

STATE OF MINNESOTA
Department of Labor and Industry

In the Matter of the Residential Building Contractor
License of Berg Exteriors, Inc.

**LICENSING ORDER
WITH PENALTY**

I. ORDER

The Commissioner of the Minnesota Department of Labor and Industry (“Commissioner”) issues this Order against Berg Exteriors, Inc.

Pursuant to Minn. Stat. §§ 326B.082, subd. 2; 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 \$5,000, of which \$2,000 is hereby forgiven pursuant to Minn. Stat. §326B.701, subd. 6 (2014).

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, Berg Exteriors, Inc. filed as a limited liability company on May 26, 1999 with a registered office address of 5145 Industrial Street, #1, Maple Plain, MN 55359.
5. Respondent holds a residential building contractor license issued by the Department on April 24, 2002, No. BC324217.
6. Respondent, as a licensed 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 Registration Program.
8. Minn. R. 2891.0020 (2015) requires residential building contractors that are licensed or required to be licensed to maintain records showing all plans, contracts, documents, records, receipts, and disbursements by a licensee of all the licensee's transactions as a contractor for a period of not less than three years after completion of any construction project or operation to which the records refer.
9. On February 4, 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.
10. On February 11, 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.
11. In March of 2016, Respondent responded in part to the Department's subpoena by providing several emails with attachments including a list of subcontractors and a 2015 vendor payment report. Respondent also submitted a list of contractors it performed work for as a subcontractor in Minnesota. Respondent was requested to forward vendor payment reports for 2014 and 2016 as specified in the February 11, 2016 subpoena.
12. On March 7, 2016, the Department was notified in writing that Neaton & Puklich, PLLP was providing legal representation to Respondent.
13. On September 1, 2016, the Department investigator sent a letter to Respondent and its attorney via first-class and electronic mail, requesting a complete response to the subpoena including specific invoices and all vendor payment records for 2014 and 2016. Respondent complied by providing the vendor payment records and copies of invoices.
14. Based on its review of Respondent's response, the Department determined that between January 2014 and March 2016, Respondent paid the following contractors 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: G.B. Exteriors, LLC; J. Morgan Drywall

LLC; Mark Nielson Drywall Services, LLC; Overby Construction Corp; Rasatt Companies L.L.C.; Seashore Construction Services, Inc.; L.A. New Generation L.L.C.; Tieben Floors, LLC, d/b/a Floors To Go, LLC; Fine-Line Foundations, Inc.; Paul Van Wie Ceramic Tile LLC; Good Country Stucco and Siding LLC; Gilbert Karl Neddermeyer; Patrick Stuckmayer Construction, LLC; Caprice Woodcraft, Inc.; Forster Spray Company, Inc.; and Zachery Alan Freiberg.

15. Based on its review of Respondent's response, the Department determined that between January 2014 and March 2016, at least six of Respondent's "subcontractors" failed to meet the nine factor test including Paul Van Wie; Rasatt Companies L.L.C.; Gilbert Karl Neddermeyer ("Neddermeyer"); Patrick Stuckmayer Construction, LLC ("Stuckmayer"); Overby Construction Corp.; and Zachery Alan Freiberg. Respondent made payments to the individuals and the business entity owners on an hourly basis as noted on invoices. Additionally, Respondent made payments to Neddermeyer and Stuckmayer based on single invoices from one individual rather than each individual or business entity invoicing Respondent for the work performed.

III. CONCLUSIONS OF LAW

1. Respondent has committed violations of applicable law. Minn. Stat. §§ 181.723, 326B.701 and 326B.082, subds. 2 (b) and 11 (b)(1) (2014).
2. 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).
3. Respondent misclassified employees as independent contractors and failed to meet the burden of proof that persons performing improvement services were independent contractors, as the business entities did not meet the nine factor test as evidenced in Respondent's business records. Minn. Stat. § 181.723 subd. 4 (2014).

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.

\$2,000 of the penalty was assessed for Respondent's hiring of unregistered subcontractors and was forgiven pursuant to Minn. Stat. § 326B.701, subd. 6(b) (2014). The portion of the penalty that was not forgiven was assessed for Respondent's false and misleading information.

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: 11/14/16

KEN B. PETERSON
Commissioner


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