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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 08-0452
	:	
FM HOME IMPROVEMENT, INC.,	:	
	:	
Respondent.	:	

Appearances:	Paul J. Katz, Esquire U.S. Department of Labor Boston, Massachusetts For the Complainant.	Thomas Zujkowski FM Home Improvement, Inc. Danville, New Jersey For the Respondent, *pro se.*
Before:	Dennis L. Phillips Administrative Law Judge	

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On January 2, 2008, the Occupational Safety and Health Administration ("OSHA") inspected a work site of FM Home Improvement, Inc. ("FMHI" or "Respondent"). The work site was located in Middletown, Connecticut. As a result of the inspection, OSHA issued to FMHI a "repeat" citation alleging a violation of 29 C.F.R. § 1926.501(b)(13), the OSHA standard relating to fall protection in residential construction work. FMHI filed a timely notice of contest, bringing this matter before the Commission. In its notice of contest, FMHI asserted that a subcontractor named Lecla LLC ("Lecla") had been responsible for the work at the site. The hearing in this matter was held in Hartford, Connecticut, on September 17, 2008. Both parties have submitted post-hearing filings.

The OSHA Inspection

Steve Biasi is the OSHA compliance officer ("CO") who inspected the site. At the hearing, he testified that he went to the site due to a complaint OSHA received about employees working on the roof of a building without any fall protection. The CO arrived at the job site on January 2, 2008. As he arrived, he observed roofers working on the roof without any fall protection. The CO met with Mr. DePhillips, the project manager for Landmark Construction, the general contractor at the site, as well as the project superintendent. After informing Mr. DePhillips and the project superintendent why he was there, the CO asked about the individuals on the roof. Mr. DePhillips and the project superintendent told the CO the roofers worked for FMHI. Mr. DePhillips contacted FMHI, and about an hour later, around 11:30 a.m., Manuel Felix arrived. Shortly thereafter, Charles Pinho also arrived. Messrs. Felix and Pinho identified themselves as FMHI supervisors. Messrs. Felix and Pinho observed the roofers with the CO, who pointed out the total lack of fall protection for the people on the roof to the two supervisors. The CO testified that the distance from the roof eave to the ground was thirty-one feet and that anyone falling that distance might die. (Tr. 31-37, 42-43, 48-51, 54, 57).

CO Biasi further testified that Mr. Felix, who seemed to be the higher-level FMHI supervisor, told him that he was in charge of quality control and safety at three different FMHI job sites. Mr. Felix also said he went to each site at least once a day. Mr. Pinho told the CO that his job also involved quality control and safety and that he additionally scheduled work, measured out the jobs, and handled material deliveries. Mr. Pinho said that he too visited the subject site at least once daily. Mr. Pinho told the CO that FMHI had had issues in the past with the roofing crew at the site not using fall protection. Both Messrs. Felix and Pinho told the CO that when they went to job sites and saw employees not using fall protection they would stop the work, give verbal warnings and tell the employees to utilize fall protection. (Tr. 37-41, 49-50).

CO Biasi stated that after seeing the employees on the roof, Messrs. Felix and Pinho had them stop work and come down from the roof because they were not wearing their personal fall arrest systems. The CO spoke to all seven of the employees.[1] Each identified himself as a roofer

[1] The seven employees at the job site were Messrs. Manuel Menota, Luis Motes, Luis Tenezaca, Gabriel Jota, Luis Antonio Clavijo, Luis Antonio Lema, and Foreman Luis Ocpavi

working for FMHI. One of the employees, Luis Lema, also said he was foreman. Mr. Felix also identified the people on the roof as direct employees of FMHI. Messrs. Felix and Pinho had the employees retrieve their fall protection from their vehicles. The CO noted that there were only three harnesses to be found in the vehicles. He also noted that the harnesses were not functional in that they were missing components, such as rope grabs, lanyards and roof anchors. Messrs. Felix and Pinho sent the employees home. Mr. Felix indicated that he would get proper fall protection for all of the employees. The CO testified that FMHI was the controlling contractor for the seven roofers with control over the overall jobsite. He also stated that FMHI exposed the seven roofers to the fall hazard. (Tr. 41-48).

The CO stated that neither Mr. Felix nor Mr. Pinho ever said the employees on the roof were independent contractors. He also noted that when he held his closing conference with FMHI, Thomas Zujkowski never indicated the roofers were independent contractors. The CO agreed, however, that Mr. Zujkowski had contacted him after the conference and on January 8, 2008, had faxed him some documents, including a "subcontract agreement" between FMHI and Lecla. (Tr. 57-59).

Stipulation of Facts

Prior to the hearing, the parties stipulated to the following facts:[2]

1. Respondent is a construction business which has done business in the states of Connecticut, New Jersey and New York in the last two years' time.
2. Respondent was engaged in residential construction in January, 2008 at 207 George Street, Building #5, Middletown, Connecticut.
3. Respondent's manager is Thomas Zujkowski. Employees of Respondent are Charles Pinho and Manuel Felix.[3]
4. In this case Respondent was cited for one Repeat violation of the standard set forth at 29 C.F.R. 1926.501(b)(13) for failure to provide and require the use of fall protection for employees engaged in residential construction on a high pitched residential type roof (10 in 12 pitch), working approximately thirty-one (31) feet to the ground.

Clavijo Lema (hereafter "Luis Lema" or "Mr. Lema"). (Tr. 44-46).

[2] The stipulated facts were received in evidence as Joint Exhibit 1 ("J-1").

[3] Item 3 originally referred to Messrs. Pinho and Felix as "Supervisory employees of Respondent." At the hearing, the parties agreed to amend this item as set out above. (Tr. 9-10).

5. In this case, the Respondent does not contest that the persons involved did not have fall protection and that these persons were in violation of the cited standard.
6. However, it is Respondent's contention that the persons who performed the work on the job in question were not employees of the Respondent, but worked as independent contractors. This is the primary (indeed, sole) issue to be decided by the Court.
7. Respondent's primary supplier of materials used on the job in question is Harvey Industries, Inc., 100 Silver Mine Road, Brookfield, Connecticut.
8. Respondent does not contest that it was previously cited for violation of the standard set forth at 29 C.F.R. 1926.501(b)(1) on September 26, 2005, which matter was settled, the item becoming a Final Order of the Review Commission on October 12, 2005.
9. Respondent's gross volume of business done in calendar (or fiscal) years 2006 and 2007 was $26,944,654 and $21,136,809 respectively.
10. Nothing in this Stipulation of Facts shall prevent either party from introducing facts relating to any issue involved herein.

During the hearing, the parties also stipulated as fact that FMHI had its own liability insurance for the work that the roofers did at the project. (Tr. 56).

Jurisdiction

Based on the parties' stipulations and the record in this case, I find that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act. I conclude, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Cited Standard and the Secretary's Burden of Proof

The cited standard, 29 C.F.R. § 1926.501(b)(13), provides as follows (in part):

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure.

To prove a violation of an OSHA standard, the Secretary must demonstrate by a preponderance of the evidence that (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Item 5 of the stipulated facts establishes that the roofers at the site did not have fall protection and that there was a violation of the cited standard.

Further, Item 6 states that the only issue requiring resolution is whether the roofers at the site were employees of Respondent or independent contractors. The Secretary has thus met her burden of proof in this matter, except for showing that the roofers at the site were employees of FMHI.

The Relevant Testimony

As set out *supra*, CO Biasi testified that Mr. Felix, a supervisor with FMHI, told him that the workers on the roof were employees of FMHI. The CO further testified that he spoke to all of the roofers and that they all stated they were working for FMHI. In addition, the CO testified that Messrs. Felix and Pinho never mentioned that the roofers were independent contractors. Finally, the CO testified that Mr. Zujkowski, FMHI's manager, did not indicate during the closing conference that the roofers were independent contractors. The CO agreed, however, that on January 8, 2008, Mr. Zujkowski faxed him a "subcontract agreement" between FMHI and Lecla, as well as other documents concerning insurance for Lecla and a fax cover sheet. (Tr. 35, 44-46, 48-50, 57-59).

Mr. Zujkowski also testified at the hearing. According to Mr. Zujkowski, FMHI is in the roofing and siding business and generally has 15 to 20 jobs going on at any one time. FMHI does not use its own employees to do its roofing work, but instead brings on people such as Luis Lema to do that work. Mr. Zujkowski said that he was not surprised that Mr. Lema had done at least three jobs for FMHI. He also said that Mr. Lema was a subcontrator at the site, that he was paid by the square foot per job building, and that FMHI pays no benefits to the roofers on its jobs. He noted that FMHI provided all the materials; *e.g.*, 15 pounds of felt, ice, water shield and shingles, for the subject job. He further noted that after the OSHA inspection, FMHI fired Mr. Lema and at least two other roofers. (Tr. 13-17).

Luis Lema, age 27, was a further witness at the hearing. According to Mr. Lema, he has a small roofing business. He does not have a business office or account and does not advertise. He is also not listed as a roofer in the telephone book. Mr. Lema testified that FMHI contacted him about the job,[4] which paid "35 cents (*sic)* a square foot."[5] He also testified that he took other people

[4] Mr. Lema indicated Milton Fantin, FMHI's owner, had contacted him. (Tr. 12, 23, 28).

[5] I find that Lecla was actually paid $35.00 per square foot. *See* Exhibit C.

with him to the job who did not work for him, but were "like temporary guys" who were "helping."[6] Mr. Lema indicated he paid the other workers out of what he made. He also said that he took his own tools to the job, but did not provide any of the materials that he used. Mr. Lema described Mr. Felix as an FMHI manager who "make[s] sure everything's okay." Mr. Felix gave instructions about what to do on the sites where Mr. Lema worked and when to do it. Mr. Felix also visited these sites at least twice a day to make sure that the job was being done right. Mr. Felix also made sure that no one fell off the roof. (Tr. 18-30).

Discussion

As a preliminary matter, I note that Mr. Zujkowski did not present the documents at Exhibits A through E at the hearing. Rather, in a filing with the Court dated October 7, 2008, he summarized the reasons regarding why FMHI should not have been cited. He also attached documents to his filing. *See* Exhibits A through E. In an order dated October 21, 2008, the parties were directed to confer and ascertain whether they could agree on the Court reopening the record for the purpose of considering the admissibility of the documents. On October 27, 2008, the Secretary's counsel stated that the parties had agreed to the reopening of the record so that the documents and one further stipulation could be received in evidence. In an order dated November 5, 2008, the Court reopened the record and admitted the documents as Exhibits A through E and the stipulation as Joint Exhibit 2 ("J-2"). The documents are as follows:

Exhibit A – Memorandum from Tom Zujkowski to Steve Biasi, re: Sub-contractor Information, dated 1/8/08 (handwritten) (1 page)
Exhibit B –
1) "SUB-CONTRACTORS AGREEMENT," signed by Lecla Construction - LLC, Luis Lema, dated 4/16/07 (1 page)
2) "INDEPENDENT CONTRACTOR AGREEMENT," signed by Lecla Construction - LLC, Luis Lema, dated 4/16/07 (2 pages)
3) "INSURANCE REQUIREMENTS" and "INDEMNIFICATION," unsigned (1 page)
4) "HOLD HARMLESS CLAUSE," signed by Lecla Construction - LLC, Luis Lema, undated (1 page)
5) "OSHA INDEMNIFICATION," signed by Lecla Construction - LLC, Luis Lema, dated 4/16/07 (1 page)
Exhibit C – Invoice, dated 1/8/08, with check, dated January 29, 2008 (2 pages)

[6] Luis Lema said his uncle and his brother were two of the roofers at the site. (Tr. 22).

Exhibit D – Lecla LLC W-9, "REQUEST FOR TAXPAYER IDENTIFICATION NUMBER AND CERTIFICATION," dated 4/16/07 (4 pages)
Exhibit E – "CERTIFICATE OF LIABILITY INSURANCE," dated 3/22/07 (1 page)

Stipulation J-2 states as follows:

> The "Sub-Contractors Agreement," the "Independent Contract Agreement" and other documents offered by the Respondent were prepared by FM Home Improvement Inc. and were required by FM to be signed by all roofers on all its jobs.

Exhibits B (pp. 1, 3, and 5-6) and D were signed by "Luis Clavijo" on April 16, 2007.[7] According to J-2, the stipulation noted above, FMHI required all its roofers to sign such documents.[8]

As set out *supra*, the CO testified that Mr. Felix told him that the roofers at the site were employees of FMHI. He also testified that neither Mr. Felix nor Mr. Pinho ever mentioned that the roofers were independent contractors. The CO further testified that during the closing conference, Mr. Zujkowski, FMHI's manager, never indicated that the roofers were independent contractors.[9] I observed the CO's demeanor on the witness stand and found his testimony direct, credible and convincing. I therefore credit his testimony. I find that neither the FMHI supervisors at the site nor Mr. Zujkowski at the time of the closing conference chose to assert to the CO that the roofers at the site were independent contractors, as FMHI now claims. I find that they did not reference Exhibits A through E until Mr. Zujkowski faxed documents to the CO on January 8, 2008, as at the time of the violation they viewed the roofers as FMHI employees for purposes of the Act. (Tr. 42-43, 57-58).

Respondent contends the persons who performed the work atop the roof were all independent contractors, and not FMHI's employees. Only an "employer" may be cited for a violation of the

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[7] The documents in Exhibits A through E show Lecla as either "Lecla LLC" or "Lecla Construction LLC." I find that Exhibits B, pp. 1, 3, and 5-6, and D were signed by Luis Lema. (Tr. 55). One of the documents, Exhibit B, p. 4, an agreement pertaining to "INSURANCE REQUIREMENTS" and "INDEMNIFICATION," is not signed by anyone. In addition, this particular document is the only one at Exhibit B that has a signature line for FMHI; the others provide only a company signature line.

[8] There is no explanation as to why no one signed the "HOLD HARMLESS" agreement at Exhibit B, p. 4.

[9] Mr. Zujkowski did not deny this fact at the hearing.

Act.[10] The Act imposes a duty on an "employer" to provide for the on-the-job safety and health of its "employees."[11] Unfortunately, the Act does not define "employee" in a manner helpful to resolving whether FMHI is an employer as the Act defines that term. The United States Supreme Court presumes Congress meant the agency law definition of "employee" in the Act, unless Congress clearly indicated otherwise. *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 316, 322 (1992) ("*Darden"*). The burden of proving that FMHI is the employer of the seven roofers lies with the Secretary. *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (Nos. 97-1631 & 97-1727, 2005) ("*Allstate*"). In determining whether FMHI was the employer of the seven roofers, the Commission relies on the common law agency doctrine and multifactor common law test set forth in *Darden, supra.*[12] *See Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1866-67 (No. 02-0865, 2007) ("*Barbosa*"); *Allstate*, *supra*. There is no shorthand formula for determining who is an "employee" under the Act, *Darden,* or common law. All incidents of the employment relationship must be assessed and weighed with no one factor being decisive. *Darden, supra*, at 319.

In *Darden,* the Court considered primarily "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323. Other factors relevant to determining whether a hired party is an employee under the general common law of agency under the Act include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business;

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[10] *See* 29 U.S.C. § 658(a); *Don Davis,* 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001); *Van Buren-Madawaska Corp.,* 13 BNA OSHC 2157, 2158 (Nos. 87-214, 77-217 and 87-450 through 459, 1989).

[11] The Act defines "employee" as "an employee of an employer who is employed in a business of his employer, which affects commerce." 29 U.S.C. § 652 (6); *Don Davis, supra,* at 1479-80.

[12] In *Darden*, the Supreme Court held that the term "employee" as used in the Employee Retirement Income Security Act of 1974, §§ 3(6,7), 203(a), 502(a), 29 U.S.C.A §§ 1002 (6,7), 1053(a), 1132(a) (ERISA), incorporated traditional agency law criteria for identifying master-servant relationships.

the provision of employee benefits; and the tax treatment of the hired party." *Id.* at 322, *citing Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

Prior to *Darden*, in determining whether a company was an "employer" under the Act, the Commission applied an economic realities test. *Allstate, supra* ,at 1035 n. 2; *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (Nos. 87-214, 87-217 & 87-450-459, 1989) ("*Van Buren-Madawaska*") (economic realities test used to determine existence of employment relationship under OSHA). Under the economic realities test, the following factors are considered: (1) whom do the workers consider their employer; (2) who pays the workers' wages; (3) who has the responsibility to control the workers; (4) does the alleged employer have the power to control the workers; (5) does the alleged employer have the power to hire, fire or modify the employment conditions of the workers; (6) does the ability of the workers to increase their income depend on efficiency rather than on initiative, judgment and foresight; and (7) how are the workers' wages established. *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1705 (No. 14801, 1978) ("*Griffin & Brand*"). There, the Commission found that Griffin & Brand was the employer of certain migrant workers, rather than their crew leader, due to the control that company exercised over the workers. As discussed later, applying an economic realities test here does not change the result.

In a post-*Darden* case, the Commission held that housekeepers from a staff leasing company were employees of the hospital as it directed their work, supplied their tools and materials, assigned shifts and supervised their work. *Froetdert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004) ("*Froetdert*"). In applying *Darden* in the *Froetdert* case, the Commission "concluded that the hospital was properly cited under OSH Act as an employer of the housekeepers because the hospital directed and controlled the means, methods, location, and timing of their work, and also provided sole on-site supervision and on-the-job instruction." *Barbosa, supra*, at 1867. In another post-*Darden* case, after an employer was cited by OSHA, its employees formed a partnership and signed an exclusive contract with their former employer. That employer contested a new OSHA citation on the basis that it was not an employer as it had no employees. The Ninth Circuit agreed with the Commission that, under both the *Darden* and economic realities tests, the workers were employees as the cited employer exercised control over all facets of their work. *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 942 (9th Cir. 1994) ("*Loomis*").

FMHI's claim that it was not the employer of the roofers is not sustainable under either the *Darden* or economic realities test. Under either test, the result is the same, *i.e.*, FMHI was the roofers' employer for the purposes of the Act. Applying the *Darden* factors to the facts of this case demonstrates the employment relationship between Respondent and the roofers at the worksite.[13]

The *Darden* Test Factors

a. The hiring party's right to control the manner and means by which the product is accomplished.

In the case at bar, the Secretary maintains that FMHI exercised regular and direct control over the roofers. Two supervisory employees of FMHI, Messrs. Felix and Pinho, visited Respondent's work site at least daily and instructed the roofers as to the job. These two FMHI employees made sure everything was "ok"at the job site. They regularly gave instructions on every job to make sure everything was done right. Mr. Felix told Luis Lema what to do on the projects. He also told Mr. Lema when to do it. Mr. Lema testified that Mr. Felix would show him how to construct a roof and insured that everything was done correctly. Mr. Felix directed the roofers to perform work at a particular roof and section. (Tr. 25-29). This is the kind and extent of control indicative of an employee-employer relationship, and not that of independent contractor.

The right to discharge a worker is also a factor indicating that the worker is an employee and that the person possessing the right is an employer. One of the ways an employer exercises control of employees is through the threat of dismissal, which helps cause workers to obey the employer's instructions. Indeed, Respondent fired Mr. Lema and at least two other roofers following the OSHA inspection.[14] (Tr. 16). I find that Respondent directed and controlled the day-to-day work of the roofers at the site and their schedule, as well as the workers themselves. The control factor weighs significantly in favor of finding that the roofers were employees of FMHI.

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[13] The *Darden* common law test does not prescribe a complete list of factors. *Loomis, supra,* at 942 ("The central inquiry is: who controls the work environment?").

[14] The "Sub-Contractors Agreement" prepared by FMHI provided that Lecla could be immediately terminated for violating "any rule." (Exhibit A, p. 1)

b. The skill required.

Generally, the less skill a worker has, the more likely it is the worker is an employee, in that those with few developed skills are less likely to be in business for themselves. In *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) ("*Superior Care*"), the Second Circuit considered factors designed to arrive at the "Economic Realities" of the relationship and found nurses to be employees (under the Fair Labor Standards Act). The court in *Superior Care* reasoned:

> The nurses are skilled workers who require several years of specialized training.… The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way. Rather, they depended entirely on referrals to find job assignments, and Superior Care in turn controlled the terms and conditions of the employment relationship. As a matter of economic reality, the nurses' training does not weigh significantly in favor of independent contractor status.

Superior Care, 840 F.2d at 1060. In this case, the roofers had less skill than the nurses in *Superior Care*. The workers in this case were not highly skilled. Their skill level weighs in favor of finding them to be employees of FMHI.

c. The source of the instrumentalities and tools.

In this instance, Respondent provided and transported to the work site the roofing materials that were essential to perform the job. Basically, Luis Lema produced himself and six other roofers at the job site to perform the yeoman-like labor associated with installing the roofing. (Tr. 25). This factor weighs in favor of finding the roofers to be employees of FMHI.

d. The location of the work.

Here, the work was not done on the hiring party's premises. Respondent instructed the roofers to travel to a specific construction site at a certain time each morning, suggesting control and an employment relationship. This factor weighs in favor of finding that the roofers were employees of FMHI.

e. The duration of the relationship between the parties.

The evidence shows that FMHI and Luis Lema had a relationship of an indefinite duration that commenced at least as early as March or April of 2007. Mr. Lema appears to have worked on at least three other jobs for Respondent. The roofers were fired sometime in 2008 after OSHA's

inspection.[15] (Tr. 16, Exhibit B, pp. 1-3, 6, Exhibit E). Under these circumstances, this factor weighs in favor of finding the roofers to be employees of FMHI.

f. Whether the hiring party has the right to assign additional projects to the hired party.

FMHI assigned additional jobs to Luis Lema. Testimony at the hearing revealed that Mr. Lema had brought workers to more than one of Respondent's jobs. (Tr. 16, Exhibit B, p. 1). This factor weighs in favor of finding that the workers were employees of FMHI.

g. The extent of the worker's discretion over when and how long to work.

The establishment of set hours of work by the hiring party indicates control and an employer/employee relationship. An independent contractor normally sets his own daily schedule. Here, the roofers were told to be at work at FMHI's assigned job sites by 8:00 a.m. (Exhibit B, p. 1). This factor weighs in favor of finding that the workers were employees of FMHI.

h. The method of payment; and the hired party's role in hiring and paying assistants.

Payment by the hour, day, week, month or by an annual salary usually reflects payments made to an employee. Payment by the job generally indicates that the worker is an independent contractor. A worker who can realize a profit or suffer a loss as a result of the worker's services is generally an independent contractor, but the worker who cannot is an employee. If the worker is subject to a real risk of economic loss due to significant investments or a *bona fide* liability for expenses, a circumstance not present in the instant case, then such factors tend to indicate that the worker is an independent contractor. Also, if the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person for whom the services are performed and, accordingly, the existence of an employer/employee relationship.

The workers in this case were paid on a piece-rate basis. True independent contractors are normally paid a flat job rate. There is no suggestion that the workers made any substantial investment in "their business," except in possibly some tools. Here, Respondent paid $35 per square

[15] *See Superior Care, supra* (the impermanence of the relationship may not be significant).

foot, akin to an employer-employee relationship. The roofers also had no opportunity to realize a profit (aside from receiving compensation for their work) or suffer a loss on the job. The roofers could not increase their income by using initiative and independent judgment. The method of payment factor weighs in favor of finding that the roofers were employees of FMHI.

Luis Lema testified that he took some "guys" who did not work for him to the job site. He also testified that his uncle worked with him "a little bit," as well as his brother who did roofing work "a little bit, not much." Mr. Lema stated he sometimes paid other people for helping him, "but not full time." He further stated he sometimes paid his uncle on a 50% basis and that his uncle was paid $35 a square foot at the subject site. It is unclear who hired at least four of the seven roofers who worked at the job site. FMHI did, however, fire at least three of the roofers, including Mr. Lema, after the OSHA inspection. The record shows, by a check dated January 29, 2008, that FMHI paid Lecla $8,470 at a rate of $35 per square foot for a job at Building # 5, George St., Middletown, Connecticut, the site of the OSHA inspection. (Tr. 16, 21-24, Exhibits C, D). There is insufficient evidence to determine precisely how much each of the seven roofers was paid, if any, for the work at the subject site. Here, the hired party's role in hiring and paying assistants is inconclusive on the issue of whether the seven roofers were FMHI employees under the Act.

i. Whether the work is part of the regular business of the hiring party.

If so, the worker is more likely an employee; if not, he or she is not. It is significant that the workers here performed a construction activity; *i.e*. residential roofing, that was integral to Respondent's residential construction business. Residences under construction generally require roofs. Roofing is part of FMHI's regular construction business. These circumstances suggest an employer-employee relationship.

j. Whether the hiring party is in business.

Here, the relationship between the roofers and FMHI was wholly within the context of Respondent's construction business. This was not a case where a homeowner not in business, for example, hired a painter to paint his or her house. FMHI hired Luis Lema to work at the job site, and FMHI clearly was in the residential construction business.[16] (Tr. 22-23). This factor weighs in favor of finding an employer-employee relationship.

[16] However, it is less clear who hired the majority of the other roofers.

k. The provision of employee benefits; and tax treatment of the hired party.

Here, Respondent attempts to rely upon a legal fiction that Lecla was an independent contractor on January 2, 2008, for purposes of determining coverage under the Act. FMHI paid no benefits to the roofers. There is no evidence that either FMHI or Lecla withheld any taxes from the roofers for their work performed at the site. *See Spirides v. Reinhardt*, 613 F.2d 826, 833 (D.C. Cir. 1979) (benefits and payment of taxes as material factors in determining the existence of an employment relationship). This factor weighs in favor of finding an independent contractor relationship, but, after weighing all the *Darden* factors, it is not dispositive in deciding whether the roofers were employees under the Act. Most of the *Darden* factors support the finding of an employment relationship. (Tr. 17, 27).

The Economic Realities Test

Applying the "economic realities" test to this case, I address the first factor, *i.e.*, whom do the workers consider their employer? According to the CO, all of the roofers at the site, including Luis Lema, told him they were working for FMHI. Also, Mr. Felix told the CO the roofers were employees of FMHI. Further, Messrs. Felix and Pinho never mentioned to the CO that the roofers were independent contractors. Based on my credibility finding *supra*, the CO's testimony is credited. I find that not only the roofers but also their supervisors considered FMHI to be the employer at the work site on January 2, 2008. The roofers' unanimous belief that FMHI was their employer was "strong evidence" that the economic relationship between FMHI and the roofers was "more like an employer-supervisor relationship than a relationship between a business and an independent contractor." *Van Buren-Madawaska, supra,* at 2159. (Tr. 42-46, 57).

As to the second factor of the economic realities test, Exhibit C, the invoice and check, shows Lecla sent an invoice on January 8, 2008, which FMHI apparently paid on January 29, 2008. Mr. Lema's testimony indicated it was his practice to pay the other workers out of his earnings. In the circumstances of this case, I do not consider this element particularly probative one way or the other. (Tr. 23-24, Exhibit C).

The third, fourth and fifth factors of the economic realities test address control of the workers. Mr. Zujkowski testified that FMHI was in the roofing and siding business, that none of its employees performed roofing work, and that Mr. Lema had done at least three roofing jobs for FMHI. In my view, that roofing is a major part of FMHI's work and Mr. Lema had done at least

three jobs for the company is more indicative of an employment relationship than that of an independent contractor. Mr. Lema indicated that the crew members did not work for him. Moreover, FMHI took action on January 2, 2008 for the violations of the rules by the roofers relating to the use of safety equipment.[17] Specifically, Messrs. Felix and Pinho told the CO that if they discovered employees not using fall protection at a site, they would stop the work, give verbal warnings, and instruct the employees to use fall protection. The statements of Messrs. Felix and Pinho are borne out by the fact that they sent the crew home while the CO was there. Also, Mr. Felix indicated he would get proper fall protection for all of the employees. Another indication of control is the fact that FMHI told the workers to report to the assigned job site no later than 8:00 AM. And, as noted *supra*, Mr. Zujkowski testified that Mr. Lema and at least two of the other roofers were fired after the OSHA inspection. (Tr. 12-14, 16, 21-22, 38-42, Exhibit D, p.1).

Besides the above, Luis Lema testified that while he took his own tools to the site, he did not provide any of the materials used for the job.[18] FMHI evidently also recognized its obligation to provide safety equipment to the employees, based on Mr. Felix's statement to the CO noted above. Moreover, Mr. Lema testified that Mr. Felix gave him instructions on every job about what to do. He further testified that Mr. Felix visited the sites where he (Mr. Lema) worked at least twice a day. Mr. Felix also told him to make sure no one fell off the roof. I observed Mr. Lema's demeanor as he testified, and I found him to be a reliable witness. Furthermore, his testimony is essentially consistent with that of the CO. I therefore credit Mr. Lema's testimony. Based on his testimony, and that of the CO, I find that FMHI exercised control over the roofers' work at the site. I further find that FMHI's control over the site was such that abatement of hazards could be obtained. (Tr. 24-30).

The last two factors of the economic realties test address the worker's wages. There was no evidence in regard to how the $35 per square foot wage was determined. Further, in light of the record, it would appear that there was no ability to increase the set wage per square foot. I do not find these two factors particularly probative one way or the other.

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[17] Similarly, FMHI would have taken action regarding the use of drugs or alcohol at the job site.

[18] Mr. Zujkowski also testified that FMHI provided the materials for the job.

FMHI Agreement-Related Documents

I turn now to the documents FMHI has presented in this case to support its contention that FMHI and Lecla had entered into a subcontract relationship that resulted in the seven roofers being independent contractors and not FMHI employees. The "INDEPENDENT CONTRACTOR AGREEMENT," which is part of Exhibit B, has a section entitled "RELATIONSHIP BETWEEN THE PARTIES." That section states that the relationship between FMHI and Lecla is independent and "is in no way to be construed as a relationship of employee or principal and agent." The section goes on to state that the subcontractor is engaged in its own business, independent of the contractor's business, and that the subcontractor has entered into the contract to perform labor service for a fee. It then states that the subcontractor: is not entitled to receive any benefits, such as worker compensation or vacation or sick pay; shall be solely responsible for all of its expenses; must determine its own hours of work and number of days needed to complete the work and must be responsible for training its own employees; and must maintain its own books and records and be responsible for complying with all applicable federal, state and local regulations. The unsigned document at Exhibit B, p. 4, directs the subcontractor to obtain general liability insurance coverage and worker compensation coverage.[19]

The OSHA INDEMNIFICATION agreement states the subcontractor: "is familiar with and understands" OSHA's regulations; agrees to indemnify "the builder from and against any and all fines, penalties, liabilities, claims and expenses" related to the subcontractor's failure to comply with OSHA regulations;" and agrees to be solely liable for any such fines levied against it or the builder.

Despite the foregoing, under the "economic realities" and *Darden* tests, the formal structure of the relationship is not determinative if it presents a false image of the relationship. *Griffin & Brand, supra,* at 1774. Further, while all of the factors set out above are to be considered, the control over the employees is a "principal guidepost." *Froetderf, supra,* at 1506. In addition, the Commission "place[s] primary reliance upon who has control over the work environment such that abatement of hazards can be obtained." *Van Buren-Madawaska, supra,* at 2159.

[19] Despite this alleged requirement, FMHI had its own Commercial General Liability insurance coverage for Lecla and the work the roofers did at the project. *See* Exhibit E. *See also* Stipulation of Fact at Tr. 56.

Aside from asserting there was a subcontractor agreement, Respondent offered no substantive testimony in support of its position that the documents memorialized such a subcontractor relationship. Whether such a relationship did indeed exist is decided by the laws of Connecticut. *See Ideal Structures Corp. v. Levine Huntsville Dev. Corp.,* 396 F.2d 917, 922 (5th Cir. 1968) (nature, obligation, validity and interpretation of a contract are according to the laws of the state where made, or where performance begins). The existence of a contract is a question of fact to be determined by the trier on the basis of all the evidence. *Fortier v. Newington Group, Inc.*, 30 Conn. App. 505, 509, 620 A.2d 1321, *cert. denied*, 225 Conn. 922, 625 A.2d 823 (1993) ("*Fortier*"). In order to form a valid and binding contract in Connecticut, there must be a mutual understanding of the essential terms between the parties to any contract. *See Ubysz v. DiPietro,* 185 Conn. 47, 51, 440 A.2d 830 (1981). If there is no mutual understanding, no enforceable contract exists. *See Fortier, supra.*

Four of the five documents at Exhibit B, entitled "SUB-CONTRACTORS AGREEMENT," "INDEPENDENT CONTRACTOR AGREEMENT," "HOLD HARMLESS CLAUSE," and "OSHA INDEMNIFICATION," were signed and dated only by Luis Lema. (Exhibit B, pp. 1-3, 5-6). The remaining document, entitled "INSURANCE REQUIREMENTS," is not signed by anyone.[20] (Exhibit B, p. 4). Ordinarily, one of the acts formulating a written contract is the signing of the contract by the parties to it. *Scaife v. Assoc. Air Center, Inc.*, 100 F.3d 406 (5th Cir. 1996). A purported contract that is not signed may not be binding on alleged parties to the contract. *C. L. Smith Co. v. Roger Ducharme, Inc.*, 65 Cal. App. 3d 735, 135 Cal. Rptr. 483 (4th Dist. 1977).[21] Respondent presented no testimony that individually addressed the documents at Exhibit B.[22] All

[20] This document also makes no reference to Lecla or FMHI's construction project at issue herein, located in Middletown, Connecticut.

[21] *See Waters v. Hartnett*, 5 Conn. Cir. Ct. 687, 260 A.2d 615 (1969) (unsigned contract unenforceable under Connecticut's Statutes of Fraud, *General Statutes* 52-550); *Baccus v. Plains Cotton Co-op. Assn.*, 515 S.W. 2d 401 (Tex. Civ. App. Amarillo 1974) (neither party is bound to a contract signed by only one party where there is otherwise no evidence of the parties' intention to be so bound).

[22] Mr. Lema did not testify that documents identifying him as an independent contractor were applicable or that he considered himself and the other roofers to be anything other than FMHI employees when working at the Middletown, Connecticut job site on January 2, 2008.

of the documents at Exhibit B were prepared by FMHI.[23] *See* J-2 stipulation. The name and address of FMHI appear on the first page of the documents at Exhibit B.[24]

On the other hand, the CO testified that on January 2, 2008, all seven roofers, including Lecla's Luis Lema, considered themselves FMHI employees while working at the FMHI job site. One of FMHI's job site supervisors, Mr. Felix, identified the seven roofers as direct FMHI employees. The general contractor's project manager and superintendent identified the seven roofers as FMHI employees. The CO's testimony was not rebutted by anyone. (Tr. 34-35, 42-44).

At best, the documents at Exhibit B reflect how Respondent would prefer to represent Lecla, *i.e.*, as an independent contractor, whenever it was in FMHI's interest to do so. The documents do not address their applicability to the seven roofers at the FMHI job site at Middletown, Connecticut on January 2, 2008. Clearly, the seven roofers, an FMHI supervisor, and the general contractor all viewed the seven roofers as FMHI employees on January 2, 2008. For the purpose of determining coverage under the Act, I accord little weight to alleged contract agreements that are either unsigned by both parties or signed by no one and that are also vague as to scope and application and unexplained by any testimony. I find that the documents at Exhibit A through E are insufficient evidence to support Respondent's contention that the seven roofers were independent contractors and not FMHI employees for the purpose of determining coverage under the Act. Specifically, I find the FMHI-prepared documents at Exhibit B to be self-serving. Stated another way, I find that there is insufficient evidence to prove the existence of viable, enforceable agreements between Lecla and FMHI that is applicable to the roofers' work at the subject site and the issue as to whether the roofers were employees under the Act.[25]

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[23] *Contra proferentem* puts the risk of ambiguity on the party that prepared the contract. *See Sturm v. United States*, 421 F.2d 723, 727 (1970). I find Mr. Lema's statement to the CO that he was an FMHI employee on January 2, 2008, to be a reasonable view of his employment status that day despite the existence of FMHI-prepared documents at Exhibits A through E. (Tr. 46).

[24] *Int'l Customs Assoc., Inc., v. Ford Motor Co.*, 893 F. Supp. 1251 (S.D.N.Y. 1995) (the mere fact that a company's name appears on a document, standing alone, does not make the company a party to a contract where the company's representative has not signed).

[25] *Home Depot U.S.A., Inc., v. United States Fire Ins. Co.*, Nos. 08-13394, 08-13404, 2008 WL 4810504, at *1 (11th Cir. Nov. 5, 2008) (in the absence of some other manifestation of mutual assent, an unsigned contract is invalid under Connecticut law).

I also find that the preparation of Exhibits A through E in April 2007 was nothing more than an attempt by FMHI to create a legal fiction that Lecla was a viable independent contractor, when it was not, to avoid, among other things, obligations that the Act would otherwise impose on FMHI. The preparation of Exhibits A through E was an exercise in "form over substance" in the context of the applicability of the Act to those working at FMHI's job sites. FMHI's claim is further undermined by the fact that, although Mr. Zujkowski cross-examined Mr. Lema at the hearing, he asked him no questions about the alleged agreements and his supposed status as a subcontractor and independent contractor at the site. (Tr. 28-30). Based on the facts and circumstances of this case, FMHI's contention that the roofers at the site were independent contractors is rejected.

In light of the evidence of record, and the Commission and other precedent set out above, I conclude that the Secretary has established that FMHI was the employer of the seven roofers at the site. All seven roofers were thus FMHI employees for purposes of coverage under the Act.[26] In reaching this conclusion, I have considered Respondent's arguments and documents and have rejected them for the reasons set out above. I have also noted Respondent's assertion that it should not have been cited because Lecla was also cited for the same condition. However, it is clear that OSHA may cite more than one employer for the same condition at a multi-employer work site, such as the job site in this case. *See RMS Consulting, LLC*, 20 BNA OSHC 1994, 1997 (No. 03-0479, 2004) (on a multi-employer work site, OSHA may appropriately cite a subcontractor whose employees are exposed to a hazard, as well as the general contractor for the same condition, especially if the general contractor created or controlled the hazardous condition). (Tr. 43).

Furthermore, there was no evidence with respect to the disposition of the citation issued to Lecla, which may well have settled or been withdrawn. Regardless, the facts of this case and the relevant case law establish that, under the economic realities and *Darden* tests, FMHI was the employer at the site. The alleged violation of 29 C.F.R. § 1926.501(b)(13) is accordingly affirmed.

[26] Because I have concluded that FMHI was obligated to comply with the cited OSHA standard based on its status as the common law employer of the roofers, I need not address the Secretary's alternative theory of multi-employer liability.

Classification of the Violation

The parties have stipulated that Respondent was previously cited for a violation of the standard set forth at 29 C.F.R. § 1926.501(b)(1) on September 26, 2005. They have also stipulated that the previous violation was settled and became a final order of the Commission on October 12, 2005. *See* J-1, Stipulation of Facts, Item 8. A violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063-64 (No. 16183, 1979).

The previously-cited standard, 29 C.F.R. § 1926.501(b)(1), provides as follows:

> 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.

Comparing the foregoing language with that of the cited standard, I find that the previous violation was substantially similar to the violation at issue here. The violation is therefore affirmed as a repeat violation.

Penalty

A penalty of $6,000.00 has been proposed in this case. In determining whether a proposed penalty is appropriate, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* 29 U.S.C. § 666(j); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the principal factor in penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones, supra,* at 2213-14. The CO testified he considered the gravity of the violation high, due to the fall distance involved and the likelihood of an accident occurring. He also testified that the employer was given a 40 percent credit due to the small size of its business. However, the employer was given no credit for history or good faith, due to the previous violation for failing to provide fall protection. (Tr. 52-53). Based on the record, I find

that the Secretary properly considered the statutory factors in her penalty proposal. I find the proposed penalty appropriate. A penalty of $6,000.00 is accordingly assessed.[27]

Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issue have been found and appear in the decision above. *See* Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Citation 1, alleging a repeat violation of 29 C.F.R. § 1926.501(b)(13), is AFFIRMED as a repeat violation, and a penalty of $6,000.00 is assessed.

_____//s//_____

The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: January 21, 2009
Washington, D.C.

[27] Upon consideration of the penalty assessment criteria, I find as fact that a repeat classification is appropriate, within the meaning of section 17(a) of the Act. I further find that $10,000.00 is appropriate as the gravity-based penalty and that an adjustment of 40 percent is appropriate due to the small size of the company.