

**STATE OF VERMONT
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**

COMMISSIONER,)	
VERMONT DEPARTMENT OF LABOR,)	
Complainant)	
)	
v.)	Docket #RB 958
)	
SISTERS AND BROTHERS)	
INVESTMENT GROUP, LLP)	
Respondent)	

DECISION AND ORDER

Respondent Sisters and Brothers Investment Group, LLP (Sisters and Brothers) contests a Citation and Notification of Penalty (collectively, Citation) issued against it by the Vermont Department of Labor (DOL), Complainant, on December 19, 2013. The Citation arose from an inspection by DOL on November 4 and 5, 2013 of a property owned by Sisters and Brothers, located at 363 East Allen Street, Winooski, Vermont.

According to the Citation, Sisters and Brothers failed to provide its employee, Charles Lambert, with adequate fall protection on a steep roof and failed to properly secure a portable ladder used for access to the roof, as required by safety and health standards promulgated by the Secretary of Labor under section 107 of the Contract Work Hours and Safety Standards Act, adopted as occupational safety and health standards under section 6 of the Occupational Safety and Health Standards Act (OSHA), 29 C.F.R. Section 1910.12(a).¹ In response, Sisters and Brothers asserts that Charles Lambert is an independent contractor, not an employee, and that as consequence Sisters and Brothers did not violate OSHA Standards.

The contest was heard on September 16, 2014 before Hearing Officer Charles Merriman, and VOSHA Review Board Member Benjamin O'Brien. Joseph Handy, one of the owners of Sisters and Brothers, appeared on its behalf. DOL attorneys Dirk Anderson and Michael Hoyt appeared on behalf of DOL.

Based on the evidence presented, and the findings of fact and reasons given below, the citation is **AFFIRMED**:

¹ The Vermont Occupational Safety and Health Administration (VOSHA) is administered under the Vermont Department of Labor, Division of Workers' Compensation and Safety. See FY13 Comprehensive Federal Annual Monitoring and Evaluation Report, p 5. <http://labor.vermont.gov/wordpress/wp-content/uploads/VT-FY-2013-Comprehensive-FAME-Report.pdf>.

Findings of Fact

1. The property associated with this appeal is 363 East Allen Street, Winooski, a residential rental property owned by Sisters and Brothers.
2. On November 4, 2013, VOSHA received a telephone referral regarding a potential safety violation at 363 East Allen Street.
3. VOSHA Compliance Officer Lawrence Newton was sent to investigate.
4. Mr. Newton arrived at the site at approximately 10:30 A.M.
5. The front of the house had been recently re-shingled. The rear of the house was in the initial stages of being re-shingled. Earlier, a crane had placed shingles, supported by cleats, on the rear roof. A nail gun lay atop a plank supported by roof brackets above the eave, but no shingles had yet been installed.
6. The eave at the back of the house is approximately 15-16 feet above ground.
7. Mr. Newton observed two individuals on site who later identified themselves as Mr. Howard and Mr. Lambert. Mr. Lambert was on the roof plank above the eave. Mr. Howard was on an extension ladder which provided access to the roof plank.
8. Mr. Newton spoke with Mr. Howard first. Mr. Howard stated that he had been hired, under a verbal contact, as a roofing subcontractor by Sisters and Brothers and that he was being paid "by the square"—which means that he was paid based upon the square yards of shingles installed.
9. On the basis of Mr. Howard's statements, DOL concluded that Mr. Howard was not an employee of Sisters and Brothers.
10. Mr. Newton next spoke with Mr. Lambert. According to Mr. Newton, Mr. Lambert stated that he had worked for Sisters and Brothers for approximately five months, that Mr. Handy had asked Mr. Lambert to go to the site to assist with the roofing work, and that Mr. Lambert was paid by Mr. Handy on an hourly basis.
11. Mr. Lambert asserts that he never told Mr. Newton that he was an employee of Sisters and Brothers. Mr. Lambert asserts that he is an independent worker, that he works for Sisters and Brothers when he chooses, that he works for other people as well, and that he likes his independence because it allows him the flexibility to work when and as often as he chooses.
12. Later that afternoon or the following day, Mr. Newton called Mr. Handy. According to Mr. Newton, he relayed his conversation with Mr. Lambert to Mr. Handy. Specifically Mr. Newton relayed that Mr. Lambert had told Mr. Newton that Mr. Lambert was assisting the roofer at Mr. Handy's direction.
13. Mr. Handy conceded that he had asked Mr. Lambert to go to the site to help Mr. Howard and conceded that he paid Mr. Lambert for the hours worked on the site. However, Mr. Handy insists that Mr. Lambert is not an employee of Sisters and Brothers but rather a person Mr. Handy contacts and hires on a periodic basis or, consistent with Mr. Lambert's testimony, when Mr. Lambert calls looking for work and Mr. Handy happens to have work for him.

14. Mr. Newton also relayed to Mr. Handy the alleged OSHA violations, discussed in paragraphs 24-31 below.

15. Based on the notes he took contemporaneous to these conversations, Mr. Newton claims that Mr. Handy said he would arrange to have safety harnesses brought to the site. Mr. Handy denies making any such statement but testified he acknowledged at the time of Mr. Newton's call that Mr. Lambert was supposed to use a harness when working on the roof.

A. Mr. Lambert's employment status

16. As noted above, this case boils down to whether, as asserted by DOL, Mr. Lambert is an employee of Sisters and Brothers or, as asserted by Sisters and Brothers and Mr. Lambert, he is an independent worker/contractor.

17. The employment status of an individual—especially a “jack-of-all trades” such as Mr. Lambert—is often difficult to discern. Arguing in favor of his status as a non-employee, one notes that Mr. Lambert does not draw a regular salary or receive benefits from Sisters and Brothers. Moreover, Mr. Lambert clearly places high value on his independence and his ability to choose when and how much to work. Mr. Lambert clearly sees himself as an independent worker and I have no reason to doubt Mr. Lambert's sincerity in holding that belief. However, Mr. Lambert's employment status, for purposes of OSHA regulations, is not measured by what Mr. Lambert or his putative employer subjectively believe that status to be. Rather, Mr. Lambert's employment status is determined based upon consideration of the following factors, as set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 112 S. Ct. 1344 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166 (1989):

- a. Who controls the manner and means by which the work is accomplished?
- b. What skill level is needed to effectively perform the work?
- c. Who provides the required instruments and tools?
- d. Where is the work located?
- e. What is the duration of the relationship between the putative employer and the putative employee?
- f. Does the putative employer control the assignment of new projects to the worker?
- g. Does the worker exert meaningful control over when and how long to work?
- h. How is the putative employee paid?
- i. Does the putative employee have the ability to hire and pay assistants in performing his tasks?
- j. Is the work the regular business of the putative employer?
- k. Is the putative employer a business?
- l. Does the putative employee receive employee benefits?
- m. Is the putative employee reported as a W-2 of 1099 worker?

18. As noted by the Court, none of these factors is dispositive; to the contrary, the job of the hearing officer is to weigh and consider each in determining the status of the worker.

19. Here, factors a, b, d, e, f-i, and k support a finding that Mr. Lambert is an employee of

Sisters and Brothers.

- a. By hiring the roofer, Mr. Handy, not Mr. Lambert, determined the manner and means by which the work would be accomplished.
- b. Roofing is not unskilled labor, to be sure, but neither is it highly skilled labor. A jack-of-all-trades certainly is competent to roof a typical residential structure, especially if acting as an assistant to a professional roofer such as Mr. Howard;
- d. The work was performed on property owned by Sisters and Brothers, not—by way of contrast—at a shop owned by Mr. Lambert;
- e. The un rebutted testimony of Mr. Newton established that Mr. Lambert had done work for Sisters and Brothers for approximately 5 months;
- f. Mr. Lambert and Mr. Handy both testified that Mr. Handy periodically assigns new jobs to Mr. Lambert.
- g. Mr. Lambert testified that he only works when he chooses to work, which suggests that Mr. Lambert controls when and how long to work. However, it is Mr. Handy, not Mr. Lambert who determines, in the first instance, whether and when Mr. Lambert will perform tasks for Sisters and Brothers.
- h. Mr. Lambert was paid by the hour, which is typical for employees, not by the job as is often the case with subcontractors. In contrast, Mr. Howard was compensated by the amount of work completed—i.e., “by the square”—not by the hours worked.
- i. Although the issue did not arise at the hearing, it seems reasonable to conclude that Mr. Lambert did not have the authority to hire assistants to assist him in assisting Mr. Howard.
- k. Mr. Handy testified that, Sisters and Brothers employs 185 individuals; there is no question that Sisters and Brothers is a business.

20. Of the remaining factors, l and m support Mr. Lambert and Mr. Handy’s claim—Mr. Lambert does not receive employee benefits and Mr. Lambert receives a 1099, not a W-2. The import of factors c and j, however, is not clear. There was no testimony as to who provided the equipment and tools—the nail gun, ladder, roof brackets and planks—for the job. It is possible that the roofing subcontractor, Mr. Howard, provided these, but that is speculation, not supported by evidence.

21. With regard to j, Mr. Handy strenuously asserted that Sisters and Brothers is in the residential rental business, not construction business and that, while it has a maintenance crew, it always contracts out for construction work. Thus, according to Mr. Handy, Mr. Lambert cannot possibly be an employee because Sisters and Brothers does not employ construction workers.

22. I do not find that argument compelling. Re-shingling a roof, like replacing clapboards, falls into that area between construction and maintenance. Upon questioning, Mr. Handy appeared to concede that some maintenance employees might be used for residing a Sisters and Brothers residence. It does not seem far-fetched that one might also assist a roofer with a re-shingling job.

23. In balancing these factors, and based on the analysis given in paragraphs 19-23 above, I find that Mr. Lambert was an employee of Sisters and Brothers at the time of Mr. Newton’s site visit.

Alleged OSHA violation—ladder

24. With respect to ladders, OSHA regulations state:

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

29 CFR 1926.1053 (b)(1).

25. The extension ladder was placed against the roof plank, which served as the "upper landing surface" for persons climbing on and off the ladder. The ladder extended approximately 1 ½ feet above the landing surface. There were no grabrail or grasping device attached to the ladder or the plank to assist one in climbing on or off the ladder.

26. Mr. Lambert testified that the aluminum ladder had been toenailed to the roof or the plank and the nails bent over to secure the edge of the ladder.

27. Assuming, without deciding, that the toenailing Mr. Lambert described would be sufficient to keep the ladder from sliding laterally, the shortness of the ladder above the roof plank, coupled with the nonexistence of any kind of grabbing device, constitutes a violation of 29 CFR 1926.1053 (b)(1).

Alleged OSHA violation—roof.

28. With respect to work surfaces, OSHA regulations state, in pertinent part:

"Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 CFR 1926.501 (b)(1).

29. The roof plank was not equipped with a guardrail or safety net system. In addition, Mr. Lambert was not secured by a roof harness at the time Mr. Newton arrived.

30. Mr. Lambert testified that he intended to use a roof harness and that he had used a roof harness while shingling the front of 363 East Allen Street. Upon cross-examination, Mr. Lambert acknowledged that he had failed to bring a roof harness on site but stated that he intended to go back to his home and retrieve one for the job. Mr. Lambert also observed that in order to secure himself by his harness, he would have to first ascend the roof to the peak and attach the harness, thereby exposing his employer to an OSHA violation in the original ascent.

31. Regarding OSHA regulations and roof harnesses, Mr. Lambert may have uncovered a paradox, but it is not one that is applicable here. Mr. Lambert was not observed climbing to the peak to secure himself by a harness. To the contrary, he was seen on the roof, without a harness and with a nail gun placed on the roof plank in preparation to begin re-shingling. Thus, Mr.

Lambert had commenced work without the benefit of adequate fall protection in violation of 29 CFR 1926.501 (b)(1).

Conclusions of law

VOSHA's standards apply to working conditions "with respect to *employments* performed in a workplace" in Vermont. *See* 29 CFR 1910.5(e) (emphasis added). For the reasons given, I find that Mr. Lambert was an employee of Sisters and Brothers on the day Mr. Newton inspected 363 East Allen Street, Winooski. I further find that the employer, Sisters and Brothers, failed to properly install a portable ladder for access to the roof and failed to provide adequate fall protection on the roof, in violation of 29 CFR 501(b)(1) and 1053 (b)(1).

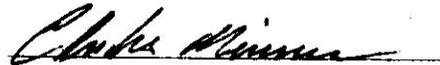
Penalty

The department imposed a penalty of \$1,500 for failing to provide adequate fall protection and \$600 for failing to properly install a portable ladder. These penalties are well within the guidelines and, indeed, represent only 30% of the maximum penalty permissible for the violations. Although Sisters and Brothers argued against the imposition of any penalty, it did not argue in the alternative for mitigation of the penalties assessed, leaving me with no basis for adjusting the Department's penalties. Accordingly, I affirm the penalties assessed by the Department.

ORDER

The Citation and Notification of Penalty issued by the Vermont Department of Labor, Occupational Safety and Health Administration, on December 19, 2013, against Sisters and Brothers Investment Group, LLP, consisting of one Citation, two Items, and imposing penalties in the aggregate of \$2,100.00 is AFFIRMED.

Dated at Montpelier, Vermont, October 31, 2014.



CHARLES L. MERRIMAN
VOSHA HEARING OFFICER