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. Pennrock Construction LLC, Respondent.	OSHRC Docket No. 13-1662

APPEARANCES:

John A. Nocito, Esquire,
U.S. Department of Labor, Office of the Solicitor,
Region III, Philadelphia, Pennsylvania
For the Secretary

Hanna-Aurelia Levinson, Esquire,
Wolgemuth & Levinson Law Offices,
Lancaster, Pennsylvania
For the Respondent

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission or OSHRC) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act or OSH Act). On August 18, 2013, Compliance Safety and Health Officer (CO) Leonard Hoban responded to a complaint of someone working without fall

protection on a residential roof at 1717 Madison Avenue, Bethlehem, Pennsylvania (worksite or Bethlehem worksite). No one was at the worksite when CO Hoban arrived that day, so he returned around 2:00 pm the following day, August 19, 2013. CO Hoban saw two workers on the ground and photographed one worker on the roof.[1] The distance from the roof's edge to the ground was approximately 15 feet. The CO opened an inspection and learned that Pennrock Construction LLC (Pennrock or Respondent) was the company performing the roofing work. (Stip. ##1, 23; Tr. 39-43, 48-49).

On September 10, 2013, the Occupational Safety and Health Administration (OSHA) issued a citation and notification of penalty (citation) to Pennrock for two serious violations. The citation alleged violations of the fall protection and ladder safety construction standards. A total penalty of $4,500 was proposed for the violations. Pennrock timely contested the citation. (Stip. ##2, 3).

Both parties filed summary judgment motions on the issue of whether any of the three workers were Respondent's "employees" as a matter of law under the Act.[2] The Court denied the motions.

A one-day hearing was held in Philadelphia, Pennsylvania on December 2, 2014. Three witnesses testified at the hearing: CO Hoban, Samuel U. Beiler (Sam Beiler or Mr. Beiler), and Alvin King (Alvin King or Mr. King). Both parties simultaneously filed post-hearing briefs. The Respondent elected to file a reply brief. The Secretary declined to file a reply brief.

Pennrock does not dispute it did not comply with the cited standards. The sole issue of dispute between the parties was whether three of Pennrock's members at the worksite were

[1] These three workers were Alvin King on the roof and Messrs. Michael King and Kevin Hopfer on the ground. (Stip. #27; Tr. 101, 176; Ex. JT-V, p. 11).
[2] Only an "employer" may be cited for a violation of the OSH Act. *Vergona Crane Co.,* 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992).

employees under the Act. Pennrock asserts that it is not an "employer" under the Act because it had no employees at the worksite. It asserts the workers were self-employed owners of Pennrock and thus the Act does not apply. (R. Br., p. 9).

For the reasons that follow, the Court affirms both citation items and assesses a total penalty of $4,500.

Stipulated Facts

The parties offered and the Court accepted the following 27 stipulations of fact. (Tr. 21; Pre-hearing Stipulations).

1. On August 19, 2013, an authorized representative of the Secretary of Labor, OSHA Compliance Safety and Health Officer Leonard Hoben, inspected the worksite.

2. On September 10, 2013, the Secretary issued a Citation and Notification of Penalty to Respondent as a result of Inspection Number 932104. Citation 1, Item 1 alleges a Serious violation of 29 C.F.R. § 1926.501(b)(13); Citation 1, Item 2 alleges a Serious violation of 29 C.F.R. § 1926.1053(b)(1).

3. On October 3, 2013, OSHA received Respondent's Notice of Contest, which was properly transmitted to the Review Commission.

4. The Review Commission has jurisdiction in this proceeding pursuant to § 10(c) of the OSHA Act, 29 U.S.C. § 651 et seq.

5. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the Commonwealth of Pennsylvania.

6. Respondent is engaged in a business affecting commerce within the meaning of Sections 3(3) of the OSH Act, 29 U.S.C. § 652(3).

7. The Construction Industry Safety and Health Standards, 29 C.F.R. Part 1926, are generally applicable in this case because the work being performed at the worksite falls within the definition of "construction" work.

8. If the Court determines that Respondent is an "employer" within the meaning of Section 3(5) of the OSH Act, 29 U.S.C. § 652(5), Respondent admits that the facts establish by a preponderance of the evidence that: (1) the standards cited in Citation 1, Items 1 and 2 apply to the conditions described therein; (2) the terms of the cited standards were violated; (3) employees had access to the violative conditions ("employee exposure"); and (4) Respondent knew of the violative conditions ("actual knowledge"), or could have known of the violative conditions with the exercise of reasonable diligence ("constructive knowledge").

9. If the Court determines that Respondent is an "employer" within the meaning of Section 3(5) of the OSH Act, 29 U.S.C. § 652(5), Respondent agrees to the entry of an Order affirming the Citation was issued and the total proposed penalty of $4,500. Respondent does not waive its right to appeal the Order by seeking review by the Commission on the issue of whether Respondent is an "employer" within the meaning of the OSH Act.

10. Prior to March 18, 2003, Samuel U. Beiler solely owned a roofing company named Pennrock Construction.

11. As part of the creation of Pennrock Construction LLC, Samuel U. Beiler executed and filed with the Internal Revenue Service an Application for Employer Identification Number for Pennrock Construction LLC on March 18, 2003.

12. Samuel U. Beiler, through attorney Nicholas T. Gard, applied for a Certificate of Organization, Domestic Limited Liability Company for Pennrock Construction LLC. The

Pennsylvania Department of State, Corporation Bureau provided Pennrock LLC with a signed and filed Certificate of Organization dated April 1, 2003.

13. The Operating Agreement for Pennrock Construction LLC ("the Operating Agreement"), effective as of April 1, 2003, established the Company's principal and registered office at Samuel U. Beiler's home located at 81 Locust Street, P.O. Box 21, Talmage, PA 17580.

14. The Company's current principal and registered office is at Samuel U. Beiler's home, now located at 5259 Diem Road in New Holland, PA 17557.

15. The Company maintains a work facility located at 90 Slaymaker Hill Road in Kinzers, PA that is used for, among other things, storage of equipment and materials.

16. The Operating Agreement establishes Samuel U. Beiler as the Company's Managing Member.

17. Samuel U. Beiler has been the Company's Managing Member since its inception.

18. Based on the distribution of the membership interests in effect on August 19, 2013, Samuel U. Beiler could not be removed or voted out as Managing Member by the other Members.

19. On August 19, 2013, the Company consisted of five Members: Managing Member Samuel U. Beiler, John Beiler, Alvin King, Michael King, and Kevin Hopfer. Samuel Beiler held a 92% membership interest in the Company, John Beiler held a 5% membership interest, and Alvin King, Michael King, and Kevin Hopfer each held a 1% membership interest.

20. John Beiler is no longer a Member of the Company.

21. Under the Operating Agreement in effect on August 19, 2013, Members were required to agree in writing to be bound by the provisions of the Operating Agreement.

22. The Company, through its Managing Member, Samuel U. Beiler, obtained a residential roofing job, located at 1717 Madison Avenue, Bethlehem, Pennsylvania ("the worksite"), from The Exterior Company, a general contractor with which the Company had a two-year working relationship.

23. The Company, through its Managing Member, Samuel U. Beiler, and The Exterior Company agreed upon a price to remove the old shingles from a 15-foot residential roof and install new shingles.

24. The price of the job was based on the square footage of the roof.

25. The Exterior Company provided the shingles.

26. As of August 19, 2013, the Members met at the Company's facility in Kinzers every workday at 6:00 a.m.

27. On the morning of August 19, 2013, the Managing Member, Samuel U. Beiler, met with 1% Members Alvin King, Michael King, and Kevin Hopfer at the Company's shop and told them the location and details of the job.

Parties' Stipulation of Facts (Stip. #), undated.

Stipulated Applicable Principles of Law

1. Respondent utilizes tools, equipment, machinery, materials, goods and supplies, which have originated in whole or in part from locations outside of the state of Pennsylvania. (Tr. 22).

2. Respondent is engaged in a business affecting commerce within the meaning of § 3(3) of the OSH Act, 29 U.S.C. § 652(3). (Tr. 22).

3. In the event that the workers at the worksite are found to be Respondent's employees under the Act, the parties stipulate that the Construction Industry Safety and Health Standards,

29 C.F.R. Part 1926 are generally applicable in this case because the work being performed at the worksite falls within the definition of "construction" work. (Tr. 22).

Joint Pre-Hearing Statement (Jt. Pre-Hr'g Stmt), pp. 4-5.

Jurisdiction

Based upon the record, the Court finds that Pennrock, 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, 29 U.S.C. §§ 652(3) and (5). The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case. (Stip. ##4, 6).

Preliminary Issue: Respondent's Name and Entity in Citation and Complaint

The Respondent asserted, as an affirmative defense, that the Secretary issued the citation to an unknown entity, "Penn Rock Construction." Respondent stated that it operates under the name and entity designation of "Pennrock Construction, LLC." (Ex. JT-III, p. 4, ¶ I).

The September 10, 2013 citation was issued to "Penn Rock Construction, 5259 Diem Road, New Holland, PA 17557" for its worksite at "1717 Madison Ave, Bethlehem, PA 18017." (Ex. JT-I).

In its October 1, 2013 Notice of Contest, Respondent requested a correction to the name of the cited company to "Pennrock Construction LLC."[3] The Notice of Contest was filed by Respondent's counsel, Hanna-Aurelia Dunlap. (Stip. # 3; Ex. JT-II, p. 19).

The Secretary captioned the Respondent as "Pennrock Construction, LLC and its successors" in the Complaint filed on February 28, 2014. The Secretary amended the citation to

[3] "Pennrock Construction LLC" was registered in Pennsylvania as a home improvement contractor at the time of the OSHA inspection. (Exs. R-B, R-C).

the "correct legal name of Pennrock Construction, LLC" pursuant to Commission Rule of Procedure 34(a)(3), 29 C.F.R. § 2200.34(a)(3), in the Complaint.[4] (Ex. JT-II, pp. 6, 8, ¶ IX).

In its Answer filed March 13, 2014, Respondent stated: "It is admitted only that the Secretary is attempting to amend the Citation. It is denied that a substitution of one party for another is the type of amendment contemplated by 29 C.F.R. § 220.34(a)(3)[*sic*]." The Respondent did not provide case law to support this assertion. In Respondent's post-hearing brief, it continues to assert that "name on the Citation has never been changed." (Ex. JT-III, p. 3, ¶ IX; R. Br., p. 8).

The Commission follows the Federal Rule of Civil Procedure at 15(a) for pre-hearing amendments, which provides that the leave to amend "shall be freely given when justice so requires." *Kokosing Constr. Co., Inc.,* 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006), *aff'd*, 232 F.App'x 510 (6th Cir. 2007). The Secretary's change of the name of the employer in his original complaint from that stated in the citation is permissible under Federal Rule of Civil Procedure 15(a),(c). It is not appropriate to grant a motion to amend if it will prejudice the opposing party. *Id.* Here, Respondent received timely notice of the institution of the action such that it was not prejudiced in defending the merits of OSHA's allegations against it. It also knew that the action would have been brought against Pennrock Construction LLC, but for a mistake concerning its proper identity. *See Vergona Crane Co.,* 15 BNA OSHC at 1783-84, n. 3.

The Secretary corrected the name of the Respondent in his first pleading with the Court.[5] Respondent has offered no evidence to demonstrate that it has been prejudiced by "LLC" not

[4] "Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought." Commission Rule 34(a)(3), 29 C.F.R. § 2200.34(a)(3).

[5] "*Pleadings* are complaints and answers filed under [29 C.F.R.] § 2200.34, statements of reasons and contestants' responses filed under § 2200.38, and petitions for modification of abatement and objected parties' responses filed under § 2200.37." A citation is not a complaint within the meaning of the Federal Rules. *See e.g. P & Z Co.,* 7 BNA OSHC 1589, 1591 (No. 14822, 1979).

being included in the company name on the underlying citation. To the contrary, Respondent asked the Secretary to correct the company's name and the Secretary did so at his first opportunity.[6] Respondent provided no support for its assertion that a modification or name change is not the type of amendment contemplated by Commission Rule 34(a)(3).

Respondent carries the burden of proof for an affirmative defense. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff'd,* 28 F.3d 1213 (6th Cir. 1994). The Court finds that Respondent has not been prejudiced in its ability to present its case. The Court finds this alleged affirmative defense is unsupported and fails.

Background & Relevant Facts

Founding and Membership

Pennrock is a Pennsylvania Limited Liability Company (LLC) established in 2003 by two founding members – Sam Beiler and his brother, John Beiler.[7] John Beiler had a 5% membership interest and Sam Beiler had a 95% membership interest in the company. The company's stated purpose was the operation of a general construction business. Sam Beiler was designated the Managing Member of the company at its inception. Sometime between the OSHA inspection and the hearing for this matter, John Beiler withdrew from the company. (Stip. ##13, 17, 19-20; Tr. 65-66, 74; Exs. JT-X, ¶ 2.2; p. 3, ¶ 3.2; p. 15, through JT-XII).

Pennrock added its first new member, Elam Riehl, in 2004. That member was given a 1% membership interest, which reduced Sam Beiler's membership interest to 94%.[8] Since then several new members have been admitted to, and withdrawn from, the company. None of these

[6] Moreover, during a pre-hearing conference call conducted on September 12, 2014, the parties agreed, with Court approval, to identify Respondent in the case caption as "Pennrock Construction LLC". Accordingly, the Court's next Order issued on September 15, 2014 identified Respondent as "Pennrock Construction LLC".
[7] Respondent is a limited liability company organized under the Pennsylvania Limited Liability Company Law of 1994, 15 Pa C.S. § 8901 *et seq*. (Ex. JT-VI, p. 2).
[8] Mr. Beiler decided Mr. Riehl would have a one percent interest. Mr. Riehl only performed roofing work. (Tr. 75-76).

new members were required to make a capital investment in the company.[9] Each new member was admitted with a 1% membership interest that was deducted from Sam Beiler's total membership interest. With the exception of the two founding members, every member had a 1% interest in the company. (Tr. 75, 90; Exs. JT-XI through JT-XII).

Since 2003, Sam Beiler's membership interest has ranged from 89% to 97%. At the time of the hearing, Mr. Beiler held a 97% interest in the company. In June 2009, Mr. Beiler's membership interest was at its historic low of 89%. However, two months later, in the sixth amendment to the Operating Agreement, three members withdrew and his membership interest rose to 92%. (Tr. 86-87; Exs. JT-XI through JT-XII, pp. 14-17).

At the time of the OSHA inspection, Pennrock had five members – Sam Beiler, John Beiler, Alvin King, Michael King, and Kevin Hopfer.[10] Alvin King had been a member since January 1, 2007. Michael King was admitted as a member March 1, 2011, and Kevin Hopfer was admitted on April 27, 2011.[11] Michael King is Alvin King's brother.[12] Mr. Hopfer was admitted to the company after answering an advertisement in the local Pennysaver publication. Alvin King,[13] Michael King, and Kevin Hopfer each had a 1% membership interest in the company. (Stip. #19; Tr. 81-85; Exs. JT-XI, JT-XII, pp. 6, 18).

Duties and Rights under the Operating Agreement and Sam Beiler

Pennrock's Operating Agreement set forth the rights and duties of the general members[14] and the Managing Member. The Operating Agreement gave each general member the right to vote on the admission of a new member, determine the membership interest of the new member,

[9] The record is silent on the capital contributions of the company's two founding members.
[10] At that time, Mr. Beiler "very seldom" worked on roofs himself because of back issues. He has never been at the Bethlehem worksite. (Tr. 68-69, 102).
[11] Michael King and Mr. Hopfer only perform roofing work for Respondent. (Tr. 82-84).
[12] Mr. Beiler's testimony shows that all of the members of the company, except one, were either friends or relatives. (Tr. 75-81).
[13] Any reference in this decision to Mr. King is for Alvin King.
[14] "General members" refers to all Pennrock members, except the Managing Member.

elect to purchase the membership interest of a withdrawing member, set the compensation of the Managing Member, and vote for a different Managing Member. Each member had one vote for each percentage of membership interest. Unanimous agreement of the members was required to admit a new member or to change the Operating Agreement. There is no evidence that any member ever objected to the addition of a new member. The only changes made to the Operating Agreement were eight amendments adding and removing members from the company. (Tr. 91, 128-29; Exs. JT-X through JT-XII).

Other company matters were either exclusively controlled by the Managing Member or subject to a majority vote of the members. Thus, as majority owner and Managing Member, Mr. Beiler had control. For example, the Operating Agreement specified that checks could only be drawn from the company's checking account by Mr. Bieler[15] or an individual acting at the direction of the majority vote of the Members. Because he also controlled the majority voting interest, Mr. Beiler controlled the selection of that individual. Either way, Mr. Beiler had complete control of Pennrock's checking account. Mr. Beiler also prepared all invoices, as well as price estimates and proposals for Respondent's new jobs. Only he had the authority to enter into contracts on behalf of Respondent. Mr. Beiler also had sole control over cash receipts that came into Respondent. He also was responsible for scheduling the daily work of the members. (Tr. 67-73, 91, 105, 108-09, 127, 138; Exs. JT-V, pp. 11-13, JT-VI, pp. 3-6, JT-X).

Mr. Beiler admitted during testimony that when a member left, the one percent interest was added back to his total membership interest; the same was true when a new member was admitted, the one percent interest was taken from his interest in the company. Mr. Beiler did not

[15] The Operating Agreement specified "Samuel U. Beiler" rather than in his function as the Managing Member. (Ex. JT-X, ¶ 4.24).

notify the other members or take a vote when he transferred the membership allocation. (Tr. 80-81, 165).

Under the terms of the Operating Agreement, the Managing Member was responsible for managing the business affairs of the company. The Managing Member controlled the banking activities, executed documents, established the company's accounting methods, selected office locations, purchased or leased property on behalf of the company, and performed "any kind of activity" to accomplish the company's purpose. The Managing Member also determined when profit distributions were made. (Tr. 69-70; Ex. JT-X, pp. 3-7).

The Operating Agreement specified company meetings were held at the company's principal office or at a location determined by the Managing Member. Because Mr. Beiler was the Managing Member, and the company's principal office was located at his home, he had exclusive control of when and where regular and special meetings were held. (Stip. #14; Tr. 73; Ex. JT-X, p. 5, ¶¶ 3.9 - 3.10).

There is no indication that any of the members realized that they could select a new Managing Member or determine his compensation. Even if they had known, because the other members total combined ownership interest had never been more than 11%, they would always be outvoted by the majority owner, Mr. Beiler. Thus, Mr. Beiler could only be removed as Managing Member by his own vote. (Stip. #18; Tr. 86-88).

Mr. Beiler solicited and acquired the construction projects for Pennrock. When a new member was admitted, Mr. Beiler established the hourly pay rate based on that person's construction experience. Mr. Beiler testified that a new member had the option to disagree with the hourly rate he offered; however, he admitted that no one had ever negotiated the hourly rate he proposed. When asked about whether he solely decided the hourly rate that was paid to

members, he stated that "[t]echnically, I'm not, because if you [the member] don't agree with that hourly rate, its' not going to go."[16] Mr. Beiler stated that the other members had no input into the hourly rate of a new member. Mr. Beiler acknowledged the amount of membership interest for a new member was also allocated by him, without input from the other members. (Tr. 84-85, 97, 108-09, 133-34, 152-57; Exs. JT-V, p. 16).

Mr. Beiler generally paid members for their work on a weekly basis. When he believed a member put in extra effort on a particular job, Mr. Beiler would pay that member a bonus above the hourly rate. Mr. Beiler stated that if a member purchased a tool for a job, Pennrock usually reimbursed the member. Members purchased their personal hand tools. (Tr. 48, 99, 106-07, 147-48, 174).

Mr. Beiler insisted there was no hierarchy in the company, all members worked cooperatively, and there was no discipline because each member was an owner. Mr. Beiler testified that once, in 2005, Pennrock had a worker that was not a member. Because he was considered an employee, Pennrock withheld taxes, issued a W-2, and carried workers compensation insurance. (Tr. 124-26, 130-31).

Mr. Beiler admitted that Pennrock's website page, as of August 20, 2013, stated Pennrock had an owner with 14 years of experience and "We have of (sic) 5 hardworking honest

[16] Mr. Beiler further testified:

> Q: And if that person who you're deciding it to doesn't agree, is that what you're saying, that that's when you -- that's what you're saying you mean subject to their approval?
>
> A: What I'm trying to say is I decide the rate and the member decides he's not -- it's not the right number for him, it needs to be higher. Then we have to talk about it. Because if he wants, say, for instance, if he wants $20 an hour and I'm saying -- I come up with the idea of $18, and he says, no, no, I want 20, then we have to compromise. Then we have to come—
>
> Q: That's never happened, though, right?
>
> A: It didn't, no.

(Tr. 153-54).

employees." Mr. Beiler stated that he was the person with the 14 years of experience.[17] On July 24, 2014, less than a year later, Pennrock's website page no longer referenced any employees. Mr. Beiler admitted the reference to "employees" had been removed. (Tr. 59, 117-20; Ex. JT-XX through JT-XXI).

Mr. Beiler stated that when he first started Pennrock he knew nothing about OSHA. Mr. Beiler stated he believed OSHA did not apply to Pennrock because they were self-employed individuals. When asked why he believed OSHA did not apply to self-employed individuals, Mr. Beiler stated that he had been at two different workplaces where an inspector had not cited individuals after they stated they were self-employed. (Tr. 132, 142-43).

Alvin King

Alvin King was the only member, other than Mr. Beiler, that testified at the hearing. Mr. King's testimony described the role that general members had in the company. Before becoming a member in 2007, Mr. King knew about Pennrock through a friend that had been a member. Mr. King interviewed with Mr. Beiler to discuss his prior construction experience.[18] Mr. Beiler informed Mr. King that his hourly rate of pay would be $12.00 and that he would receive a 1% membership interest. Mr. King did not negotiate the terms of his pay rate or membership. He read and signed the Operating Agreement without asking any questions.[19] He did not ask anyone to read through the Operating Agreement on his behalf. Mr. King made no capital contribution to the company. Mr. King agreed he had voted on the addition of new members. Mr. King's sole duty to Pennrock was to provide roofing work at the company's construction projects. On August 19, 2013, he and the other two members, Michael King and Kevin Hopfer, took

[17] Mr. Sam Beiler started working in roofing with Welsh Mountain in 1999. He then did roofing work at L.S. Construction. In June, 2002, he began working for himself and started Pennrock Construction. (Stip. #10; Tr. 59-60; Ex. JT-VII).
[18] Mr. King did not have any roofing experience at that time. (Tr. 171).
[19] Mr. King testified he had an eighth grade education. (Tr. 172).

Pennrock's work vehicle from Kinzers to the Bethlehem worksite.[20] Mr. King stated he was the lead man on the worksite because of his greater roofing experience. (Tr. 77, 114, 134, 154, 169-76, 179).

Work Assignments

Every workday morning at 6 a.m., Respondent's members reported to the company's work facility in Kinzers for the daily work assignment from Mr. Beiler. There, Mr. Beiler told the members the scope and duration of the work. If Pennrock had two concurrent projects, Mr. Beiler determined which members reported to each worksite. For the Bethlehem roofing project, Pennrock was paid based upon the size of the roof. The general contractor provided the roofing shingles for the job. Pennrock provided the majority of the tools at the worksite: nail guns, nails, hoses, compressors, ladders, roof planks and buggies.[21] (Stip. ##24 through 26; Tr. 91-94, 175; Ex. JT-V, p. 14).

The OSHA Inspection

When the CO arrived at the worksite, he asked the two workers on the ground who was in charge and Michael King referred him to Alvin King, who was on the roof. After some initial discussion, Mr. King told the CO that Pennrock was an LLC and OSHA did not have jurisdiction over LLCs.[22] Mr. Alvin King told CO Hoban that he reported to Sam Beiler, who was in charge. He also told the CO that he received his direction from Sam Beiler, who also handled all questions. Mr. King then called Mr. Beiler and put the CO on the phone. Sam Beiler also told the CO that Respondent was an LLC and, therefore, exempt from OSHA jurisdiction. The CO

[20]Mr. Beiler used his personal credit to acquire the company's vehicle. The company paid for the vehicle and the title was in Mr. Beiler's name. (Tr. 112-15; Ex. JT-XVII).

[21] A roof buggy is a self-propelled trailer into which shingles can be thrown. (Tr. 93-94).

[22] CO Hoban told Alvin King that he had observed two OSHA Violations. The CO testified that the photograph at Ex. JT-XXII showed Alvin King on the roof with no fall protection and a ladder that did not reach three feet above the roof's edge. (Tr. 46, 54; Ex. JT-XXII).

explained to Mr. Beiler why he was at the worksite and the violations he had found. The CO told Messrs. Beiler and King that fall protection must be used to finish the project. At some point, the roofing crew left the worksite. The CO then took a few more pictures and spoke to the homeowner before leaving the worksite. (Tr. 43-52, 56-57, 102, 176-78).

During their discussion, Alvin King told CO Hoban that Sam Beiler: 1) assigned all work and told them where to go on a daily basis, 2) approved any changes in the field, 3) was the only person who could "hire and fire,"[23] and 4) gave him [Alvin King] direction. He also told CO Hoban that the three employees at the worksite were paid weekly on an hourly basis. (Tr. 47-55).

Mr. King testified that he and the crew returned to the worksite about 30 minutes later (after the CO left) to finish the job. Fall protection equipment was in the Pennrock work vehicle, but was not used when finishing the job. Mr. King testified that he did not wear the fall protection because he felt safe on the roof. (Tr. 177-78).

Credibility Assessment

The CO's testimony is credible and given great weight. He testified in a forthright manner and his testimony about the worksite and inspection was consistent with Mr. King's testimony.

Mr. King's testimony was straightforward and sincere with no apparent intent to mislead the Court. He was forthright when he stated he had read through Pennrock's operating agreement in 2007 (and had no one else review it on his behalf). He was sincere when he testified the he did not participate in the management of Pennrock; he simply provided general

[23]Mr. Beiler testified that he could not fire a member. The Court does not find his testimony credible based upon Alvin King's contradictory testimony and other instances of incredulity identified herein. (Tr. 126; Ex. JT-VI, p. 5).

labor and was the lead man on the worksite. His testimony is credible and given great weight too. (Tr. 172-176).

Mr. Beiler's testimony was confused and uncertain at times. One instance was his response to the question of whether he had sole control over spending at Pennrock. During direct examination by the Secretary, Mr. Beiler testified that he did not have sole control over spending; he needed approval from the other members. This courtroom testimony was at odds with testimony Mr. Beiler gave at his earlier deposition when he said that he did have sole control over Respondent's spending. On cross examination, Pennrock's counsel asked Mr. Beiler to explain why he had stated in his pre-hearing deposition that he had "sole" control of spending. Mr. Beiler explained that he had not paid attention to the word "sole" during his deposition. He then stated that all members had input into Pennrock's spending. On redirect examination, Secretary's counsel asked Mr. Beiler to harmonize this conflicting testimony with his earlier testimony that the other members only performed roofing work for Pennrock. Mr. Beiler testified:

> Q: We went through Amendment 1 through 8.
> A: Yes.
> Q: And each time I asked you that person just does roofing work, right?
> A: Yes.
> Q: And you said yes. And I asked if they do anything else. You said no. Is that right?
> A: Yes.
> Q: Okay. Now you're saying that they do roofing work and they have input into spending. Is that your testimony, today?
> (Pause.)
> By Mr. Nocito:
> Q: Can you answer that question, sir?
> A: Yes. I guess -- I guess you're right.
> Q: I'm right what?
> A: That I did testify on that.

(Tr. 70-72, 76-79, 84-86, 146-49).

Additionally, Mr. Beiler's testimony was inconsistent about whether the other members approved the amount of ownership interest for a new member. During cross-examination by Pennrock's counsel, he stated:

> Q: Do the members, regardless of their ownership interest, *do they also have to unanimously approve transfer of ownership interest*? In other words, if you want to give a new member some percentage of your membership interest, do all the members have to approve that as well?
> A: Yes.

(emphasis added) (Tr. 129).

However, during further re-cross examination by Pennrock's counsel, Mr. Beiler testified:

> Q: Did you inform any of the other members that you were re-allocating that one percent interest back to yourself?
> A: No, I did not. And they weren't informed that it was being taken from me at the first place. When a member comes off, they weren't informed that the percent comes off of my percent. What I'm trying to say, it came off mine and went back where it came from.

(Tr. 165).

The Court finds that Mr. Beiler transferred and allocated membership interest without notification to or approval from the other members. The Court finds Mr. Beiler's testimony that members had approval over the amount of membership interest assigned to others was self-serving, contradictory, and not credible.[24]

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[24] Mr. Beiler testified:

> Q [three extraneous words omitted] – let's make it simple. With respect to Mr. Hoffer, I asked the question you determined his percent interest would be one percent and you said yes.
>
> A Okay.
>
> Q Right?
>
> A Yes.
>
> Q Are you now saying that that answer was not the truthful answer?
>
> A No. No, I'm not. Okay, you're right. I did say I determined that, right. You have to excuse me. I'm not the sharpest tool in the shed. I get confused.

In another instance, Mr. Beiler's courtroom testimony was impeached by pre-hearing deposition testimony concerning his role as sole decider of a member's hourly rate. At the trial, he testified that he was not the sole decider of a member's hourly rate. During his deposition, he stated that he was. (Tr. 96-97).

Overall, Mr. Beiler's testimony is credited only when it is supported by other credible testimony or evidence. Any other statement is given little weight.

Were the three members at the worksite Pennrock employees and was Pennrock Construction LLC an employer under the Act?

Purpose and Background of the OSH Act

Congress enacted the Act in 1970 to address a serious problem: the human and economic toll of workplace accidents that were killing an estimated 14,000 American workers per year and disabling millions more. *See* 29 U.S.C. § 651; *All About OSHA,* at pp. 4-5 (2015). Congress commissioned OSHA to regulate safety and health hazards in almost every industry throughout the country, and extended the Act's protections broadly to all "employees" who work for "employers." *See* 29 U.S.C. § 652(5)-(6). As a result, yearly workplace fatalities have fallen to a reported 4,679 in 2014 even as the size of the workforce has more than doubled.[25] (S. Br., p. 1).

LLC Members

(Tr. 156-57).

[25] Bureau of Labor Statistics summary of 2014 fatalities available at http://www.bis.gov/news.release/pdf/cfoi.pdf. *See also* http://www.osha.gov/Publications/all_about_OSHA.pdf. (S. Br., p. 1).

Respondent has organized under a business form, a limited liability company, that was unknown in 1970.[26] This case tests whether a business that uses a corporate form that was not in existence in 1970 will be permitted to disregard OSHA standards that protect American workers primarily by assigning everyday workers a diminutive ownership interest in the business and labeling them as "members." Here, OSHA inspected a residential roofing job where three workers performed roofing work with no fall protection. All three workers were "members" of Pennrock Construction LLC organized under Pennsylvania law. All three workers held a 1% interest in Pennrock, whereas Samuel Beiler, Respondent's managing member, held a 92% interest. Pennrock contends that the three workers' 1% stake in the company rendered them owners of Pennrock, rather than employees who are eligible to receive the Act's protections.

Determining if an Employment Relationship Exists

The OSH Act's definitions of "employer" and "employee" incorporate longstanding master-servant principles that were developed under the common law of agency. *See Froedtert Memorial Lutheran Hosp.*, 20 BNA OSHC 1500 (No. 97-1839, 2004), *citing Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (*Darden*).[27] Those principles, as applied in determining whether a person is an owner or an employee, focus on the person's legal and actual ability to exert control over the organization. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (*Clackamas*) (setting forth applicable common-law factors; "the common-

[26] 15 Pa..C.S.A. § 8901, Limited Liability Company Law of 1994, Committee Comment – 1994. (Wyoming statute enacted in 1977 was the first statute enacted in the United States that created the "new limited liability company entity.").

[27] Federal courts of appeals and the Commission have applied the common-law test set forth in *Darden* to determine whether an individual is an employee under the OSH Act. *See, e.g., Slingluff v. OSHRC*, 425 F.3d 861, 867-68 (10th Cir. 2005); *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 942 (9th Cir. 1994); *Vergona Crane Co.,* 15 BNA OSHC at 1784. Where, as here, the issue is whether an owner, partner, member or similar person within an organization is an "employer" or "employee," the common law test set forth in *Clackamas* similarly applies. This is the position advocated by OSHA, the agency that has enforcement responsibilities under the OSH Act. (S. Br., p. 12).

law element of control is the principal guidepost that should be followed").[28] "Being remedial and preventative in nature, the [OSH] Act must be 'construed liberally in favor of the workers whom it was designed to protect[.]'" *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979).[29]

Respondent asserts that each member was self-employed and therefore not an employee of Pennrock. Respondent describes its members in a variety of ways throughout the record: members, partners, owners, employees, and self-employed individuals. (Tr. 103, 118, 124, 129, 132, 143, 209; R. Br., p. 15).

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co*., 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated). The OSH Act places duties on "employers" to protect the health and safety of "employees." 29 U.S.C. § 654(a). The Act requires each employer to comply with occupational safety and health standards and regulations promulgated under the OSH Act. *Id.* An employer is a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652 (5). Person means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). An employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(3).

The definitions of employer and employee in the Act are nominal, circular and unhelpful. In similarly worded statutes, the Supreme Court relied on the common law for guidance in

[28] As with the professional corporation at issue in *Clackamas,* a LLC is a relatively new type of business entity with no exact common-law precedent. Nonetheless, the common law's definition of the master-servant relationship provides helpful guidance when defining the term "employee" under the OSH Act.

[29] A broad reading of the term "employee" would, consistent with the statutory purpose of the OSH Act to reduce fatalities and injuries in the workplace, expand the coverage of the OSH Act by enlarging the number of employees entitled to protection under the OSH Act. *See Clackamas*, 538 U.S. at 447, n. 6.

determining whether an individual is an employee, or alternatively, the kind of person that the common law would consider an employer. *See Clackamas*, 538 U.S. at 444-45*; Darden*, 503 U.S. at 322-23. The company's control over a worker is the key factor to determine if an employer-employee relationship exists. *Clackamas,* 538 U.S. at 448; *see Darden*, 503 U.S. at 323. The Commission has not yet addressed the direct question of whether LLC members can also be employees under the definition in the OSH Act. Here, the Court will determine if the three workers at the worksite were Pennrock employees on August 19, 2013 by applying the tests set forth in both *Darden* and *Clackamas*.[30]

Darden **Analysis**

The Commission applies the common-law agency doctrine set forth in *Darden*, which focuses on the company's "right to control the manner and means by which the product" is accomplished, to determine if an employment relationship exists.[31] *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010). Additional factors relevant to analysis include:

> the skill required [for the job]; 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; the provision of employee benefits; and the tax treatment of the hired party.

[30] In considering the issue of control, the Court in *Clackamas* focused on whether "the individual acts independently and participated in managing the organization or whether the individual is subject to the organization's control." *Clackamas*, 538 U.S. at 449. Because the focus of control was on whether the shareholder was an employee of the professional corporation, the *Darden* factors, which focused on "drawing a line between independent contractors and employees," were not directly applicable. *Id.* at 445. Nonetheless, an analysis of the *Darden* factors is helpful here in defining who is an "employee" under the OSH Act and deciding whether Pennrock's general members were self-employed, independent contractors.

[31] In *Darden*, the U.S. Supreme Court faced the question whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA). The Court adopted a common-law test for determining who qualifies as an "employee" under ERISA. *See Darden*, 503 U.S. at 323.

Id. citing Darden, 503 U.S. at 323-24.

Control of the Manner and Means by which the Product is Accomplished

The Commission recognizes the company's control over the worker is the "principal guidepost" to determine the existence of an employment relationship. *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC at 1506 (*citing Clackamas*, 538 U.S. at 448). As later discussed, applying the six-factor *Clackamas* test demonstrates that Pennrock controlled the manner and means by which the roofing work was accomplished by the roofers at the worksite on August 19, 2013. This factor weighs in favor of an employee relationship.

Skills Required

The skill required for the work was general construction experience and no other specialized skill. With his greater experience, Mr. King provided guidance to the other members at the worksite. This factor weighs in favor of an employee relationship. (Tr. 101, 176).

Source of Tools, Work Location, Hours Worked and Right to Assign Additional Projects

For the Bethlehem worksite, Pennrock provided the majority of the tools at the worksite, including nail guns, compressors, ladders, roof planks, and roof buggies. The members reported to the company's work facility each workday morning for the day's assignment and then used Pennrock's vehicle to get to the worksite. If Pennrock had more than one project, the Managing Member decided who was assigned to a particular worksite. The record is silent on a member's discretion for work hours; however, because the members reported to the work facility each workday at 6 a.m., it suggests that work hours were generally set for the group rather than at each member's discretion. All the factors related to the worksite, tools, hours worked, and assignments support an employee relationship. (Stip. #26; Tr. 92-94, 114, 175-76).

Payment Method

Pennrock was paid a flat fee for the roofing work at the Bethlehem worksite. Each member at the worksite was paid at an hourly rate determined by the Managing Member; he was not paid based on his membership interest or the fee Pennrock charged for the project. Mr. Beiler occasionally paid a bonus to a member for extra effort on a job. This payment structure is more akin to an employer-employee relationship than that of a self-employed independent contractor or a co-owner. This factor weighs in favor of an employee relationship. (Stip. #24; Tr. 94-95).

Whether Pennrock is in Business and Work is Part of Pennrock's Regular Business

Pennrock was in the business of construction and the work the members performed was directly related to Pennrock's business purpose. (As opposed, for example, to providing accounting or legal services.) Pennrock, through its Managing Member, acquired all the work projects for its members. The sole role of the other general members was providing general labor at its construction projects. This resembles a traditional employee relationship.

Duration of Relationship and Hiring or Paying of Assistants

The duration of the relationship between Pennrock and its members does not shed light on the nature of the relationship. Mr. King had been a member since 2007 and the other members since 2011. The hiring and paying of assistants is not a relevant factor for this analysis. The Court finds these factors are not dispositive. (Tr. 169-71).

Tax Treatment and Employee Benefits

Finally, the only *Darden* factors that weigh in favor of an independent contractor relationship are tax treatment and provision of benefits. The company does not provide workers compensation or other benefits for the members that perform roofing work. The company does not withhold any taxes from its payments for construction work performed. Each member files

income tax returns with the IRS under the category of partner. The Court finds the tax treatment and lack of benefits to the members similar to someone who is not an employee. Even so, tax reporting status is not a controlling factor in a *Darden* analysis. *See Sharon & Walter Constr., Inc.,* 23 BNA OSHC at 1290. (finding the "failure to withhold federal income and social security taxes was . . . not a bona fide reflection of an authentic independent contractor relationship."). (Tr. 111, 131-32, 141; Exs. JT-XIII through JT-XV).

Result of *Darden* Analysis

Overall, the *Darden* factors show the relationship was more akin to that of an employer-employee rather than of a self-employed, independent contractor. Considering all of these factors, especially the level of control the company had in obtaining and assigning projects, setting the hourly pay of its members, and providing the tools to complete the work, the Court finds the members at the worksite were employees of Pennrock under the OSH Act. The *Darden* analysis supports the conclusion the role of the three workers at Pennrock's worksite was more analogous to a traditional employer-employee relationship than that of someone who is not an employee.

***Clackamas* Analysis**

Respondent argues that *Clackamas* supports its position that Pennrock's members cannot also be Pennrock's employees. In *Clackamas*, the question was whether a director-shareholder-physician (owner) of a professional corporation engaged in medical practice could also be an employee when determining whether the company was exempt from the requirements of the Americans with Disabilities Act of 1990 (ADA).[32] *Clackamas*, 538 U.S. at 441-42. The Supreme Court adopted the EEOC's six-factor test that was devised to answer the inquiry of

[32] Resolution of the clinic's defense that it was not covered by the ADA because it did not have 15 or more employees depended on whether "four physician actively engaged in medical practice as shareholders and directors of a professional corporation should be counted a 'employees.'" *Clackamas,* 538 U.S. at 441-42.

"whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 449. As it had in *Darden*, the Supreme Court found the "common-law element of control was the principal guidepost that should be followed." *Id*. at 449. (R. Br., p. 18).

The *Clackamas* factors address not only the extent of an individual's control, but also the source of an individual's authority to control. *See Smith v. Castaways Family Diner*, 453 F.3d 971, 984 (7th Cir. 2006) (*Castaways Family Diner)* (concluding that determination of whether an individual controls or has the right to control an enterprise, and thus constitutes an employer, "must take into account not only the authority that person wields within the enterprise, but also the source of the authority"). The Third Circuit, adopting the Seventh Circuit's approach in *Castaways Family Diner*, set forth that a court must consider whether the individual "exercises the authority by right, or whether he exercises it by delegation at the pleasure of others who ultimately do possess the right to control the enterprise." *Mariotti v. Mariotti Bldg. Prods., Inc.,* 714 F.3d 761, 768 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 437 (U.S. Oct. 15, 2013)(No. 13-201) (*Mariotti*), *quoting Castaways Family Diner*, 453 F.3d at 984.

The six *Clackamas* factors are: 1) "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work," 2) "Whether and, if so, to what extent the organization supervises the individual's work," 3) "Whether the individual reports to someone higher in the organization, " 4) "Whether and, if so, to what extent the individual is able to influence the organization," 5) "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts, " and 6) "Whether the individual shares in the profits, losses, and liabilities of the organization." *Id.* at 449-50.

As discussed below, application of the six-factor test demonstrates the members at the worksite were subject to the company's control, did not act independently, and did not significantly participate in managing the company.

1. "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work." *Clackamas*, 538 U.S. at 449-50.

Respondent asserts that it had no control over its members because it did not establish work rules and it did not hire or fire members. This assertion fails. (R. Br., 27-28).

Respondent asserts that all members had to unanimously agree to the addition of a new member and thus it could not hire an individual. The record shows that even though Pennrock did not have a formal hiring process, the addition of a new member resembled an employee hiring process. Mr. King had a discussion with Mr. Beiler prior to joining the company which resembled a traditional interview. As Managing Member, Mr. Beiler determined the hourly rate offered to Mr. King. Mr. King accepted the hourly rate proposed. Mr. King also signed the operating agreement without negotiation or having another party evaluate its terms. Mr. Hopfer became a member after responding to an advertisement in the Pennysaver publication. Advertising for a new member is significantly like advertising for a new employee. (Tr. 83, 97, 171-73; R. Br., p. 12).

Mr. Beiler admitted that he determined the hourly rate offered to each member. He also determined each member's amount of ownership interest without the input of or vote by the other members.

There is no evidence that any member, other than the Managing Member, had a meaningful role in choosing a new member. No one had voted against the admission of a new member. Mr. Beiler decided to reallocate departing members' percentage interest back to

himself. These reallocations were not put to a vote by the members. Further, the amendments reflecting the addition of new members to Pennrock were either unsigned or did not have the signature of all the requisite members.[33] (Tr. 80-85, 91; Exs. JT-XI through XII).

For example, the third amendment, dated January 1, 2007, added Alvin King as a member. It was signed only by Messrs. Sam Beiler and John Beiler. There were two other members at the time, Messrs. Elam Riehl and Eli E. King, Jr. Neither signed the third amendment indicating their approval. The fourth amendment, dated January 1, 2008, added Ervin Esh with a one percent interest.[34] It shows that all members signed their approval on May 6, 2008, with the exception of Mr. Riehl. Mr. Riehl continued to appear as a member until the sixth amendment, dated August 1, 2009, which removed him as a member effective August 1, 2007. (Tr. 77-79; Ex. JT-XII, pp. 6-11, 15).

The Operating Agreement required a unanimous vote of the members to add a member; however, it appears this was more of a pro forma exercise to agree with the terms set by Mr. Beiler, rather than a meaningful vote of the membership. The pro forma nature of voting for new members and the virtually exclusive control of the Managing Member when adding a new member is more akin to that of a traditional employer.

To support its position that the members at its worksite were not its employees, Pennrock attempts to distinguish the instant case from *Harris v. Universal Contracting, LLC, et al.,* No. 2:13-CV-00253 DS, 2014 WL 2639363 (D. Utah, June 12, 2014) (finding that evidence demonstrated that members of an LLC were subject to the firm's control and as such were employees as defined by the Fair Labor Standards Act (FLSA) where manager controlled a

[33] Eight amendments to the Operating Agreement were submitted. Amendments five, six, and seven had no signatures. Amendments one, four, and eight were each missing one signature. Amendments two and three were missing two signatures. (Exs. JT-XI through JT-XII).
[34] Mr. Esh only performed roofing work for Respondent. (Tr. 79).

minimum of fifty percent of firm's membership units, had complete control of the operating agreement potential members must sign in order to join Pennrock, and had the authority under the operating agreement to hire and fire members and supervise and control the work).[35] The Court relied on the factors set forth by the Supreme Court in *Clackamas* to answer the question "whether members can simultaneously be members and employees of the LLC." *Harris v. Universal Contracting, LLC, et al.,* 2014 WL 2639363, at *2. The *Harris* court found the company's hundreds of Class B members were employees under the FLSA because they were subject to the company's control. *Id.* at *7. The managers in *Harris* were able to redeem a Class B member's ownership interest for various reasons, including failing a drug test, providing poor quality service, or not providing services for a specified time period. *Id.* at *3. (R. Reply Br., pp. 3-4).

Respondent asserts that, unlike the employer in *Harris*, it could not fire or terminate a member. This is not so. To the contrary, the Operating Agreement includes a similar provision that states that membership is effectively terminated when a member no longer provides services to the company. "A Member ceases to be a Member, and is deemed to have withdrawn from the Company . . . When the Member no longer provides services to the Company for a period of thirty (30) days." This provision demonstrates that membership can be terminated and does not effectively distinguish the instant case from *Harris*. The Court finds that a comparison to *Harris* does not favor Pennrock's argument. Pennrock's Operating Agreement included a provision to terminate an individual's membership after 30 days of non-service, similar to that in the *Harris*. (Ex. JT-X, ¶ 4.20(b); R. Reply Br., p. 4).

[35] The staffing laborers were each awarded one membership unit of the LLC upon signing the agreement. *Harris v. Universal Contracting, LLC, et al.,* 2014 WL 2639363, at *1).

Pennrock asserts it did not have written work rules for its members and thus had no control. However, the lack of written work rules is not telling for a company of five individuals. Even so, through its Managing Member, Pennrock regulated the work conditions of its members. The Managing Member set each member's hourly pay rate. If the Managing Member believed a member had put forth extra effort at a job, he included a bonus in his paycheck. (Tr. 104-07).

The Managing Member solicited and selected the company's projects, negotiated the terms of the projects, and then directed the members when and where to carry out the work. The members reported to Pennrock's work facility each workday morning to get the day's assignment. If there was more than one ongoing project, the Managing Member determined which members reported to each worksite. The general members had no role in soliciting the business for the company. The members did not control which job was selected by Pennrock or when to report to that job. The general member's only role was providing labor at the worksite.

The Court finds that Pennrock exerted significant control over the rules of the members' work; the members had no choice about the location, hours, or the nature of the assigned work. Only Mr. Beiler hired and fired Pennrock members and employees. For all these reasons, the Court finds the first *Clackamas* factor weighs in favor of a traditional employer-employee relationship. (Tr. 47-55).

2. "Whether and, if so, to what extent does the organization supervise the individual's work." *Clackamas*, 538 U.S. at 450.

Respondent asserts that the Operating Agreement does not provide a means to control the members' performance at the worksite and the Managing Member was not a supervisor. When Mr. Beiler informed the general members of the location, type, and scope of a construction project, it was simply a voluntary division of duties. This assertion fails. The Operating

Agreement required the Managing Member to "supervise, manage, and control the business activities of the Company." He also had the authority to "[e]mploy employees … and terminate such employees". Additionally, the Managing Member had duties beyond those specified in the Operating Agreement. He prepared bid proposals, negotiated terms, and acquired the projects for Pennrock. The other members had no role in acquiring projects for the company. There was no division of duties in managing the company. The general members simply provided labor to complete projects. (Ex. JT-X, ¶ 3.7(a), (d); R. Br., pp. 28-29; R. Reply Br., pp. 4-5).

Respondent also asserts there is no supervision of an individual's work because there is no formal supervisory structure and the Managing Member does not accompany the other members to the worksite. This assertion also fails. The Third Circuit has recognized that the degree of direct supervision should be considered in the context of the nature of the work. *See Donovan v. DialAm. Mktg., Inc.*, 757 F.2d 1376, 1383-84 (3d Cir. 1985)(*Donovan*). In *Donovan,* the Court found that an employer's lack of direct supervision over home-based researchers was not dispositive as to whether they were employees subject to the minimum wage provisions of the FLSA. It stated "homeworkers by their very nature are generally subject to little supervision and control by an alleged employer." *Id.* at 1386. Nonetheless, the Court found that the home researchers were "employees" subject to the FLSA. Here, Mr. King served as the lead man on the job at the worksite. Mr. Beiler admitted that the other roof workers deferred to Mr. King, because by August, 2013 he was the most experienced member at the worksite. When guidance was needed, other general members followed Mr. King's lead. Mr. King, likewise, turned to Mr. Beiler when he needed help during OSHA's inspection. Mr. Beiler gave Mr. King direction and approved any changes in the field. This demonstrates Pennrock had the necessary supervision of its general members at the worksite. Additionally, the Court finds that Pennrock supervised the

members' work by establishing the time, location, and nature of the work. The lack of a more formal supervisory structure for a five-member company on a routine roofing job is not significant. (Tr. 47-55; R. Br., p. 28).

Respondent's assertion that Pennrock does not supervise its members' work is rejected. The evidence shows that Pennrock controlled the location of the work, the type of work, and the time of work for the members on its projects. The role of a member at Pennrock's worksite was significantly like that of a traditional employee.

3. "Whether the individual reports to someone higher in the organization." *Clackamas*, 538 U.S. at 450.

Respondent asserts that any suggestion that the members reported to Mr. Beiler is incorrect. Instead, Respondent argues Mr. Beiler was simply conveying information for organizational and scheduling purposes; he was not a supervisor or manager. The evidence shows otherwise. Mr. Beiler acquired the projects, determined the scope of work, and made work assignments to members. For purposes of the work, the members reported to Mr. Beiler.[36] This is demonstrated by the fact they reported to the office each workday morning for their work assignments. Mr. King found it necessary to contact Mr. Beiler during the OSHA inspection. This also demonstrates Mr. Beiler was effectively "higher in the organization." He was not

[36] Mr. Beiler testified:

> Q Does anybody report to anybody else?
>
> A At times.
>
> Q In what way?
>
> A In a way that since I do the scheduling, so to speak, we have to respond like that so we know where we are, where we stand for the next day.

(Tr. 125).

accountable to anyone at the company and had no supervisor. (Tr. 47-55, 88-89; R. Br., p. 28, 30; R. Reply Br., pp. 6-7).

The lack of a formal supervisory structure in a company can be informative, but it is not controlling. *See Clackamas*, 538 U.S. at 451. The evidence shows the members at the worksite took their instructions from Pennrock's Managing Member. The Court finds the members of Pennrock, when engaged in a construction job, reported to the Managing Member.

Respondent also asserts that because the members are part of the Amish culture, no one is higher in the company than another.[37] Mr. Beiler testified that, "just like any human being," Respondent tries to be honest, trusting, and cooperative. He further said that its members have a "very, very strong work ethic." Mr. Beiler testified that he could not call Pennrock an "Amish business." He said not all members were Amish. The Court finds that Respondent's assertion regrading hierarchical considerations that may exist in the Amish culture is not dispositive of the issue whether Respondent was the employer of the three workers at the worksite within the meaning of section 3(5) of the OSH Act on August 19, 2013. (Tr. 34-35, 120-24; R. Br., p. 30).

The Court finds this *Clackamas* factor weighs in favor of a traditional employer-employee relationship.

4. "Whether and, if so, to what extent the individual is able to influence the organization." *Clackamas,* 538 U.S. at 450.

Respondent asserts that all the members of Pennrock could significantly influence the organization. The evidence does not support this position. (R. Br., pp. 31-32).

The general members had little influence by right or in practice. The terms of the Operating Agreement provided a few limited rights for each member to exercise. Few issues

[37] Pennrock did not make any Constitutional arguments related to this assertion.

required a unanimous vote; *e.g*. the addition of new members and changes to the Operating Agreement. (Ex. JT-X, ¶¶ 4.9, 5.1).

The Operating Agreement stated that a new member's ownership percentage was to be determined by unanimous vote of the members. "The members may by unanimous vote admit additional Members and fix the capital contributions, if any, to be made, and the participation percentages (in profits and losses or units of participation), of such additional Members." Despite this requirement, in day-to-day practice, the members had no input into the amount of ownership interest for a new member. Pennrock, through its Managing Member, set the hourly pay rate and the amount of membership interest for each member. Further, the Operating Agreement gave all members the opportunity to purchase the membership interest of a withdrawing member, but in practice, no one had the opportunity to exercise this right. Mr. Beiler admitted that he did not inform members when membership interest was transferred. (Tr. 129, 153-54, 165; Ex. JT-X, ¶ 5.3).

Other issues were either controlled by a majority vote of the members or by the Managing Member. Because Mr. Beiler was both the majority owner and Managing Member, the other members had no actual influence over the company. Even the location of company meetings was controlled by Mr. Beiler because the company's business office was at his personal residence.

Because the Managing Member had the majority, controlling, ownership interest in the company, any actual influence by another member was limited. In the company's history, the combined voting power of the general members did not exceed 11%. The Managing Member had a 92% majority voting power at the time of the inspection. As a result, the influence of the other members was very limited. The Court finds the general members had little influence over

the company according to the terms of the Operating Agreement and even less influence over the company in practice.

The Court finds this *Clackamas* factor weighs in favor of a traditional employer-employee relationship.

5. "Whether the parties intend that the individual be an employee, as expressed in written agreements or contracts." *Clackamas,* 538 U.S. at 450.

Respondent argues that the members of Pennrock did not intend to be employees, but instead self-employed, co-owners of Pennrock, as evidenced by the fact that each member paid his own self-employment taxes and Pennrock did not provide unemployment or Workman's Compensation Insurance benefits.[38] Respondent asserts that Pennrock operated as a partnership and each new member signed the Operating Agreement that defined him as a member.[39] The question of whether a partner or member with a 1% ownership interest is an employee cannot be answered by asking whether the member appears to be the functional equivalent of a partner. Asking whether members are partners – rather than asking whether they are employees – "simply begs the question."[40] An employer may not evade the strictures of the OSH Act simply by labeling its employees as "partners", or for that matter "members", in an operating Agreement.[41] Further, *Clackamas* held that neither an individual's title nor the nature of a company's business filing was determinative. *See Clackamas*, 538 U.S. at 446-50. *Clackamas* stated that "all of the incidents of the relationship" must be evaluated, not just the terminology used in a written

[38] Three proposals for work by Respondent captioned "PennRock Construction" made in August, 2013, just before the OSHA inspection, all state: "Our workers are fully covered by Workman's Compensation Insurance." Respondent's brochure prepared in about 2011/2012 is entitled "Pennrock Construction". (Exs. JT-XVI, JT-XIX).
[39] Respondent also asserts that the members cannot be employees because they voluntarily accepted Mr. Belier as the Managing Member; there is no control because this was a choice of each member. However, Respondent did not explain how this voluntary acceptance differs from that of a traditional employee's acceptance of a management structure. The Court finds this assertion is inapposite. (R. Br., pp. 17, 22).
[40] *See Clackamas*, 538 U.S. at 446.
[41] *See Clackamas*, 538 U.S. at 450 ("Nor should the mere existence of a document styled 'employment agreement' lead inexorably to the conclusion that either party is an employee.").

agreement. *Id.* at 450-51. The Court does not find a member's job title, tax or insurance status dispositive. *Id.* The mere fact that a person has a particular title, such as member or partner, does not determine whether he or she is an employee under the OSH Act. (Tr. 110-11, 124; Exs. JT-VIII, JT-XII, p. 6; R. Br., pp. 32-33).

The Secretary asserts that a member can also be considered an employee. The Court agrees. As the Secretary points out, Pennsylvania LLC law states "a member or manager *may be an employee* or other representative of and engage in transactions with a limited liability company to the same extent as a person who is not a member or manager of the company." 15 Pa. C.S.A. § 8946(a) (emphasis added). (S. Br., p. 22).

6. "Whether the individual shares in the profits, losses, and liabilities of the organization." *Clackamas*, 538 U.S. at 450.

The general members made no capital contributions when they were admitted to the company, so they had no initial investment. The record is silent regarding the capital contributions of the founding two members. (Tr. 90-91, 173; Ex. JT-X, p. 15).

The Operating Agreement stated that "net profits or net losses . . . shall be distributable . . . to each of the members in proportion to their capital contribution." The Managing Member determined when distributions were made to members. It is unclear from the record, how distribution amounts for each member were determined since there was no capital contribution. (Tr. 73; Ex. JT-X, pp. 7, ¶ 4.7; 12, ¶ 4.23).

Other than the Managing Member, the dollar amounts of the members' capital accounts were minimal. For example, Mr. King's capital account balance ranged from $44 to $94 to $57, from 2011 to 2013. Mr. Hopfer's 2013 distribution upon withdrawal from the company was $27. In contrast, Mr. Beiler's capital account at 2013 year end reflected a negative balance of

$49,415. This demonstrates the share of profit or loss for the 1% members was minimal and there was a significant disparity between the majority member and the other general members.[42] The Court finds that the three members at the worksite minimally shared in company profits and had no risk of financial loss. (Exs. JT-XIII, p. 7; JT-XIV, p. 16; JT-XV, pp. 1, 9, 13).

Likewise, all members of an LLC are individually shielded from liabilities by definition. *See* 15 Pa. C.S.A. § 8922(a) ("members of a limited liability company shall not be liable, solely by reason of being a member…for a debt, obligation or liability of Pennrock of any kind or for the acts of any member, manager, agent or employee of Pennrock"). This rule is also set forth under section 4.11 of the Operating Agreement. None of the members (including the Managing Member) were liable for the "debts, obligations, or liabilities of the Company, including liability under a judgement decree or order of a court, except as otherwise required by law." Accordingly, none of Pennrock's members shared in the liabilities of the organization. (Exs. JT-V, p. 12, JT-X, p. 9, ¶ 4.11).

This factor favors the finding the three members at the worksite were more akin to employees than owners.

Results of Six-Factor *Clackamas* Analysis

The Court finds that under the six-factor *Clackamas* analysis, the three Pennrock members at the worksite were employees for the purpose of coverage by the OSH Act. The Court further finds Pennrock was their employer and was required to provide safe working conditions to them as their employees under the OSH Act. The Court's conclusion is consistent with the Third Circuit's application of *Clackamas*. *See Mariotti*, 714 F.3d at 768-69. In

[42] Respondent also asserted that, because the members were engaged in work for the mutual benefit of all, they were not performing service in the affairs of another as an employee does. However, the evidence does not support this position. The general members had little monetary benefit beyond their hourly wages. The Court finds this assertion is not supported. (R. Br., pp. 20-21).

Mariotti, the Third Circuit found that for several months after his employment was terminated, a shareholder-director continued to have "the ability to participate in fundamental decisions" of the corporation and thus, was not an employee under Title VII. *Id.* In an earlier case, the Third Circuit held that withholding taxes from a paycheck was not determinative of whether an individual was an employee under Title VII. *See Ziegler v. Anesthesia Assoc. of Lancaster, Ltd.*, 74 Fed. Appx. 197 (3d Cir. 2003)(unpublished). Even though taxes were withheld from their paychecks as if they were employees, the shareholder-physicians in *Ziegler* owned and managed the professional corporation and were employers for the purpose of Title VII and not employees. *Id.* at 199.

Respondent cites to *Riether v. U.S.,* 919 F. Supp. 2d 1140 (D. N.M. 2012) (*Riether*) and *Stage Road Poultry Catchers, LLC v. Commw. of Pa. Dep't of Labor and Indus., Office of Unemployment Comp., Tax Servs. (Stage Road),* 34 A. 3d 876 (Pa. Commw. Ct., 2011) to support its argument that a member of Pennrock cannot also be considered an employee. The Court finds these cases do not support Pennrock's position. In *Reither* a company partner attempted to report his earnings under two separate tax classifications – partner and traditional employee. *Reither,* 919 F. Supp.2d at 1159-60. That court ruled that all of the partner's earnings from the company must be categorized as self-employment income and be subject to the self-employment tax. *Id.* In *Stage Road*, the court found that the workers at issue were independent contractors rather than employees of the company and thus the company did not owe state unemployment compensation tax on their behalf. *Stage Road,* 34 A.3d at 891-92. Both of these cases pertain to an individual's classification for purposes of taxation. As discussed above, the tax category of an individual is not dispositive to a determination that a worker is an employee under the OSH Act. (R. Br., pp. 23, 26).

The Court finds, with respect to the worksite at issue on August 19, 2013 that: 1) the three members, Messrs. Alvin King, Michael King, and Kevin Hopfer, were employees of Pennrock for purposes of the OSH Act, and 2) Respondent was the "employer" of the same three workers within the meaning of section 3(5) of the OSH Act. These three workers at the work site did not manage Pennrock and exercised no control over its affairs. They did not hire and fire members or employees; Mr. Beiler did that. They did not assign projects to others. They took orders from Mr. Beiler and were subject to his control. They did not decide how Pennrock's profits and losses were distributed. At common law, they would have been considered employees, not owners, of Pennrock, and the Court finds that is what they were on August 19, 2013. (Tr. 47-55).

CITED STANDARDS

Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1

The Secretary cited Pennrock for a serious violation of 29 C.F.R. § 1926.501(b)(13) which requires:

> *Residential construction*. 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.

> Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

Pennrock stipulated the standard was applicable, its terms were violated, and its employees were exposed to the violations. It further stipulated it knew, or could have known, of the violative condition. Pennrock was engaged in residential roofing work at its Bethlehem worksite.[43] The roof was approximately 15 feet above the ground.[44] The Court finds the standard is applicable. The CO photographed Mr. King working on the roof without fall protection. Mr. King confirmed that he did not use fall protection. The Court finds Pennrock did not provide fall protection as required by the standard. Exposure is established through evidence that employees have access to the zone of danger during assigned work duties. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). The Court finds that employees were exposed to the fall hazard. (Stip. ##7-8, 22-23; Tr. 43-44, 54, 101, 175-78; Ex. JT-XXII).

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-80. It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.* Knowledge is imputed to an employer "through its supervisory employee." *Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012). The formal title of an employee is not

[43] Respondent was working at the worksite under a subcontract with the Exterior Company. (Stip. #22; Tr. 101).
[44] During testimony, both CO Hoben and Alvin King referred to the roof's height as 16 feet. Because the height that triggers the requirement for fall protection is 6 feet, the Court finds the inconsistency with the stipulated height of 15 feet is not significant. The Court finds the distance from roof to ground was 15 feet, as stipulated. (Stip. #23; Tr. 54, 178).

controlling for imputation of knowledge to the company.[45] *Id.* The Commission has imputed the knowledge of crew leaders and foremen. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000). At the worksite, Mr. King was identified as the person in charge. During his testimony, Mr. King stated that he was the lead man at the worksite. Mr. Beiler admitted that Mr. King was the most experienced roofer at the worksite, but would not call him a lead man. Knowledge can be imputed to Pennrock through Mr. King. Additionally, Respondent stipulated that it had either actual or constructive knowledge of the hazardous condition. The Court finds that the element of knowledge is established. The Court finds the Secretary proved his prima facie case for Citation 1, Item 1. (Stip. #8; Tr. 43, 101-02, 176).

Serious Characterization & Penalty Amount

The Secretary properly classified this citation item as serious. A violation is classified as serious under § 17(k) of the Act if "there is substantial probability that death or serious physical harm could result" if an accident occurred. 29 U.S.C. § 666(k); *Compass Envtl., Inc*., 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The Court finds that serious physical harm is the likely result if an employee falls 15 feet to the ground.

The maximum penalty for a serious violation is $7,000. 29 U.S.C. § 666(b). Section 17(j) of the Act requires the Commission give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Compass Envtl., Inc.,* 23 BNA OSHC at 1137. The Secretary asserts that he gave due consideration to the gravity of the violation, the size of the Respondent's business, good faith, and history of prior violations to assess the proposed penalty of $2,800. The Court agrees. The proposed penalty of $2,800 is affirmed. (Stip. #9; Ex. JT-II, p. 8, ¶ XII).

[45] Respondent asserts that its "[m]embers are not assigned 'job titles'." (Ex. JT-V, p. 10).

Citation 1, Item 2

The Secretary also cited Pennrock for a serious violation of 29 C.F.R. § 1926.1053(b)(1) which requires:

> *Use*. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated: (1) 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.

Pennrock stipulated the standard was applicable, its terms were violated, and its employees were exposed. It further stipulated it knew, or could have known, of the violative condition. (Stip. #8).

Pennrock's workers were using a ladder to access the roof at its Bethlehem worksite. The Court finds the standard is applicable. The CO photographed Mr. King descending the ladder from the roof. The ladder did not extend 3 feet above the edge of the roof. The Court finds that Pennrock did not comply with the requirements of the cited standard and (at least) employee Alvin King was exposed to the hazard. (Tr. 43-44, 54; Ex. JT-XXII).

As lead man at the worksite, Mr. King's knowledge of the ladder's condition is imputed to Pennrock. Further, Respondent stipulated that it had either actual or constructive knowledge of the hazardous condition. The Court finds that the element of knowledge is established. (Stip. #8).

The Court finds the Secretary proved his prima facie case for Citation 1, Item 2.

Serious Characterization & Penalty Amount

The Court finds that serious physical harm is the likely result if an employee is unable to safely access the ladder. The Secretary asserts that he gave due consideration to the gravity of the violation, the size of the Respondent's business, good faith, and history of prior violations to assess the proposed penalty of $1,700. The Court agrees. The proposed penalty of $1,700 is affirmed. (Stip. #9; Ex. JT-II, p. 8, ¶ XII).

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(13) is AFFIRMED, and a penalty of $2,800 is assessed.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED, and a penalty of $1,700 is assessed.

/s/

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

Dated: October 20, 2015
Washington, D.C.