

STATE OF MINNESOTA
Department of Labor and Industry

In the Matter of the Contractor Registration of
JMH Construction Inc, d/b/a Princess Siding,
and Monica Hernandez, Individually

**LICENSING ORDER
WITH PENALTY**

I. ORDER

The Commissioner of the Minnesota Department of Labor and Industry (“Commissioner”) issues this Order against JMH Construction Inc., d/b/a Princess Siding, and Monica Hernandez, individually (“Respondents”).

Pursuant to Minn. Stat. §§ 326B.082 (2014); 326B.083 (2014); and 326B.701 (2014), the Commissioner hereby assesses against Respondents, jointly and severally, a monetary penalty of \$12,000, of which \$2,000 is hereby forgiven pursuant to Minn. Stat. §326B.701, subd. 6 (2014).

Pursuant to Minn. Stat. § 326B.082, subds. 11(b) and 12 (2014) and Minn. Stat. § 326B.083 (2014), the Commissioner hereby suspends the construction contractor registration of Respondents, No. IR672060, until such time that Respondents provide a complete answer to the Commissioner’s March 23, 2016 subpoena and pay the portion of the monetary penalty imposed herein that is not forgiven.

The Commissioner takes the above action based upon the following Findings of Fact and Conclusions of Law:

II. FINDINGS OF FACT

1. Minn. Stat. § 326B.701, subd. 2 (2014) requires all contractors who intend to provide commercial or residential building construction or improvement services in Minnesota to be registered with the Minnesota Department of Labor and Industry (“Department”)’s Construction Contractor Registration Program (“Registration Program”) if they are not required to hold a license issued by the Department.
2. Pursuant to Minn. Stat. § 181.723, subd. 3 (2014), an individual who performs services for a person that are in the course of the person’s trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual unless the individual meets all nine factors described in Minn. Stat. § 181.723, subd. 4(a) (2014) (“the nine factor test”). If the individual cannot meet all nine factors, he or she is deemed to be an employee of the person that hired the individual.
3. Minn. Stat. § 181.723, subd. 4(a) and (b) (2014) also states that an individual who is

required to be registered in the Registration Program or is an owner of a business entity that is required to be registered but who fails to do so, is presumed to be an employee of any person that hires the individual to perform services on the person's behalf. However, the person for whom the services were performed may rebut this presumption by showing that the unregistered individual met all nine factors of the nine factor test at the time the services were provided.

4. According to the records of the Minnesota Secretary of State, JMH Construction Inc ("JMH") filed as a business corporation on May 7, 2012 with a registered office address of 7213 Minnetonka Blvd., St. Louis Park, MN 55426.
5. Respondents hold a construction contractor registration issued by the Minnesota Department of Labor and Industry ("Department") on September 10, 2013, No. IR672060. In its most recent renewal, Respondents identified their address as 7213 Minnetonka Blvd., St. Louis Park, MN 55426 and disclosed that Respondent Monica Hernandez ("Hernandez") is the sole owner and officer of JMH.
6. Respondents, as a registered contractor, must comply with all statutes and rules governing the residential and commercial construction industry, including contractor registration and worker classification, Minn. Stat. §§ 181.723, 326B.701, and 326B.081 to 326B.085 (2014) and Minn. R. Chapter 5224 (2015).
7. Minn. Stat. § 326B.701, subd. 5 (2014) prohibits a contractor from hiring another contractor to perform building construction services unless the contractor being hired is licensed with the Department or registered in the Department's Construction Contractor Registration Program ("Registration Program").
8. On March 10, 2016 the Department opened an investigation of Respondents based on information that indicated Respondents may have engaged in violations of the Minnesota statutes and rules governing worker classification in the construction industry.
9. On March 23, 2015, a Department investigator mailed a subpoena duces tecum to Respondents. The subpoena required the production of documentation relating to Respondents' subcontractors, contractors, and employees.
10. On April 7, 2016, Hernandez called the Department investigator to acknowledge receipt of the subpoena. Hernandez stated that she was working out of state but would respond to the subpoena.
11. The Department investigator was notified in writing on May 13, 2016, that Respondents had retained an attorney. The attorney requested a 30 day extension to appropriately respond to the subpoena and the Department granted the extension.
12. On June 13, 2016, Respondents provided a written response to the subpoena via their attorney. The response included the following statement: "The Federal business tax returns have not been filed for the years 2014 and 2015. A copy of the extension applications for each of those years has been attached to the response." Respondents stated that they had employees in Minnesota and used subcontractors since January 1, 2014. A check with the Minnesota Department of Employment and Economic

Development' Unemployment Insurance Program's records revealed that JMH has not reported the payment of any wages.

13. Respondents provided the partial business names of two subcontractors that were paid for performing construction or improvement services in Minnesota while acknowledging they had used other subcontractors as well. Respondents were unable to provide the full legal business names, business addresses and telephone numbers of subcontractors as requested by the Department's subpoena.
14. The subpoena also asked for copies of all contracts for services provided by the subcontractor, and all bids or invoices received from the subcontractor. The written responses stated "No contracts were entered into between Respondent and the subcontractors."
15. The subpoena asked for a list of all payments made to the subcontractors. The written response stated: "Respondent has no accounting records other than a list of subcontractors paid." Respondents provided copies of three checks paid to Quality Exteriors and Northland Exteriors in 2014 for a total of \$8,300.
16. Respondents worked as a subcontractor performing construction or improvement services in Minnesota for three contractors. Respondents' records include a document titled "ABC Jobs" showing payments received by JMH between April 15, 2014 and April 26, 2016 that totaled approximately \$500,000. They provided copies of checks and remittance advice for to support the payments received. JMH also received \$97,500 from a second contractor and \$102,000 from a third contractor for specific jobs in Minnesota during the timeframe of the Department's investigation.
17. The Department concluded that Respondents paid Quality Exteriors and Northland Exteriors, among other subcontractors, for the performance of building construction or improvement services and treated them as independent contracts despite the fact that the contractors were not licensed by the Department or registered in the Registration Program at the time they performed construction services on Respondent's behalf. By operation of law, the owners of these non-registered entities are presumed to be employees of the Respondents, unless the Respondents can rebut that presumption by proving that their relationship with each entity met the nine factor test.
18. On June 24, 2016, the Department emailed a letter to Respondents' attorney requesting a complete response to the subpoena, including a complete list of persons that performed building construction or improvement services for JMH in Minnesota from January 1, 2014 to the present.
19. Respondents' attorney communicated with the Department investigator via email and telephone that Hernandez has not retrieved additional documents as planned.

III. CONCLUSIONS OF LAW

1. Respondents have committed violations of applicable law. Minn. Stat. §§ 181.723, 326B.701 and 326B.082, subs. 5 (b) and 11 (b)(1) (2014).

2. Respondents hired persons that were neither licensed by the Department nor registered in the Registration Program to provide construction services on Respondents' behalf and treated them as independent contractors in violation of Minn. Stat. § 326B.701, subd. 5 (b)(2) (2014).
3. Respondents failed to cooperate with the Department's investigation by failing to produce documents in response to the Department's subpoena and subsequent information requests. Minn. Stat. § 326B.082, subd. 11 (b) (2014).
4. Respondents failed to meet the burden of proof that persons performing improvement services were independent contractors and not employees hired to perform building construction and improvement services because they were not identified by business records and therefore, did not meet the nine factor test. Consequently Respondents are deemed to have misclassified employees as independent contractors. Minn. Stat. § 181.723 subd. 4 (2014).

5. IV. DETERMINATION OF PENALTY AMOUNT

In determining the amount of the penalty, the Commissioner considered: the extent of deviation from compliance; whether the violations were willful; the gravity of the violations; the number of violations; whether there is a history of past violations; whether Respondents gained economic benefit in not complying with the law; and other factors as justice may require.

V. REQUEST FOR HEARING

Pursuant to Minn. Stat. § 326B.082, subd. 12(c) (2014), Respondents shall have 30 days after issuance of this Licensing Order to request a hearing. A request for hearing must be in writing and must be served on or faxed to the Commissioner at the following address or fax number by the deadline.

Minnesota Department of Labor and Industry
CCLD - Enforcement Services Unit
Attention: Charlie Durenberger
443 Lafayette Road North
St. Paul, MN 55155

Fax number: (651) 284-5746

The date on which a request for hearing is served by mail shall be the postmark date on the envelope in which the request for hearing is mailed. If the request for hearing is served by fax it cannot exceed 15 pages in length and must be received no later than 4:30 p.m. central time on the last day permitted for serving a request. Respondents' review rights are more thoroughly described in Minn. Stat. § 326B.082, subs. 4 and 12(c) (2014).

If Respondents submit to the Commissioner a timely request for hearing, this Licensing Order shall be stayed unless otherwise ordered by a judge, and a contested case hearing will be conducted. The contested case procedures are set out in chapter 14 of the Minnesota Statutes, and the Rules of the Office of Administrative Hearings, Minn. Rules 1400.5010 to 1400.8400

(2015), and Minn. Stat. § 326B.082, subd. 12(c) (2014). These materials may be purchased from the Minnesota Book Store, telephone (651) 297-3000, and are also available at www.revisor.mn.gov.

VI. EFFECT OF FINAL ORDER


If Respondents do not request a hearing or Respondents' request for a hearing is not served on or faxed to the Commissioner by 30 days after issuance of this Licensing Order, this Licensing Order shall become a final order of the Commissioner and will not be subject to review by any court or agency. *See* Minn. Stat. § 326B.082, subd. 12(c) (2014).

The portion of the monetary penalty assessed against the Respondents by this Licensing Order for hiring unregistered subcontractors is forgiven, but the violation alleged herein shall be deemed evidence of a history of a violation for hiring an unregistered subcontractor for purposes of calculating a monetary penalty for any future violation of Minn. Stat. § 326B.701, subd. 5 (b)(2) (2014).

The monetary penalty assessed against the Respondents by this Licensing Order other than the forgiven portion is due and payable on the date the Licensing Order becomes final. *See* Minn. Stat. § 326B.083, subd. 3(a) (2014). When this Licensing Order becomes final, the Commissioner may file and enforce any unpaid portion of the penalty as a judgment in district court without further notice or additional proceedings. *See* Minn. Stat. §§ 16D.17 (2014) and 326B.083, subd. 2 (2014). Failure to pay a monetary penalty owed may result in the revocation, suspension, or denial of any or all licenses, permits, certificates, and registrations issued by the Commissioner. *See* Minn. Stat. § 326B.082, subd. 17 (2014). Also, pursuant to Minn. Stat. § 16D.13 (2014), Respondent is hereby notified that thirty (30) days after the date this Licensing Order becomes final, simple interest computed in accordance with Minn. Stat. § 16D.13, subd. 2 (2014) will begin to accrue on the unpaid portion of the penalty.

Dated: 8/4/16

KEN B. PETERSON
Commissioner

BY: 
CHARLIE DURENBERGER
Director of Licensing and Enforcement
Construction Codes and Licensing Division
Department of Labor and Industry