

## DRAFT- legislative breakfast 1-21-15

### \*\* Introduction:

I co-own a design/build construction company in Woodstock.

My husband and I are the only 2 officers and employees of David Anderson Hill, Inc.. Our forte is in matching up the right subcontractors and artisans for each project to the client's style, needs and pocketbook. .

We are currently being audited by the Workers' Compensation department of the Department of Labor and we would like to share with you and your committee some of our experiences and concerns that we have had during the course of this audit.

### **\*\*First we see 3 areas of concern.**

1-The broad interpretation of a legal case "Chatham Woods" that the DOL is using as a basis of misclassification of employees.

2-The overreaching investigation methods, employed by DOL which include coming unannounced on to an active job site

3- The open-ended investigation timeline that the DOL feels entitled to have with out clearly written guidelines and timeframes.

### **\*\*Our experiences:**

#### **1 A-**

Our experience has been that the DOL has taken the stance that we should have been providing WC to all subcontractors working on our site, even officers and LLCs who legally excluded themselves from coverage and passed the "nature of work" and "right to control" tests. The DOL based this on their interpretation of the Chatham Woods Decision which they contend states that every worker on a construction site, even those who have excluded themselves, must be covered by WC and that the GC is the insurer of last resort.

( Reference "*The Vermont Business Owner's guide to Workers Compensation*" And *Labor. Vermont.Gov form 29*)

#### **2 A -**

Early in their investigation the DOL WC auditor showed up unannounced on our job site, taking photos and questioning our subcontractors. (A fellow GC had her show up unannounced on his job site and proceed to take pictures. When the contractor approached her car in order to ask her to identify herself she took a photo of him, rolled

up her window, and sped off without explanation. )

It is our, and our attorney's, understanding that not only do they not have authorization to show up unannounced on a job site, but authorization for this kind of on site inspection was specifically requested by the DOL in a bill introduced in the legislature in a previous year and that this bill was defeated. Our job site was clearly posted with "no trespassing" signs which the auditor ignored.

She put herself at risk because blasting and the operation of heavy equipment was taking place at the time. It also would have been awkward and caused a serious credibility problem (seriously unprofessional) if the owners of the house were at home and had been informed by the auditor that she was investigating our company for lack of WC insurance.

### **3 A -**

The DOL investigation started in October of 2013. We provided all information requested by the auditor and, at the auditor's request, purchased an "if any" WC policy for our company even though we were not legally bound to do so. However, five months later the tenor of the investigation changed and At that point we decided that we needed to retain counsel and to date have spent almost \$10,000 in attorney's fees.

We are now entering the 15th month of their audit with no resolution in sight. A fellow contractor who's audit started before ours is still waiting for resolution and has been told by the auditor that it would probably be another year to a year and a half before they would make a determination!

#### **\*\* Possible Solutions:**

**A- Change the law to require all workers to carry WC (no exceptions, white collar / Blue collar) or to indemnify (hold harmless) the contractor who hires a subcontractor, who has legally opted to exclude themselves.**

**B- Where the DOL has entrusted WC carriers with the responsibility for investigating claim fraud by claimants, perhaps it should entrust WC carriers with the responsibility for determining whether a GC is misclassifying employees as ICs (which is how the issue was raised in the Chatham Woods case)**

**This has an added benefit as would save VT taxpayers from hiring investigators (*credit Steve Ellis*)**

**C- The DOL should have transparency procedures for audits set forth in writing, including but not limited to: clearly defined guidelines for investigation, disclosure of the reason for the audit, and set timelines for audit investigation and resolution.**

#### **\*\*To Wrap it up...**

We fully realize that the DOL has a tough job investigating and prosecuting WC fraud and there are probably many instances where the laws are being flaunted and those

who don't abide by the rules should be caught and punished.

We have been in the business for 35 years. Our experience has been that most contractors want to do what is right, and no one wants to see the independent subs being seen as a liability in the workforce. You and your committee could help us work toward that end by making absolutely clear what the WC guidelines are and how they should be enforced by the DOL.

Respectfully submitted,

David Hill  
Susan Fuller

\*\*OPTIONAL COMMENTS:

*(But unfortunately the perception by us and many others in the industry is that the DOL has gone rogue and has been using heavy handed audit tactics and their unilateral interpretation of case law rather than the legislative process to guide their investigations. )*

I am proud to be a 7<sup>th</sup> generation Vermonter. The nature of a Vermonter is to be independent and a person should not be denied the ability to work because they are that way. Small independent businesses make VT the state it is and the heavy handed procedures by the DOL is hurting vs helping those businesses to stay alive.