

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LABOR AND)
EMPLOYMENT SECURITY, DIVISION)
OF WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 98-2496
)
PATRICK JACKEY, d/b/a)
BERT'S WORLD OF COLOR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Myers, Florida, on October 5, 1998.

APPEARANCES

For Petitioner: Louise T. Sadler
Senior Attorney
Department of Labor and
Employment Security
Suite 307, Hartman Building
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

For Respondent: Patrick Jackey, pro se

STATEMENT OF THE ISSUE

The issue is whether Respondent unlawfully failed to obtain workers' compensation insurance coverage for five employees between May 1995 through April 1998 and, if so, what is the proper amount of the penalty.

PRELIMINARY STATEMENT

By Notice and Penalty Assessment Order issued May 5, 1998, Petitioner alleged that Respondent unlawfully failed to carry workers' compensation insurance coverage for his employees and assessed a penalty of \$43,488.

By Petition for Formal Hearing or Request for Review, Respondent requested a formal administrative hearing.

At the hearing, Petitioner called four witnesses and offered into evidence seven exhibits. Respondent called no witnesses and offered into evidence two exhibits. All exhibits were admitted.

The court reporter filed the transcript on November 9, 1998.

FINDINGS OF FACT

1. Respondent has been a residential painting subcontractor in Florida for the past 12 years. From May 1995 through April 1998, Respondent provided no workers' compensation insurance coverage for any persons whom he hired to work as painters. Respondent has treated such persons as independent contractors, rather than employees.

2. On April 29, 1998, one of Petitioner's investigators visited a residential job site in the Rotunda development in Englewood. He found two painters working inside a new home that was under construction.

3. Interviewing Respondent, the investigator learned that Respondent was in charge of the painting crew and was supplying the painting labor and material for the house. Respondent stated

that he was paid by another contractor, who was paid by the general contractor.

4. Respondent admitted that he paid his crew on an hourly rate for the work that they performed each week. Respondent's testimony at the hearing that he paid his crew by the job, and not a specific hourly rate, is discredited.

5. Dale Keaser, one of the two painters, testified. He has worked for Respondent since August 1996. At all times, Respondent paid Mr. Keaser \$10 per hour. Respondent never paid Mr. Keaser by the job, and Mr. Keaser never incurred any expenses in connection with the work, except for occasional use of his truck, for which Respondent reimbursed him for gas. Respondent invariably supplied the materials necessary to do the work. Respondent directed Mr. Keaser what to do and when to do it, and Respondent inspected the work frequently. Mr. Keaser never had an exemption from workers' compensation coverage and never provided Respondent an affidavit attesting to his satisfaction of the criteria defining independent contractors.

6. Respondent paid Mr. Keaser wages of \$400 in 1996, \$11,095 in 1997, and \$3080 in 1998. The premium rate of the National Council on Compensation Insurance for each of these years was, respectively, 32.18 percent, 28.47 percent, and 28.92 percent. The resulting unpaid amount of workers' compensation premium is thus \$4178.21.

7. Petitioner has failed to prove by admissible evidence that the other persons working for Respondent were employees.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

9. Section 440.10(1)(a) provides that every employer must obtain workers' compensation coverage for its employees. Respondent satisfies the statutory threshold, as set forth in Section 440.02(15)(b)2, of one employee in the construction industry. The issue in this case is whether Petitioner has shown that Respondent's workers were employees, rather than independent contractors.

10. Section 440.02(13)(d)1 provides that "employee" does not include "independent contractor" if

- a. The independent contractor maintains a separate business with his own facility, truck, equipment, materials, or similar accommodations;
- b. The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal requirements;
- c. The independent contractor performs or agrees to perform specific services or work for specific amounts of money and controls the means of performing the services or work;
- d. The independent contractor incurs the principal expenses related to the service or work that he performs or agrees to perform;
- e. The independent contractor is responsible for the satisfactory completion of work or services that he performs or agrees to

perform and is or could be held liable for a failure to complete the work or services;

f. The independent contractor receives compensation for work or services performed for a commission or on a per-job or competitive-bid basis and not on any other basis;

g. The independent contractor may realize a profit or suffer a loss in connection with performing work or services;

h. The independent contractor has continuing or recurring business liabilities or obligations; and

i. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

12. Section 440.10(1)(g) provides that a person is conclusively presumed to be an independent contractor if he provides his general contractor with an affidavit attesting that he meets all of the requirements of Section 440.13(d) and either a valid certificate of workers' compensation insurance or a valid certificate of exemption issued by Petitioner.

13. The burden of proof is on Petitioner, which seeks to impose a fine against Respondent. The standard of proof is a preponderance of the evidence. Although violations of Chapter 440 can result in a substantial fine, which may even render an employer insolvent, the employer nonetheless does not have a license or property interest at stake so as to raise the standard of proof to clear and convincing evidence.

14. The only competent, admissible evidence concerning the employment status of persons working for Respondent comes from the observations of Petitioner's investigator, who saw that

Mr. Keaser and his coworker were clearly engaged in the construction industry, opined as to the so-called "pattern of payroll" that he deduced from Respondent's business records, and generally established jurisdictional prerequisites; the admissions of Respondent to Petitioner's investigator; the testimony of Respondent; the testimony of Mr. Keaser; and Respondent's business records.

15. This evidence establishes that Mr. Keaser served as an employee of Respondent. His employment clearly failed the first, third, fourth, fifth, and sixth criteria for establishing independent-contractor status and probably failed the seventh, eighth, and ninth criteria, as well.

16. However, the evidence is insufficient to show that Mr. Keaser's coworker or that other workers in the past also served as employees, rather than independent contractors, of Respondent.

17. The record does not establish that Respondent's workers had exemption certificates, so Respondent is not entitled to the benefit of the conclusive presumption that they were independent contractors. Respondent bears the burden of showing entitlement to this conclusive presumption because he would enjoy the benefit that the presumption confers.

18. Section 440.02(13)(d)1 establishes nine criteria to determine if an individual is an employee or independent contractor. To qualify as an independent contractor, an individual must meet all nine criteria. The Legislature

recognized that this is a departure from the balancing approach present in other statutory schemes, such as federal tax law and labor law, or under the common law: the flush language of Section 440.02(13)(d)1 applies the common law test for independent contractors to individuals in certain classes of employment.

19. In cases such as this that do not involve the conclusive presumption concerning employment status, the question arises as to which party has the burden of proof or burden of going forward with the evidence on the issue of the employment status of the two individuals. In other words, the question is whether Petitioner must prove that Respondent's workers are employees and not independent contractors or whether Respondent should have to prove that they are independent contractors and not employees.

20. The facts concerning an individual's employment status are more available to the employer than to Petitioner, so as to suggest that the burden of going forward with the evidence as to employment status should be on Respondent. Imposing the burden of going forward with the evidence as to the employment-status issue would also relieve Petitioner of the difficult burden of proving a negative--i.e., that the individuals are not independent contractors.

21. However, imposing upon Respondent the burden of going forward with the evidence on the employment-status issue effectively shifts the entire burden of proof to Respondent, at

least in cases such as the present where the sole issue is the employment status of workers. The purpose of placing the burden of proof on Petitioner is to relieve Respondent of the burden of proof that it is not guilty of the violation with which it is charged. Moreover, the burden imposed upon Petitioner is not great because, in cases governed by the statutory criteria, Petitioner must merely show that the putative employees failed to meet any one of the nine criteria.

22. Thus, Petitioner must prove that the workers are not independent contractors, rather than require Respondent to prove that they are. Absent a showing that the workers failed any one of the nine statutory tests, Respondent prevails.

23. The only criteria implicated by the business records, in terms of the "pattern of payroll," are the third and sixth criteria. The third criterion is that the "independent contractor performs or agrees to perform specific services or work for specific amounts of money and controls the means of performing the services or work." The sixth criterion is that the "independent contractor receives compensation for work or services performed for a commission or on a per-job or competitive-bid basis and not on any other basis." Recurring payments of equal amounts to a single payee may suggest hourly employment or payment on a per-job basis for a series of identical jobs requiring the same amount of time to perform-- e.g., \$400 per house with one house done per week.

24. Thus, Petitioner has proved only that Respondent failed to pay \$4178.21 in workers' compensation insurance premiums on behalf of Mr. Keaser.

25. Section 440.107(3) provides that, in addition to any stop-work order or other relief, Petitioner may assess an employer failing to obtain workers' compensation coverage a penalty in the amount of double the amount that the employer "would have paid during periods it illegally failed to secure payment of compensation in the preceding 3-year period based on the employer's payroll during the preceding 3-year period" or, if greater, \$1000.

26. The statutory penalty in this case is thus double the unpaid premium amount, or \$8356.42. Section 440.107(3) provides for the accrual of interest at the rate of one percent per month.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order assessing Respondent a penalty of \$8356.42, plus any lawful interest.

DONE AND ENTERED this 4th day of December, 1998, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building

1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 1998.

COPIES FURNISHED:

Louise T. Sadler
Senior Attorney
Department of Labor and
Employment Security
Suite 307, Hartman Building
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

Patrick Jackey
Bert's World of Color
365 South Oxford Drive
Englewood, Florida 34223

Edward A. Dion, General Counsel
Department of Labor and Employment Security
307 Hartman Building
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2152

Douglas L. Jamerson, Secretary
Department of Labor and Employment Security
303 Hartman Building
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2152

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order must be filed with the agency that will issue the Final Order in this case.