THE COMMONWEALTH OF MASSACHUSETTS
Department of Industrial Accidents
600 Washington Street, 7th Floor
Boston, Massachusetts 02111

MITT ROMNEY
Governor

KERRY HEALEY
Lieutenant Governor

JOHN C. CHAPMAN
Commissioner

****

JAMES McMORROW (D/B/A JFM CONSTRUCTION), Insured/Employer

AMERICAN ZURICH INSURANCE COMPANY, Insurer

TRAVELERS INDEMNITY COMPANY, Servicing Carrier

Policy No. UB 7530A003; Effective 06/22/03-04; 06/22/04-05

Appeal Proceeding Pursuant to Chapter 152, Section 65B

****

Appearances: James F. McMorrow, dba JFM Construction, Employer
John Tocci, Esq. on Behalf of Employer
Michael Tetreault, Audit Manager, on Behalf of Insurer
Garrett J. Harris, Esq. on Brief for Insurer

I. Introduction

James McMorrow d/b/a JFM Construction (JFM), appeals to the Massachusetts Department of Industrial Accidents ("DIA") for relief from a determination by Zurich American/St. Paul Travelers ("Travelers")[1] that JFM owes an additional $22,400.00 in premium for five painters, nine carpenters, and one siding installer: $7,000 for 06/22/03 – 06/21/04; $7,000 for 06/22/04 – 06/21/05, and $8,400 for 06/22/05 – 06/21/06.

[1] In the Brief of the Insurer, the servicing carrier identifies itself as "Travelers Indemnity Company", although, in correspondences relating to this matter, it has identified itself as "St. Paul Travelers."

Stenographic transcripts record the hearing on 11/04/04, which continued to 03/23/05. The policy cancelled on 06/22/05 for JFM's not paying the renewal premium. American Zurich issued policy #ASSIGN0289027 on 06/28/05 to 06/28/06 to "James McMorrow DBA JFM Painting." This policy continues in effect as of today, July 12, 2005.

II. **Factual Background**

Mr. McMorrow is a licensed Home Improvement Contractor (HIC REG 133704). [He does not have a Construction Supervisor's License.] Mr. McMorrow began doing business as "JFM Construction" in 2001 in Barnstable. (**Exhibit A**). JFM is in the business of residential painting, flooring, siding, roofing and remodeling. JFM advertises in the Hyannis Area Yellow Pages under business headings for "Flooring," "Painting," "Roofing and Siding" (**Exhibit B**.) "JFM Painting," "JFM Flooring," and "JMF Construction – Specializing in Re-Roofing" all use the telephone number (508) 771-1608 which is registered to James F. McMorrow, 17 Circle Drive, Hyannis, Mass. 02601-3601 [Current address: 53 Lewis Road, W. Yarmouth, MA 02673] JFM does not advertise as a general contractor performing work through the use of subcontractors.

On or about June 11, 2001, Mr. McMorrow applied to the Workers' Compensation Rating and Inspection Bureau of Massachusetts ("the Bureau") for insurance coverage from the Bureau's Assigned Risk Pool.[2] American Zurich wrote Mr.

Regardless, the servicing agency and insurer shall collectively be referred to herein as "Travelers;" further, Travelers appears here in a dual role as the issuing carrier, and as the defender of the Assigned Risk Pool.

[2] The Bureau, in accordance with GLM c.152, §65A, provides Massachusetts employers, such as Mr. McMorrow, who are unable to obtain workers' compensation insurance coverage in the voluntary market, the means to satisfy their legal obligations under GLM c.152 to provide workers' compensation benefits to their employees. Any insurance carrier that intends to write or continue to write workers' compensation

McMorrow an "if any" workers' compensation policy for the principal employment classifications "Carpentry NOC" (5403), "Carpentry - Detached Dwelling" (5645), "Painting/Paperhanging NOC" (5474), "Contractor-Executive Supervisor or Construction Superintendent"(5606)[3] Neither Mr. McMorrow, nor his associates, are covered individually by workers' compensation insurance. The three with employees -- Sean Hanafin, Gary Souza, and Reynald Lins -- cover them by their own "if any" policies. JFM appeals Travelers' request as an inappropriate assessment for its three "if any" workers' compensation policies for a sole proprietor contractor who has no employees.

III. Insurer's Position

Travelers seeks higher premium payments for the increased risk to which it believes JFM's employees have exposed it.[4] Travelers broadly argues that all JFM workers are employees, particularly as they are paid by the hour. It would appear that to this insurer a worker's being paid by the hour is an indelible hallmark of employee status.

Travelers attaches great weight to the undisputed fact that on or about 10/14/03, John Lamoreaux, a siding installer, pierced his finger with a nail-gun at a JFM jobsite. At the hospital he reported that the accident occurred on the job. A Travelers representative spoke with Mr. McMorrow, who verified the injury took place on the job.

---

insurance policies in Massachusetts is required to accept assignments of uninsured employers from the Bureau.

[3] All those with whom CFM contracts have "if any" policies which do not provide workers' compensation coverage to the sole proprietor, but covers his employees, "if any." Amendments to the Independent Contractor Law deem irrelevant the status of a worker as a "sole proprietor or partnership," for the purpose of obtaining worker's compensation insurance. GLM c. 149, § 148B (c). *Advisory from the Attorney General, Chapter 193 of the Acts of 2004*, at pp. 2-3.

[4] Travelers did not provide first hand testimony on how its auditor reached conclusions on employee status.

(**Exhibit C**.) Travelers paid Mr. Lamoreaux' "medicals only" claim, and wonders out loud why this worker is an employee then, and an independent contractor now?[5]

Travelers audited the JFM payroll records on July 23, 2004, and determined that JFM had fourteen other employees. (**Exhibit E** Transcript of Hearing Conducted on March 23, 2005 (the "HT") pp. 8-15.) The auditor concluded her report as follows:

> Insured is a sole proprietor acting as a home improvement and repair contractor. He works for homeowners and other general contractors. Operations include repair of rotting sills, building wooden decks, painting – interior and exterior of homes, carpentry, installing new windows, etc. Owner does all operations at job sites as well as coord. of workers and estimating jobs. No regular payroll. **All labor noted is contract – paid by the hour. All workers have wc coi on file, but do not appear to have any employees**. One claimant noted – included. Included all labor based on nature of work – all had wc certificates – none appear to have any employees.[6] (Emphasis supplied)

Travelers' New England Region Audit Manager, Mr. Michael Tetreault, by letter of 10/06/04, detailed Traveler's reasons for asking for additional premium (**Exhibit F.**):

> We believe that these individuals are employees, and *not* independent contractors, based on the following elements of their relationship with JFM Construction:
>
> 1. **The individuals in question are being paid hourly**, and do not contract by the job.
> 2. The relative nature of the work performed is the same what our insured is in business to perform.
> 3. The individuals in question are paid for labor only, and do not provide any materials.
> 4. While these individuals do have their own tools, they are supplied with ladders and all job materials by our insured. [7] (Emphasis supplied)

[5] Travelers presented evidence that it paid a worker's compensation claim amounting to $363.36 relating to an injury suffered by John Lamoreaux while working as a subcontractor for JFM. Travelers contends that this payment constitutes evidence that Mr. Lamoreaux was an "employee" of JFM. This contention was refuted by Mr. McMorrow who testified that he made no admissions regarding Mr. Lamoreaux's status but, rather; when he received a call from a hospital inquiring whether Mr. Lamoreaux worked for JFM he responded in the affirmative. This was in no way meant to be any kind of admission relating to Mr. Lamoreaux's independent contractor status but rather a simple statement of fact – that Mr. Lamoreaux was working as an independent contractor with JFM. HTat 29-32. Mr. Lamoreaux, in fact, executed an independent contractor agreement with JFM just a week prior to commencing work pursuant to that contract. As was pointed out at the hearing, JFM had no control over how Mr. Lamoreaux or the hospital at which he received treatment chose to report his injury.

[6] See 07/23/04 Audit

[7] See 07/23/04 Audit

The letter charts the workers, their duties, their codes, and amount paid each between 06/22/03 and 06/22/04. This chart is reproduced below with an additional column added to the far right. This column presents information, provided in a letter of 12/16/04 to Mr. Tetreault by Mr. Tocci, counsel to JFM, setting forth how each workers is paid. (**Exhibit G**). Mr. McMorrow subsequently testified to the accuracy of the information under oath:

James Semos	painting	5474	$ 10,937	job/hour [8]
Chris Lamb	painting	5474	$ 7,984	job
Mike Rodrigues	carpentry	5645	$ 1,591	job/hour
Xavier Tallman	painting	5474	$ 3,586	job/hour
Reynald Lins	carpentry	5645	$ 3,719	hour
Trenton Smith	carpentry	5645	$ 1,806	job
Gary Souza	carpentry	5645	$ 3,685	hour
Alan Smith	carpentry	5645	$ 3,415	job
Mike Cheney	painting	5474	$ 862	job
John Chapman	carpentry	5645	$ 7,187	job
John Lamoreaux	siding	5645	$ 9,539	job
John Fitzgerald	carpentry	5645	$ 3.977	job/hour
Wayne St.Pierre	carpentry	5645	$ 313	job
Sean Peckham	painting	5474	$ 15,521	job/hour
Michael Crowley	carpentry	5645	$ 1,035	job

[8] The "job," "hour," and "job/hour" designations are provided by counsel for JFM in letter of 12/06/04 to Mr. Tetreault of Travelers. Travelers indicates all are paid hourly and all work for others. **Exhibit D**, p.5.

IV. Insured's Position

A. Documentation

JFM believes it has the coverage appropriate to its needs. JFM has no employees, thus has no actual need for workers' compensation coverage on non-existent employees. As a sole proprietor, Mr. McMorrow is not required to cover himself with workers' compensation; however, the certificate helps him secure work. The only employees he might possibly hire, but has not, are included under the classifications on his current "if any" policy. Mr. McMorrow alleges it is unjust enrichment for Travelers to require him to pay additional premium for workers whom he does not consider to be his employees.

Mr. McMorrow maintains both JFM and the workers intend their relationship to be that of a general contractor to independent contractors. He provides the Department with copies of contracts from these individuals: James Semos, Chris Lamb, Michael Rodrigues, Reynald Lins, John Fitzgerald, John Chapman and John Lamoreaux. (**Exhibit H**.) JFM submits the sworn affidavits of John Chapman, Michael Rodrigues and John Semos (collectively the "Affidavits") (**Exhibit I**.) JFM makes factual assertions on how he pays each worker in a 10-page document to Travelers referenced as (**Exhibit G**.)

B. General Nature of JFM and Relationship with Subcontractors

Travelers asserts JFM is "engaged in the business of residential painting, flooring, siding, roofing and remodeling;" Mr. McMorrow contends he is "in the business of procuring and administering building contracts, particularly for the carpentry, painting, and siding of homes." See 03/23/05 Hearing at pp. 15-17. Travelers sees JFM as a home improvement and repair contractor, who earns income from the labors of workers who do

what employees would if he had employees. JMF testifies that he chooses not to have employees, rather be a contractor who drums up business, solicits bids, specs jobs, and obtains reliable subcontractors who can work unsupervised in certain specialties. While Mr. McMorrow coordinates the projects, he asserts that his participation does not rises to that of a supervisor exercising "control" under the relevant law.

Mr. McMorrow testifies he is a sole proprietor who does not perform painting, siding or carpentry work himself. HT at 16. He acknowledges that he cannot perform siding or carpentry work. HT at 16 and 17. He contracts either with a homeowner, or with a licensed construction supervisor. Id. Mr. McMorrow engages subcontractors for the painting, carpentry and siding on work he has bid as a contractor. Id. He is a coordinator, a contractor, a salesman – but not a tradesman.

Each JFM tradesman is not only responsible for his designated job, but also is 100% responsible for remedying any difficulty. Each worker uses his skill and independent judgment to perform contracted services. HT at 17; Affidavits at ¶ 5. Mr. McMorrow controls no aspect of their work. Id. The homeowner, and/or the prime contractor, determines the details of each job, and obtains all necessary permits. HT at 51-52. Each subcontractor makes his own work schedule. HT at 17; Affidavits at ¶ 5.

JFM assumes no risk of loss, and requires, by contract, each subcontractor to carry his own insurance. HT at 18; Affidavits at ¶ 6.[9] JFM testifies that he pays his independent contractors almost exclusively "by the job," not "by the hour." [10]

[9] On rare occasions, Mr. McMorrow loaned a generator (when a house fuse blew) or large ladder to a subcontractor. In INSTRUMENTATION portion of AGREEMENT BETWEEN JFM CONSTRUCTION AND INDEPENDENT CONTRACTOR JFM retains the following right: "JFM may supply equipment, tools, material, supplies and additional personnel to accomplish the designated tasks …" usual practice is for each subcontractor to bring his own tools to perform contracted work. HT at 18-19; Affidavits at ¶ 3. E.g. Each carpenter uses his own pneumatic nail gun and other carpentry tools. Id. Each painter uses his own brushes, tarps, small ladders and other tools necessary for painting. HT at 19; Affidavits at ¶ 3.

While Mr. McMorrow is clear how aspects of some jobs require payment by the hour, he is equally clear that by far the most common measure of payment is by the job.[11] The homeowner bears the hourly costs of the subcontractor. Id. The homeowner, or prime contractor, purchases all building supplies. HT at 21; Affidavits at ¶ 4. Some homeowners purchase materials through JFM to take advantage JFM's discount at Cape Cod building supply companies. Id. The homeowner benefits from the discount, and pays for all supplies purchased through JFM. Id.

JFM claims no binding, ongoing relationship with any of the subject subcontractors. HT at 22-23; Affidavits at ¶ 8. These workers are free to contract with others, and receive IRS Form 1099s from others. Travelers' audit figures indicate that, during the audit year, five of fifteen received under $2,000 and ten less than $4,000. [12] HT at 27 and 28. Although Travelers assert that these employees are dependent on pay from JFM, the economic reality is that these payments are insufficient for workers to live on in, or near, the geographical area of their employment.

Each subcontractor is free to accept or decline any job offered him. Similarly, JFM is not required to offer subcontracting work to any particular individual or entity. Id. The independent nature of the relationship between JFM and the subcontractors is

---

[10] Note: The assertion that he pays more frequently by the job than by the hour contradicts the auditor's assertion that the company books record only hourly pay; however, Mr. McMorrow testified under oath to paying chiefly by the job, and Travelers did not rebut with any testimony from an individual with first-hand knowledge of the audit so as to clarify its assertions on the prevalence of hourly pay.

[11] For example, subcontractors installing drywall or siding are paid "by the square" – a set amount for each 10'x10' drywall or siding "square" installed. HT at 19-21; Affidavits at ¶ 3.On occasion, JFM pays by the hour. A carpentry subcontractor hired to replace windows cannot be paid a set price before knowing details of the job, something which often is not determinable until the job has commenced. For example, if a carpenter finds termite damage, the job is longer and more costly. HT at 20. Similarly, a subcontractor cannot determine the cost of wallpaper removal until he has commenced work. Id.

[12] There is a question about how much Sean Peckham earned. According to Travelers, Sean Peckham, earned $15,521 during the audit year; however, Mr. McMorrow's financial records indicate that JFM paid

further illustrated by the fact that, of the fifteen, only two performed occasional work for JFM at the time of the hearing on 03/23/05. HT at 22. James Semos and John Chapman perform occasional work as independent contractors as described in affidavits. Each says he "own[s] and operate[s] my own business." Affidavits at ¶ 2. Each also indicated that he is "responsible for hiring, supervising and paying my own assistants . . . [and is] free to work for any contractor I please." Affidavits at ¶¶ 6 and 7. John Fitzgerald and Wayne St. Pierre are no longer in the contracting industry. HT at 22.

Sean Hanafin, Gary Souza and Reynald Lins, subcontractors who had performed services for JFM in the past, have employees of their who work in the course of these subcontractors' businesses. HT at 60-61.[13] JFM maintains that the "if any" policies of these independent contractors are sufficient to provide coverage for their employees. [14] JFM provided the Department copies of the independent contractor agreements with James Semos, Chris Lamb, Michael Rodrigues, Reynald Lins, John Fitzgerald, John Chapman and John Lamoreaux. HT 23-25. The standard form of agreement provides that the independent contractor "retains the sole and exclusive right to control or direct the manner or means by which the work . . . is to be performed." The intent, *ab initio*, is to establish a general contractor/independent subcontractor relationship.

Each Agreement makes the independent contractor responsible for withholding, and paying, any and all payroll taxes, or other withholdings, required by law. It states,

---

Mr. Peckham under $2,000 during the audit period. This is representative of how it would have helped Travelers to have an auditor available to testify toTravelers readings of the accounts.

[13] That these putative independent contractors do not carry workers' compensation insurance raises issues for JFM and Travelers under GLM c. 152, § 18.

[14] The liability for the workers of these subcontractors does not transfer to Travelers under GLM c.152, §18 because Sean Hanafin, Gary Souza and Reynald Lins have adequate workers compensation coverage for their employees.

that (the "IC") "is engaged in IC's own independently established business, IC and its employees are not eligible for, and shall not participate in, any employee pension, health, unemployment, or other fringe benefit plan of JFM."

Directly on-point, the Agreement requires:

> IC shall obtain and maintain in force during the term of this agreement workers' compensation insurance coverage covering all employees of IC.
>
> ***IC shall not utilize any employees or contractors in the performance of the work without first obtaining such insurance coverage***.

(Emphasis added). The requirement that each subcontractor carries his own workers' compensation insurance, JFM maintains, is an absolute precondition to entering into a contract with JFM. HT at 25-26. Under their agreement, subcontractors who are sole proprietor subcontractors without workers' compensation coverage need to provide JFM a certificate of workers' compensation insurance coverage. [15] Travelers' auditor, as previously mentioned, found all subcontractors had valid, current workers' compensation "if any" certificates.

D. Individual Breakdown by Subcontractor

As stated earlier, Travelers did not present auditor testimony to rebut the worker-by-worker analysis presented by Mr. McMorrow as to how each worker got paid. At the continued hearing on 03/23/2005, Mr. McMorrow testified, under oath, to the veracity of information contained in the above-referenced document sent to Mr. Tetreault, dated 12/15/2004.[16] HT 22-24. JFM asserts this subcontractor-by-subcontractor breakdown provides further substantiation that JFM, and the workers consider their relationship to be that of a contractor and independent contractors.

[15] All workers have "if any" policies written by Schlegel & Schlegel Insurance of W. Yarmouth, MA

V Legal Standard

A. Insurer's Position:

1. Applicable Law and Contract Language

Travelers references the relevant statutes and case law to substantiate its position that all JFM's workers are employees. Travelers follows a thorough, step by step route to build a foundation for conclusion that these workers are employees. Travelers readily adopts the "presumption of employment" [GLM c. 149, sec. 148B, which the Legislature placed quietly within the Commonwealth's wage act statutes in the summer of 2004] to trump the workers' compensation case law cited by the insured[17].

An "employee" is broadly defined under GLM c. 152, § 1(4) as follows:

> every person in the service of another under any contract of hire, express or implied, oral or written, excepting . . . (g) a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer, but not excepting a person conclusively presumed to be an employee under section twenty-six.

Travelers contends GLM. c. 152 "is to be interpreted in the light of its purpose and, so far as may be, to promote the accomplishment of its beneficent design" to protect the "health, safety and welfare of employees." Neff v. Comm'r of Dept. of Industrial Accidents, 421 Mass. 70, 73 (1995); GLM. c. 152, § 25A. The Supreme Judicial Court stated, "[t]he workmen's compensation act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718, 719 (1951).

---

[16] As indicated earlier, the far right column of the graph on p.4. shows how Mr. McMorrow testified that each worker is paid.

[17] JFM contends that the "presumption of employment" in GLM 149 does not effect cases brought under GLM c. 152 which has its own standards for determining the difference between an employee and an independent contractor through the Reviewing Board of the Department. See: ." MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174 (1992) et progeny..

The overall purpose of the Workers' Compensation Act is to protect all employees of the insured-employer, regardless of how the employer categorizes such employees. Shannon's Case, 274 Mass. 92, 94 (1930). The Act gives all workers on a common job the benefit of the statute. Bindbeutel v. L.D. Willcutt & Sons Co., 244 Mass, 195, 198 (1923). In particular, although the label by which the parties describe their relationship may be given due weight, "just calling someone an independent contractor in an attempt to evade responsibility for employment taxes and workers' compensation coverage will not defeat an employment relationship which in actuality exists." MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 179 (1992)[18].

In the MacTavish case, the Board noted the applicability of the policy underlying GLM c. 152, §18 (concerning employees of uninsured subcontractors) to cases involving contractors who work directly for the insured employer:

> Section 18 prevents an employer from avoiding workers' compensation liability by letting out his work to an uninsured independent contractor or subcontractor, and so depriving employees of the latter of compensation benefits where they are engaged in performing work of the principal . . .. **The same rationale must be applied to a worker who is performing services directly for the principal.** Id. at 178-179.[19]

---

[18] JFM cites Barrett v. D & P Contracting, 15 Mass. Workers' Comp. Rep. 94 (2001), uses the same criteria established in MacTavish (supra) to determine that a worker is an independent contractor. The Reviewing Board found MacTavish to be O'Connor's employee.

[19] In his March 23, 2005 brief, the insured mischaracterizes a superior court judge's opinion in Larson v. Fred Salvucci Corp., Middlesex C.A. No. 03-3226 (J. Gants, Sept. 14, 2004). That opinion, which ruled that Section 18 did not shield a general contractor from tort liability to an employee of a subcontractor, made no reference to the calculation of workers compensation insurance premium. Although it is not directly pertinent to this matter (which does not involve employees of uninsured subcontractors), it should be noted that, contrary to the insured's suggestion, the rules of the WCRIB, consistent with Chapter 152, provide for an assessment of additional premium on a general contractor's policy when the GC hires uninsured subcontractors: "The contractor shall furnish satisfactory evidence that the subcontractor or independent contractor with employees had workers compensation insurance in force covering the work performed for the contractor. **For each such subcontractor or independent contractor for which such evidence is not furnished, additional premium shall be charged on the policy which insured the**

Travelers contends that GLM c. 152, § 18 is relevant to JFM's obligations in this instance, to the extent that the aforementioned "if any" policy it wrote for Mr. McMorrow broadens its exposure, were any, or all, of the erstwhile independent contractors to be found employees. [20]

B. <u>Presumption of Employment</u>:

A Massachusetts employer may rebut the statutory presumption that its worker is an employee by demonstrating how each worker meets all three elements to be an independent contractor as set forth in GLM c. 149, § 148B. 148B: [21]

> (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

---

contractor…" MASSACHUSETTS WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE MANUAL, Part 1, Rule IX.C.3. (Emphasis added.)

[20] CFM's position, as stated earlier, is that by casting such a large net without examining the circumstances of each individual worker, Travelers is using §18, and other justifications set forth above, to gouge him and to enrich themselves unjustly.

[21] JFM contends that this Wage Act standard applies only in matters taking place under GLM c. 149 and 151, not c. 152.This rigid, 3-part test is unlike the well-established IRS, FLSA, National Labor Relations Act ("NLRA") and state law tests, which have flexible criteria that must be balanced according to the circumstances of the work arrangement. Since the independent contractor tests contain "no shorthand formula or magic phrase that can be applied to find the answer, . . . all the incidents of the relationship must be assessed and weighed with no one factor being decisive." [Citations omitted.]. **In contrast, the Independent Contractor Law requires proof that the worker meets all 3 of its requirements. Otherwise the worker is deemed an employee for purposes of Massachusetts' worker's compensation and wage laws.** *Advisory from the Attorney General, Chapter 193 of the Acts of 2004*, at pp. 2-3. (Emphasis added.)

> **(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.**
>
> (c) **An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section**.[22]
>
> (d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. **Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152** and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having management of the corporation or entity shall be liable for violations of this section. (Emphasis added.)

Travelers moves from statutory recitation to statutory interpretation when it undergirds its conclusion that JFM's workers are employees [under GLM c. 149, §148B] via the *Advisory from the Attorney General, Chapter 193 of the Acts of 2004*, pp. 1-2:[23]

> The Independent Contractor Law creates a presumption that a work arrangement is an employer-employee relationship unless the party receiving the services can overcome the legal presumption of employment by establishing that three factors are

[22] The practice (and shortcomings) of requiring workers to obtain their own workers compensation insurance in order to create the appearance of independence was addressed in a 2004 Harvard study on employee misclassification in the Massachusetts construction industry, which noted:

> Sometimes, before workers can begin employment, employers require them to purchase their own workers' compensation and liability insurance coverage. They are expected to sign certificates of worker's compensation insurance and of liability insurance as well as various other waivers absolving the employer of obligations.

The Social and Economic Costs of Employee Misclassification in Construction, Construction Policy Research Center, Harvard Law School and Harvard School of Public Health (Dec. 2004), p.8 (available at www.law.harvard.edu/programs/ lwp/Misclassification%20Report.pdf).

[23] Available at www.ago.state.ma.us/filelibrary/Employee148BAdvisory.html.

> present. First, the worker must be free from the presumed employer's control and direction in performing the service, both under a contract and in fact. Second, the service provided by the worker must be outside the employer's usual course of business. And, third, the worker must be customarily engaged in an independent trade, occupation, profession or business of the same type.

Further, the Attorney General advises:

> An employer's failure to withhold taxes, contribute to unemployment compensation, or provide worker's compensation may not be considered when analyzing whether an employee has been appropriately classified as an employee or independent contractor. GLM c. 149, § 148B (b). Hence, an employer's subjective belief that a worker should be an independent contractor may have limited relevance under the Independent Contractor Law. Similarly, the amendments to the Independent Contractor Law deem irrelevant the status of a worker as a "sole proprietor or partnership," for the purpose of obtaining worker's compensation insurance. GLM c. 149, § 148B (c).

The elements of the statute are conjunctive. Although three must be met, the wording of each element is open to wide interpretation. The Appeal Court and the Supreme Judicial Court have not yet had the opportunity to opine on the particular statutory interpretation which this appeal may compel to be made.

a. The First Element: Freedom from Control and Direction:

The first element seeks to determine is whether a worker is free from the employer's control and direction, both under his "contract and in fact." The "right of control" is as ancient as the common law out of which it emerged. But, what do the words "under contract and in fact" mean? The Advisory interprets "contract" to be a *writing* on which two minds meet to describe a job and how the work gets done. The

"contract" provides that direction to a worker which substitutes for a supervisor's exercise of direction and control.[24]

Historically, the courts looked at whether there was a right of control, even if such right was not exercised. McDermott's Case, 283 Mass. 74 (1933). It is "highly persuasive" that the right of control exists when:

- payment based upon the time worked (e.g., hourly, monthly, weekly), as opposed to commission or by the job;
- the employer's provision of tools, equipment and/or materials, or reimbursement of the worker for same;
- the absolute right to terminate the relationship without liability, as opposed to the contractor's right to complete the project or sue for contract damages;
- whether the worker completes the job using his or her own approach without instruction, and also dictates the hours that he or she will work on the job. See MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992); Commonwealth v. Savage, 31 Mass. App. Ct. 714, 717-18 (1991); Brigham's Case, 348 Mass. 140, 141-42 (1964).

In all cases, "[t]he *right* of control is more determinative than its actual exercise. It is not necessary that the employer have control over every movement to find employee status." Dolbeare v. Merchants Home Delivery Service, Inc., 9 Mass. Workers' Comp. Rep. 812, 815 (1995) (emphasis in original)[25].

b. The Second Element: Service Performed outside Course of JFM's Usual Business

For the second element – i.e., the scope of the parties' respective services and businesses – the insurer cites that "a worker whose services form a regular and continuing

[24] To protect against abuse or over-reaching by employers, GLM c.152, §46 provides: "No agreement by any employee to waive his right to compensation shall be valid." Travelers contends the alleged independent contractor agreements are attempts by the insured to abridge the workers' compensation rights of employees. Query: are the Agreements JFM requires its workers to sign invalid under this section of the statute for their "waiving (their) right to compensation" thereby?

[25] In his March 23, 2005 brief, the insured cited the DIA Reviewing Board decision in Barrett v. D&P Contracting, Board Nos. 053705-96, 053338-96 (March 15, 2001) in support of his argument that his workers are independent contractors. However, the insured incorrectly stated that the Reviewing Board found the worker in Barrett to be an independent contractor. Rather, the Board merely vacated the decision of the administrative judge and remanded the matter for a new hearing on the worker's status.

part of the employer's business, and whose method of operation is not such an independent business that it forms in itself a separate route through which his costs of industrial accidents can be channeled, should be found to be an employee and not an independent contractor." MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 178 (1992) (citing 1 Larson, *Workmen's Compensation*, Desk Edition, § 43.50 at 8-10).[26]

In the MacTavish the "business operation" analysis as follows:

> Where the right of control is not clearly established by the primary facts of the case, the administrative judge must analyze whether the work is part of the employer's regular business operation, preliminary to it (such as obtaining raw materials), subsequent to the main job (such as selling and distribution), or otherwise ancillary to it (such as transportation, construction, repair, maintenance). Then the administrative judge must decide whether the work is being performed by an independent, separate business. In other words, the question becomes**: What is the economic reality? Is the worker operating a distinct business?** (6 Mass. Workers' Comp. Rep. at 180.) (Emphasis added)

The Supreme Judicial Court provides a prior analysis in McAllister's Case, 229 Mass. 193, 195 (1918), in which a journeyman paper hanger is injured while at work at the insured department store:

> [A]lthough the claimant testified that while at work "he was his own boss," his services manifestly formed part of the company's regular business conducted by itself, and the placing of the paper by his skill and labor inured to its benefit. The time and place of labor were not constant but were determined by the employer as required by the demands of customers. If while the work was in process dissatisfaction arose, or damage was being done, the customer would be obliged to resort not to him but to the company for further directions or redress. It cannot be said on

[26] A worker who performs the same type of work that is part of the normal service delivered by the employer may not be treated as an independent contractor. Attorney General's Advisory at p. 4 (citing Canning's Case, 283 Mass. 196 (1933) (pipe fitter hired to install steam pipes in employer's rug factory was engaged in the usual course of the employer's business, and therefore was an employee entitled to workers' compensation coverage).

> the record as matter of law, that the Industrial Accident Board was not warranted in finding that the parties never intended the claimant should have the absolute right to hang the paper when and as he pleased regardless of any supervision by the company, which alone would be responsible in damages for unperformed or imperfect work; and that whenever and wherever necessary the power to direct what should be done in satisfaction of the purchaser's contract, the parties contemplated and understood, was lodged with, or retained by the company, whose orders given through the foreman the claimant uniformly obeyed and executed.

The Internal Revenue Service guideline, I.R.S. Rev. Rule. 87-41, 1987-1 C.B. 296, concerning employees and independent contractors, is based on common law, and identifies twenty factors indicative of an employment relationship, including:

> 3. INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.[27]
>
> 4. SERVICES RENDERED PERSONALLY. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
>
> 6. CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. (Emphasis added.)[28]

[27] See also Boston Bicycle Couriers, Inc. v. DET, 56 Mass. App. Ct. 473, 483 (2002) (fact that courier service "could not operate" without delivery drivers, and that such drivers are an "integral part" of service's business, supported finding that service did not prove independent contractor exemption and that drivers were employees).

[28] A continuing or long-term relationship "denotes an employer-employee relationship as being more likely." Jones v. Brashears, 107 S.W.3d 441 (2003) (long-term relationship indicated where parties signed contract for period of one year).

c. The Third Element – Subcontractor Customarily Engaged in Independent Trade, Occupation, Profession or Business of Same Nature as Involved in Services Performed:

The Attorney General's Advisory provides a succinct description of factors to consider for the third element in GLM c. 149, § 148B:

> The worker must work routinely in an "independently established trade, occupation, profession or business." GLM c. 149, § 148B (a) (3). The particular service in question must be "similar in nature" to the "independently established trade, occupation, profession or business" of the worker. GLM c. 149, § 148B (a) (3). An independent contractor must represent him or herself to the public as "being in business to perform the same or similar services." IRS Revenue Ruling 87-41, Factor 12(c). Furthermore, an independent contractor often has a financial investment in a business that is related to the service he or she is currently performing for the employer. IRS Revenue Ruling 87-41, Factor 14. Ordinarily, an independent contractor has characteristics of an independent business enterprise. See *Fair Labor Standards Handbook*, Tab 200 ¶ 217, August 1998. Advisory pp. 4-5.

As the Appeals Court noted in Boston Bicycle Couriers, Inc. v. DET, 56 Mass. App. Ct. 473, 482 n.15 (2002), the "independent trade or business requirement seems to draw the line of demarcation on an economic basis, so as to include within the Act those who perform services for an entrepreneur and who are not themselves acting as entrepreneurs in that connection in the pursuit of an independently established business, trade, or profession." The Appeals Court ruled that a finding of employment was because the employer presented no evidence that the worker had provided services to anyone else during the relevant time period, "as would be expected of a true entrepreneur engaged in a permanent, lasting delivery services business." Id. at 481 n.14. [29]

[29] A most troubling unintended consequence of the employer's burden to prove that it independent contractor is not its employee comes when to obtain documentation to evidence the independence of the contractor the employer must invade the privacy of the contractor's business records such aswould demonstrate that the contractor received Form 1099s from third parties. JMF has offered to provide such 1099s for contractor John Chapman subsequent to the close of the record which, though relevant to the

B. Insured's Position:

1. Applicable Law and Contract Language

Travelers' position established, the insured puts a different spin on equivalent facts to reach a conclusion that these workers are independent contractors.

JFM cites Barrett v. D & P Contracting, 15 Mass. Workers' Comp. Rep. 94 (2001), a decision that comes close to finding a worker to be an independent contractor under the MacTavish analysis.[30] The Reviewing Board in Barrett, building on MacTavish,, states that a fact-finder must balance the following factors in making to determine whether a worker is an independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;

---

employer's case, are not admitted into evidence as Mr. Cjapman did not have the opportunity under oath to testify to their veracity.

[30] It uses the same criteria established in MacTavish (supra) to show the possibility that on remand an administrative judge might find Barrett to be an independent contractor. The Barrett Reviewing Board found "the judge's findings regarding the central issues of D&P's control and supervision are sparse" Id. at 99. Applying the foregoing criteria to the facts of the case, it found Barrett,, who was hired by D & P Contracting to perform roofing work, was an independent contractor. "We vacate the decision insofar as it concludes than an employer/employee relationship existed between D&P and the claimant."

(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

JFM maintains that the Barrett/McTavish standard (with no presumption of employment) the Department is likely to conclude that its workers are independent contractors, based on the testimony and documents JFM provided.

2. <u>The Rebuttable Presumption of Employment</u>

Mr. McMorrow urges us to set aside the presumption of employment of the Wage Act standards of GLM. c.149, §148B, and look to the affidavits, independent contractor agreements, and testimony of Mr. McMorrow for the answers under workers' compensation law:

a) JFM exercised no oversight over the details of the work performed, or otherwise supervised the worker.

b) Each worker operated his own business and was employed in a distinct business – as painters or carpenters -- from JFM, a contracting business.

c) Each worker, with rare exceptions, supplied his own tools.

d) Each person engaged by JFM worked sporadically, at most, and was free to decline any engagement.

e) Most workers were paid by the task.

f) Each worker provided a certificate indicating that they operated their own business and either maintained workers' compensation insurance or were exempt from doing so.

g) The parties intended to create an independent contracting relationship.

Notwithstanding his objection to GLM c. 149, §148B test, JFM contends that an analysis of the facts under its standards will yield the same positive result.

1. The First Element: Freedom from Control and Direction

JFM asserts he has no control ***or right to control*** any of the work performed by the subcontractors. The homeowner and/or prime contractor set the scope of the work to be performed. All fifteen subcontractors perform services without ***any*** supervision by JFM. Id. Each subcontractor uses his own skill and independent judgment when performing services. Id. Mr. McMorrow testifies that he does not know how to perform carpentry or siding work; therefore, he is incapable of directing the activities of carpenters, or of those installing siding. HT at 16 and 17. He did not and does not supervise, or have the right to supervise, details of work performed by painters. Id at 16. The independent contractors work so well he does not have to hire a "Contractor Executive Supervisor" as would be covered under his "if any" contract of insurance.

2. The Second Element -- Service Performed outside Usual Course of JFM's Business:

[31] JFM asserts that a "reasonable" interpretation of the meaning of "usual course" is that each subcontractor provides services outside of the usual course of JFM's business. JFM is engaged in the business of procuring home construction and renovation contracts. He is gets the jobs, staffs them with the appropriate independent contractors,

[31] As indicated above, the interpretation of this element [as promoted by Travelers by its reference to the Attorney General's Advisory and reliance on Canning's Case] is roundly criticized and rejected by Massachusetts Department of Revenue. Application of Travelers' interpretation of "usual course," the insured contends, defies a long-standing admonition of the Supreme Judicial Court that the definitional "words in the [worker's compensation] statute ***must be construed reasonably***." In re Howard, 218 Mass. 404, 408 (1914) (emphasis added).

and makes sure everyone gets paid. He does not engage in the vocations of painting, siding, carpentry, or construction supervisor. [32]

JFM argues that were the Department to apply GLM c. 149, §148B, a statute Mr. McMorrow believes is inapplicable to workers' compensation case, based on the adduced evidence that the fifteen subcontractors performed services outside of the usual course of JFM's contractor business. Tohold otherwise renders each and every employee of a subcontractor to be the employee of a prime contractor, thereby destroying the historical factual and distinction between employees and independent contractors.

3. Third Element --Subcontractor Customarily Engaged In Independent Trade, Occupation, Profession or Business of Same Nature as Involved in Services Performed

JFM maintains it has satisfied the third prong of the test set forth in GLM c. 149, §148B, that fifteen subcontractors are customarily engaged in an independent trades, occupations, professions or businesses, which constitute independent businesses qualitatively different from his sales and coordination contractor business. [FN 19.]Tradesmen work with their hands. Mr. McMorrow does not. He uses his construction experience, community networking, and sales skills to find work, rounds up independent contractors to do it, and makes sure everyone financial expectations are met. JFM

[32] To hold otherwise, he asserts, subjects makes every construction subcontract an engagement for employment, leading to ludicrous results. Under Travelers' interpretation, JFM hypothesizes, a worker may be an employee of Alpha Construction Company as a paving laborer. If Alpha Construction contracts with Beta Construction for a paving job on the Big Dig, and if Beta contracts, in turn, for construction services with Omega Construction, including paving services, and Omega Construction contracts with the Massachusetts Highway Department to serve as the Big Dig's prime contractor, ***that worker would be an employee of Alpha Construction, Beta Construction, Omega Construction, and the Massachusetts Highway Department***. [JFM claims this absurd result is what Travelers is advocating.]

concludes that each subcontractor believes he is creating an independent subcontracting relationship with JFM. [33]

VI. Discussion

"Are the workers for JMF independent contractors or employees?" The legal speculation above provided by the parties is reminiscent of the apocryphal someone who asked a passerby for the time, and instead was given a comprehensive lesson on how to build a watch, and a roadmap to Switzerland. We can cut to the chase and use both of the suggested standards to determine who is an employee and who is an independent contractor in relation to JFM Construction.

To use the MacTavish/Barrett criteria of workers' compensation law, we balance the factors determined to be significant by the Reviewing Board:

a) [**The extent of control which, by the agreement, the master may exercise over the details of the work**]; JFM in the written agreement it enters into with each contractor states the intent that the "master" have no control over the work of the "servant."
b) [**Whether or not the one employed is engaged in a distinct occupation or business**]; Each worker is engaged in a "distinct occupation or business" as a sider, a painter, and a carpenter who are in different, ell established trades.
c) [**The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision**]; In the home improvement marketplace there is scant need for supervision; the nature of the work is such that a homeowner can perform it should s/he choose; e.g. there are numerous self-help videos, books, websites, pamphlets and television programs on how to make home improvements performed

[33] The two who still perform occasional work with JFM – James Semos and John Chapman – submit affidavits in which each verify that he has worked as an independent contractor with JFM, and "own[s] and operate[s] my own business." Affidavits at ¶ 2. Each also indicates that he is "responsible for hiring, supervising and paying my own assistants . . . [and is] free to work for any contractor I please." Affidavits at ¶¶ 6 and 7. Three of the subcontractors who had performed services for JFM in the past and whom Travelers claims are JFM employees – Sean Hanafin, Gary Souza and Reynald Lins – have employees working in the course of their business. HT at 60-61. Only five derived substantial income from working with JFM during the audit year.

by JFM's subcontractors; these are labor-intensive jobs which homeowners may not have the time, patience, or aptitude to perform.

d) [**The skill required in the particular occupation**]; Painting, carpentry, siding require skills the average worker can do by him or herself after they have done a job once with guidance; none of the CFM workers is a tyro.
e) [**Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work**]; JFM retains the right to supply equipment, but testifies that usual practice is for workers to bring their own tools to the job.
f) [**The length of time for which the person is employed**]; Nothing indicates any exclusive, year-long employment of the subcontractors with JFM during the policy periods, rather, short-in-duration "jobs" are done sporadically;
g) [**The method of payment, whether by the time or by the job]**; Travelers auditor found payment for the work done was by the hour; however, did not provide testimony from anyone with first-hand knowledge as to how the auditor arrived at an opinion about the method of payment which contradicts sworn testimony; Mr. McMorrow testified under oath that worker are paid primarily by the job, and that on occasion, for reasons stated, an independent contractor is paid by the hour extra work unanticipated when the sub contractor bid the job.
h) [**Whether or not the work is a part of the regular business of the employer**]; The employer is a contractor; he is not a painter, carpenter, or sider; independent contractors routinely provide services to one general contractor such as JFM, then proceed to perform similar services for other general contractors.
i) [**Whether or not the parties believe they are creating the relation of master and servant; and**] The independent contractor agreement referenced earlier evidences this intent.

Following the direction of the Reviewing Board in Barrett, and building on MacTavish, the next step is for JFM to rebut the statutory presumption that its workers are employees by demonstrating how each sub-contractor meets all three statutory elements of the independent contractor status as set forth in GLM c. 149, § 148B.

1. [**The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and**] The independent contractor agreement each

employee enters into with JFM memorializes the intent that such employee in free from control and direction; no one on behalf of the insurer testified to their direct knowledge that Mr. McMorrow controlled or directed his workers in contravention of the agreement.

2. **[The service is performed outside the usual course of the business of the employer; and]** While it is true that JFM's remuneration as a contractor is an aggregate of the income provided by customers' remuneration for services rendered by the respective workers, it also is true that the workers are free to contact with other contractors and homeowners to perform similar work as independent contractors in the field of their particular specialty; homeowners and home improvement contractors are not in the same business, yet they can contract with the same independent contractor for the same services.
3. **[The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.]** These tradesmen are free to work for whomever they choose; they do not earn enough money from JFM to live on; economic reality dictates that these tradesmen have to work for others to earn enough to survive; JFM maintains that it is not its place to demand Form 1099s from its independent contractors just to prove that they have other contractors for whom they work.

When we balance the factors under workers' compensation law, and continue our analysis under the three criteria under GLM. c149, 148B, we arrive at a conclusion.

VII. Decision

Travelers contends GLM. c. 152 "is to be interpreted in the light of its purpose and, so far as may be, to promote the accomplishment of its beneficent design" to protect the "health, safety and welfare of employees." Neff v. Comm'r of Dept. of Industrial Accidents, 421 Mass. 70, 73 (1995); GLM. c. 152, § 25A. The Supreme Judicial Court

stated, "[t]he workmen's compensation act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718, 719 (1951).

We agree.

These workers exist among a loose confederacy of independent contractors with no predominate business allegiance to a controlling employer or employers. Our determination of their status as employee or independent contractor is fact-driven. The matter at bar is of a small businessman, working as a contractor, who is trying to do the right thing. Mr. McMorrow has workers' compensation, and his "if any" policy provides coverage for his employees, should he have any. He is a sole proprietor who does not need workers' compensation on himself, but who finds he needs to carry the coverage [memorialized in the three subject policies] in order to obtain home remodeling business.

Although Mr. McMorrow may someday aspire to become a contractor with employees, Travelers provides no credible no evidence that he sustains such a payroll today. To perform the business of JFM Construction, Mr. McMorrow enters into separate contracts with independent contractors who have the availability and skills appropriate to perform unsupervised the work each job requires.[34] Therefore, there is no greater exposure to risk for Zurich-American (Travelers) with respect to the policies issued to Mr. McMorrow (d.b.a. JFM Construction) than anticipated at the time they were written.

VIII. Holding:

Whereas the Department finds that no witnesses for the insurer testified from first-hand knowledge of how the conclusions of the audit of 07/23/04 were reached; that

[34] Travelers' auditor found all of these workers to be covered by their individual "if any" workers' compensation policies. Sean Hanafin, Gary Souza, and Reynald Lins, who performed services for JFM in the past, each have employees working in the course of their businesses. These individuals' "if any" policies provided workers' compensation benefits to their employees.

Mr. McMorrow provided credible first-hand testimony that these workers are independent contractors paid by the job [and, sometimes, by the hour]; that the weight of the analysis under both the MacTavish/Barrett test of workers' compensation case law, and the conjoined elements of the GLM c. 149, §148B test, leads the Department to conclude that the subject workers intended to create an independent contractor relationship with JFM; and, that it is in this capacity of "independent contractor" that the fifteen workers have functioned during the policy periods in question.

The Appeal of the insured is GRANTED.

The Department finds that the insured, JFM Construction, owes no additional premium to American-Zurich (Travelers) for the three policies central to this Appeal. The Department orders the insurer forthwith to square its accounts with the insured consonant with this decision, and to provide a written report to the Department on its compliance with this order within thirty (30) days from the issuance this decision

Further appeal of the decision of the Department may be taken to the Superior Court for the County of Suffolk.

For the Department, this Twelfth Day of July, 2005.

Douglas W. Sears, Esq.
Hearing Officer