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

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RAINBOW DEVELOPMENT, LLC
d/b/a/ AUTO SHINE, Employer

LIBERTY MUTUAL
INSURANCE GROUP, Insurer

WC131S319439019; WC131S319438010; WC131S319438011
WC131S319438012 Cancelled 07/31/03
WC531S319438023 Cancelled: 10/04/03

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APPEARANCES

Mark Bendlock	Employer
Attorney Robert Kraus	For Employer
Timothy Watterson	For Insurer

MEMORANDUM OF DECISION

APPEAL PROCEEDING PURSUANT TO GLM c. 152, §65B

I. Introduction

On 07/13/03 and on 10/04/03 Liberty Mutual cancelled the above-captioned workers' compensation policies of Rainbow Development, LLC d/b/a Auto Shine (hereafter, "Auto Shine"). On May 12, 2004, Mark Bendlock, company President, appealed to the Commissioner "for a hearing to determine if our independent contractors are indeed subcontractors as Liberty Mutual states, or are they considered independent contractors and not calculated in our workers' compensation

premium." A hearing pursuant to GLM c. 152, §65B took place at the Boston Office of the Department on June 29, September 7, and November 22, 2004. A transcript of each session in the case file.

II. Facts

The relationship between Auto Shine, and those who provide services on its behalf, is specified in a four-page document, which all prospective hires must sign.[i] (Tr.11/22/04 p.7,11) This "Independent Contractor Agreement" (hereafter "Agreement") establishes the intent that each hire is to be an independent contractor. The terms set out the mutual agreements between Auto Shine and those who provide services. A review of the terms of the Agreement is helpful to determine the workers' compensation status of those workers who had to sign it before they went to work for Auto Shine.

III. **The Agreement**:

The Agreement specifies that Auto Shine's business is to provide motor vehicle cleaning, paintless dent removal, and bumper refinishing at various automobile dealership lots in the Commonwealth (par.1). [Workers provide no services at the employer's premises at 12 Henry St. Brockton.] Workers provide their own tools and supplies; however," (a)ny cleaning agents and chemicals" used in fulfilling the contracted service are subject to Auto Shine's approval. (par.3), and "(a)mounts unpaid for materials purchased from (Auto Shine) may be set against amounts due … from (Auto Shine)" (par. 10).

For compensation, each worker submits a written invoice weekly. Auto Shine pays the workers from 35% to 50% of the dollar value of the service rendered. (Tr. 11/22/04, pp.14,19,20). The company "in its discretion, and for its convenience, lumps together payments due … at intervals of its choosing provided that all payments due … shall be made

within 30 days of the performance of services" (par. 11, K). The employer does not directly oversee the work.

Auto Shine's only business is to provide the services its workers perform under the Agreement whose pertinent paragraphs read as follows:

Paragraph 4. Federal, State, and Local Payroll Taxes: "Neither federal, nor state, nor local income tax, nor payroll tax of any kind shall be withheld or paid by Rainbow Development, LLC on behalf of the Independent Contractor. The Independent Contractor shall not be treated as employee with respect to the services performed hereunder for federal or state purposes."

Paragraph 5. Tax Duties and Liabilities: "The Independent Contractor understands that they Independent Contractor are responsible to pay, according to the law, the Independent Contractor's income tax. If the Independent Contractor is not a corporation, the Independent Contractor further understands that the Independent Contractor may be liable for self-employment (social security) tax, to be paid by the Independent Contractor according to law."

Paragraph 6. Fringe Benefits: "Because the Independent Contractor is engaged in the Independent Contractor's own independently established business, the Independent Contractor' is not eligible for, and shall not participate in, any pension, health or other fringe benefit plan, of Rainbow Development, LLC."

Paragraph 7. Insurance Workers Compensation: "No worker's Compensation insurance shall be obtained by Rainbow Development, LLC concerning the Independent Contractor or the employees of the Independent Contractor. The Independent Contractor shall provide to

Rainbow Development, LLC a certificate on Insurance and workers compensation. If the Independent Contractor shall fail to so provide evidence of workers compensation coverage, Rainbow Development shall purchase said coverage and charge the Independent Contractor the rate of 5.2 % thereof." (Tr. 11/22/04 pp.39, 39,40)

Paragraph 11 (E). Relationship between Rainbow Development, LLC and the Independent Contractor: "This Agreement shall not constitute an employment or any other continuing relationship between Rainbow Development, LLC and the Independent Contractor. The sole relationship between the parties hereunder shall be that of independent contracting parties."

IV. ARGUMENT:

As the above paragraphs make it clear that Auto Shine intends to use the Agreement to document its contention that its workers are "independent contractors" when and if challenged, we turn to an examination of whether workers who labor under its terms are "independent contractors" or "employees" under GLM c. 152, §18, and GLM c. 149, §148. (Tr. 11/22/04, p.11)

Auto Shine's basic argument is that work performed by the purported independent contractors hired to clean and detail automobiles is done away from the business premises; that Auto Shine does not direct and control the activities of the workers; and payments made to these workers should not be included in Auto Shine's workers' compensation insurance premium determination.

Paragraph 7. is paradoxical. (Tr. 11/22/04 pp. 38,39,40,41)

On the one hand Auto Shine declares that it is not obliged to "obtain" workers' compensation coverage for the workers; on the other, it states that if the workers are not covered by their own policies, Auto Shine "shall purchase said coverage and charge the Independent Contractor the rate of 5.2% thereof."

Under the Agreement, not only does Auto Shine promise to purchase workers' compensation coverage for any worker who needs it, but it also has a mechanism in place to recoup the workers' compensation premium costs from the insured worker's paycheck. Therefore, if this Agreement reflects the practice of Auto Shine, as appellant's testimony claims that it does, Liberty's audit would not have found any uninsured workers. (Tr. 11/22/04 p.46) That Liberty cannot find workers' compensation coverage for the workers covered in the audit does not bode well for Auto Shine. (Tr. 11/22/04 p.44)

V. CONCLUSION

GLM c. 149, §148 sets the context for the conclusion we reach.[ii] The facts indicate that Auto Shine's hiring and business practices, as they appear in the Agreement, are not substantiated by its business track record. Liberty's audit found Auto Shine's workers were neither covered by Auto Shine's workers' compensation insurance, nor by the workers' own policies.

We find these facts to be true.

Fitting the facts to the law, it is apparent that not only is Auto Shine in breach of its Agreement with its workers, it also is in violation of GLM c. 152, §18, which states in pertinent part:

> If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons.

The Agreement, standing alone, has no effect on relieving Auto Shine of its obligation to cover its workers with workers' compensation insurance under GLM c. 152, sec. 18. Bottom line: were Auto Shine to

have employees, they would perform the same services as those whom the Agreement terms as "independent contractors." The only "business" Auto Shine does is to provide its customers with the services that these employees perform.

The intent behind Auto Shine's producing the Agreement appears to be to create a ruse to circumvent its obligations to provide workers' compensation insurance coverage to its workers. This practice contravenes the overall intent of GLM c. 152, and portends to bring this infraction under the regulatory scrutiny of GLM c. 149, § 148B (3)(d):

> 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 the management of the corporation or entity shall be liable for violations of this section.

The services these workers provide are essential to the usual business of Auto Shine; therefore, they are "employees" under GLM c. 149, § 148B(2). These workers are not "exempt" as are those who provide services "outside of the usual course of the business of the employer." For example, were the same workers to perform these same services directly for an automobile dealer – and not go through a "middleman" such as Auto Shine -- that automobile dealer would have a stronger argument, than does Auto Shine, to support an "employer / independent contractor" relationship with them. (Tr. 11/22/04 p.52). Because Auto Shine's only business is to provide the services these workers render Auto Shine's customer, the relationship between employer and worker is most properly characterized as "employer / employee."

We conclude that Auto Shine's workers are "employees" whose remuneration Liberty can appropriately calculate into Auto Shine's workers' compensation premium.

The appeal is **Denied**.

Further appeal of this decision of the Department may be taken to the superior court for the county of Suffolk.

Respectfully submitted, this 5th day of January 2005.
Department of Industrial Accidents

Douglas W. Sears, Esq.
Hearing Officer

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[i] The full text of the Independent Contractor Agreement is appended.

[ii] Section 148B. (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.
(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.
(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 the management of the corporation or entity shall be liable for violations of this section.
(e) Nothing in this section shall limit the availability of other remedies at law or in equity.