

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,) Case No. 03-1757
)
vs.)
)
SUSIE RIOPELLE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, in Tampa, Florida, on August 27, 2003.

APPEARANCES

For Petitioner: David C. Hawkins, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Randall O. Reder, Esquire
1319 West Fletcher Avenue
Tampa, Florida 33612-3310

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the Respondent failed to abide by the coverage requirements of the Workers' Compensation Law, Chapter 440, Florida Statutes (2002), by not obtaining workers' compensation insurance for her employees; and

whether the Petitioner properly assessed a penalty against the Respondent pursuant to Section 440.107, Florida Statutes (2002).

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, Chapter 440, Florida Statutes (2002), the Department of Financial Services, Division of Workers' Compensation (the "Department"), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On March 27, 2003, the Department issued a "Stop Work and Penalty Assessment Order" alleging that Susie Riopelle, d/b/a Riopelle Construction, failed to abide by the coverage requirements of the workers' compensation law on that date. The order directed Riopelle Construction to cease business operations and pay associated penalties of \$1,100. On April 1, 2003, the Department issued a "First Amended Stop Work and Penalty Assessment Order," changing the named employer to Susie Riopelle and increasing the assessed penalty to \$26,100: \$100 pursuant to Section 440.107(5), Florida Statutes (2002); \$1,000 pursuant to Section 440.107(7), Florida Statutes (2002); and \$25,000 pursuant to Section 440.10(1)(f), Florida Statutes (2002).

On April 17, 2003, Respondent filed a Petition for Formal Hearing, which was forwarded to the Division of Administrative Hearings on May 16, 2003, for assignment of an Administrative

Law Judge and conduct of a formal administrative hearing. The case was initially scheduled for hearing on July 17, 2003, continued once on a motion by the Department, then held on August 27, 2003.

On August 22, 2003, the Department filed a Motion to Amend Administrative Charges. The motion requested approval to amend the charges as set forth in a Second Amended Stop Work and Penalty Assessment Order (the "stop work order" at issue in this case). The proposed amendment reduced the assessed penalty to \$21,100 and identified the allegedly misclassified employees as James C. King, Darren McCarty, Jeffrey Paul Judson, Robert Stinchcomb, and James Conner. The motion was granted without objection at the outset of the August 27, 2003, final hearing.

At the hearing, the Department presented the testimony of Donald Lott, the Department's investigator, and Leo Canton, the Department's district supervisor. The Department's Exhibits 1 through 14 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Darren McCarty, Robert Stinchcomb, James King, and Edward Riopelle.

Respondent's Exhibits A through W, CC, OO, XX, YY, DDD, and GGG were admitted into evidence. Respondent's Exhibits X through Z, AA, BB, DD through NN, PP through WW, ZZ, AAA through CCC, EEE, and FFF were proffered. The proffered documents relate to Respondent's challenge to the facial constitutionality of

Section 440.107, Florida Statutes (2002). An Administrative Law Judge does not have jurisdiction over such constitutional issues. See Communications Workers Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997).

A Transcript of the final hearing was filed at the Division of Administrative Hearings on September 15, 2003. On September 24, 2003, the parties filed a Joint Motion for Extension of Time to File Proposed Recommended Orders, which was granted by Order dated September 26, 2003. Pursuant to the Order granting extension, both parties timely filed Proposed Recommended Orders by October 8, 2003.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of the workers' compensation law that employers secure the payment of workers' compensation for their employees. § 440.107, Fla. Stat (2002).¹

2. On March 27, 2003, the Department's district supervisor, Leo Canton, assembled a compliance team of three investigators: Donald Lott, Carol Cobb, and Tracey Gilbert. They met at the Gibsonton exit of I-75, south of Tampa at the Alafia River, and began riding around the area, where a good

deal of new home construction was taking place. The group was looking for potential violations of the workers' compensation statute. From the main road, they could see some workers on a two-story house with exposed trusses, and Mr. Canton decided this would be a good place to investigate.

3. The compliance team arrived at the job site, 9734 White Barn Road, Riverview, Florida. They observed five men conducting framing activities, which included cutting two-by-fours, climbing ladders to adjust trusses and hurricane ties, and laying plywood sheathing on the trusses. The five men were later identified as Darren McCarty, Robert Stinchcomb, James King, Jeffrey Judson, and James Conner.

4. Parked in front of the partially constructed house was a utility trailer registered to Susie Riopelle. The trailer contained an air compressor, hoses, framing equipment, ladders, nail guns, and other tools. The main hose from the air compressor was split into six or seven separate hoses so that the workers could simultaneously use multiple nail guns.

5. Mr. Canton asked the men to stop working and talk with him. Mr. Canton testified that each of the five men told the same basic story: he was employed by Yellow Jacket Construction, Inc. ("Yellow Jacket"); he was paid by the hour and in cash; and Yellow Jacket owned the tools in the utility

trailer. The only variable was the length of employment for each man.

6. Mr. Canton told the men they would need to contact their employer. They all stated that Edward Riopelle was their boss. Mr. Canton then asked the men if they would mind giving statements to members of the compliance team. All five workers agreed to give statements.

7. Mr. Lott and Mr. Canton interviewed Darren McCarty, who told them he worked for Yellow Jacket as a framer and carpenter and that he was paid weekly in cash by Edward Riopelle at the rate of \$12 to \$15 per hour, depending on the job. Mr. McCarty signed a notarized Affidavit confirming this information.

8. Mr. Canton interviewed Robert Stinchcomb, who said that he worked for Yellow Jacket as a framer. Mr. Stinchcomb identified Edward Riopelle as his boss and stated that he was paid \$10 per hour, in cash. Mr. Stinchcomb signed a notarized Affidavit confirming this information.

9. Jeffrey Judson signed an Affidavit stating that he worked as a framer for Yellow Jacket and that he was paid \$12 per hour, in cash, by Edward Riopelle.

10. After the interviews, Mr. Canton determined that the five workers were employees of either Yellow Jacket or Edward Riopelle. None of the five workers interviewed at the job site

had workers' compensation insurance on March 27, 2003.

Mr. Canton directed Mr. Lott to issue a stop work order.

11. Mr. Lott issued the order to Edward Riopelle, who had arrived at the job site after being phoned by one of the workers. Edward Riopelle informed the Department personnel that Yellow Jacket had been dissolved and that his wife, Susie Riopelle, was the sole owner of the business.

12. As of March 27, 2003, Respondent Susie Riopelle was a sole proprietor operating in the construction industry by framing single-family homes. Ms. Riopelle had been the sole owner of Yellow Jacket, a corporation which was also in the business of framing construction. Yellow Jacket had contracted with a payroll leasing company that was responsible for paying the salaries of and providing workers' compensation coverage for Yellow Jacket's employees, who were paid by the hour.

13. In January 2003, Ms. Riopelle and her husband Edward (who had no formal involvement with Yellow Jacket, though he often assisted his wife with aspects of the business) began planning to leave the Tampa Bay area and move to Fort White in Columbia County. They consulted with their employees, who expressed a desire to stay together and obtain construction work on their own. The Riopelles advised their employees that they would have to establish their own businesses in order to obtain work as independent contractors. Ms. Riopelle advised the

employees to obtain occupational licenses, commercial liability insurance, and apply for exemptions from workers' compensation insurance requirements.

14. At some point in March 2003, Ms. Riopelle began treating these Yellow Jacket employees as independent contractors working on houses that Ms. Riopelle had contracted to build. Among these purported independent contractors were the five men interviewed by the compliance team on March 27, 2003: Jeffrey Judson, Darren McCarty, Robert Stinchcomb, James King, and James Conner.²

15. Messrs. King, McCarty, Judson, and Conner obtained their own Hillsborough County occupational licenses in mid-February 2003. The "business type" listed on each of their licenses was "perform services for construction contractor." Mr. Stinchcomb already had a Hillsborough County occupational license, dated June 8, 2001, as a "sub-contractor (can't bid; works under contractor)."

16. Messrs. Judson, King, McCarty, and Conner obtained individual general liability insurance through Commercial Casualty Insurance Company of North Carolina. Mr. Judson's and Mr. McCarty's policies covered the period February 19 through May 19, 2003. Mr. King's and Mr. Conner's policies covered the period March 14 through June 14, 2003.

17. On March 18, 2003, Ms. Riopelle and her sister-in-law, Tina Shew, appeared at the Department's Tampa office seeking to file applications for workers' compensation exemptions on behalf of four of the former Yellow Jacket employees, including some of those who were at the job site on March 27, 2003. Mr. McCarty testified that he paid Ms. Shew to handle the paperwork so that he would not have to miss work. Ms. Riopelle testified that Ms. Shew had the same arrangement with the other workers.

18. Mr. Canton testified that Department rules prohibit anyone other than the applicant from submitting an application for exemption and that an investigation is usually commenced when someone comes in with multiple applications. He met with Ms. Riopelle and Ms. Shew and attempted to explain that there was more to attaining non-employee status than having the exemption and an occupational license. He gave Ms. Riopelle a "Non-Employee Worksheet," a document used by investigators in the field, in an effort to explain the nine statutory factors considered by the Department in determining whether a worker is an employee or an independent contractor.

19. In speaking with Ms. Riopelle, Mr. Canton learned that she was a subcontractor for Badger Construction, a company that was building 300 houses in the Gibsonton area. Ms. Riopelle told Mr. Canton that her contact at Badger Construction was the person who told her how to qualify her employees as independent

contractors. Mr. Canton testified that he had never heard of Badger Construction and was concerned that it was apparently giving bad information to its subcontractors. Mr. Canton instructed the Department's examiner not to process the applications submitted by Ms. Riopelle and Ms. Shew, pending an investigation of this matter. It is reasonable to infer that this conversation with Ms. Riopelle led Mr. Canton to choose the Gibsonton area for the compliance team's March 27, 2003, visit.

20. On March 27, 2003, after the initial stop work order was issued, Mr. Lott served Ms. Riopelle with a "Request for Business Owner Affidavit and Production of Business Records," seeking copies of business records "to determine whether or not you or your business is required to provide Workers' Compensation insurance coverage for employees, or to determine the civil penalties you may owe for failing to carry Workers' Compensation insurance."

21. At the time the stop work order was issued, Section 440.107(2), Florida Statutes, required each employer to keep business records that enable the Department to determine the employer's compliance with the coverage requirements of the workers' compensation law and empowered the Department to adopt rules describing the information that those business records must contain. Florida Administrative Code Rule 69L-6.015 provides, in relevant part:

In order for the Division to determine that an employer is in compliance with the provisions of Chapter 440, F.S., every business entity conducting business within the state of Florida shall maintain for the immediately preceding three year period true and accurate records. Such business records shall include original documentation of the following, or copies, when originals are not in the possession of or under the control of the business entity:

* * *

(3) Records indicating for every pay period a description of work performed and amount of pay or description of other remuneration paid or owed to each person by the business entity, such as time sheets, time cards, attendance records, earnings records, payroll summaries, payroll journals, ledgers or registers, daily logs or schedules, time and materials listings.

* * *

(5) All contracts to which the business was or is a party for services performed by an independent contractor, or in the event a written contract was not executed, written documentation including the name, business address, telephone number, and FEIN or social security number if an FEIN is not held, of each independent contractor; and proof of workers' compensation insurance held by each independent contractor during the life of the contract for his/her services or records sufficient to prove that the independent contractor was not required pursuant to Chapter 440, to have workers' compensation insurance coverage during that time period;

(6) All check ledgers and bank statements for checking, savings, credit union, or any other bank accounts established by the business entity or on its behalf. . . .

22. On April 1, 2003, the Riopelles arrived at the Department's Tampa office and presented Mr. Lott with their business records. Mr. Lott testified that these records were not sufficient to establish that the five workers in question were independent contractors. None of the records produced by the Riopelles permitted the Department to determine receipts, the identity of entities with whom Ms. Riopelle was doing business, or the amount of money she was paid or owed as a result of business operations at the job site on March 27, 2003.

23. Mr. Canton confirmed that the documents produced by the Riopelles did not establish the independent contractor relationship. He noted that the Riopelles produced some contracts between Susie Riopelle and the individual workers, but these contracts called for payment per linear foot, a method consistent with an employer/employee relationship.

24. At the hearing, Ms. Riopelle introduced subcontractor agreements, general liability insurance applications, county occupational licenses, and a 28-page composite exhibit of financial records to support the claim that the five workers at the job site on March 27, 2003, were independent contractors.

25. The subcontractor agreements are problematic for several reasons. The contract between Ms. Riopelle and Jeffrey Judson, dated March 24, 2003, specifies no contract price. It states that Mr. Judson is to perform "framing and sheathing

exterior [sic] walls," and names "Westfield Homes Plan #2350" as the specifications for construction. The contract does not specifically state that the referenced work is to be performed at 9734 White Barn Road in Riverview. Ms. Riopelle testified that the contract with Mr. Judson was for work on the house at 9734 White Barn Road.

26. The contract between Ms. Riopelle and Mr. Stinchcomb, also dated March 24, 2003, specifies a price of \$250 "to be paid on following Friday after signing this aggrement [sic]." It states that Mr. Stinchcomb is to "cut all studs, wrap garage doors and build arches," and names "Westfield Homes Plan #2350" as the specifications for construction. The contract does not specifically state that the referenced work is to be performed at 9734 White Barn Road in Riverview.

27. Mr. Stinchcomb, a retiree who worked part-time for Ms. Riopelle, testified that he did not know how the contract price of \$250 was arrived at by Ms. Riopelle. He stated that he was getting \$10 per hour and surmised that \$250 represented payment for a five-hour per day, five-day work week.

28. The contract between Ms. Riopelle and James Conner, also dated March 24, 2003, specifies a price of \$480 "to be paid on Friday following date of this signed agreement." It states that Mr. Conner is to "frame all interior walls to first & second floor to provide labor only," and names "Westfield Homes

Plan #2350" as the specifications for construction. The contract does not specifically state that the referenced work is to be performed at 9734 White Barn Road in Riverview.

29. The contract between Ms. Riopelle and James C. King is missing a signature page, though both Ms. Riopelle and Mr. King adopted the contract's terms in their testimony. The contract specifies a price of \$400, "to be paid on the following Friday after the signing of this agreement." It states that Mr. King is "to set [trusses] on roof," and names "Westfield Homes Plan #2350" as the specifications for construction. The contract does not specifically state that the referenced work is to be performed at 9734 White Barn Road in Riverview.

30. The contract between Ms. Riopelle and Darren McCarty, dated February 28, 2003, does not specify a contract price. It states the following terms of payment: "To pay sum of percentage of job completed by Monday each week and paid on following Friday upon receipt of purchase order at rate of \$.60 per sq. ft. purchase order w/below." The items listed below the quoted statement were: "name; subdivision; lot & block; complete address; model #; total sq. footage; price; FEIN # or SSI; liability policy #; occupation license #." The contract states that Mr. McCarty is "to perform labor only framing residential."

31. Ms. Riopelle testified that Mr. McCarty's contract was meant to establish that Mr. McCarty would be paid by the job, not by the hour. She stated that because roofs are different sizes, a set price cannot be set per roof; rather, the price must be set based on the square footage of the roof.

Ms. Riopelle testified that this contract did not specify a location because it was a general contract meant to cover any roof that Mr. McCarty worked on.

32. Testifying generally about these contractual agreements, Ms. Riopelle stated that the workers were paid 80 percent of the agreed amount upon completion of the work. The remaining 20 percent of the contract price would be paid when the work passed inspection by local authorities. At the hearing, Mr. McCarty agreed with Ms. Riopelle's explanation of the method of payment.

33. At the hearing, Ms. Riopelle submitted documents signed by Mr. Stinchcomb and Mr. McCarty attesting that, as of February 24, 2003, these men were no longer employees of Yellow Jacket. However, the documents were notarized on April 3, 2003, after the stop work order was issued. These documents are unreliable as a basis for findings as to the relationship between the parties on March 27, 2003, given that they were apparently created after that relationship was called into question by the Department. Ms. Riopelle also submitted a

similar document regarding Mr. Conner, but Mr. Conner's signature does not appear on the document. Mr. Conner did not appear at the hearing, and thus, there is no means in this record to ascertain his involvement in the creation of this document.

34. Three of the former Yellow Jacket employees testified at the hearing. Mr. McCarty testified that he had been a carpenter for 15 years and that he owned and used his own tools, including nail gun and nails, on the job. He testified that he had worked on Yellow Jacket's payroll until two weeks before the March 27 site visit, which he offered as his explanation for why he told the compliance team that he worked for Yellow Jacket. Mr. McCarty recalled Ms. Riopelle telling him that she and her husband were planning to move. He testified that he and the other workers got together to plan how they could go into business for themselves. Ms. Riopelle advised them regarding qualification as independent contractors.

35. Mr. McCarty testified that the group of former Yellow Jacket employees bid on the job they were working on March 27, 2003. They figured out the overall price of the house, then figured out which portion of the work each person would perform and for how much money. On this job, Mr. McCarty contracted to build the exterior part of the house, including the beam and the

trusses. He would complete the skeleton part of the roof, then Mr. King would take over and complete the laying of the plywood.

36. Mr. McCarty testified that he told the compliance team that he was paid "\$12 to \$15 per hour" because that is the way he computed his bid on the job. If he completed it quickly, his pay would equal \$15 per hour. If he took more time, his pay would equal \$12 per hour.

37. Mr. Stinchcomb testified he was 73, retired, and working part-time for Ms. Riopelle. His function at the job site was to perform all the wood-cutting, including the fabrication of window arches. He used his own equipment. Mr. Stinchcomb recalled conversations with his fellow workers about dividing up the work "to keep everybody together but on an independent deal. That's why everybody was supposed to go get their occupation licenses and their workman's comp or whatever they were doing, but we were all going to stay together as independents." Mr. Stinchcomb maintained that he was paid \$10 per hour at all times he worked for Yellow Jacket or Ms. Riopelle.

38. James King testified he was 21 years old and had been decking roofs for eight years. He remembered being told by Ms. Riopelle that he was going to need to get a subcontractor's license but was not sure of the difference between working as an employee and as an independent contractor. Mr. King testified

that he told the compliance team that he worked for Yellow Jacket because the paperwork on his workers' compensation exemption had not come back. He stated that when he worked for Yellow Jacket, he was paid by the hour; but when he worked for Ms. Riopelle, he was paid by the job.

39. While the workers testified that they used their own tools on the job, it was undisputed that Ms. Riopelle owned the trailer containing an air compressor and that all of the workers except Mr. Stinchcomb, the wood cutter, used the air compressor at the job site. Ms. Riopelle testified that she leased the trailer and equipment to Mr. Conner at a rate of \$20 per day. At the hearing, she produced a document purporting to be a contract between her and Mr. Conner, dated February 28, 2003, stating that Ms. Riopelle was leasing framing equipment and the trailer to Mr. Conner for \$20 per day, payable weekly. However, the contract was notarized on April 3, 2003, raising the question whether it was created after the fact of the stop work order. Ms. Riopelle submitted no other documentation to substantiate the existence of a lease agreement for the trailer and equipment.

40. Mr. McCarty agreed that the workers were leasing the air compressor from Ms. Riopelle, and stated that the cost came to about \$20-per-week per person, which would roughly gibe with the \$20-per-day figure given by Ms. Riopelle. However, Mr. King

testified that he was paying Edward Riopelle \$50 per week to lease the air tools.

41. Edward Riopelle testified that once Yellow Jacket became defunct and Ms. Riopelle began to operate under her own name, the workers were paid in cash on receipt of their invoices for labor. At the hearing, no invoices were provided to indicate whether the workers were being paid by the hour or on a "commission," "per job," or "competitive bid" basis.

42. Ms. Riopelle maintained that Messrs. McCarty, Stinchcomb, King, Judson, and Conner were independent contractors, rather than employees on March 27, 2003, and that she, therefore, was not required to secure the payment of workers' compensation for the five workers. As of March 27, 2003, Section 440.02(15)(d)1, Florida Statutes, provided, in relevant part, that the term "employee" does not include an "independent contractor" if:

a. The independent contractor maintains a separate business with his or her own work 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 or she performs or agrees to perform;

e. The independent contractor is responsible for the satisfactory completion of work or services that he or she 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. . . .

43. Section 440.02(15)(d)1, Florida Statutes, listed the nine elements of the independent contractor exemption in the conjunctive, meaning that all nine elements must be established for the exemption to apply. This interpretation is confirmed by Section 440.02(15)(c), Florida Statutes, which at the time provided: "For purposes of this chapter, an independent

contractor is an employee unless he or she meets all of the conditions set forth in subparagraph (d)1."

44. Based upon the testimony and all the documentation submitted at the hearing, it is found that Ms. Riopelle and the five workers had an understanding that the men would no longer be employees of Yellow Jacket because the Riopelles were leaving the area. As of March 27, 2003, the men had obtained occupational licenses, obtained individual general liability insurance, and applied for workers' compensation exemptions.

45. However, despite these actions, the evidence does not demonstrate that the employer-employee relationship had been severed as of March 27, 2003. Because several of the documents submitted by Ms. Riopelle appear to have been back-dated, the reliability of all the documents is called into question. Even assuming that the subcontractor agreements were entered into prior to March 27, 2003, they do not establish that the men were independent contractors under the criteria set forth in Section 440.02(15)(d)1, Florida Statutes. Mr. Judson's contract does not state a price. Mr. McCarty's contract calls for him to be paid per square foot of work performed, not on a per-job basis. None of the contracts states a time or place of performance, making it unclear whether the contracts pertain to the work being performed on March 27, 2003.

46. It is significant that when the men were first questioned at the job site on March 27, 2003, they told the Department's compliance team that they were employed by Yellow Jacket and were paid by the hour. Even at the hearing, Mr. Stinchcomb continued to maintain that he was paid on an hourly basis. Mr. McCarty tried to explain his answer to the compliance team by reference to how he arrived at his bid, but this testimony was unconvincing. The men were paid in cash, and Ms. Riopelle submitted no ledgers or other documentation to support her claim that she was paying the men on a per-job basis, despite a Department rule requiring her to maintain such records.

47. The nature of the work being performed by the five men makes it highly unlikely that any one of them could be held responsible for the satisfactory completion of the work or could be held liable for a failure to complete the work or services. While the men made some effort to separate the tasks at the job site, Mr. McCarty conceded that they helped each other out when necessary.

48. The men were using equipment belonging to Ms. Riopelle. It was claimed at the hearing that the men were leasing the equipment from Ms. Riopelle, but the testimony did not agree on the terms of the lease. Ms. Riopelle's statement that she rented the equipment to Mr. Conner for \$20 per day

roughly comported with Mr. McCarty's testimony that each man paid \$20 per week for the equipment. However, Mr. King testified that he paid \$50 per week to Edward Riopelle for use of the air tools.

49. There was no evidence that any of the men incurred the principal expenses related to their work, could realize a profit or suffer a loss in connection with performing their work, had continuing or recurring business liabilities or obligations, or that the success or failure of their business depended on the relationship of business receipts to expenditures. The weight of the evidence leads to the finding that Messrs. McCarty, King, Stinchcomb, Judson, and Conner were performing salaried labor as employees of Ms. Riopelle on March 27, 2003.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003).

51. Employers are required to secure payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

52. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat.
"Employment . . . means any service performed by an employee for the person employing him or her" and "with respect to the

construction industry, [includes] all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) and (b)(2), Fla. Stat.

53. "Employee" means "any person engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. . . ." § 440.02(15)(a), Fla. Stat.

54. The Department has the burden of proving by a preponderance of the evidence that an employer violated the Workers' Compensation Law and that the penalty assessments were correct under the law. Department of Labor and Employment Security, Division of Workers' Compensation v. Genesis Plastering, Inc., Case No. 00-3749 (DOAH April 27, 2001, Para. 32) (Adopted by Final Order May 25, 2001); Department of Labor and Employment Security, Division of Workers' Compensation v. Bobby Cox, Sr., d/b/a CH Well Drilling, Case No. 99-3854 (DOAH March 20, 2000, Para. 34) (adopted, in part, by a Final Order June 8, 2000).

55. The Department established by a preponderance of the evidence that the workers were not "independent contractors." The burden then shifted to Ms. Riopelle to establish that they were independent contractors. Ms. Riopelle was in a unique position to bring forth evidence regarding the workers; but the documentation she presented was insufficient, and the testimony

she presented was unconvincing. In the absence of documentation to establish that the workers met the criteria to be considered "independent contractors," the workers must be considered "employees."

56. Section 440.107(5), Florida Statutes, provided:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to do so, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations at the place of employment or job site. If the department makes such a determination, the department shall issue a stop-work order within 72 hours. The order shall take effect upon the date of service upon the employer, unless the employer provides evidence satisfactory to the department of having secured any necessary insurance or self-insurance and pays a civil penalty to the department, to be deposited by the department into the Workers' Compensation Administration Trust Fund, in the amount of \$100 per day for each day the employer was not in compliance with this chapter.

The evidence presented at the hearing established that the Department correctly assessed a penalty of \$100, pursuant to Section 440.107(5), Florida Statutes.

57. Section 440.107(7), Florida Statutes, provided in relevant part:

In addition to any penalty, stop-work order, or injunction, the department shall

assess against any employer, who has failed to secure the payment of compensation as required by this chapter, a penalty in the following amount:

(a) An amount equal to at least the amount that the employer would have paid or up to twice the amount 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

(b) One thousand dollars, whichever is greater. . . .

The evidence presented at the hearing established that the Department correctly assessed a penalty of \$1,000, pursuant to Section 440.107(7), Florida Statutes.

58. Section 440.10(1)(f), Florida Statutes, provided:

(f) If an employer fails to secure compensation as required by this chapter, the department may assess against the employer a penalty not to exceed \$5,000 for each employee of that employer who is classified by the employer as an independent contractor but who is found by the department to not meet the criteria for an independent contractor that are set forth in s. 440.02. The department shall adopt rules to administer the provisions of this paragraph.

59. The Department has adopted Florida Administrative Code Rule 69L-6.018 to implement Section 440.10(1)(f), Florida Statutes, providing:

(1) An employer who fails to secure compensation as required by Sections 440.10(1) and 440.38(1), F.S., for each

employee classified by the employer as an independent contractor but who does not meet the criteria of an independent contractor specified in Section 440.02, F.S., shall be assessed a penalty in the following amount:

(a) \$2500 per misclassified employee for the first two misclassified employees per site; and

(b) \$5,000 per misclassified employee after the first two misclassified employees per site.

(2) The Division shall determine that an employer has misclassified an employee as an independent contractor if:

(a) The employer in any way reports that a worker who is an employee pursuant to Section 440.02(15), F.S., is an independent contractor;

(b) The employer maintains records identifying the worker as an independent contractor; or

(c) The employer holds out the employee as an independent contractor for federal tax purposes.

The evidence presented at the hearing established that the Department correctly assessed a penalty of \$20,000, pursuant to Section 440.10(1)(f), Florida Statutes and Florida Administrative Code Rule 69L-6.018, for the five misclassified employees.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and

demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, directing that the Respondent stop work and cease her operations until such time as she secures workers' compensation coverage for her employees and directing that the Respondent pay a penalty in the amount of \$21,100.

DONE AND ENTERED this 16th day of January, 2004, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of January, 2004.

ENDNOTES

1/ All citations will be to Florida Statutes (2002) unless otherwise indicated. Chapter 2003-412, Laws of Florida, enacted significant changes to the statutory provisions relevant to this case. However, the events at issue in this matter occurred prior to the effective date of Chapter 2003-412.

2/ All of the named employees except James Conner had been employees of Yellow Jacket. Messrs. Judson, McCarty, and King had been paid through the contracted payroll leasing service. Mr. Stinchcomb was paid directly by Ms. Riopelle because he was collecting retirement from another job, and the payroll leasing service therefore would not cover him.

COPIES FURNISHED:

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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 should be filed with the agency that will issue the final order in this case.