

STATE OF MINNESOTA
Department of Labor and Industry

In the Matter of the Construction Contractor
Registration of William Nunn Painting Ltd.

**LICENSING ORDER
WITH PENALTY**

I. ORDER

The Commissioner of the Minnesota Department of Labor and Industry (“Commissioner”) issues this Order against William Nunn Painting Ltd. (“Respondent”).

Pursuant to Minn. Stat. §§ 326B.082, subd. 6; 326B.082, subd. 12 (b); 326B.083 (2014); and 326B.701 (2014), the Commissioner hereby assesses against Respondent a monetary penalty of \$5,500, of which \$2,000 is hereby forgiven pursuant to Minn. Stat. §326B.701, subd. 6 (2014).

Pursuant to Minn. Stat. § 326B.082, subs. 11(b) and 12 (2014) and Minn. Stat. § 326B.083 (2014), the Commissioner hereby suspends the construction contractor registration of Respondent, No. IR712098, until such time that Respondent pays the portion of the monetary penalty imposed herein that is not forgiven. During the period of the registration suspension, Respondent and its principal(s) is/are prohibited from registering in the Registration Program under any business name.

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, subs. 4(a) and 4(b) (2014) also states that an individual who is required to be registered in the Registration Program 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, William Nunn Painting Ltd. ("Nunn") filed as a business corporation on December 26, 2006 with a registered office address of 15 Lakeview Avenue, Tonka Bay, MN 55331.
5. Respondent holds a construction contractor registration issued by the Minnesota Department of Labor and Industry ("Department") on August 4, 2016, No. IR712098.
6. Respondent, 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 July 11, 2016, the Department opened an investigation of Respondent based on information that indicated Respondent may have engaged in violations of the Minnesota statutes and rules governing worker classification in the construction industry.
9. On July 18, 2016, a Department investigator mailed a subpoena duces tecum to Respondent. The subpoena required the production of documentation relating to Respondent's subcontractors, contractors, and employees.
10. Respondent complied with the subpoena in part by providing a list of subcontractors that were paid for performing construction or improvement services. The Department concluded that Respondent paid Chiral Arts L.L.C.; John Forsen; Grimsrud Art & Design, LLC; Mass of Light, LLC; Isak Englund; Paul Englund LLC; and Greg Howard for the performance of building construction or improvement services and treated them as independent contractors 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.
11. On August 11, 2016, the Department investigator mailed a letter to Respondent requesting all contracts for services; all bids or invoices, and copies of checks or a list of payments made to the seven unregistered persons listed as subcontractors to determine if they were independent contractors and that the business relationship with each person complied with the nine factor test.

12. Based on its review of Respondent's response, the Department determined that between January 2014 and December 31, 2015, seven of Respondent's subcontractors failed to meet the nine factor test. Respondent wrote that all contracts were oral and were on a time and materials basis. Invoices were submitted orally or informally by notes. Notes were discarded upon payment with the exception of two notes Respondent provided as part of its response and identified as received from John Forsen. The notes specified 29 hours worked in January 2014 on Vincent Street for \$725, and 7 hours plus 1 hour for 208. Although the notes do not identify the submitter or receiver, there is a notation on one indicating a date, check number, and amount of \$725 which correlates with a spreadsheet of payments made to John Forsen.
13. The Department found insufficient evidence to support that the individuals or owners of business entities were independent contractors who receive compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis. According to the Respondent's written response on August 26, 2016, with the exception of Chiral Arts L.L.C., the other individuals or business entities were either offered employment or accepted employment with William Nunn Painting Ltd. since January 1, 2014. According the Respondent's quarterly reporting to the Minnesota Department of Employment and Economic Development's Unemployment Insurance Program, Paul Englund, Gregory Howard, and Isak Englund were all employees in the second quarter of 2016.

III. CONCLUSIONS OF LAW

1. Respondent has committed a violation of applicable law. Minn. Stat. §§ 181.723, 326B.701 and 326B.082, subd. 11 (b)(1) (2014).
2. Respondent contracted to perform or performed construction services for another person without first being actively registered in the Registration Program in violation of Minn. Stat. § 326B.701, subd. 5 (b)(1) (2014).
3. Respondent hired persons that were neither licensed by the Department nor registered in the Registration Program to provide construction services on Respondent's behalf and treated them as independent contractors in violation of Minn. Stat. § 326B.701, subd. 5 (b)(2) (2014).
4. Respondent misclassified at least seven workers who failed to meet the factors required by Minn. Stat. § 181.723 subd. 4(a) and (b) (2014) in order to qualify to be treated as independent contractors.

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 Respondent 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), Respondent 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. Respondent's review rights are more thoroughly described in Minn. Stat. § 326B.082, subs. 4 and 12(c) (2014).

If Respondent submits 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 Respondent does not request a hearing or Respondent's 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 Respondent 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 Respondent 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: 9/8/16

KEN B. PETERSON
Commissioner



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