**United States of America**

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

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MONROE DRYWALL CONSTRUCTION, INC.,<br>Respondent. | OSHRC Docket No. 12-0379 |

APPEARANCES:

Ronald J. Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety & Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Nathalie Monroe, President, Monroe Drywall Construction, Inc.; Panama City Beach, FL
For the Respondent

## DECISION AND REMAND

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following a fatal accident, the Occupational Safety and Health Administration ("OSHA") inspected a worksite in Panama City, Florida. As a result of the inspection, OSHA issued Monroe Drywall Construction ("MDC") two citations under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-678. In Citation 1, the Secretary alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions at the site, and a serious violation of 29 C.F.R. § 1926.416(a)(3), for failing to inquire about the status of exposed circuit wires or warn employees of an electric

shock hazard.[1] In Citation 2, the Secretary alleges an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1), for not having a written hazard communication program. After a hearing, Administrative Law Judge Stephen J. Simko, Jr., vacated both citations, finding that the Secretary failed to prove "the workers who were performing drywall work at the site were employees of MDC."

For the following reasons, we reverse the judge's decision and remand the matter for further proceedings consistent with this opinion.

**BACKGROUND**

The accident occurred at a worksite where a large retail store was being remodeled. The project's general contractor, The Hatch Group, retained several subcontractors, including GMB Construction Services ("GMB"), which it hired to complete the framing, drywall installation, and finishing. GMB, in turn, arranged for MDC to perform drywall work at the project. MDC admits that its President, Nathalie Monroe ("Monroe"), and Vice-President, Jeremy Monroe, worked at the site. Besides the Monroes, four other workers were at the site assisting with drywall work.[2] On September 27, 2011, one of these drywall workers was electrocuted when he contacted exposed wiring while clearing an area in which to stack drywall.

On review, the Secretary argues that the judge erred in finding that none of the four drywall workers were MDC employees. MDC, appearing *pro se* throughout these proceedings,

[1] The Secretary withdrew Item 1a of this citation, which alleged a serious violation of 29 C.F.R. § 1926.20(b)(1).

[2] In several instances during the proceedings, these four individuals were referred to by their ethnicity. We will refer to the workers either by name, where known, or by the nature of the work they performed, i.e. "drywall workers."

did not file a brief on review.[3] Before the judge, however, MDC argued that it did not employ the four drywall workers.[4]

**DISCUSSION**

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply; (3) employees had access to the violative condition; and (4) the employer knew or could have known of the violative condition. *See, e.g., Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1982 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Here, the judge did not reach the elements of the violation because he concluded that the Secretary did not prove, as a threshold matter, that MDC employed the four drywall workers.[5] Specifically, he found that much of the Secretary's

[3] When a non-petitioning party does not respond to a briefing notice, the Commission may decide the case without the party's brief. 29 C.F.R. § 2200.93(d); *Well Solutions Inc.*, 15 BNA OSHC 1718, 1720 n.2, 1992 CCH OSHD ¶ 29,743, p. 40,418 (No. 89-1559, 1992). While a party is not required to file a brief, MDC did not respond to the briefing notice or to a subsequent letter from the Commission's Executive Secretary requesting that the company either: (1) provide a brief or letter setting forth its arguments, or (2) inform the Commission in writing that it did not intend to do so. The Commission's rules are intended to enable proceedings to progress efficiently while assuring fairness to all parties. *See e.g., Carolyn Manti d/b/a Manti Homes*, 16 BNA OSHC 1458, 1993 CCH OSHD ¶ 30,265, p. 41,683 (No. 92-2222, 1993). These rules are not inflexible, but there are limits to how liberally the Commission and its judges can interpret them to assist an employer appearing *pro se*. *Id.*; *Imageries*, 15 BNA OSHC 1545, 1547, 1992 CCH OSHD ¶ 29,639, p. 40,131 (No. 90-378, 1992) (noting that *pro se* litigants are not excused from following the Commission's procedural rules).

[4] We note that the judge took several steps throughout the proceedings to accommodate MDC's *pro se* status. *See e.g., Action Group, Inc.*, 14 BNA OSHC 1934, 1935, 1990 CCH OSHD ¶ 29,166, p. 39,018 (No. 88-2058, 1990) (recognizing that *pro se* litigants may require additional consideration). These efforts included: explaining the hearing process, asking if there were objections to the Secretary's evidence, facilitating the testimony of MDC's witnesses, and liberally construing a document as the company's Answer and then permitting its late filing, even though MDC did not serve the Secretary.

[5] Although the judge looked at the four drywall workers as a group in analyzing the employment question, the Secretary need only show that one worker employed by MDC had access to the violative condition. *See Tri-City Constr. Co.*, 7 BNA OSHC 2189, 2192, 1980 CCH OSHD ¶ 24,267, p. 29,549 (No. 76-4094, 1980) (finding exposure where employer stipulated that "at least one employee was exposed to the [cited] hazard").

evidence was either inadmissible hearsay or, in the alternative, outweighed by Monroe's testimony that MDC did not employ the four drywall workers.

We find that the judge failed to give appropriate weight to the Secretary's evidence of an employment relationship between MDC and three of the drywall workers, whom we find were employees of MDC.[6] This evidence includes: (1) the testimony of OSHA Compliance Officer ("CO"), Jeffrey Lincoln; (2) a signed statement from Thomas Grant, GMB's on-site supervisor; (3) deposition testimony from GMB's President, George Blanchette, and (4) two documents related to MDC's scope of work.[7] The CO interviewed two of the drywall workers, Cesar Torres and Genaro Angeles-Vincentes. Although Torres primarily speaks Spanish, he told the CO in English that Monroe hired him to work at the site. With the aid of a translator, Torres and Angeles-Vincentes confirmed that Monroe hired them, along with the decedent and one additional individual, to hang drywall at the site and that she directed their work. Torres also told the CO through the translator that he reported his hours, and those of the other drywall hangers, to Monroe, who paid all of them in cash.

In his decision, the judge determined that the drywall workers' statements did not constitute admissions of a party opponent under Fed. R. Evid. 801(d)(2), in effect finding they were inadmissible hearsay. He acknowledged, however, that MDC never objected to the statements as hearsay, though he noted that Monroe "appeared unaware" that MDC could make a hearsay-based objection. But when there is no objection, relevant out-of-court statements are admissible and entitled to their natural probative weight. *See MVM Contracting Corp*., 23 BNA OSHC 1164, 1166, 2010 CCH OSHD ¶ 33,073, p. 54,651 (No. 07-1350, 2010) (finding waiver

[6] The Secretary also asserts that MDC employed the fourth, unnamed drywall worker. As we have found an employment relationship between MDC and the three other drywall workers, we do not reach whether MDC also employed the fourth drywall worker.

[7] In addition, the Secretary offered evidence concerning the decedent's workers' compensation claim, after the judge admitted a document proffered by MDC titled "Amended Verified Petition for Attorney's Fees" (the "Petition"). We question whether the Petition, which related to the settlement of the workers' compensation claim, or the documents offered in response by the Secretary, are relevant to determining if MDC employed the decedent or any other workers under the OSH Act. Nonetheless, because the judge concluded that the evidence was not probative, we find it unnecessary to evaluate whether he erred in admitting it. *See Woolston Constr. Co., Inc*., 15 BNA OSHC 1114, 1119, 1991-1993 CCH OSHD ¶ 29,394, p. 39,569 (No. 88-1877, 1991) (finding no error when judge did not rely on witness's testimony), *aff'd without published opinion*, No. 91-1413, 1992 WL 117669 (D.C. Cir. May 22, 1992).

in the absence of a timely objection); *Power Fuels, Inc*., 14 BNA OSHC 2209, 2214, 1991 CCH OSHD ¶ 29,304, p. 39,347 (No. 85-166, 1991) (same); *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 164-65 (3d Cir. 2004) (finding that hearsay evidence admitted without objection is to be considered and given its natural probative weight as if it were admissible in law); Fed. R. Evid. 103(a)(1), 401, 403. And by waiting to raise the issue *sua sponte* for the first time in his decision, the judge deprived the Secretary of an opportunity to introduce other evidence to show that the statements were not hearsay or that they were admissible under one of the exceptions to the rule. *See* Fed. R. Evid. 801, 803, 804, 807. Without any objections, the Secretary had no reason to present the declarants themselves or to otherwise establish the truth of what they asserted. *See* Fed. R. Evid. 103, 801, 804; *Regina Constr. Co*., 15 BNA OSHC 1044, 1048, 1991-1993 CCH OSHD ¶ 29,354, p. 39,467 (No. 87-1309, 1991) (noting that respondent could have called out-of-court declarants as witnesses); *George Harms*, 371 F.3d at 164-65 (same). Therefore, the judge erred in treating this evidence as inadmissible hearsay.

The judge ruled in the alternative that if the statements of Torres and Angeles-Vincentes were admissions of a party opponent and thus admissible under Fed. R. Evid. 801(d)(2), they still should not be given any weight because the Secretary "offered nothing" to show the translator's qualifications. This too was error. As an initial matter, not all of the statements made by Torres required a translator, so the statements he made in English to the CO fall outside of the judge's ruling. Moreover, MDC does not claim that the translator erroneously conveyed what Torres and Angeles-Vincentes said. *See* Fed. R. Evid. 103(a) (requiring parties to preserve claims of error). Indeed, Monroe actually corroborated key aspects of the translated statements by admitting that: (1) on the day of the accident, Torres told "everybody" he worked for her, (2) she knew Torres from working with him on a past project, and (3) Torres called her after the accident asking for money. Further, neither MDC nor the judge questioned the accuracy of the CO's recollection or his credibility. *Id*. In this situation, we find that having limited information about the translator's qualifications does not justify giving the statements he translated for Torres and Angeles-Vincentes no weight. *See United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991) (finding interpretation reliable despite the lack of evidence regarding the interpreter's qualifications); *United States v. Alvarez*, 755 F.2d 830, 859-60 (11th Cir. 1985) (determining that because the interpreter was a language conduit the translation was not hearsay); *DCS Sanitation Mgmt. Inc. v. OSHRC*, 82 F.3d 812, 815-16 (8th Cir. 1996) (same).

With regard to Grant's written statement and Blanchette's deposition testimony, the judge gave this evidence no weight based on his finding that both were motivated to falsely claim that GMB did not itself employ any of the drywall workers in order to avoid liability. The judge instead credited Monroe's "adamant" testimony, even though he described her as "excitable" at the hearing. According to the judge, her "demeanor … was consistent with that of a person truthfully testifying and sensing that no one believes her protestations that these [drywall] workers were not MDC's employees."

The record, however, does not support the judge's weighing of this evidence. *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1441-42, 1992 CCH OSHD ¶ 30,239, p. 41,649-50 (No. 91-102, 1993) (finding that credibility must be assessed in view of the whole record). Both Grant and Blanchette denied that GMB hired, employed, or paid any individual drywall workers. Blanchette asserted that GMB subcontracted all of the drywall hanging and finishing to MDC, and that Monroe admitted to him she employed the decedent and other drywall workers.[8] Grant also specified that Monroe employed Torres, the decedent, and two others.[9] In evaluating Grant's statement, we see no difference between his motivation and Monroe's—she too had an interest in avoiding liability. As for Blanchette, not only does MDC make no claim that he lied, there is less to impugn his testimony than there is to impugn Monroe's. At the time of his deposition, it was too late for the Secretary to issue GMB a citation under the OSH Act and the

[8] By neither attending nor responding to Blanchette's deposition, MDC waived any potential hearsay objections. *See Power Fuels,* 14 BNA OSHC at 2214, 1991 CCH OSHD at p. 39,347. Even if there had been a timely objection, Monroe's statements would be admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2). *See MVM Contracting*, 23 BNA OSHC at 1166, 2010 CCH OSHD at pp. 54,651-52.

[9] Although Grant did not testify at the hearing, the CO relayed their conversations and MDC, after being specifically asked by the judge, had no objection to the admission of Grant's signed, written statement. *See MVM Contracting*, 23 BNA OSHC at 1166, 2010 CCH OSHD at pp. 54,651-52. Notably, MDC disputes only the accuracy of Grant's statements about who employed the drywall workers, not the fact that he made them.

decedent's workers' compensation claim had been settled.[10] Thus, we find Grant's statement and Blanchette's testimony to be credible and persuasive evidence that MDC employed the drywall workers.

Our conclusion is further supported by two documents the Secretary submitted into evidence, both of which the judge erroneously characterized as "not help[ful]" to deciding the employment issue. The first is a letter from GMB to Monroe about the scope of work, and the second is MDC's "invoice" for the project. Granted, neither document speaks directly to whether MDC hired the decedent and other drywall workers. However, both are relevant in assessing the contrast between the statements of Grant and Blanchette, who both asserted that GMB hired MDC to do all the drywall work—including hanging and finishing—and Monroe's opposing testimony that MDC contracted to do only the finishing work. GMB's letter to Monroe requests the following work for a total cost of $5,500: "hang[,][11] tape, bed coat and finish coat for 338 boards[,] bed coat and skim coat all existing drywall that has already been taped[,] touch up remainder of existing." After working at the site for a few days, Monroe faxed GMB a document labeled "Contractors Invoice," seeking payment of $5,500 to "Hang - tape - finish" 338 boards, and finish 150 boards, which also specifies that it is "In accordance with our Agreement." Contrary to the judge, we find that these two documents corroborate Grant and Blanchette's statements that GMB subcontracted both the drywall hanging and finishing work to MDC, and that GMB therefore had no need to hire drywall workers itself for the project.

In sum, the judge's assessment of the Secretary's evidence is unsupported by the record as a whole. Therefore, his view of Monroe's credibility does not compel a different result than

[10] The judge also found Blanchette lacked credibility because he denied employing Grant even though he admitted that Grant was at the site to supervise GMB's subcontractors. We find that the judge gave this apparent contradiction undue weight. The record shows that the two men were friends and Blanchette viewed Grant's role as one of "helping him out" in exchange for room and board, as opposed to an employer/employee relationship. Blanchette's belief in this regard may have been legally incorrect but nonetheless held in good faith. This evidence, therefore, does not justify rejecting his testimony that GMB hired only MDC to hang and finish the drywall. *See Beta Constr.*, 16 BNA OSHC at 1441-42, 1993 CCH OSHD at pp. 41,649-50.

[11] Blanchette explained at his deposition that hanging and taping are two different activities, and that there was a missing comma after "hang" in his letter.

the one we reach here.[12] *See C. Kaufman, Inc*., 6 BNA OSHC 1295, 1298, 1977-1978 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978) (stating that Commission will not defer to a credibility finding if it is not "made in light of the entire record" or if it is "materially distorted by an erroneous view of the legal issue."); *Metro Steel Constr. Co*., 18 BNA OSHC 1705, 1707, 1999 CCH OSHD ¶ 31,082, p. 46,667 (No. 96-1459, 1999) (finding judge's reliance on compliance officer's testimony was error when the record as a whole contradicted that testimony); *Brickfield Builders*, 17 BNA OSHC 1084, 1993-1995 CCH OSHD ¶ 30,696, p. 42600 (No. 93-2801, 1995) (same).

For these reasons, we find that the Secretary's evidence shows that MDC employed Torres, Angeles-Vincentes, and the decedent. Accordingly, we reverse the judge's decision and remand for him to consider whether the Secretary established the alleged violations by proving applicability of the cited standards, noncompliance, exposure to the violative conditions, and knowledge.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 19, 2013

[12] We note that the Commission is in the same position as the judge when assessing the credibility of Blanchette, Grant, and the drywall workers, none of whom testified at the hearing, and when reviewing the documentary evidence. *See Brickfield Builders Inc.*, 17 BNA OSHC 1084, 1993-1995 CCH OSHD ¶ 30,696, p. 42,600 (No. 93-2801, 1995) (rejecting judge's assessment of photographic evidence).

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APPEARANCES:

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Atlanta, Georgia
For the Complainant.

Nathalie Monroe and Jeremy Monroe, Monroe Drywall Construction, Inc.
Panama City Beach, Florida
For the Respondent, *pro se*.

Before: Administrative Law Judge Stephen J. Simko, Jr.

## DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under 29 U.S.C. § 659(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (Act). The Occupational Safety and Health Administration (OSHA) inspected a worksite of Respondent in late September and early October of 2011. The worksite was located in Panama City, Florida. The inspection came about after a worker at the site was electrocuted on September 27, 2011, while engaged in drywall work.

On January 24, 2012, OSHA issued Respondent a Citation and Notification of Penalty (Citation). Item 1a of Citation 1 alleged a serious violation of 29 C.F.R. § 1926.20(b)(1), for not having a safety and health program. The Secretary withdrew this item at the hearing. Item 1b of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for not instructing employees in the recognition and avoidance of unsafe conditions at the site. Item 2 of Citation 1 alleges a

violation of 29 C.F.R. § 1926.416(a)(3), for not inquiring about the status of exposed circuit wires or warning employees of the electric shock hazard. Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. 1910.1200(e)(1), for not having a written hazard communication program. The Secretary has proposed a total penalty of $6,600.00 for the alleged violations.

Respondent, Monroe Drywall Construction (MDC), timely contested the Citation. The court held a hearing in this matter on June 12, 2012, in Panama City Beach, Florida. MDC contended at the hearing, as it has since the beginning of this case, that it had no employees at the site and that the individual who died was not its employee. The Secretary's contention was that MDC had several employees performing drywall work at the site and that the individual who died was in fact an employee of MDC.

Only the Secretary has filed a post-hearing brief. For the reasons that follow, the court finds the Secretary has not met her burden of proving the workers who were performing drywall work at the site were employees of MDC. The citation items noted above are vacated.

**Procedural Background**

This case was initially designated for the Commission's Simplified Proceedings, under Commission Rule 203(a). On March 14, 2012, the Secretary filed a motion to remove the case from Simplified Proceedings. On March 21, 2012, the court issued an order granting the motion, rescheduling the hearing for June 12, 2012, and directing Respondent to file an answer on or before April 9, 2012. On May 2, 2012, the Secretary's counsel (counsel) filed a motion to dismiss MDC's notice of contest and grant a default judgment arguing that she had not received an answer and was not able to reach Respondent's owners. On June 8, 2012, the court held a telephone conference to discuss the hearing set for June 12, 2012. During that conference, counsel stated she first learned at that time, that MDC had faxed the court a letter on May 12, 2012, reiterating its intent to contest the Citation. Also during the conference, the court advised that it was deeming the May 12 letter to be MDC's answer. Counsel informed the court she was unaware of the letter and had not received a copy of it. The court faxed counsel a copy of the letter. Stating she had not previously received the letter and had not initiated discovery, counsel made an oral motion for a continuance during the telephone conference. The court denied the motion and ordered the parties to appear for the hearing as scheduled. Later that same day,

counsel faxed to the court her "Emergency Motion for Reconsideration of Motion to Continue Hearing Date" (Motion).

At the beginning of the hearing, the Secretary's counsel argued her Motion and gave the reasons why she felt she had been prejudiced by not being able to conduct discovery. The court found the Secretary had not been prejudiced and denied the Motion. The court then provided the parties a brief recess so that they could discuss the case and possibly reach agreement on some issues. After the recess, the Secretary's counsel advised that she was withdrawing Item 1a of Citation1 and that the parties had stipulated to jurisdiction and coverage under the Act.

During the hearing, all of the exhibits offered by the parties were admitted except for MDC's exhibit R-3. R-3, entitled "Amended Verified Petition for Attorney Fees and Costs," which relates to the worker compensation claim filed on behalf of the deceased worker. MDC offered R-3 because the claim information set out on the first page of the document shows the employer of the deceased employee as "GMB Construction Services/The Hatch Group, LLC," rather than Respondent. The Secretary's counsel objected to R-3 being admitted. The court deferred ruling on the admissibility of R-3. The court also left the record open for 30 days to give the Secretary the opportunity to develop the record in regard to the employer/employee relationship at issue in this case.

On July 10, 2012, the Secretary conducted a post-hearing deposition of George Blanchette, the owner of GMB Construction Services. On August 7, 2012, the Secretary filed a motion seeking the admission of Blanchette's deposition testimony. Attached to the deposition are several exhibits. The deposition testimony of Blanchette and the attached exhibits are admitted as the Secretary's exhibit C-16. Exhibit R-3 is also admitted.

**Factual Background**

The worksite was a store located in a strip mall in Panama City, Florida, that was being remodeled to become a Big Lots store. The Hatch Group (THG) was the general contractor on the site, and Paul Kidder was THG's superintendent. Several other companies had been contracted to perform work at the site. GMB Construction Services (GMB) had been contracted to do framing and drywall work. It subcontracted with an Orlando-based company to do framing work, and allegedly subcontracted with MDC to do drywall work. GMB subcontracted with MDC because Thomas Grant, the superintendent of GMB at the site, had recommended MDC; Grant was the ex-husband of Nathalie Monroe, MDC's president, and he was familiar with her

work. GMB also subcontracted with MDC because GMB is based in the Orlando area and it wanted to defray its costs by utilizing a local drywall company. George Blanchette, GMB's owner, sent a proposal of the work to be done to MDC on September 19, 2011. MDC sent a document entitled "Contractor's Invoice" to GMB on September 21, 2011. Natalie Monroe asserted this was not an invoice for completed work, but rather the respondent's proposal using this form. On September 17, 2011, Grant began working at the site, acting as a liaison between GMB's framers and THG. Grant was also supervising GMB's subcontract with MDC. MDC began working at the site about that same date. Nathalie Monroe and her husband, Jeremy Monroe, MDC's vice-president, both worked at the site. Four Hispanic laborers were performing drywall work on the building. GMB's framers were also doing some drywall work. In addition, there was also an electrical contractor working at the site. On September 27, 2011, one of the Hispanic drywall workers contacted wiring protruding from conduit on the job site, while preparing to stack drywall boards. He was electrocuted.

The accident took place at about 9:00 a.m. on September 27, 2011. Nathalie and Jeremy Monroe were not at the site at that time. Nathalie Monroe arrived shortly after the accident, after the deceased had been taken away by ambulance. Law enforcement officials were still there when she arrived. When they questioned her, she stated that she did not know the deceased worker and that he did not work for her. Later that day, Blanchette of GMB sent Nathalie Monroe an e-mail. The e-mail informed her that no employees of MDC would be allowed back on the worksite.

On September 28, 2011, OSHA Compliance Officer Jeffrey Lincoln conducted an inspection at the site. He had spoken with the local medical examiner's office and police department before going to the site. He met with Nathalie Monroe in the parking lot and arranged with THG for her to enter the site. She told him she felt it was unfair for her to be barred from the site for not having worker compensation coverage as the deceased worker was not her employee. During the inspection, Lincoln also spoke to Kidder, THG's superintendent, and to Grant, GMB's superintendent. They both told him that the subcontract was for MDC to hang and finish the drywall but that MDC was disputing the scope of the subcontract. On September 29, 2011, Lincoln interviewed two of the Hispanic workers with the help of a local interpreter, and he wrote down what they said. Lincoln took photographs of what he saw at the site. He also obtained photographs the police department had taken. Based on what he learned,

Lincoln determined the Hispanic workers were employees of MDC. He recommended the issuance of the Citation.

**Discussion**

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). In this case, the Secretary must first prove that MDC was properly cited as the employer of the four Hispanic workers at the site. *See, e.g., Joel Yandell*, 19 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999) (citation omitted).

The Secretary relies on statements Lincoln obtained during the inspection. Exhibits C-3 and C-4 are Lincoln's notes from what Cesar Torres and Genaro Angeles-Vicentes, two of the Hispanic drywall workers, stated to him. Lincoln used a local interpreter when he took the statements. Based on the statements of Cesar Torres and Genaro Angeles-Vicentes, Lincoln concluded that they, along with the deceased worker and one more person, worked for Nathalie Monroe at the site and were paid in cash. The court gives no weight to these statements.

Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay if it is offered against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The threshold question is whether the statements were made by employees of MDC. The Secretary made no initial showing that Cesar Torres and Genar Angleles-Vicentes were employees of MDC other than their statements. The Secretary asks this court to assume these workers were MDC employees. She relies on the statements of these workers to establish an employer/employee relationship. These statements alone are insufficient to prove these workers are MDC employees. The Secretary must also produce credible independent evidence of an employment relationship. Assuming, for the sake of argument, these workers were employees on the date of the alleged violations, they were not employees when they gave their statements to the OSHA compliance officer, Mr. Lincoln. As a former employee is no longer an agent of the company or corporation, a statement made after employment has ended is not an admission attributable to the organization. *Cruz v. Aramark Serv., Inc.*, 213 Fed. Appx. 329, 333 (5th Cir. 2007); *Walsh v. McCain Foods Ltd.*, 81 F.3d 722

(7th Cir. 1996). GMB sent Nathalie Monroe an e-mail on September 27, 2011, barring employees of MDC from the site. *See* C-16, Exh. 6. Lincoln did not take the statements of two of the Hispanic workers until September 29, 2011. Even if these individuals had been employees of MDC, there is no evidence they were employees of MDC when Lincoln interviewed them. At most, they were former employees at that time. Their statements are thus not admissions attributable to MDC.

Should the statements be deemed admissions, the Commission has held that the judge hearing the case must decide the reliability of such statements and the weight to give them. *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-48 (No. 87-1309, 1991). There are two significant problems with Exhibits C-3 and C-4. As noted above, Lincoln interviewed the workers with the help of a local interpreter, and he wrote down what they said. The Secretary offered nothing to show the interpreter's qualifications or that the interpretation was accurate. Even more important, the statements are not signed. Exhibits C-3 and C-4 are found to be unreliable and are accorded no weight.

Finally, even if Exhibits C-3 and C-4 were accorded some weight, the judge, in determining the agency or employment relationship and its scope, is to consider the contents of the statement but must also find other supporting evidence independent of the statement. *Krause v. City of La Crosse*, 246 F.3d 995, 1002 (7th Cir. 2001). In other words, the Secretary cannot prove that the Hispanic workers in this matter were employees of MDC by means of Exhibits C-3 and C-4 alone; she must also present persuasive supporting evidence.

The Secretary's other evidence regarding who the Hispanic employees worked for is not persuasive. As indicated above, Kidder, THG's superintendent, and Grant, GMB's superintendent, told Lincoln that MDC's subcontract was to hang and finish the drywall; at the same time, they said that MDC was disputing the scope of the subcontract. Lincoln did not take a written statement from Kidder. He did take one from Grant, and Grant signed his statement. In Exhibit C-14, Grant said that MDC had hired Torres and the other Hispanic employees to hang drywall. There is reason to question the reliability of Grant's statement. Grant indicated in Exhibit C-14 that GMB had hired him as its superintendent at the site because he knew Blanchette, GMB's owner. Nathalie Monroe testified that Grant and Blanchette had grown up together, which was confirmed by Blanchette during his deposition. The court also notes Nathalie Monroe's testimony that when she arrived at the site shortly after the accident, Grant

ran out of the building, holding a rotor and saying, "here's the tool of your hanger." He then indicated she was going to be in trouble because "one of your [guys] just got killed." (Tr. 91-92). It was Ms. Monroe's impression that by the time she arrived, Grant had told everyone the employee was hers, which was not true, and that no one would take her word he was not. Ms. Monroe's testimony, and that of Jeremy Monroe, indicates the Hispanic employees worked for GMB.

As to the deposition testimony, Blanchette testified he had no employees at the site and that the drywall work was subcontracted to MDC. He even denied employing Grant, contrary to Exhibit C-14, and stated that Grant was just "helping [him] out" for a couple of weeks, in return for room and board, because he (Blanchette) could not be at the site to check on the work. (Exbibit C-16, pp 10-12). In light of this testimony, which conflicts with Grant's statement, the court gives no weight to Blanchette's deposition testimony on the point. The court also gives no weight to Grant's hearsay statement. It appears, due to their long acquaintance, that Grant may have been attempting to help Blanchette by reporting, after the accident occurred, that the Hispanic workers were MDC's employees.

Nathalie Monroe was adamant in her testimony at the hearing that MDC has never had any employees and that the Hispanic employees did not work for MDC. Ms. Monroe has been very consistent in this regard. After the accident, she told law enforcement officials and OSHA that she did not know the deceased employee and that he had not been working for MDC. At the hearing, Ms. Monroe presented Exhibits R-1 and R-2, Certificates of Election to be Exempt from Florida Workers' Compensation Law for herself her husband and Jeremy Monroe. She explained that such certificates are available to employers who own their own companies and do not hire any employees. Ms. Monroe also testified that she and Jeremy Monroe do their own work. This testimony was supported by Blanchette, who stated that on one of his early visits to the site, both Nathalie and Jeremy Monroe were doing drywall work and no one else was there.

In support of her position, the Secretary points to Exhibit C-2, the proposal GMB sent to Nathalie Monroe on September 19, 2010, and Exhibit C-13, a document entitled "Contractor's Invoice," that Ms. Monroe sent to GMB on September 21, 2010. The Secretary asserts that these documents show that MDC was to both hang and finish the drywall, contrary to Ms. Monroe's indicating at the hearing that MDC was only finishing the drywall at the site. The court finds that no determination in this regard need be made. The Secretary has not proved that the

Hispanic workers were employees of MDC, and Exhibits C-2 and C-13 do not help the Secretary in this regard.

The Secretary also points to evidence in the record that Nathalie Monroe had known Torres before this job and had contacted him and asked him to work for her at the subject site. Ms. Monroe agreed she had known Torres prior to this job, as they had worked on some of the same job sites before. She categorically denied that he worked for her on this job. She also denied she had paid him or any other employees any money for working on this job.

Finally, as noted above, Exhibit R-3 was received in evidence after the hearing. Exhibit R-3, entitled "Amended Verified Petition for Attorney Fees and Costs," pertains to the worker compensation claim (WCC) filed on behalf of the deceased employee. MDC offered Exhibit R-3 as the claim information on the first page shows the employer of the deceased employee as "GMB Construction Services/The Hatch Group, LLC," instead of Respondent. To rebut Exhibit R-3, one of the Secretary's exhibits attached to Exhibit C-16, Blanchette's deposition, shows the employer of the deceased employee as both GMB and MDC. (*See* Exhibit 7.), entitled "Employer/Carrier's Response to Request to Produce," which was filed in the WCC proceeding relating to the deceased employee. As the Secretary herself pointed out at the hearing, however, WCC documents are not relevant in determining whether an entity was properly cited as the employer under the Act. The court finds Exhibit R-3 and Exhibit 7 of Exhibit C-16 are not probative in that regard.

Complainant's case rests totally on hearsay. She produced no witnesses at the hearing with direct knowledge of the facts surrounding the incident at issue. Her only witness at the hearing relied on unreliable hearsay. Respondent appeared pro se through its president Natalie Monroe and her husband Jeremy Monroe. Both were unfamiliar with legal proceedings and appeared unaware that they could object to the introduction of hearsay evidence by the Secretary. Natalie Monroe's testimony was generally consistent and that testimony was generally consistent with her out of court statements. Minor inconsistencies were explained to the Courts satisfaction. Ms. Monroe testified that she was French Canadian and had some difficulty in her flow of testimony. She consistently asserted, however, that she and her husband were the only employees of MDC on this jobsite, that the workers on the job were not MDC employees and that she arrived on site on September 27, 2011 after the occurrence of the fatal incident. I find her testimony consistent. Her demeanor, while excitable, was consistent with that of a person

truthfully testifying and sensing that no one believes her protestations that these workers were not MDC's employees. I find her testimony credible and convincing.

The Secretary was given the opportunity to produce post trial evidence regarding MDC's employment relationship with these workers on the jobsite. She chose to depose George Blanchette with GMB. She offered no other evidence during the 30 day period following the hearing.

While the Court did not observe Mr. Blanchette's demeanor, reading his deposition testimony reveals inconsistencies with the hearsay statement of Mr. Grant as to whether Mr. Grant even worked for GMB. Both Blanchette and Grant appear to be motivated to show that GMB was not the employer of the deceased worker or three other workers on the site. At most, if accepted, Blanchette's testimony goes to whether GMB is the employer of these workers. It does not establish that MDC is the employer. Neither Blanchette's testimony nor Grant's statement are found to be consistent or credible. They are accorded no weight regarding the identity of the employer of the four Hispanic workers on this jobsite.

For all of the foregoing reasons, the court finds that the Secretary has failed to meet her burden of proving that MDC was the employer of the Hispanic workers at the jobsite. The citation items issued to MDC are VACATED.

**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:

1. Item 1a of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.20(b)(1), is vacated.
2. Item 1b of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.21(b)(2), is vacated.
3. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.416(a)(3), is vacated.
4. Item 1 of Other Citation 2, alleging a violation of 29 C.F.R. 1910.1200(e)(1), is vacated.

/s/

**STEPHEN J. SIMKO, JR.**
Judge

Date: November 20, 2012
Atlanta, Georgia