

**BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY**

ADOLFO DELGADO,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No.: 1405393
	)	
CEM ENTERPRISES,	)	
	)	
Employer,	)	
	)	
v.	)	Hearing No.: 1410164
	)	
SM CONTRACTORS,	)	
	)	
Employer.	)	

**ORDER**

This matter came before the Industrial Accident Board ("Board") on April 24, 2014 pursuant to a motion filed on March 24, 2014 by SM Contractors ("SM"). On October 24, 2013, Claimant was injured pursuant to a roofing job at a job site called Cool Springs. There is a dispute regarding the identity of Claimant's employer at the time of the injury. Consequently, Claimant filed two Petitions to Determine Compensation Due – one against CEM Enterprises ("CEM") and one against SM. SM filed a Motion to Dismiss Claimant's Petition against it on the grounds that it was not Claimant's employer on the date of the accident. The purpose of this evidentiary hearing is to address SM's motion and to identify Claimant's employer on the date of the alleged work accident.

**SUMMARY OF THE EVIDENCE**

Mr. David Lyons testified on behalf of SM. He is a Production Manager for G. Fedale. He described G. Fedale as a general contractor for roofing and siding jobs. He stated that G.

Fedale typically subcontracts work to SM. When he subcontracts work, he only works with Mr. Sergio Solis. He testified that on October 24, 2013, SM was responsible for jobs on two different sties - both in Wilmington, Delaware. One of the jobs was a one-day job and considered a "tear-down" job. The other job involved new construction and was an ongoing job. Mr. Lyons stated that the new construction job started on the Monday of October 16<sup>1</sup> and ended Thursday, October 24 or Friday October 25. Tear-down work and new construction work are specialized and require employees with skill sets different from each other. In other words, a new construction crew would not be assigned a tear-down job and vice versa.

To the best of his knowledge, SM only had one new construction crew and therefore, SM could not have been responsible for working at Cool Springs on October 24. Mr. Lyons admitted that he does not know if the people working for SM are employees of SM or are subcontractors of SM. He also admitted that he would not know if SM concurrently subcontracted new construction work to begin on October 24 to another company while SM worked on a G. Fedale job. G. Fedale does not control who SM arranges to work on behalf of SM but Mr. Lyons has preferred people working for SM to perform particular work. He stated that the maximum size crew at any particular job site is five people. A crew could range from four to six people.

Mr. George Floyd who is a Verizon Wireless Custodian of Records testified on SM's behalf. He testified that NVR is the identified contract holder of the number of 410-858-5565. The contract does not identify a person's name associated with such telephone number; it only identifies the company name of NVR.

Mr. Floyd testified that the contract holder of the number of 302-463-4792 is Mr. Robert Marchiani. Mr. Floyd testified that on October 1, 2013 there is a call from Mr. Marchiani's telephone number to 302-399-1754. On October 23, 2013 there are nineteen calls between Mr.

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<sup>1</sup> The Board takes judicial notice that said Monday was Monday, October 14, 2013.

Marchiani's telephone number and 302-602-0234. On October 24, 2013, there are thirty calls between Mr. Marchiani's telephone number and 302-602-0234. Also on October 24, there are three calls between Mr. Marchiani's telephone number and NVR's telephone number. On October 24 and on October 25, there are no calls between NVR's telephone number and 302-250-9378 or calls between Mr. Marchiani's telephone number and 302-250-9378. On November 30, 2013 there was one telephone call and one text between Mr. Marchiani's telephone number and 302-399-1754. Mr. Floyd could not verify that the contract holder exclusively used the assigned telephone number, if at all.

Mr. Sergio Solis testified on SM's behalf. He is an owner of SM. His cell phone number is 302-250-9378. Mr. Solis testified that during the year of 2013, he had five crews but only one new construction crew. Of the five crews, he has two crews of employees and typically three crews of subcontractors. He always verifies that each subcontractor has workers' compensation insurance before agreeing to subcontract work.

Mr. Solis reviewed a list of SM employees to verify that Claimant's name was not on the list. However, Mr. Solis stated that said list was only a partial list of employees. He admitted that he did not produce a full list of SM employees to CEM or to Claimant despite CEM's request for production. He stated that he was under the impression he was only supposed to produce proof of payroll.

Mr. Solis stated that Mr. Adrian Corrales is the foreman of the new construction crew and an employee of SM. Mr. Solis testified that on October 24, the new construction crew was doing work in Wilmington as a subcontractor for G. Fedale. He stated that on October 23, Mr. Marchiani telephoned him twice about doing work at Cool Springs. Mr. Solis stated that the telephone number of Mr. Marchiani at that time was 302-290-0938. Mr. Solis testified that he

declined the offer because it conflicted with the work he was doing in Wilmington; no one in his crew would be available.

Mr. Solis acknowledged that SM had done roofing work for CEM previously. He stated that SM may have done six jobs for CEM in Maryland including some subcontracting work during the October/November timeframe but he denied that SM ever worked at Cool Springs. Mr. Solis regularly spoke with Marchiani about jobs after the work accident. Mr. Solis claimed that the telephone number of 302-602-0234 is a CEM phone number.

Mr. Solis did not learn of Claimant's workers' compensation claim until Mr. Marchiani notified him *via* telephone call in November. Mr. Solis read some of the contents from an NVR Accident report<sup>2</sup>, a report that Mr. Solis later testified he had not previously seen until the day of the hearing. The accident report indicates that it was prepared by Mr. Matthew Webster whose contact telephone number is 410-858-5565. In the report, it identifies Claimant as an employee of CEM and identifies Mr. Bob Marchiani as the owner of CEM. It indicates that Mr. Luis Flores was also a CEM employee and translator for Claimant. Mr. Solis represented that Mr. Flores has worked at job sites where CEM did work but he would not know if Mr. Flores was a CEM employee.

Mr. Solis testified that he never met Claimant. The first time he saw Claimant was at the hearing. He stated that SM never supplied Claimant tools or safety gear at any time. SM never provided Claimant training at any time. SM never paid Claimant for work. SM pays its employees by check.

Mr. Solis testified that he is a Facebook friend of Mr. Valverde otherwise known as "Toro". Mr. Solis and Toro grew up together in Costa Rica. Approximately one year to a year-

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<sup>2</sup> The Board gave great leeway to both parties with respect to admitting evidence in the interests of judicial economy. It allowed Mr. Solis to read from the report over CEM's objection. CEM later submitted into evidence as CEM Exhibit #3 the same accident report but attached an affidavit of Mr. James Sack.

and-a-half ago, Mr. Solis and Toro stopped keeping in touch. Mr. Solis represented that he knows that Toro is an employee of Mr. Marchiani because "he knows him." Mr. Solis claimed that Toro had been working for Mr. Marchiani for three to four years. He acknowledged that on Toro's Facebook profile page, Toro identifies Ryan Homes as his employer.

Mr. Solis verified that he received a check from CEM dated November 7, 2013 in the amount of \$875. Mr. Solis testified that Mr. Marchiani telephoned him to inform him that CEM had a check for SM. Mr. Solis believes that approximately a week after the telephone call, Mr. Marchiani gave him the check. The check was deposited on November 9, 2013 according to the deposit slip. Mr. Solis could not verify for what job the payment was made but guessed that it could have been for work in Havre de Grace. Checks are cut after the work is completed.

Mr. Solis also could not verify for what jobs CEM paid SM an October 24, 2013 check in the amount of \$525 and an October 10, 2013 check in the amount of \$1550. Mr. Solis speculated that the October 10, 2013 check may have related to a job in Middletown.

Claimant testified with the assistance of a live interpreter. Claimant was called as a witness by SM. Claimant stated that he understands English but does not speak much English. Claimant testified that he met Toro at a party two days prior to the work accident. He does not know Toro's real name. At the party, Toro mentioned about working for the same company as Toro. Claimant stated that Toro had two telephone numbers, 732-237-5125 and the other was the telephone number was 302-602-0234.

On October 24, Toro telephoned Claimant to do work for Toro and for Bob (Mr. Marchiani). Toro never said that Claimant was going to be working for CEM. Instead, Toro said that Claimant will be working for Mr. Marchiani and that Mr. Marchiani would be paying

Claimant by company check.<sup>3</sup> Toro provided the location of the construction site – Cool Springs.

Claimant drove himself to the construction site. He is a skilled roofer and did not require training. He brought with him his own tools as is normally done on new construction sites. He was responsible for purchasing safety equipment. Once Toro instructed Claimant about what to do generally, Claimant understood the details of the job. Claimant would not require supervision; no one would be directing Claimant or helping him. Claimant denied being a subcontractor and stated that he does not have workers' compensation insurance.

Claimant testified that when he reported for work, he was under the impression that Mr. Marchiani was the boss of CEM and that Claimant was working for Mr. Marchiani. Mr. Marchiani was going to pay Claimant initially by a personal check until such time that Claimant obtained a certain kind of number that he said was similar to a social security number. The understanding was that Mr. Marchiani needed said number to add Claimant to the payroll and to pay Claimant wages by a company check. Claimant did not sign tax documents upon his hire. Claimant testified that he received no payment for the job because he was injured before any roofing was done.

After the work accident, Claimant telephoned Toro. Toro instructed him not to do anything because he was on his way. Toro was in New York at the time. Mr. Marchiani arrived to the scene before Mr. Luis Flores. Claimant represented that Mr. Flores was an employee of Mr. Marchiani. Mr. Flores drove Claimant to the hospital. Mr. Flores instructed Claimant not to reveal that the injury was work-related and to state that he got injured at home. Claimant said

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<sup>3</sup> Claimant described the payment schedule. Typically, once the job is finished, he would notify the employer that the job is complete. They would come to the site to inspect. He would then get paid eight days after the work is completed.<sup>3</sup> Employees are not paid until after the first two weeks of work. Thereafter, employees are paid weekly. Fridays are payday.

that he is friends with Mr. Flores. Mr. Flores rented a room to Claimant and helped Claimant gain employment after the work injury.

Claimant's work history prior to the date of the injury included working last summer for a gentleman from Costa Rica. In June or July, he worked for Pepe, Mr. Marchiani's business partner.

Claimant never saw a copy of the accident report. He did not recognize Matthew Webster's name. Claimant never went to the business location of CEM. Claimant never spoke directly with Mr. Marchiani.

Claimant stated that he does not know who Mr. Solis is. He may have seen Mr. Solis once a long time ago; otherwise, the first time Claimant has seen Mr. Solis was at the hearing. Claimant testified that to his knowledge he has never worked for Mr. Solis or for one of Mr. Solis' subcontractors. He was unsure why Mr. Solis was at the hearing.

Claimant recognized that Toro's Facebook page identified Toro's employer as Ryan Homes. Claimant remarked that Ryan Homes is the company responsible for building the homes at Cool Springs but that Ryan Homes hires other companies to perform various construction jobs. Claimant believed that Toro worked for Mr. Marchiani.

Claimant testified that he did not recognize the name of Angel Luis Alvarado. Claimant was shown a Certificate of Insurance for Luis Alvarado. The address on the certificate is the same address of Claimant's former residence. Claimant testified that when he lived at that address, he lived with four other people. One of the people they referred to as Flaco but Claimant did not know his real name.

Mr. Greivin Rodriguez testified with the assistance of a live interpreter as a witness for SM. He has his own contracting business for roofing and siding. He used to work for a

company named Tri-Mark. Mr. Rodriguez is familiar with Claimant. Claimant used to live in New Jersey where all of these guys are contractors. Claimant moved from New Jersey to Delaware two years prior to the work accident. Mr. Rodriguez represented that Claimant occasionally worked for Mr. Longato.

Mr. Rodriguez stated that he opened the Cool Springs project for Ryan Homes. He remarked that when he is completely involved with a construction project, he knows all of the players. Mr. Rodriguez expressed his belief that on October 24, Claimant worked for Mr. Longato. Claimant told him that he was working for Mr. Longato.

Mr. Rodriguez acknowledged that Claimant could have worked for Mr. Marchiani but more likely worked for Mr. Longato. He was not sure: if Mr. Longato and Mr. Marchiani were business partners<sup>4</sup>; of the name of Mr. Longato's company; and the name of the company that signed the Cool Springs project. He has no direct knowledge such as in the form of paperwork of Claimant's relationship with either Mr. Marchiani or Mr. Longato. He has not seen anything tangible identifying Claimant's employer. He just knows the people involved; he knows these guys and helps them. Mr. Rodriguez stated that he is the one who gives all these guys work.

Mr. Rodriguez explained how the subcontracting business works. He calls Mr. Longato and Mr. Longato gives out the jobs. Mr. Marchiani is the one who heads all the jobs and tells people where to go. The companies contact the workers by telephone. It would be customary for Claimant to have learned of the job via telephone call.

On day of accident, Claimant called him. Claimant told him that he got injured and told him about the hospital. Mr. Rodriguez was not present when Claimant was driven to the hospital.

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<sup>4</sup> At another point in his testimony, he represented that Mr. Longato was the sole owner of a company. Mr. Longato picked up workers and brought them to the job sites.



On October 25, Mr. Flores called him to hire Mr. Rodriguez to help finish the job at Cool Springs. Mr. Rodriguez represented that Mr. Flores on the day of the work accident was working for Mr. Longato and for Mr. Marchiani. Mr. Flores instructed Mr. Rodriguez about what to do. Mr. Rodriguez helped Mr. Flores and another gentleman to finish the job. Mr. Flores paid Mr. Rodriguez in cash. Mr. Rodriguez received no payment from Mr. Marchiani, from Mr. Longato, or from CEM. Mr. Rodriguez stated that he was not a CEM employee or employee of Mr. Marchiani. Mr. Rodriguez did not see Mr. Marchiani or Mr. Longato at the Cool Springs site.

Mr. Rodriguez testified that he met Mr. Solis one time while Mr. Rodriguez was working for Tri-Mark. Mr. Marchiani was the supervisor at Tri-Mark at that time. Mr. Rodriguez went to the tennis courts where Mr. Marchiani and Mr. Solis were playing to collect his paycheck. He had not seen Mr. Solis after that until the day of the hearing. He was aware that Mr. Solis was a subcontractor of Tri-Mark. Mr. Rodriguez testified that he no longer communicates with Mr. Marchiani. They had a problem while working together at Tri-Mark.

Mr. Rodriguez stated that he does not know of Angel Alvarado by name but he might have met him. He has heard people mention the name Toro. Mr. Rodriguez used to work with a former employee of Mr. Marchiani and of Mr. Longato who often spoke of Toro. While Mr. Rodriguez has heard of Toro's name often, he does not know who Toro is.

Mr. Adrian Corrales testified on SM's behalf with the assistance of a live interpreter. He is the foreman on new roofing projects for SM. He has worked for SM for three-and-a-half years and has only worked on new construction projects for SM. The work is skilled and does not require direct supervision. He knows what to do and does not need to have each stage inspected before proceeding to the next step. He provides his own equipment and his own van. He

consistently has one person who helps him with jobs. If he requires additional help, he gets the additional help; according to Mr. Corrales, however, Mr. Corrales does not hire or fire people for SM.

Mr. Corrales is aware that SM has more than one crew but Mr. Corrales does not know the total number of crews SM employs. Mr. Corrales represented, however, that his crew is the only SM crew that works on new construction. Therefore, if Mr. Solis had a crew working at Cool Springs it would have been Mr. Corrales' crew. Mr. Corrales is aware of Cool Springs from driving by and seeing signs but he has never worked at Cool Springs. Mr. Solis pays Mr. Corrales by check. The name on the check is of the general contractor who Mr. Corrales identified as CEM Contractors.

Mr. Corrales testified that he and Mr. Flores have treated each other as cousins since they were little. Mr. Flores' cell phone number is 302-399-1754. Mr. Corrales testified that he visits Mr. Flores and speaks with him daily. Mr. Corrales represented that Mr. Flores works for Mr. Marchiani; he knows the latter because he and Mr. Flores are so close. Mr. Flores has never worked for Mr. Solis.

Mr. Flores lives with Claimant. Mr. Corrales stated that he is friends with Claimant; he might not characterize him and Claimant as "really good friends" but they never had any problems. He will speak with Claimant once in a while but not daily. He is not certain for whom Claimant works but he is certain that Claimant has never worked for Mr. Solis. Mr. Corrales never saw Claimant at a job site where SM was doing work.

Mr. Corrales is aware of a person named Toro although he does not know Toro's full name. He does not know Toro personally but he has seen Toro making the rounds at various work sites of Mr. Marchiani and of Mr. Longato's crews. He knows that Toro works for Mr.

Marchiani and Mr. Longato. Toro will pick up tools for people working for Mr. Marchiani and Mr. Longato and will ask if anyone needs anything. Toro will provide translation for people on site when they have communication problems.

Mr. Corrales acknowledged that he has done two construction projects in Maryland and that one of the projects was in Northeast, Maryland. He added that he does not believe the Northeast, Maryland project was at Cool Springs. On October 24, Mr. Corrales was doing a job in Wilmington in which G. Fedale subcontracted the work to SM. The job was very difficult and it took several days. Therefore, it was not possible for Mr. Corrales to have been working in Maryland on October 24.

Mr. Flores telephoned Mr. Corrales and informed Mr. Corrales of Claimant's work accident. Mr. Flores stated that Claimant had fallen at a worksite in Maryland and was alone. Mr. Flores was going to pick up Claimant. Claimant expressed his belief that he worked for Mr. Marchiani and for Mr. Longato. At another point in Mr. Corrales' testimony, Mr. Corrales testified that Claimant believed his employer was Mr. Marchiani without stating Mr. Longato's name. Mr. Corrales testified that he might have visited Claimant to see if Claimant was okay; they are friends.

Toro may have called Claimant because Claimant does not speak sufficient English to communicate with Mr. Marchiani. Mr. Corrales stated that he was under the impression that Toro told Claimant not to sue and that they were going to help Claimant.

Mr. Pepe Longato testified on behalf of CEM. He has been employed by CEM for two-and-a-half years. He and Mr. Marchiani are business partners. The company is CEM Ryan. It was formed a year-and-a-half ago. Mr. Marchiani exclusively runs the Maryland and Delaware crews. Mr. Longato runs the upstate New York crews. Mr. Longato lives in New York.

Mr. Longato does not involve himself with the Delaware or Maryland day-to-day activities or projects. Mr. Marchiani is exclusively responsible for retaining subcontractors in Delaware and in Maryland. However, he and Mr. Marchiani talk daily about the business. Mr. Longato is aware of CEM's employees, even those who work in Maryland and in Delaware. He is made aware of the hiring and firing of employees in Maryland and in Delaware. He stated that Claimant was never a CEM employee and added that he had never before seen Claimant.

Mr. Longato stated that CEM Ryan is a different company than Ryan Homes. CEM Ryan is not the same company as CEM. Mr. Marchiani was not involved in CEM. Only Mr. Longato was in charge of CEM including CEM's business in Delaware and in Maryland. CEM is not the same company that was involved in a previous workers' compensation case *Abel-Lopez Reynoso v. CEM Enterprises* that was before the Board in October 2012.

Mr. Longato testified that he does not recall when CEM stopped operating. He could not recall if CEM's business wound down around the time CEM Ryan commenced operating. He also could not recall when CEM Ryan went into operation despite his testimony above. There was no intention, however, for CEM Ryan to become the successor to CEM. He does not recall whether the Cool Springs contract was with CEM or with CEM Ryan. He remarked that Mr. Marchiani is in a better position to know.

Mr. Longato testified that once CEM Ryan commenced operations, they stopped writing checks from CEM's bank account. On cross examination, Mr. Longato reviewed the copies of the checks that were admitted as SM Exhibit #7. He acknowledged that it was his stamped signature on each of the checks. Mr. Marchiani issues the checks for the Delaware and Maryland projects and has the authority to use Mr. Longato's signature stamp on the checks.

Included in the Exhibit were two checks - one was check number 1211 and the other was check number 1701. Both checks were made payable to SM. Both checks were dated November 7 although check number 1211 indicated the year 2010. Check number 1701 indicated the year 2013. SM deposited both checks on November 9, 2013. SM's counsel contended that the 2010 reference was made in error and should have indicated 2013.<sup>5</sup> The payor of check number 1211 was CEM. The payor of check number 1701 was CEM with Ryan Homes stated underneath. Mr. Longato stated that while they have kept the CEM account open, they stopped using CEM checks once CEM Ryan started operating. Mr. Longato stated that he would not know why both accounts were being used on the same date if SM's counsel's contention was true.

Mr. Longato testified Ryan Homes subcontracts its work. CEM subcontracts some of its work. He will only subcontract work if there is proof of insurance.

Mr. Longato testified that he was in Peru from late October to early November; therefore, he was not in the country on the day of the work accident. Mr. Longato does not know Mr. Flores. Mr. Longato denied ever picking up workers in Delaware and in Maryland since CEM Ryan became operational. Mr. Longato has been in New York since that time.

Mr. Valverde otherwise known as "Toro" used to be an employee of CEM a long time ago. Mr. Longato fired Toro in the 2012 timeframe. Toro never worked for CEM Ryan. According to Toro's Facebook page, Toro is currently employed by Ryan Homes.

Mr. Robert Marchiani testified on behalf of CEM. He and Mr. Longato are the co-owners of CEM Ryan. CEM Ryan is a general contracting business involved in roofing, siding, doors and windows. CEM Ryan formed one year to one-and-a-half years ago initially to do work for Ryan Homes in upstate New York. Thereafter, it expanded its business into other states

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<sup>5</sup> SM's counsel during questioning represented that a check would not be able to be deposited on November 9, 2013 if the check date was 2010, two years prior.

including Delaware and Maryland. Mr. Marchiani manages the business in this area including Delaware and Maryland. Mr. Marchiani gets and bids the work, gets the jobs and schedules the people for the jobs only on behalf of CEM Ryan. Mr. Longato manages the business in the New York region. He and Mr. Longato are the only ones with the authority to hire and fire on behalf of CEM Ryan.

Mr. Marchiani testified that he has not been affiliated with any other company including CEM once CEM Ryan incorporated. He stated that CEM closed at some point during the preceding year but he could not recall when. Initially, Mr. Marchiani denied any affiliation with CEM at any point in its existence.<sup>6</sup> He stated that CEM and CEM Ryan are not associated with each other. CEM Ryan is a partnership LLC having a different tax identification number than CEM. Prior to CEM Ryan, Mr. Marchiani was affiliated for twenty-one years with Tri-Mark. CEM Ryan has no employees and did not have employees from October 2013 to the present. CEM Ryan has no payroll records or no employee tax records. On the other hand, CEM did have employees.

Mr. Marchiani estimated that his side of the CEM Ryan business handles approximately thirty percent of the roofing work for Ryan Homes. In late 2013, Ryan Homes retained CEM to do the roofing at Cool Springs. Mr. Marchiani explained that a company like Ryan Homes would go through his company to build homes even though his company does not have employees because his company has the manpower and connections to retain the appropriate subcontractors. Hence, Ryan Homes permits contractors to further sub out the work.

Mr. Marchiani testified that he has known Mr. Solis for twenty years. While at Tri-Mark he subcontracted work to Mr. Solis and Mr. Solis' partner Miguel. Mr. Marchiani estimated that

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<sup>6</sup> Mr. Marchiani wore a sweatshirt that distinctly had written on it CEM Siding and Roofing. It did not appear to say CEM Ryan.

since CEM Ryan has been in existence, it may have subcontracted to SM approximately ten to twelve times. In the year 2013, he subcontracted approximately fifty percent of the Maryland work to SM. Mr. Marchiani testified that it is not unusual for a subcontractor to further subcontract a job. Sometimes a contractor can be too busy to have its employees complete the work. When Mr. Marchiani was affiliated with Tri-Mark, approximately sixty to seventy percent of the work subcontracted to SM was further subcontracted.

Mr. Marchiani testified that he specifically subcontracted the Cool Springs roofing project to SM. CEM submitted into evidence as CEM Exhibit #1 a copy of the certificate of insurance evidencing SM's proof of workers compensation insurance from November 29, 2012 to November 29, 2014. CEM is identified as the certificate holder.

Mr. Marchiani also referred to a "CEM Enterprise Inc." check with "Ryan Homes" written under the CEM name. The check is dated November 7, 2013 in the amount of \$875 made payable to "S AND M" to evidence payment to SM for the Cool Springs roofing project. "The check number is 1701. Mr. Marchiani testified that although the check does not identify the specific job for which the payment is made, the job is identified in CEM Ryan's accounting software program ("Peachtree system"). Contracts are only verbal; they are not written. They use the Peachtree system to identify for what jobs payments are made.

Mr. Marchiani testified that he inputs the data into the Peachtree system to generate the checks. A copy of the check and the printed page from the Peachtree system related to the check were admitted into evidence as CEM Exhibit #2.<sup>7</sup> Mr. Marchiani testified that he issued

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<sup>7</sup> Such evidence was admitted into evidence over SM's objection. Mr. Marchiani verified that he inputted the information into the software system. He verified that it was an accurate depiction of how it presents and of the information he entered into the system. The Board overruled SM's objection.

the check to SM for the Cool Springs roofing project on lot 193<sup>8</sup> – the location of Claimant's work accident. Such location and job are identified on the memo line in the Peachtree system. The Peachtree system identifies "CEM Enterprises" as opposed to "CEM Ryan" as the company issuing the check.

Mr. Marchiani personally handed the check to Mr. Solis. He and Mr. Solis are friends. Mr. Marchiani testified that payments can be made thirteen to fifteen days after the job is completed – typically around the second Friday after the job is completed. Hence, issuing a check on November 7 could be consistent with payment for work that was completed around the day of the work accident.

Mr. Marchiani expressly denied that Claimant was an employee of either CEM or of CEM Ryan. Claimant was not hired by Mr. Marchiani, Mr. Longato, or anyone affiliated with CEM. Mr. Marchiani never subcontracted work to Claimant. Mr. Marchiani testified that the first time he ever saw Claimant was at the hearing.

Mr. Marchiani testified that he became aware of Claimant's injury on either October 24, 2013 or on October 25. Mr. Matthew Webster who is the Ryan Homes supervisor notified him that one of the guys got hurt at Cool Springs. Mr. Marchiani tried to identify who was on the Cool Springs job site. Mr. Marchiani telephoned Mr. Solis. Mr. Solis stated that he did not have anyone working at that site. Mr. Marchiani thereafter telephoned another possible subcontractor responsible for a non-roofing project at the Cool Springs site to inquire if he was the injured worker's employer. Mr. Marchiani explained that he thought since the work accident involved a vehicle that the worker could have gotten injured on a ground job. The other person denied being Claimant's employer.

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<sup>8</sup> The memo line states "C/S 193 R". Mr. Marchiani testified that "C/S" indicates Cool Springs. "R" indicates a roofing job. "193" identifies the lot number of the job.



Mr. Marchiani testified that he notified Mr. Webster that CEM was not scheduled to be at the Cool Springs site “yet”. Mr. Marchiani then testified that SM was the only subcontractor scheduled to be at Cool Springs for roofing “that day”. He also testified that he could not recall the specific date SM was scheduled to work at Cool Springs but it would have been around the October 24 timeframe. Mr. Marchiani represented that he never found out the identity of Claimant’s employer.

Mr. Marchiani testified that he eventually spoke to Mr. Flores. Mr. Marchiani claimed that Mr. Flores is employed by Mr. Angel Alvarado who is a separate contractor similar to SM. Mr. Marchiani stated that Mr. Solis was under the impression through Mr. Rodriguez<sup>9</sup> that Mr. Flores did the roof. Mr. Flores denied doing the roof. Mr. Marchiani spoke with Mr. Solis about the work accident a number of times.

Mr. Marchiani acknowledged that for other projects CEM has subcontracted work to Mr. Alvarado and has a certificate of insurance from Mr. Alvarado. Mr. Alvarado’s address identified on the certificate of insurance is 189 Mitchell Road, Dover, Delaware, the same address as Claimant’s former residence. However, CEM has never paid Mr. Alvarado for work done at Cool Springs.

Mr. Marchiani estimated that SM may have had ten operating crews around the October 2013 timeframe. Mr. Marchiani believes that SM in general has more than one new construction crew contrary to testimonies of SM witnesses. Mr. Marchiani stated that CEM previously had subcontracted SM to perform concurrent new roofing projects at multiple sites.

Mr. Marchiani summarized as follows. CEM subcontracted the Cool Springs roofing work to SM. CEM did not subcontract the roofing project with anyone other than SM. SM

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<sup>9</sup> Mr. Marchiani only knows Mr. Rodriguez through Mr. Longato when he worked in New York. Mr. Rodriguez was never employed by CEM Ryan.

provided CEM with a certificate of insurance covering the job. There is a check evidencing SM being paid to perform the roofing job. SM deposited said check. Claimant is not a CEM employee. It is possible that Mr. Alvarado was a subcontractor of SM.

On cross examination, Mr. Marchiani acknowledged that it is possible that Mr. Alvarado could have been a subcontractor for a job that is not affiliated with CEM Ryan. He also acknowledged that it is possible that neither Mr. Alvarado nor Claimant was working for SM on the day of the work accident. Mr. Marchiani stated that anyone doing work for him is required to provide a certificate of insurance and to fill out either a W9 or a 1099 form. He does not have such paperwork from Mr. Alvarado or from Claimant.

Mr. Marchiani did not become familiar with the NVR accident report until a month-and-a-half after the work accident. Until then, he had only known about the work accident from Mr. Webster's telephone call. Mr. Marchiani reviewed the NVR accident report<sup>10</sup> at the hearing and recognized that according to the report: Mr. Marchiani is the owner of CEM; that Claimant is a CEM employee; that Mr. Flores is a CEM employee and translator; and that Mr. Flores and Mr. Marchiani came to the scene of the accident on the day of the accident. There was another accident report from ABC that apparently similarly stated that CEM was Claimant's employer and that Mr. Marchiani arrived at the scene of the work accident. Mr. Marchiani was unfamiliar with the ABC accident report. Mr. Marchiani also acknowledged that Claimant's testimony was consistent with what was stated in the NVR accident report. Despite the latter, Mr. Marchiani maintained: that Claimant at no time was a CEM employee; that Mr. Flores was not a CEM

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<sup>10</sup> The NVR accident report was admitted into evidence as CEM Exhibit #3. An Affidavit of James Sack, Vice President, Secretary, and General Counsel for NVR, Inc. was attached to the accident report over SM's objection. The affidavit identified NVR, Inc. as the owner of the homebuilding construction site referred to as "Cool Springs" located in Charlestown, Maryland. It confirmed that Mr. Webster, the production supervisor for NVR on the Cool Springs job site prepared the accident report. It stated that NVR, Inc. contracted CEM to complete the roofing work for certain Cool Springs housing units and that CEM was not prohibited from subcontracting the roofing work. Lastly, it stated that NVR, Inc. takes no position on who was Claimant's employer.

employee; and that Mr. Marchiani did not arrive at the scene of the accident but that he returned to the location either on October 25 or October 26. He visited the Cool Springs site because he routinely visits the job sites twice per week.

Mr. Marchiani testified that he knew Toro briefly when he went to New York. Toro used to live in Delaware but relocated to Syracuse. He and Toro no longer talk very much. Mr. Marchiani testified that at no time between October 2013 and the day of the hearing was Toro employed by CEM. He verified that Toro indicates on his Facebook page that Ryan Homes is Toro's employer. He also verified that Toro and Mr. Solis are Facebook friends whereas Toro and Mr. Marchiani are not Facebook friends.

Mr. Marchiani represented that the 302-602-0234 telephone number that earlier in the hearing was claimed to belong to Toro actually was a CEM telephone number that Mr. Marchiani gave to Mr. Steve Lawry, a former partner of Mr. Marchiani. Mr. Marchiani does not know how that telephone number would have gotten into Toro's possession. When asked why there were thirty telephone calls between Mr. Marchiani's telephone number and the 302-602-0234 telephone number, Mr. Marchiani explained that the calls were between he and Mr. Lawry about work.

Mr. Marchiani admitted that he issued check numbers: 1701 (discussed above); 1671; and 1652. Check number 1671 is a check dated October 24, 2013 made payable to "S AND M" in the amount of \$525.00. According to the memo line in the document from the Peachtree system, it was paid for a roofing job at Chesapeake Club on lot 145.<sup>11</sup> Mr. Marchiani remarked that the

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<sup>11</sup> The memo line stated "C/C 145R".

check referenced CEM as the payor as opposed to CEM Ryan because the Chesapeake Club was not a job for Ryan Homes.<sup>12</sup>

Check number 1652 is a check dated October 10, 2013 in the amount of \$1,550.00 made payable to "S AND M". Referring to the printout from his entry into the Peachtree system, Mr. Marchiani testified that he issued this check for a roofing job in Havre de Grace on lot 842. He could not recall the name of the job site but the initials were "B/R".

On cross examination, Mr. Marchiani was referred to SM Exhibit #7 that identified three checks SM deposited on November 9, 2013. Two checks (check numbers 1701 and 1671) were issued from CEM with Ryan Homes indicated on the checks and the checks came from the same bank account. The other check (check number 1211) only identified CEM and had a different bank account number identified. All three checks appeared to be signed by Mr. Longato.

SM's counsel suggested that the fact that two checks were issued on the same day - one on behalf of CEM and one on behalf of CEM with "Ryan Homes" written under the CEM name - suggests that CEM was in operation at the time of Claimant's accident and was in operation concurrently with CEM Ryan (assuming the account identifying Ryan Homes is a CEM Ryan account). Mr. Marchiani admitted that he was responsible for issuing checks from both the CEM bank account and the bank account that has CEM and Ryan Homes identified on the check. He issued CEM checks for non-Ryan Homes business.

Mr. Marchiani restated that he was "not really" involved with CEM. He was only responsible for doing the accounting and managing the payroll of CEM. At another point in his testimony, Mr. Marchiani acknowledged being "most likely" responsible for the issuance of all of the checks identified in SM Exhibit #7. Yet at another point in his testimony, Mr. Marchiani

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<sup>12</sup> A copy of check number 1671 was included in SM Exhibit #. The Board notes that the check stated in the payor section "CEM ENTERPRISE INC" with 'RYAN HOMES' underneath.

stated that he never before saw the checks identified in SM Exhibit #7 and does not know if they went through the Peachtree system.

### **FINDINGS OF FACT AND CONCLUSIONS AT LAW**

The primary issue presented to the Board is whether Claimant was an employee of SM on October 24, 2013 when the accident occurred. If the Board determines that SM was not Claimant's employer, the Board shall also determine in the alternative if CEM was Claimant's employer on October 24, 2013 to enable this matter to be scheduled for a hearing on the merits if appropriate.

For the purposes of the Workers' Compensation Act ("Act"), an "employee" is defined under 19 *Del. C.* § 2301(10) as: "every person in service of any corporation (private, public, municipal or quasi-public), association, firm, or person ... under any contract of hire, express or implied, oral or written, or performing services for valuable consideration ... ." However, a person is not considered an employee under the Act if such employment is deemed to be "casual and not in the regular course of the trade, business, profession, or occupation of his employer ..." 19 *Del. C.* §2301(10).

It is clear that Claimant was hired to perform roofing work on new construction for valuable consideration. He did not agree to do the work gratuitously. Roofing work is something that falls within the regular course of the trade, business, profession, or occupation of both CEM and SM. Assuming Claimant was employed by either company, Claimant would not be characterized as a "casual" employee as defined by statute. The Board finds that Claimant was in fact an employee as defined by statute.

There are four elements to consider when determining which of several possible employers is the appropriate one for the purposes of payment of workers' compensation benefits

to an injured worker. “These are (1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee’s wages; and (4) who has the power to control the conduct of the employee when he is performing the particular job in question.” *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 393-4 (Del. 1964). The determination of the employment relationship must consider the totality of the circumstances without a single factor absolutely controlling. *See Gooden v. Mitchell*, 21 A.2d 197, 201 (Del. Super. 1941).

CEM contends that it was not involved in the roofing project at Cool Springs but rather CEM Ryan was a party to the contract. The Board rejects such argument. Despite Mr. Marchiani’s insistence that he only worked on behalf of CEM Ryan and not CEM, Mr. Marchiani ultimately admitted that he was managing the Cool Springs roofing contract that included roofing work on lot 193 and that such contract was specifically with CEM. Mr. Marchiani did not state that the contract was with CEM Ryan.<sup>13</sup>

Mr. Marchiani also conceded that on behalf of CEM: he managed the accounting and payroll for CEM; he entered data into the Peachtree accounting system; he issued checks; and he had authority and used Mr. Longato’s signature stamp to sign the checks. The Board concludes the Mr. Marchiani played an active role in the business of CEM.<sup>14</sup> Mr. Marchiani made such concessions after he and Mr. Longato insisted that Mr. Marchiani had no affiliation with CEM but only with CEM Ryan. Neither Mr. Marchiani nor Mr. Longato was credible.

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<sup>13</sup> The Board notes that CEM submitted into evidence an affidavit of Mr. Sack in which Mr. Sack represented: that Mr. Sack is Vice President, Secretary, and General Counsel for NVR, Inc.; that NVR is the owner of the homebuilding construction site referred to as “Cool Springs”; that CEM was contracted by NVR, Inc. to assume responsibility for completion of roofing work for certain housing units that were under construction at Cool Springs; and that CEM was not prohibited from subcontracting the roofing work on the Cool Springs site to other companies. Hence, even the affidavit submitted by CEM bolstered the fact that CEM was responsible for the roofing project at Cool Springs as opposed to CEM Ryan.

<sup>14</sup> Mr. Marchiani’s admission that he was responsible for managing the Cool Springs contract provides proof that he was more involved with the business of CEM than his represented concessions.

As the company responsible for ensuring that the roofing work was completed at Cool Springs, CEM was responsible for hiring and firing its employees, for paying its employees for the work performed, and for controlling the conduct of its employees while performing the particular work in question. According to the evidence, CEM did have the option to subcontract the work. If it subcontracted the work to a company having workers' compensation insurance, CEM would not be liable for the subcontractor's employee getting injured on the job.

CEM through the testimony of Mr. Marchiani contended that it subcontracted the Cool Springs work to SM and only to SM. SM has workers' compensation insurance. In support of its contention, CEM presented check number 1701 in the amount of \$875 made payable to SM for roofing work on lot 193 at Cool Springs. The date of the check was November 7, 2013. Mr. Solis deposited such check on November 9, 2013 on behalf of SM. Mr. Solis could not recall for what project the check was issued. However, giving CEM the benefit of the doubt that CEM subcontracted the Cool Springs roofing work to SM the Board notes that such check does not provide proof that the subcontracted work commenced October 24; in other words, CEM could have subcontracted the work to SM after Claimant got injured. As a result of Claimant's injury, Claimant was unable to complete the job on October 24. The Board notes that Mr. Marchiani entered the Cool Springs notation after the day of the accident and after being informed of the accident.

Mr. Solis testified that Mr. Marchiani contacted him on October 23 to perform the work at Cool Springs on October 24 but that Mr. Solis on behalf of SM had to decline. Mr. Solis testified that he only has one new construction crew.<sup>15</sup> The evidence supports the fact that only a new construction crew would work on a new construction project. SM's only new construction

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<sup>15</sup> Mr. Carrales and Mr. Lyons both testified that to the best of their knowledge SM only has one new construction crew.

crew was already committed to working at a G. Fedale site in Wilmington, Delaware on October 24. Mr. Lyons of G. Fedale and Mr. Corrales, SM's foreman of the new construction crew, verified that SM's new construction crew worked at the Wilmington site on October 24. Therefore, SM's employees could not have been performing work at Cool Springs on October 24. The Board believes Mr. Solis that he refused Mr. Marchiani's request to complete the work at Cool Springs on October 24.<sup>16</sup> The Board also believes Mr. Solis' testimony that he did not subcontract the Cool Springs work to another company to enable the work to commence on October 24. Therefore, the Board grants SM's motion to dismiss Claimant's Petition to Determine Compensation Due against it.

Claimant testified that Toro contacted him to work for Mr. Marchiani at the Cool Springs site. In no uncertain terms, Claimant testified that he was convinced that on October 24, 2013 he was working for Mr. Marchiani and that Mr. Marchiani would pay him directly for the work. According to Claimant, Toro represented that Toro also worked for Mr. Marchiani. Both Claimant and Mr. Marchiani testified that they had did not know each other. Claimant stated that Toro was Claimant's contact.

The Board notes that having testimony from Toro could have clarified issues. However, no one called Toro as a witness. According to the evidence, Toro used to work for CEM but apparently now works for Ryan Homes. It is not clear to the Board when Toro ceased working for CEM. Whether or not Toro was still working for CEM on October 24, 2013 rests on the credibility. SM's witnesses testified credibly. CEM's witnesses did not.

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<sup>16</sup> Claimant testified that: he had never seen Mr. Solis other than possibly one time; he did not know Mr. Solis; he has never worked for Mr. Solis; and he has never worked for one of Mr. Solis' subcontractors. Claimant added that he did not understand why Mr. Solis was involved in the hearing. Mr. Carrales did not believe that Claimant ever worked for Mr. Solis. He added that he had never worked on the same job site as Claimant. The Board notes that if the latter is true then Claimant could not have worked with SM's new construction crew since Mr. Carrales was the foreman.



As stated above, Claimant believed that Toro worked for CEM on October 24, 2013. Mr. Solis testified that Toro worked for Mr. Marchiani and Mr. Longato around the time of Claimant's injury. Mr. Solis represented that he would know Claimant's employer because he and Toro were longtime friends; they grew up together in Costa Rica. Mr. Solis acknowledged that he stopped keeping in touch with Toro approximately a-year-and-a-half ago.

Mr. Corrales testified that he did not know Toro personally but he believed Toro worked for Mr. Marchiani and Mr. Longato. Mr. Corrales saw Toro at work sites where Mr. Marchiani and Mr. Longato had crews working. Toro would provide transportation and would assist Mr. Marchiani and Mr. Longato's crews. Toro also provided translation when needed for people on site.

After the work injury Claimant telephoned Toro to report what happened. Claimant testified that one of the two telephone numbers Toro used to contact Claimant was 302-602-0234. Mr. Marchiani admitted that the 302-602-0234 telephone number was a CEM number but denied that Toro had access to it.

Mr. Marchiani also admitted that on October 23, 2013, there were nineteen telephone calls made between his telephone number and the 302-602-0234 telephone number and that on October 24, there were thirty calls made between his telephone number and the 302-602-0234 telephone number. Mr. Marchiani claimed that he gave the telephone with the 302-602-0234 number to a former business partner, Mr. Lawry, and that the reason for all of the telephone calls was to discuss business they had together. Especially since Mr. Marchiani was not honest in his testimony regarding his involvement with CEM, it is questionable that he would give a CEM telephone (a company cell phone) to a former business partner who does not work for CEM or have affiliation with CEM.

On the other hand, Claimant presented highly credibly. He testified that Toro used that telephone number to contact him. It is more believable that Toro was employed by CEM and was therefore using a CEM company telephone.

When the work injury occurred, Mr. Webster who worked for the owner of the Cool Springs construction site telephoned Mr. Marchiani to notify him about the accident. Mr. Solis never received a call from Mr. Webster. Contrary to Mr. Marchiani's testimony, Mr. Solis testified that Mr. Marchiani did not notify him on either October 24 or October 25 of Claimant's accident. The Board earlier found that CEM did not subcontract the roofing work with SM to commence October 24 so it would make sense that Mr. Marchiani would immediately notify Mr. Solis about Claimant's accident. Although Mr. Marchiani could have used a different telephone to call Mr. Solis, there is no record of a call made from Mr. Marchiani's telephone number to Mr. Solis' telephone number on October 24 or October 25.

Mr. Marchiani testified that at no time in October 2013 to the present did Toro work for CEM. Mr. Longato testified that he fired Toro from CEM in the 2012 timeframe although Mr. Longato had no proof of the duration of Toro's employment. The problem is that as stated above, Mr. Marchiani and Mr. Longato provided both disingenuous and dishonest testimony and they have no evidence other than their testimony that Toro no longer worked for CEM on October 24, 2013.

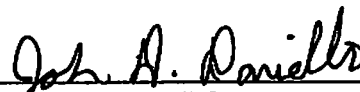
The Board finds by a preponderance of the evidence that Mr. Marchiani arranged for Toro to find someone to do the roofing work at Cool Springs on behalf of CEM. This appears to be a practice that is done. For example, Mr. Corrales who is employed by SM testified that when he needs assistance, he finds the prospective employee but Mr. Solis is the one who technically hires and can fire the employee. The Board finds that Claimant met his burden that Toro

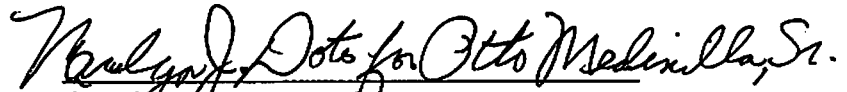
arranged for Claimant to do the work on behalf of CEM. CEM is ultimately responsible for providing the insurance to cover Claimant's workers' compensation benefits.

### STATEMENT OF THE DETERMINATION


For the reasons set forth above, SM's Motion to Dismiss Claimant's Petition for Compensation Due against it is GRANTED. The Board finds that CEM was Claimant's employer at the time of the accident.

IT IS SO ORDERED THIS 5<sup>th</sup> DAY OF JUNE, 2014.


  
JOHN DANIELLO

  
OTTO MEDINILLA, SR.

I, Julie Pezzner, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

  
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Mailed Date: 6.6.14

  
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OWC Staff

Walt Schmittinger, Attorney for Claimant  
John Ellis, Attorney for CEM Enterprises  
Joseph Andrews, Attorney for SM Contractors