BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS & SAFETY, OCCUPATIONAL SAFETY & HEALTH SECTION, Complainant,	)
v.	)
A&R CONSTRUCTION, INC., Contestant.	) Docket No. 08-2238) Inspection No. 310851910) OAH No.08-0632-OSH

DECISION AND ORDER

I. Introduction

This matter arises from an inspection on August 25, 2008, of a residential construction site at 7652 Camino Place, Anchorage. Following the inspection, the Alaska Department of Labor and Workforce Development, Division of Labor Standards & Safety, issued a single citation to A&R Construction, Inc., alleging a violation of the occupational safety and health standards set forth at 29 C.F.R. §1926.501(b)(13). That standard mandates that employees engaged in residential construction activities at six feet or more above a lower level must be protected by a guardrail, safety net, or personal fall arrest system. The division classified the violation as a repeat violation and assessed a monetary penalty of $2,000.00.

On behalf of A&R, Rodney McDaniel filed notice of contest. A hearing was conducted on May 26, 2010. The division was represented by Assistant Attorney General Erin A. Pohland. Mr. McDaniel participated telephonically on behalf of A&R. The division called Safety Compliance Officer Mark Baumgarten as a witness. Mr. McDaniel testified on behalf of A&R. After considering the evidence and the arguments of the parties, the Occupational Safety and Health Review Board makes the following findings of fact, conclusions of law, and order.

II. Findings of Fact

On August 25, 2008, Safety Compliance Officer Mark Baumgartner conducted an inspection of a residential construction project at 7652 Camino Place, Anchorage.[1] A&R Construction, Inc., was performing roofing work at the site under a subcontract with a general contractor, Ruf Drywall. Fona Boru, a carpenter and Sergey Tipikin, a laborer, were engaged in construction activities on the roof, at an elevation of approximately ten to fourteen feet over

[1] Ex. 2, p. 1.

ground level.[2] Rodney McDaniel, the owner of A&R, was on the site and directing the two workers, who were under his supervision.[3] The workers were not using personal fall protection and the area they were working in was not protected by a guardrail or safety net.[4] Both signed written statements admitting to being employees of A&R and that they had not been using fall protection.[5] Mr. McDaniel talked with the safety officer. Mr. McDaniel did not deny that the two workers were the employees of A&R, that they were engaged in work under his supervision on behalf of A&R, and that they were not using personal fall protection or another safety device.[6] He did not claim that they were friends or relatives who had stopped by to help him out. He stated that he had instructed them to install slide guards.[7] Mr. Boru and Mr. Tipikin were employees of A&R Construction, Inc. at the time of the inspection.

III. Discussion

An employer in Alaska must to everything necessary to protect the safety of employees,[8] including (1) complying with all occupational safety and health standards and regulations adopted by the division,[9] and (2) furnishing to each employee a place of employment that is free from recognized hazards that are likely to cause serious physical harm to its employees.[10] The division has by regulation adopted the bulk of the federal OSHA standards for the construction industry, 29 C.F.R. §1926; in particular, it has adopted 29 C.F.R. §1926.501(b)(13).[11] This regulation requires the use of fall protection when working at heights greater than six feet from ground level.

The citation at issue in this case alleges that A&R violated 29 C.F.R. §.501(b)(13). A&R does not dispute that the individuals identified by the inspector were working at heights in excess of six feet without fall protection. It argues, however, that it is not liable because those two individuals were not its employees, but rather were acquaintances of Mr. McDaniel who were providing services free of charge to Mr. McDaniel as a personal favor, without compensation.

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2 Ex. 2, p. 2; Ex. 3 (photographs); Inspection Narrative (Hearing. Exhibit 1).
3 Mr. Baumgarten testified that both workers identified Mr. McDaniel as "in charge".
4 Ex. 2, p. 2; Ex. 3.
5 Employee Interviews (Hearing Exhibit 1)
6 Inspection Narrative, p. 2.
7 Inspection Narrative, p. 2.
8 AS 18.60.075(a).
9 AS 18.60.075(a)(1).
10 AS 18.60.075(a)(4).
11 8 AAC 61.1010(c).

A. A Volunteer May Be An Employee

A&R argues that the individuals on the work site were not employees: they were volunteers. Under federal law, this argument might have some merit: the federal statutory definition of an employee is circular,[12] and the United States Occupation Safety and Health Commission has adopted the common law definition of an employee for purposes of federal OSHA law.[13] Under that definition, a volunteer might not be an employee.

But this case involves Alaska law. For purposes of Alaska's occupational safety and health statutes, an "employer" is a defined by statute as a person who has one or more employees, and an employee is defined by statutes as a person "who works for an employer."[14] Notably, the Alaska statutory definition does not require the existence of a contract of employment between the employer and the employee as a condition for status as an employee. Accordingly, the statutory definition does not preclude a volunteer, who provides services free of charge and has no contract of employment with the employer, from status as an employee for purposes of compliance with Alaska's occupational safety and health standards.[15] Moreover, this means that a business entity that, like A&R in this case, performs services under a subcontract on a commercial residential construction project, need not itself have any paid employees to hold the status of an employer for purposes of Alaska's occupational safety and health standards.[16] Thus, the primary defense asserted by A&R is inapplicable. A commercial entity such as A&R may be held liable for a violation of Alaska's occupational safety and health law even if the violation consists of conduct by a volunteer, so long as the volunteer was working "for", that is, on behalf and subject to the direction of A&R, on a commercial project and even if A&R had no workers employed as such under contracts of employment. [17]

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[12] 29 U.S.C. §652(6) provides: "The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce."

[13] *See* Singluff v. Occupational Safety and Health Review Commission, 425 F.3d 861, 867-868 (10th Cir. 2005).

[14] AS 18.60.105(a)(4), (5), (b)(1), (2).

[15] *Accord*, Hartnett v. Village of Ballston Spa, 547 N.Y.S.2d 902 (N.Y. App. Div. 1989) (applying New York law defining employees for purposes of public employees' occupational safety and health law as "persons permitted to work by an employer").

[16] Because it is established that A&R is a commercial enterprise that was conducting business under a construction subcontract, it is not necessary to address whether the Alaska occupational safety and health standards also apply in other contexts.

[17] There is authority for the proposition that OSHA does not create liability for compensatory damages for injuries incurred by an invitee as a result of a violation of applicable safety standards. *See*, Jones v. McKitterick, 215 F.3d 1337 (10th Cir. 2000); Kleker v. Elbert, 634 N.E.2d 482, 485 (Ill. App.. 1994); Auxier v. Auxier, 843 P.2d 93, 96 (Colo. App. 1992); Barrera v. E.I. Du Pont De Nemours & Co., Inc., 653 F,2d 915, 920 (5th Cir. 1981).

B. The Laborers Were Working For A&R

A&R argues that because Mr. Boru and Mr. Tipikin were volunteers, rather than paid employees. However, the preponderance of the evidence is to the contrary. Mr. McDaniel's testimony at the hearing was repeatedly inconsistent or in conflict with his own prior assertions. For example, Mr. McDaniel's notice of defense asserted that he was not responsible for work done by friends who stop by without him knowing it, but he was on the site and was aware that these individuals were performing work for him. As another example, Mr. McDaniel at one point claimed that A&R had not had any employees since 2008, but on another stated that he had paid some employees in cash for work on this job in 2009. In addition, Mr. McDaniel initially identified both individuals as his brothers-in-law, but later stated only one was actually married to a family member. Finally, Mr. McDaniel at one point claimed that he told the inspector that they were not his employees, but at another point stated he did not because he was stunned at the time of the inspection. Mr. McDaniel offered no proof to support his assertion that either man was a brother in law. Mr. Baumgarten testified that Mr. McDaniel did not deny their status as his employees at the time of the inspection. As noted above, both Mr. Boru and Mr. Tipikin signed written statements indicating that they were employed by A&R. That there is no direct evidence of compensation would not be surprising if Mr. McDaniel was paying them in case, as he testified he had previously done. The preponderance of the credible evidence is that Mr. Boru and Mr. Tipikin were employees of A&R Construction, Inc. at the time of the inspection.

IV. Conclusion

The division established a violation of 29 C.F.R. §501(b)(13). A&R has not shown that the division's proposed penalty is improper under applicable guidelines. The division's citation, and the resulting penalty, are therefore AFFIRMED.

DATE: 11/24/10 By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Signed
Timothy O. Sharp, Chairperson

Signed
Tomas A. Trosvig, Member

Signed
James Montgomery, Member

[This document has been modified to conform to the technical standards for publication.]

These decisions do not suggest, however, that an employer is exempt from civil administrative penalties for violating applicable safety standards, based upon the absence of a contract of employment with an affected worker.