zone of danger; and (iii) what activities the employees engaged in when gluing the deck. Thus, there appears to be a disconnect between the testimony offered to support a finding of exposure to the hazard and what actually occurred on the date of the inspection. Complainant assumes activities not alleged in the Citation and facts which are not in the record to argue employees were exposed. Complainant has failed to prove exposure of any employee to the hazard alleged in the Citation.

c. Citation 1, Item 2 Does Not Provide Fair Notice

Citation 1, Item 2 must also be vacated as it does not provide fair notice to Respondent. For a citation to meet the requirements of fair notice it must at a minimum fulfill the requirements of notice pleading applicable to Commission proceedings. *Del Monte Corp.,* 4 BNA OSHC 2035, 2038 (No. 11865, 1977) ("In notice pleading an essential consideration is whether there is fair notice of the circumstances of the alleged violation that will permit a fair defense"). Therefore, a citation, in addition to setting forth the penalty, should state with particularity the location, time, place, and circumstances of each alleged violation. 29 C.F.R. § 2200.34(2). The Citation in this case does not include an allegation that the violation took place prior to the date of the inspection. The activity being cited was work involving the installation of the railing which took place before the inspection commenced.[14] Citation 1, Item 2

[14] It is permissible to cite violations which are alleged to have occurred within six months of the issuance of the citation. 29 U.S.C. § 658(c). Complainant commonly engages in this practice by stating on a "particular date and prior to" certain activities were engaged in. However, in this case it did not. Accordingly, Respondent was deprived of fair notice that Complainant's allegations included activities that occurred prior to the commencement of the

is also VACATED on the grounds of failure to provide fair notice to Respondent.

Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g., Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

In this case, OSHA adjusted the penalty to take into consideration the probability of the injury, gravity of the violation, the size of Respondent's business, good faith, and Respondent's violation history. For Citation 1, Item 1, the CSHO testified that there was a greater probability of hazard because employees' hands were in close proximity to the blade when using the DeWalt and Bosch saws without proper guarding. (Tr. 49). The gravity of the violation was classified as moderate because any injuries would have had a limited period of disability. (Tr. 49). The CSHO testified that a sixty (60) percent reduction based on Respondent's size was applied. (Tr. 50). No penalty adjustment was given based upon history because there were no previous inspections of Respondent's worksites and no reduction was given for good faith because Respondent had limited health and safety programs. (Tr. 50). Therefore, a penalty of $2,400 was proposed for Citation 1, Item 1. The Court finds the proposed penalty and the considerations given by Complainant to the amount of the penalty to be supported. Therefore, the Court will assess a penalty of $2,400.00 for Citation 1, Item 1.

ORDER

The foregoing present the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Accordingly, based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1a is hereby AFFIRMED as a Serious violation and a corresponding

inspection.

penalty of $2,400.00 is ASSESSED.

2. Citation 1, Item 1b, is hereby AFFIRMED as a Serious violation and a corresponding penalty of zero dollars is ASSESSED.
3. Citation 1, Item 2 is VACATED.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: March 16, 2016
Denver, Colorado