

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF WORKERS' )  
COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-4014  
 )  
RETROSPEC PAINTING & )  
RECONSTRUCTION, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On December 17, 2003, an administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: John M. Iriye, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Joseph E. Launikitis, Esquire  
Fuller, Holsonback, Bivins & Malloy  
400 North Ashley Drive, Suite 1500  
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues in the case are whether the Respondent was required to carry workers' compensation coverage for certain

individuals, and, if so, whether the Petitioner correctly assessed a penalty against the Respondent.

PRELIMINARY STATEMENT

By Stop Work and Penalty Assessment Order dated September 22, 2003, the Department of Financial Services, Division of Workers' Compensation (Petitioner), assessed a penalty against Retrospec Painting & Reconstruction, Inc. (Respondent). Based on information provided by the Respondent, the Petitioner entered an Amended Stop Work and Penalty Assessment Order on September 30, 2003.

The amended order proposed a penalty based on work performed by two entities, one identified as "Mauro Makawachi d/b/a MM & JP Painting" and the other identified as "Julio Macahutchy d/b/a Rainbow Painting."

The Respondent filed a Petition for Formal Hearing. The Respondent's petition was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

The Respondent's Petition for Formal Hearing identified objections only to the allegations related to "Mauro Makawachi d/b/a MM & JP Painting." Additionally, in its response to Petitioner's request for admissions related to "Julio Macahutchy d/b/a Rainbow Painting," the Respondent asserted that such issues were outside the Respondent's petition for hearing.

At the commencement of the hearing, the Respondent moved to amend its Petition for Formal Hearing to include issues related to "Julio Macahutchy d/b/a Rainbow Painting." The Petitioner objected to the motion. The motion was denied. Accordingly, this Recommended Order addresses only the allegations involving "Mauro Makawachi d/b/a MM & JP Painting" and the related penalties.

At the hearing, the Petitioner presented the testimony of two witnesses, and had Exhibits numbered 1 through 12 admitted into evidence. The Respondent presented the testimony of one witness, and had Exhibits numbered 1 through 3 admitted into evidence.

The one-volume Transcript of the hearing was filed on January 8, 2004. The Petitioner filed a Proposed Recommended Order on January 20, 2004. The Respondent filed a Proposed Recommended Order on January 21, 2004.

#### FINDINGS OF FACT

1. On September 18, 2003, Tracy Gilbert, an inspector employed by the Petitioner, visited a residential construction worksite located at 3109 West Sunset Drive, Tampa, Florida.

2. At the time of her visit, Ms. Gilbert saw three unidentified men painting the interior of a two-story residence. The men were wearing t-shirts bearing the Respondent's name and a telephone number. She attempted to speak to the men, but none

spoke English, and Ms. Gilbert was unable to communicate with them. Ms. Gilbert attempted to obtain information from a fourth unidentified man who arrived at the construction site while she was present, but the evidence fails to establish that any relevant information was obtained.

3. Ms. Gilbert then located the construction site permit board, and as she examined the board, a fifth unidentified man wearing a t-shirt bearing the Respondent's name and a telephone number, walked up to her and gave her a business card with the Respondent's information on it.

4. Ms. Gilbert called the telephone number printed on the t-shirts and business card and left a message. Within a few minutes, Richard T. Killam returned her call.

5. Mr. Killam is the owner and operator of the Respondent. Ms. Gilbert advised Mr. Killam of what she had seen. Mr. Killam advised Ms. Gilbert that the individuals she had seen were not his employees, and stated that they were employed by an individual identified as Mauro Makawachi (Mauro) to whom the job was "subcontracted." Mr. Killam provided a telephone number to Ms. Gilbert, which he identified as that of Mauro.

6. The Respondent contracts with general contractors for painting jobs at various construction sites. In situations where additional labor is required, including the one at issue in this proceeding, the Respondent has on occasion hired Mauro

to work on those jobs. The evidence fails to establish the existence of any written contract between Mr. Killam and Mauro related to the worksite at issue in this proceeding.

7. Ms. Gilbert called the telephone number provided by Mr. Killam and had a brief conversation with the individual identified as Mauro, but apparently obtained no information regarding the situation during the conversation and has since been unable to establish further contact with Mauro.

8. Although it is reasonable to presume that the unidentified persons observed at the worksite by Ms. Gilbert were being paid for their work, there is no evidence that the Respondent employed or paid the unidentified persons.

9. Mr. Killam testified that he had arranged for the work at the jobsite to be performed by Mauro. It is reasonable to infer that the unidentified persons observed painting at the worksite by Ms. Gilbert were there at the direction of Mauro and would have been paid by Mauro.

10. The Respondent asserts that Mauro is an independent contractor for whom the Respondent is under no obligation to obtain workers' compensation insurance coverage. Mr. Killam provided to Ms. Gilbert an affidavit of "independent contractor" status and a certificate of insurance both allegedly provided to him by Mauro.

11. The evidence fails to establish that Mauro's affidavit reflected the actual terms of his work on behalf of the Respondent.

12. Mauro's affidavit of independent contractor status indicates that Mauro incurred the "principle [sic] expenses related to the services or work" that Mauro performed for the Respondent. Mr. Killam testified that the primary expenses of a painting business are paint and labor. There is no credible evidence that Mauro maintained a separate business with his own materials. The Respondent paid for the paint used at the worksite.

13. The affidavit indicates that Mauro held or had applied for a federal employer identification number. There is no credible evidence that Mauro held or has applied for a federal employer identification number.

14. The affidavit indicates that Mauro performed specific amounts of work for specific amounts of money. There is no credible evidence that Mauro was paid on a commission or per-job competitive bid basis by the Respondent. The Respondent paid Mauro on a regular basis for labor performed during the pay period.

15. Mauro's certificate of insurance identified the insurer as "Aries Insurance Company." Ms. Gilbert determined that Aries Insurance Company had stopped writing business prior

to the date of issuance on the certificate of insurance provided by the Respondent to the Petitioner, and, therefore, the Certificate of Insurance was invalid.

16. The Respondent leased some employees from Progressive Employer Services, which provided workers' compensation insurance for leased employees. Mauro was not a leased employee.

17. There is no evidence that Mauro or the unidentified workers observed by Ms. Gilbert were exempt from workers' compensation requirements.

18. The evidence establishes that the Respondent failed to provide workers' compensation coverage for Mauro. There is no evidence that the unidentified workers observed by Ms. Gilbert were provided with workers' compensation coverage by anyone.

19. Based on the payroll records provided to Ms. Gilbert by the Respondent, Ms. Gilbert calculated the total amount of penalty directly attributable to payments by the Respondent to Mauro as \$13,049.45.

#### CONCLUSIONS OF LAW

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

21. The Petitioner has the burden of establishing by a preponderance of the evidence that an employer has violated

requirements to provide workers' compensation coverage and that the proposed penalty assessment is correct. In this case, the burden has been met.

22. Every employer is required to secure workers' compensation coverage for employees. §§ 440.10(1)(a) and 440.38, Fla. Stat. (2002).

23. The Respondent is an "employer" as defined by Section 440.02(16), Florida Statutes (2002).

24. The Respondent asserts that Mauro was an "independent contractor" for whom the Respondent was not required to provide coverage because the Respondent obtained an affidavit and a certificate of insurance from Mauro. The evidence fails to establish that Mauro was an independent contractor. Section 440.10(1)(g), Florida Statutes (2002), provides as follows:

- (g) For purposes of this section, a person is conclusively presumed to be an independent contractor if:
  1. The independent contractor provides the general contractor with an affidavit stating that he or she meets all the requirements of s. 440.02; and
  2. The independent contractor provides the general contractor with a valid certificate of workers' compensation insurance or a valid certificate of exemption issued by the department.

25. The evidence fails to establish that the certificate of insurance received by the Respondent was valid at the time he received it. The Respondent's assertion that he was unaware



that Aries Insurance Company did not write workers' compensation coverage is immaterial.

26. The evidence further fails to establish that Mauro was an independent contractor pursuant to Section 440.02(15), Florida Statutes (2002), which provides in relevant part as follows:

(15)(a) "Employee" means any person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

\* \* \*

(c)1. "Employee" includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and, except as provided in this paragraph, elects to be included in the definition of employee by filing notice thereof as provided in s. 440.05. Partners or sole proprietors actively engaged in the construction industry are considered employees unless they elect to be excluded from the definition of employee by filing written notice of the election with the department as provided in s. 440.05. However, no more than three partners in a partnership that is actively engaged in the construction industry may elect to be excluded. A sole proprietor or partner who is actively engaged in the construction industry and who elects to be exempt from this chapter by filing a written notice of the election with the department as provided in s. 440.05 is not an employee. 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.

2. Notwithstanding the provisions of subparagraph 1., the term "employee" includes a sole proprietor or partner actively engaged in the construction industry with respect to any commercial building project estimated to be valued at \$250,000 or greater. Any exemption obtained is not applicable, with respect to work performed at such a commercial building project.

(d) "Employee" does not include:

1. 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.

However, the determination as to whether an individual included in the Standard Industrial Classification Manual of 1987, Industry Numbers 0711, 0721, 0722, 0751, 0761, 0762, 0781, 0782, 0783, 0811, 0831, 0851, 2411, 2421, 2435, 2436, 2448, or 2449, or a newspaper delivery person, is an independent contractor is governed not by the criteria in this paragraph but by common-law principles, giving due consideration to the business activity of the individual. Notwithstanding the provisions of this paragraph or any other provision of this chapter, with respect to any commercial building project estimated to be valued at \$250,000 or greater, a person who is actively engaged in the construction industry is not an independent contractor and is either an employer or an employee who may not be exempt from the coverage requirements of this chapter. (emphasis supplied)

27. The facts fail to establish that Mauro meets the requirements set forth at Section 440.02(15)(d), Florida

Statutes (2002), which could establish Mauro's status as an independent contractor.

28. Based on the preponderance of the evidence including the Respondent's records and testimony, Mauro meets the definition of "employee" set forth at Section 440.02(15)(a), Florida Statutes (2002).

29. The Petitioner assessed a penalty against the Respondent based on the provisions of Section 440.107, Florida Statutes (2002), which in relevant part provides as follows:

(5) 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 division makes such a determination, the division 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.

\* \* \*

(7) 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.

30. The Respondent asserts that any penalty imposed must be limited by operation of Section 440.10(1)(f), Florida Statutes (2002), which in relevant part provides as follows:

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.

31. The Petitioner has adopted Florida Administrative Code Rule 69L-6.018 which provides as follows:

69L-6.018 Misclassification of Employees as Independent Contractors.

(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) \$2,500 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.

32. In this case, the Respondent reported Mauro as an independent contractor, although Mauro was in fact an employee pursuant to Section 440.02(15), Florida Statutes (2002). The Petitioner could have assessed an additional penalty of \$2,500 as set forth in the Rule, but for reasons unclear, the Petitioner is not seeking to impose the penalty authorized by Section 440.10(1)(f), Florida Statutes (2002). The penalty authorized by Section 440.107(7), Florida Statutes (2002), is not limited by Section 440.10(1)(f), Florida Statutes, but may be imposed "[i]n addition to any penalty, stop-work order, or injunction."

33. Ms. Gilbert testified that her calculation of the penalty included a \$100 non-compliance fine and \$13,049.45 based

on actual payments to Mauro. An additional penalty amount of \$2,551.13 was based on payments made to "Julio Macahutchy d/b/a Rainbow Painting" which are not at issue in this proceeding. There is no evidence that Ms. Gilbert's calculation of the penalty was not in accordance with the statute.

34. The Petitioner asserts that the provision of t-shirts to the unidentified men gives rise to the inference of control and cites Department of Labor and Employment Security v. A. J. Interiors, Inc., DOAH Case No. 00-4177 (Final Order issued June 8, 2001) in support of the assertion. The Respondent testified that he provided shirts to persons performing work for him to provide a professional appearance at the job site. Review of the facts of the cited case indicates that in the A. J. Interiors case, the workers wearing the t-shirts were identified by name, spoke with the investigator, acknowledged that they subcontracted work from the Respondent in that case, and had no workers' compensation insurance. In this case, there was no communication with the workers. The mere wearing of a t-shirt does not give rise to an inference of control by the Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a Final Order affirming the Stop Work and Penalty Assessment Order issued on September 22, 2003, as amended by the Amended Stop Work and Penalty Assessment Order issued on September 30, 2003.

DONE AND ENTERED this 4th day of February, 2004, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of February, 2004.

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.