



Testimony of Carmen Witmer,
J.D. Witmer Drywall, Inc.,
Before the Pennsylvania House of Representatives
Labor & Industry Committee
June 3, 2019

Good morning. I would like to thank Chairman Cox, Chairman Harkins, and the members of the Committee for the opportunity to testify this morning. My name is Carmen Witmer, my husband, Jared, who is seated behind the panel, and I are grateful for the opportunity to share our testimony with you today. Jared and I are lifelong Dover residents, graduating from high school there in 1998. During high school Jared had the opportunity to learn the trade of drywall finishing from his oldest brother. Once high school was over, he went into business for himself with the help of a local contractor.

In 2004, Jared and I began our family and he bought a small cape cod house in Dover that had an additional garage for him to store his drywall tools and scaffolding. This is still the home we live in now, four children and 15 years later. Jared has always been a task oriented, very hard-working individual. His work as a drywall finisher is well known throughout our area and he is driven to accomplish a job for his clients in a timely manner that he pushes himself to work very fast. At the end of the day, that kind of work ethic catches up to you, so he comes home exhausted and many times, layered in drywall dust from sanding. We are the face of small businesses in your communities.

Jared does not have employees and he does not have project managers like the very large drywall outfits. He normally receives a call from a custom home builder, general contractor or homeowner about a drywall project and he is the one to measure the job, he handles all of the supplies, he finds a finishing crew that is available to hang the board for him, and he finishes the drywall. The size and scale of our business is not comparable to very large drywall companies who are doing mainly commercial jobs and have multiple project managers with the boss sitting in an office and conducting business meetings.

In the fall of 2012, Jared received notice from the Department of Labor & Industry that they had selected us for an Act 72 audit on the business. The auditor asked for many of our records pertaining to business year 2011, and we were only told later that the auditor was trying to

determine if the people Jared had paid from the business account were sub-contractors or our own employees. The auditor then asked for records and documents for the years 2008, 2009, and 2010. At the time we didn't understand what was happening and it wasn't until our final assessment from the auditor came that our accountant told us he was using new legislation called Act 72 to retrieve unemployment compensation funds from us. The final assessment from the Department totaled over \$13,000, and we were absolutely devastated. I remember speaking with the auditor and explaining to him that while we didn't have all of the documents he asked for, we did prove that many of the people had their own businesses, but his response was "In my opinion, these people are your employees."

Unfortunately, we were not well advised by our accountant at that time, did not realize that we should have hired an attorney, nor did we realize that the appeal process had very strict filing deadlines. In desperation, we sent in a late appeal that was denied.

Paying over \$13,000 was not financially possible for us as at that time. Jared is an ethical sub-contractor who makes sure his financial obligations to his sub-contractors are met. In fact, he has taken out a small line of credit to make sure other sub-contractors are paid in a timely manner as he waits for builders to pay him - usually 30 or more days after completing a job.

During the time of the audit we were just thankful Jared had consistent work. To have the Department tell us that we had misclassified our sub-contractors was unbelievable to us. My mother, feeling bad for us, gifted us money that we were able to combine with our savings to pay the violation at the beginning of 2015. While we were disheartened with what happened we were glad to finally be done with the whole ordeal. We made changes to our record keeping, according to the recommendations of the Department's auditor, and moved forward with peace of mind knowing we were following the law.

Two years later, in May of 2017, we received notice from the Department that they were going to be performing another audit on our business for the year 2016. When I read that notice, I literally got sick. I didn't know how I was going to tell Jared it was happening, again. But we had made numerous changes in our recordkeeping since the last audit, including hiring a new accounting firm, so we were cautiously optimistic - we had done everything the first auditor told us to do to come into compliance. We pulled together all the Department's requested documents, and our accountant met with the auditor.

Given our records, our accountant told us we were "good as gold." But we would soon find out that this was only the beginning of another battle. The auditor requested three more years of records and we supplied him with all the documents requested. Our accountant couldn't understand why they requested more documentation since we had given him everything he requested.

Once again, the final assessment came in and the Department is now asking for over \$15,000. The only explanation given to us by the auditor for this determination was that our sub-

contractor agreement wasn't "sufficient." We firmly believe that we are in compliance with Act 72 and the recommendations made to us by the first auditor.

We knew in the first audit that we would have to accept some of the blame for not having adequate records for our sub-contractors – and I am not here to plead ignorance of the law as a total defense, but after making all of the necessary changes to come into compliance after our first audit, and the second audit results are the same, we believe something is very wrong with the administration of this law. Throughout both audits Jared has spoken with many other contractors about this issue. Some, who have had the same audit, were never held to the standards outlined in Act 72.

In addition, we are concerned that it appears not all contractors are being treated equally under the law. In the Department's annual report dated March 1, 2019, it doesn't make sense why J.D. Witmer Drywall is being assessed fines in excess of \$13,000, yet the largest drywall outfit in our area is only asked to pay in \$1,000. It is obvious that there are inconsistencies within the auditing process.

We specifically question what gives the Department the authority to tell us that another business entity is our employee, when we've given proof that says otherwise. The other sub-contractors would be nothing short of offended and insulted if you told them that they were employees of J.D. Witmer Drywall.

Before you consider any changes to Act 72 to increase the Department's authority and raise the fees associated with violations, we would request that a detailed investigation be done into how the Department is enforcing the current law. Why are contractors assumed to be willfully out of compliance? Why did this legislature give the Department the authority to assess penalties for a first violation? Wouldn't employees and small businesses be better off if the Department tried to bring businesses into compliance with documented recommendations from the staff auditors and a follow-up period for compliance? Fines and penalties should not be assessed on small businesses to the point of causing the contractor to lose their business on the basis of a "first time offense."

The goal of the Department should be to bring everyone into compliance with the law, not to raise revenue. We were forced to prove a negative - subjectively. Act 72 allows the Department to write regulations that hopefully would have provided further guidance to businesses on how to follow the Act – setting standards that all must follow - including a set standard for all Department auditors. What type of documentation will be acceptable to the Department to prove compliance, what should a sub-contractor contract include to be considered adequate by the Department – these are just two examples of how the Department could help small businesses come into compliance with the law. Small businesses need clear, understandable rules that are applied uniformly and fairly. Act 72 went into effect in February 2010 and to date the Department has not written regulations providing that clarity.

There are other policy recommendations and suggestions that PBA is happy to discuss with the Committee at the appropriate time. I am here to put a face to the small businesses that Act 72 effects every day.

We have always felt very blessed to live life the way we do. My husband is his own boss and supports me and our four children whom we homeschool. We have time for family and hobbies because he can set his own schedule and, in the end, he decides how and when the business is going to grow or stay the size it has always been. The problem is when, for no apparent reason, someone comes to tear down what you've been building, diligently for many years. I know my husband desires to someday retire from the drywall trade because his body can't handle this type of hard labor for many decades to come. This is why we are here today. To inform all of you of the practices being put into place that will wipe out small contractors and force them to find jobs that will never match the satisfaction of being your own boss and having a successful business.

On behalf of the Pennsylvania Builders Association and the more than 255,000 members and employees it represents, I thank you again for the opportunity to testify today and would be happy to take your questions.