

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF WORKERS' )  
COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-3204  
 )  
SUSIE RIOPELLE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding by video teleconference before Fred L. Buckine, a duly-designated Administrative Law Judge, located in Tallahassee and the parties located in Orlando, Florida, on December 9, 2003.

APPEARANCES

For Petitioner: Andrea L. Reino, Esquire  
Department of Financial Services  
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 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 Petitioner properly assessed a penalty against 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 (Department), seeks to enforce the statutory requirement that employers secure this payment of workers' compensation for their employees.

On August 8, 2003, the Department issued a "Stop Work and Penalty Assessment Order" (SWPAO-DWC-03-121-D3) alleging that Respondent, Susie I. Riopelle, doing business as (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.

Respondent timely filed a Petition for Formal Hearing, which was forwarded to the Division of Administrative Hearings on September 5, 2003, for assignment of an Administrative Law Judge to conduct a formal administrative hearing. The case was scheduled for hearing on December 9, 2003, via video teleconference with the Administrative Law Judge located in Tallahassee and the parties located in Orlando, Florida.

At the hearing, the Department presented the testimony of Donald Lott, the Department's compliance investigator, and Leo Canton, at all times material, acting district supervisor. The parties stipulated to the admission of the Department's Exhibits 1 through 26, and they were admitted into evidence. Respondent testified on her own behalf and presented the testimony of her husband, Edward Riopelle, and Darren McCarty. Respondent's one exhibit was admitted into evidence.

Respondent's exhibit, statements and documents relating to Respondent's challenge to the facial constitutionality of Section 440.170, Florida Statutes (2002), is not given consideration by the undersigned because 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).

Respondent requested that official recognition be taken of Division of Financial Services, Division of Workers' Compensation v. Susie Riopelle, DOAH Case No. 03-1757, heard on August 27, 2003. At the time of the request, the final order had not been entered by the Agency. Accordingly, Respondent's request for official recognition is herewith denied.

A Transcript of the final hearing was filed with the Division of Administrative Hearings on of December 3, 2003. On January 5, 2004, Respondent requested an extension of time to

file proposed recommended orders, and, by Order of January 6, 2004, the requested extension was granted, extending the time to file proposed recommended orders to February 2, 2004. The Order granting the extension of time to file proposed recommended orders waived the time requirement for this Recommended Order. See Fla. Admin. Code R. 28-106.216. Petitioner timely filed its Proposed Recommended Order.

After having received Petitioner's Proposed Recommended Order by fax on February 2, 2004, Respondent filed its Proposed Recommended Order on February 4, 2004. On February 19, 2004, Petitioner filed a motion to strike Respondent's Proposed Recommended Order along with a Notice of Hearing on the pending motion scheduled for February 23, 2004. The motion to strike Respondent's proposed order was denied.

#### FINDINGS OF FACT

Based upon observation of the witnesses and their demeanor while testifying; documentary materials received in evidence; stipulations by the parties; evidentiary rulings made pursuant to Section 120.57, Florida Statutes (2003); and the record evidence submitted, the following relevant and material finding of facts 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).<sup>1</sup>

2. On August 8, 2003, Respondent was a sole proprietor in the construction industry by framing single-family homes. On that day, Respondent was the sub-contractor under contract with Marco Raffaele, general contractor, providing workers on a single-family home(s) located on Navigation Drive in the Panther Trace subdivision, Riverview, Florida. It is the responsibility of the Respondent/employer to secure and maintain workers' compensation coverage for each employee.

3. During the early morning hours of August 8, 2003, Donald Lott, the Department's workers' compensation compliance investigator, was in the Panther Trace subdivision checking on site workers for potential violations of the workers' compensation statute.

4. While driving down Navigation Drive in the Panther Trace subdivision, Mr. Lott approached two houses under construction. There he checked the construction workers on site and found them in compliance with the workers' compensation statute. Mr. Lott recognized several of the six men working on the third house under construction next door and went over to investigate workers' compensation coverage for the workers.<sup>2</sup>

5. At the third house Mr. Lott interviewed Darren McCarty, Henry Keithler, and Mike Sabin, all of whom acknowledged that they worked for Respondent, d/b/a Riopelle Construction. Mr. Lott ascertained through Southeast Leasing Company (Southeast Leasing) that three of the six workers, Messrs. Keithler, Sabin, and McCarthy were listed on Southeast Leasing Company's payroll through a valid employee lease agreement with Respondent as of August 8, 2003. The completed employee lease agreement provided for Southeast Leasing Company to provide workers' compensation coverage for only those employees whose names, dates of birth, and social security numbers are contained in the contractual agreement by which Southeast Leasing leased those named employees to the employing entity, Respondent, d/b/a Riopelle Construction.

6. Mr. Lott talked with the other three workers on site, Ramos Artistes, Ryan Willis, and Robert Stinchcomb. Each worker acknowledged working for (as an employee) Respondent on August 8, 2003, in the Panther Trace subdivision.

7. In reply to his faxed inquiry to Southeast Leasing regarding the workers' compensation coverage status for Messrs. Artistes, Willis, and Stinchcomb, Southeast Leasing confirmed to Mr. Lott that on August 8, 2003, Southeast Leasing did not have a completed employee leasing contractual agreement with Respondent for Messrs. Artistes, Willis or Stinchcomb.

Southeast Leasing did not provide workers' compensation coverage for Messrs. Artistes, Willis or Stinchcomb on August 8, 2003.<sup>3</sup>

8. Southeast Leasing is an "employee" leasing company and is the "employer" of "leased employees." As such, Southeast Leasing is responsible for providing workers' compensation coverage for its "leased employees" only.

9. Southeast Leasing, through its account representative, Dianne Dunphy, input employment applications into their system on the day such application(s) are received from employers seeking to lease employees. Southeast Leasing did not have employment applications in their system nor did they have a completed contractual employment leasing agreement and, therefore, did not have workers' compensation coverage for Messrs. Artistes and Willis at or before 12:08 p.m. on August 8, 2003.

10. After obtaining his supervisor's authorization, Mr. Lott served a Stop Work and Penalty Assessment Order against Respondent on August 8, 2003, at 12:08 p.m., requiring the cessation of all business activities and assessing a penalty of \$100, required by Subsection 440.107(5), Florida Statutes, and a penalty of \$1,000, as required by Subsection 440.107(7), Florida Statutes, the minimum penalty under the statute. On August 12, 2003, the Department served a Corrected Stop Work and Penalty Assessment Order containing one change, corrected federal

identification number for Respondent's business, Riopelle Construction.

11. Mr. Stinchcomb, the third worker on the construction job site when Mr. Lott made his initial inquiry, was cutting wood. On August 8, 2003, at or before 12:00 p.m., Mr. Stinchcomb was not on the Southeast Leasing payroll as a leased employee covered for workers' compensation; he did not have individual workers' compensation coverage; and he did not have a workers' compensation exemption. On that day and at that time, Mr. Stinchcomb worked as an employee of Riopelle Construction and was paid hourly by Riopelle Construction payroll check(s).

12. Respondent's contention that Mr. Stinchcomb, when he was working on the construction job site between the hours of 8:00 a.m. and 1:00 p.m. on August 8, 2003, was an independent contractor fails for the lack of substantial and competent evidence in support thereof.

13. On August 8, 2003, the Department, through Mr. Lott, served an administrative request for business records on Respondent. Respondent failed and refused to respond to the business record request. An Order requiring Respondent to respond to Petitioner's discovery demands was entered on December 1, 2003, and Respondent failed to comply with the order. On December 8, 2003, Respondent responded that "every



effort would be made to provide the requested documents by the end of the day" to Petitioner.

14. Respondent provided no reliable evidence and Mr. Stinchcomb was not called to testify in support of Respondent's contention that Mr. Stinchcomb was an independent contractor as he worked on the site on August 8, 2003.

15. Respondent's evidence, both testamentary and documentary, offered to prove that Mr. Stinchcomb was an independent contractor on the date in question failed to satisfy the elements required in Subsection 440.02(15)(d)1, Florida Statutes. Subsection 440.02(15)(c), Florida Statutes, in pertinent part provides that: "[f]or 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)." Subsection 440.02(15)(d)(1) provides that an "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.

16. The testimony of Respondent and the testimony of her husband, Edward Riopelle, was riddled with inconsistencies, contradictions, and incorrect dates and was so confusing as to render such testimony unreliable. Based upon this finding, Respondent failed to present evidence sufficient to satisfy the requirement of Subsection 440.02(15)(d)1, Florida Statutes, and failed to demonstrate that on August 8, 2003, Mr. Stinchcomb was an independent contractor. Petitioner proved by a preponderance

of the evidence that on August 8, 2003, Mr. Stinchcomb, while working on the single-family construction site on Navigation Drive in the Panther Trace subdivision was an employee of Respondent and was not an independent contractor. Petitioner proved by a preponderance of the evidence that Mr. Stinchcomb did not have workers' compensation coverage on August 8, 2003.

17. On August 8, 2003, Mr. Willis was a laborer on the single-family construction site on Navigation Drive in the Panther Trace subdivision as an employee of Respondent, who paid him \$7.00 per hour. Mr. Willis was not listed on the employee list maintained by Southeast Leasing, recording those employees leased to Respondent. Mr. Willis did not have independent workers' compensation coverage on August 8, 2003. Mr. Willis had neither workers' compensation coverage nor a workers' compensation exemption on August 8, 2003. Petitioner proved by a preponderance of the evidence that Mr. Willis did not have workers' compensation coverage on August 8, 2003.

18. On August 8, 2003, Mr. Artises was a laborer on the single-family construction site on Navigation Drive in the Panther Trace subdivision and was an employee of Respondent. Mr. Artises had been in the employment of Respondent for approximately one week before the stop work order. Mr. Artises did not have independent workers' compensation coverage on August 8, 2003. Mr. Artises did not have a workers'

compensation coverage exemption on August 8, 2003. Petitioner proved by a preponderance of the evidence that Mr. Aristes did not have workers' compensation coverage on August 8, 2003.

CONCLUSIONS OF LAW

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

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

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

22. "'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.

23. 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).

24. The Department established by a preponderance of the evidence that Messrs. Artistes, Willis, and Stinchcomb were not "independent contractor[s]" nor were they "leased employee[s]." The burden then shifted to Respondent to establish that Messrs. Artistes, Willis, and Stinchcomb either were independent contractors or leased employees. Respondent was in a unique position to bring forth evidence regarding each worker; but the belated documentation she presented was inconsistent, insufficient, and unreliable. The testimony and documentary evidence presented by Respondent and her witnesses were unconvincing. In the absence of appropriate and reliable documentation to establish that the workers in questions met the criteria to be considered "independent contractors," the workers must be considered "employees."

25. Subsection 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.

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

27. Subsection 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. . . .

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

29. Subsection 440.10(1)(f), Florida Statutes, provided:

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.

30. The Department has adopted Florida Administrative Code Rule 69L-6.018 to implement Subsection 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.

(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 any 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.

31. The evidence presented at the hearing established that the Department correctly assessed a penalty pursuant to Section 440.107, Florida Statutes, and Florida Administrative Code Rule 69L-6.018 for the 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 pleading 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,



affirming and adopting the Corrected Stop Work and Penalty Assessment Order dated August 12, 2003.

DONE AND ENTERED this 29th day of March, 2004, in Tallahassee, Leon County, Florida.



---

FRED L. BUCKINE  
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  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of March, 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 proceeding. However, the events at issue in this case occurred before the effective date of Chapter 2003-412, Laws of Florida.

2/ This witness made initial contact with Respondent and Messrs. Ramos, Willis, and Stinchcomb through his involvement in a prior case: Division of Financial Services, Division of Workers' Compensation v. Susie Riopelle, DOAH Case No. 03-1757, heard on August 27, 2003. (No Final Order entered by the Department as of the date of this Recommended Order).

3/ Inquiry was made of Southeast Leasing Company between the hours of 9:00 a.m. through 11:00 a.m. The SWOPAO was secured, signed, and served on Respondent at 12:08 p.m. on August 8, 2003. At the time the SWOPAO was served, Messrs. Willis and Aristes were not on the Southeast Leasing Company's list of contractually leased employees.

COPIES FURNISHED:

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

Andrea L. Reino, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

Honorable Tom Gallagher  
Chief Financial Officer  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

Mark Casteel, General Counsel  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

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.