

MT Carpets

INDEPENDENT CONTRACTORS

Sole proprietors

The requirement that an independent contractor have an account with state agencies as required for the payment of taxes provided in RCW 51.08.195(5), does not necessarily encompass contractor registration with the Department of Labor and Industries because a contractor must register with the Department and establish an account only if the contractor has employees.***In re Mauricio Torres (MT Carpets), BIIA Dec., 04 21119 (2006)*** [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 06-2-25404-0SEA.*]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: MAURICIO N. TORRES DBA MT) DOCKET NO. 04 21119**
2 **CARPETS)**
3 **FIRM NO. 963,965-00) DECISION & ORDER**

4 **APPEARANCES:**

5 Firm, Mauricio N. Torres, dba MT Carpets, by
6 Law Offices of Matthew N. Metz, per
7 Matthew N. Metz

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 H. Regina Cullen, Assistant

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12 The firm, Mauricio N. Torres, dba MT Carpets, filed an appeal with the Board of Industrial
13 Insurance Appeals on November 10, 2004, from an order of the Department of Labor and Industries
14 dated November 3, 2004. In this order, the Department affirmed the Notice and Order of
15 Assessment No. 0370083 dated April 15, 2004, in which the Department assessed industrial
16 insurance taxes, penalties and interest for the period of January 1, 2001 through December 31,
17 2003, in the amount of \$65,187.70. The Department's Notice and Order of Assessment is
18 **REVERSED AND REMANDED.**

19 **DECISION**

20 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
21 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
22 Order issued on December 16, 2005, in which the industrial appeals judge reversed and remanded
23 the Notice and Order of Assessment of the Department dated November 3, 2004.

24 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
25 no prejudicial error was committed. The rulings are affirmed.

26 The issue presented in this appeal is whether Mauricio N. Torres is required to pay industrial
27 insurance premiums for the work performed by certain carpet installers during the period of
28 January 1, 2001 through December 31, 2003.

29 Mr. Torres claims that his relationship with the installers does not constitute employment
30 subject to the provisions of Title 51, while the Department maintains that Mr. Torres is liable for
31 premiums, based solely on the undisputed fact that the installers had failed to register as
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1 contractors with the Department of Labor and Industries. (RCW 18.27.020 requires contractors to
2 register with the Department of Labor and Industries.)

3 Vincente Gamiles, the Department auditor who conducted the audit that lead to the
4 issuance of the Citation and Order of Assessment now under appeal, testified that if the installers
5 had contractor licenses when they performed the work, Mr. Torres would not be responsible for
6 payment of industrial insurance premiums. And, in the Petition for Review of the Proposed
7 Decision and Order in which the industrial appeals judge vacated the assessment, the Department
8 asked the Board to remand the matter to the Department so that the assessment could be
9 recalculated, deleting the premiums assessed for two of the installers who did register with the
10 Department toward the end of the audit period, thereby reiterating its position that it was only the
11 lack of registration that made Mr. Torres liable for premiums.

12 RCW 51.08180, which defines the term "worker," and RCW 51.08.070, which defines the
13 term "employer," set out conditions under which those terms do not apply. When all of the
14 conditions have all been met, the employment is exempt from mandatory coverage.
15 RCW 51.08.195 sets out an alternative exemption to mandatory coverage when all of the conditions
16 set out in that statute have been met. But the Department has raised only one condition--contract
17 registration--that it argues is required for exemption from mandatory coverage and has not been
18 met. Accordingly, we will consider the only argument raised by the Department in support of the
19 assessment and will not consider whether other conditions required by the various statutes have
20 been fulfilled.

21 We have granted review to correct a finding of fact that is not supported by the record and
22 to explain our reasoning in finding that Mauricio N. Torres, dba MT Carpets, is not liable for
23 premiums for the carpet installers with whom he contracted.

24 Mauricio Torres and his wife, Araceli Torres, started a carpet installation business in 1998.
25 When Mr. Torres began receiving more work than he could handle on his own, he made plans to
26 broker the extra work to other installers. Mr. Torres testified that he did not want to have an
27 employee/employer relationship with those installers so he contacted the Department of Revenue
28 to learn what was necessary to accomplish that. Based on what Mr. Torres understood the
29 requirements to be, he and the installers entered into an agreement that Mr. Torres believed would
30 allow him to be free of the obligations of an employer.

31 The agreement, reduced to writing in a document entitled "Master Service Contract,"
32 identified MT Carpets as a carpet contract broker, whose business it is to secure carpet installation

1 contracts and to market the contracts to independent carpet installers. It identified the installers
2 (referred to as subcontractors) as independent carpet installers, whose business it is to install
3 carpets.

4 The contractual terms the installers were required to agree to included keeping books;
5 making all required local, state, and federal tax payments; obtaining and maintaining all required
6 local, state, and federal business licenses and registration; and, obtaining liability insurance.

7 An executed contract set forth that the installer, identified by name as well as by uniform
8 business identifier (UBI) number, has been granted a business license by the state, and has
9 warranted that he has complied with all applicable business registration and licensing obligations.
10 RCW 18.27.020 requires contractors to register with the Department of Labor and Industries.

11 In fact, the evidence demonstrates that only two of the installers, Miguel Picent Leon and
12 Jose Virgilio Hernandez, registered as contractors with the Department of Labor and Industries and
13 then not until June 24, 2003, almost the end of the audit period.

14 We begin our analysis this way.

15 It is the policy in this state to require coverage for all employment. RCW 51.12.010 states:

16 There is a hazard in all employment and it is the purpose of this title to
17 embrace all employments which are within the legislative jurisdiction of
18 the state.

19 There are some exceptions to that policy. RCW 51.12.020, provides a list of "the only
20 employments, which shall not be included within the mandatory coverage of this title." Some
21 employment on the list is specific to a job title, for example, newspaper carrier or insurance agent,
22 while other excluded employment emphasizes the worker's relationship to the work, for example,
23 "sole proprietors or partners."

24 Carpet installers are not specifically excluded from covered employment although the
25 manner of employment between Mr. Torres and the installers may exempt that employment from
26 mandatory coverage.

27 Carpet installers are workers within the definition of RCW 51.08.180, which states:

28 "Worker" means every person in this state who is engaged in the
29 employment of an employer under this title, whether by way of manual
30 labor or otherwise in the course of his or her employment; also every
31 person in this state who is engaged in the employment of or who is
32 working under an independent contract, the essence of which is his or
her personal labor for an employer under this title, whether by way of
manual labor or otherwise, in the course of his or her employment . . .

1 Each carpet installer worked under an independent contract, the essence of which was his
2 personal labor. The installer was free to accept or reject a job offer and when a job was accepted,
3 the installer worked free of direction and control from Mr. Torres. "The right under the contract to
4 control the manner of doing the work and the means by which the result was to be accomplished,"
5 is the essence of an independent contractor. *Hubbard v. Department of Labor & Indus.*, 198 Wash.
6 354 (1939). But the carpet installer, who is an independent contractor, is still a worker within the
7 statutory definition because the essence of the contract is the personal labor of the installer. *White*
8 *v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956); and *Lloyd's of Yakima v. Department of*
9 *Labor & Indus.*, 33 Wn. App. 745 (1982).

10 Having established that the carpet installer is a worker within the definition of the statute, we
11 look at the various statutes that make mandatory coverage inapplicable, that is, where there would
12 be no obligation to provide coverage for the person doing the work and no expectation on that
13 person's part the coverage would be provided.

14 RCW 51.08.180 and RCW 51.08.070, which define the terms "worker" and "employer,"
15 provide exceptions to mandatory coverage, but each requires that both parties to the employment
16 relationship, be registered as contractors with the Department under Chapter 18.27 RCW for the
17 exemption to apply.

18 RCW 18.27.010 includes carpet installers within the definition of "contractor" and
19 RCW 18.27.020 makes it mandatory for any person performing work as a contractor to register with
20 the Department. Therefore, carpet installers are statutorily required to register with the Department
21 and are in violation of the law when they fail to do so. However, we decline to impute the installer's
22 violation of the law to Mr. Torres, at least insofar as that fact alone would make him liable for
23 premiums. The failure of the installers to register does have an impact on Mr. Torres's liability for
24 premiums in that it puts the exception to mandatory coverage found in RCW 51.08.180 and
25 RCW 51.08.070 out of reach. Those statutes specifically require both the employer and the worker
26 to be registered. Unlike the industrial appeals judge, we are satisfied that Mr. Torres was
27 registered with the Department as a contractor. It is the installers who had not registered. Except
28 for two installers who registered toward the end of the audit period, exemption under one of these
29 statutes would not apply.

30 The statute we rely on to find that Mr. Torres is not responsible for premiums for the
31 installers he brokered the work to is RCW 51.08.195, which states in its preamble: "As a separate
32 alternative to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under

1 RCW 51.08.180, services performed by an individual for remuneration shall not constitute
2 employment subject to this title if it is shown that:" There are six provisions that must be met for
3 the exemption to apply.

4 Again, we note that the Department cited Mr. Torres for the sole reason that the installers
5 were not registered with the Department. Our review, therefore, is confined to the terms of
6 subsection (5) because that is the only issue raised by the Department.

7 Subsection (5) reads as follows:

8 On the effective date of the contract of service, or within a reasonable
9 period after the effective date of the contract, the individual has
10 established an account with the department of revenue, and other state
11 agencies as required by the particular case, for the business the
12 individual is conducting for the payment of all state taxes normally paid
by employers and businesses and has registered for and received a
unified business identifier number from the state of Washington.

13 The state initiated the unified business identifier number to simplify registration and licensing
14 requirements for the business community. A master application allows a person to register or
15 license with state agencies using a single form. One unified business identifier number that will be
16 used by all state agencies participating in the UBI program is assigned to the applicant. The
17 Department of Revenue and the Department of Labor and Industries both participate in the UBI
18 program. WAC 458-20-101.

19 Subsection (5) was apparently intended to capture applicable taxes. An application for
20 registration as a contractor is not a payment of a state tax normally paid by employers and
21 businesses. The provision "payment of state taxes normally paid by employers" cannot be read to
22 encompass contractor registration. A contractor who registers with the Department is not required
23 to have an account for the payment of premiums unless that contractor has employees.
24 RCW 18.27.030.

25 The evidence in this case establishes that the installers had registered with the Department
26 of Revenue and had obtained unified business identifier numbers and in that way, complied with
27 subsection (5). This finding is based in part on Exhibit No. 2, which was admitted without objection.
28 That exhibit consists of five pages of copies of Form 1099 Misc. for the seven installers, namely,
29 Miguel Piceno Leon, Jose Virgilio Hernandez, Heriberto Salas Sanches, Victor Torres Naranjo,
30 Alberto Reyes Sanchez, Carlos Caron Cortez and Juan Reyes Hernandez, who are alleged to be
31 employees of Mr. Torres. Each 1099 listed a UBI number.
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1 We see nothing in RCW 51.08.195 that requires the installer to register as a contractor. We
2 contrast the wording of that statute with the wording of the definition/exemption of worker found in
3 RCW 51.08.180 and the definition/exemption of employer found in RCW 51.08.070. Both
4 specifically require both parties to the contract to be registered under Chapter 18.27 RCW. We
5 conclude from that that had the Legislature intended such a requirement to apply in the alternative
6 exception, it would have said so.

7 As we stated in *In re Alliance Flooring Services, Inc.*, 03 32294 (2005), "The purpose of
8 RCW 51.08.195 is to provide a mechanism for distinguishing between independent business
9 people and workers." We conclude on the evidence before us that the installers had independent
10 businesses and were not covered workers. They are exempt from industrial insurance coverage.
11 The Department assessment against Mauricio Torres, dba MT Carpets, is incorrect and should be
12 vacated.

13 **FINDINGS OF FACT**

- 14 1. On April 15, 2004, the Department of Labor and Industries issued a
15 Notice and Order of Assessment No. 0370083 against Mauricio N.
16 Torres, dba MT Carpets, in the amount of \$65,187.70 for taxes,
17 penalties and interest due the State Fund for each quarter of the
18 calendar years of 2001, 2002 and 2003. The order was communicated
19 to Mr. Torres on June 5, 2004.

20 On June 24, 2004, the Firm filed a Protest and Request for
21 Reconsideration of the Notice and Order of Assessment.

22 On November 3, 2004, the Department issued an order in which it
23 affirmed the Notice and Order of Assessment No. 0370083 dated
24 April 15, 2004.

25 On November 10, 2004, the Firm filed an appeal from the Notice and
26 Order of Assessment No. 0370083 with the Board of Industrial
27 Insurance Appeals and on December 15, 2004, the Board issued an
28 Order Granting Appeal and assigned the appeal Docket No. 04 21119.

- 29 2. The Department of Labor and Industries conducted an audit of Mauricio
30 Torres, dba MT Carpets, and subsequently issued a Notice and Order
31 of Assessment alleging that the sum of \$65,187.70 was due in industrial
32 insurance taxes, penalties and interest for the period of January 1, 2001
through December 31, 2003.

3. For the period of January 1, 2001 through December 31, 2003,
Mauricio Torres was a sole proprietor doing business as MT Carpets.
Mr. Torres installed carpet and brokered contracts to install carpets to
other carpet installers.

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2 4. The installers who contracted with Mr. Torres to install carpets were
3 free from his direction and control in the performance of their work, but
4 the essence of the contract was the personal labor of the installer.
- 5 5. For the period of January 1, 2001 through December 31, 2003,
6 Mauricio Torres was registered as a contractor with the Department of
7 Labor and Industries.
- 8 6. For the period of January 1, 2001 through December 31, 2003,
9 Mauricio Torres brokered carpet installation contracts to seven
10 installers. For the period of January 1, 2001 through June 23, 2003,
11 none of the installers was registered as contractors with the Department
12 of Labor and Industries. For the period of June 24, 2003 through
13 December 30, 2003, two of the seven installers were registered as
14 contractors with the Department of Labor and Industries.
- 15 7. The Firm's compliance with subsections (1) through (4) and
16 subsection (6) of RCW 51.08.195, are not at issue in this appeal.
- 17 8. On the effective date of the contract of service between Mauricio Torres
18 and each installer, or within a reasonable period after the effective date
19 of the contract, each installer had established an account with the
20 Department of Revenue and any other state agency as required by the
21 particular case for the business the installer was conducting for the
22 payment of all state taxes normally paid by employers and businesses,
23 and had registered for and received a unified business identifier number
24 from the state of Washington.

CONCLUSIONS OF LAW

- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the
26 parties to and the subject matter of this appeal.
- 27 2. Pursuant to RCW 51.08.195, for the period of January 1, 2001 through
28 December 31, 2003, the services performed by the seven carpet
29 installers for remuneration, did not constitute employment subject to
30 Title 51 RCW.
- 31 3. For the period of January 1, 2001 through December 31, 2003,
32 Mauricio N. Torres, dba MT Carpets, was not liable for industrial
insurance premiums for the seven carpet installers to whom he
brokered contracts.
4. The Notice and Order and Notice of Assessment in which the
Department affirmed the order dated 0370083, is incorrect. The order
is reversed and the matter remanded to the Department with directions

1 to vacate the assessment for the period of January 1, 2001 through
2 December 31, 2003, in the sum of \$65,187.70 in taxes, penalties, and
3 interest against Mauricio Torres, dba MT Carpets.

4 It is so **ORDERED**.

5 Dated this 12th day of July, 2006.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

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8
9 /s/ _____
10 THOMAS E. EGAN Chairperson

11
12 /s/ _____
13 CALHOUN DICKINSON Member