

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LABOR AND)
EMPLOYMENT SECURITY, DIVISION)
OF WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 99-2048
)
EASTERN PERSONNEL SERVICES,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case by video teleconference on August 17, 1999, before the Division of Administrative Hearings, by its Administrative Law Judge, Suzanne F. Hood. The Administrative Law Judge was located in Tallahassee, Florida. The parties and witnesses were located in Jacksonville, Florida.

APPEARANCES

For Petitioner: David C. Hawkins, Esquire
Department of Labor and
Employment Security
Suite 307, Hartman Building
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

For Respondent: Paul L. Day, pro se
Eastern Personnel Services, Inc.
Building Three
7373 Hodgson Memorial Drive
Savannah, Georgia 31406

STATEMENT OF THE ISSUES

The issues are whether Respondent violated Sections 440.10 and 440.38, Florida Statutes (1997), by not securing workers' compensation insurance for its Florida employees; and if so, whether Petitioner properly issued a Stop Work Order and assessed civil penalties pursuant to Sections 440.107(5) and 440.107(7), Florida Statutes (Supp. 1998).

PRELIMINARY STATEMENT

On March 2, 1999, Petitioner Department of Labor and Employment Security, Division of Workers' Compensation (Petitioner), issued a Stop Work Order directing Respondent Eastern Personnel Services, Inc. (Respondent) to shut down its operation at a construction site located on Amelia Island, Florida. Petitioner issued the Stop Work Order due to Respondent's failure to secure workers' compensation insurance pursuant to Sections 440.10 and 440.38, Florida Statutes. In conjunction with the Stop Work Order, Petitioner assessed a civil penalty in the amount of \$100 against Respondent pursuant to Section 440.107, Florida Statutes.

On March 2, 1999, Petitioner issued a Request for Business Records pursuant to Section 440.107, Florida Statutes. The Request for Business Records directed Respondent to furnish Petitioner with certain records on or before March 4, 1999. Respondent did not comply with the request.

Petitioner issued a Notice and Penalty Assessment Order dated March 31, 1999, assessing an administrative penalty against Respondent in the amount of \$93,492. Petitioner issued the Notice and Penalty Assessment Order based on the amount of Respondent's evaded workers' compensation insurance premium pursuant to Section 440.107, Florida Statutes.

On or about April 20, 1999, Respondent filed a Petition for Formal Hearing or Request for Review with Petitioner. Petitioner referred Respondent's hearing request to the Division of Administrative Hearings on May 4, 1999.

The parties filed a Joint Response to Initial Order on May 12, 1999. On May 17, 1999, the undersigned issued a Notice of Hearing by Video Teleconference, scheduling this matter for formal hearing on August 17, 1999.

On June 16, 1999, Petitioner filed a Notice of Service of Division's Request for Admissions, First Set of Interrogatories, and of Request for Production of Documents. Respondent's responses to these discovery requests were due on or before July 21, 1999, pursuant to Rules 1.340(a), 1.350(b), and 1.370(a), Florida Rules of Civil Procedure. Respondent did not respond to Petitioner's discovery requests.

On or about July 22, 1999, Petitioner served Respondent with a copy of a proposed motion for order to compel discovery, together with a cover letter. The cover letter requested Respondent's immediate response or objection to the above-

referenced discovery requests. Petitioner received no response to its July 22, 1999, letter.

On July 28, 1999, Petitioner filed Division's Motion for Order to Compel Discovery. Specifically, the motion sought to compel responses to the following: (a) Division's First Set of Interrogatories; (b) Division's Request for Production of Documents; and (c) Division's Request for Admissions.

On July 29, 1999, Petitioner filed notices that it intended to take the depositions of Linda Burtchett and Stanley Benner. Petitioner served these notices on Respondent by Federal Express, Overnight Delivery, that same day.

The undersigned heard oral argument on Petitioner's Motion for Order to Compel Discovery in a telephone conference on August 3, 1999. During the conference, the undersigned directed Respondent to respond to Petitioner's discovery requests on or before August 6, 1999. Respondent indicated that he would respond as directed. The undersigned also advised both parties that they were required to exchange exhibits with each other, and to file with the undersigned, copies of any exhibits that they intended to present as evidence on or before August 12, 1999. These rulings were memorialized in an Order Granting Motion to Compel and Setting Forth Pre-hearing Instructions dated August 4, 1999.

On August 8, 1999, Petitioner took the deposition of Linda Burtchett in Casselberry, Florida. Respondent did not make an appearance at the deposition.

On August 10, 1999, Petitioner filed a notice that it would take the deposition of Nora O'Connell. This notice was served on Respondent by facsimile transmission that same day.

On August 11, 1999, Petitioner filed Division's Motion for Order Imposing Sanctions for Discovery Violations by Eastern Personnel Services, Inc. This motion sought sanctions against Respondent due to its failure to furnish Petitioner with responses to discovery requests as required by the undersigned's order granting the above-referenced motion to compel.

Respondent's responses to Petitioner's First Set of Interrogatories and Requests for Admissions were attached to the Division's Motion for Order imposing Sanctions for Discovery Violations by Eastern Personnel Services, Inc. However, Respondent's discovery responses did not include the production of documents pursuant to Petitioner's Request for Production of Documents. Specifically, Respondent failed to provide Petitioner with the following documents: (a) workers' compensation insurance policy(s), including declarations and endorsements; (b) payroll records; (c) proposed hearing exhibits; (d) documents used in responding to interrogatories; (e) documents referenced in answers to interrogatories; and (f) documents in support of any allegation contained in the Petition for Formal Hearing.

On August 11, 1999, Petitioner took the deposition of Stanley Benner. Mr. Benner and the court reporter were located in Jacksonville, Florida. Petitioner and Respondent participated in the deposition by telephone.

On August 12, 1999, Petitioner took the deposition of Nora O'Connell. Ms. O'Connell and the court reporter were located in Jacksonville, Florida. Petitioner and Respondent participated in the deposition by telephone.

On August 12, 1999, Petitioner filed a Notice of Filing Division's Exhibits, List of Exhibits, and List of Witnesses. This notice stated, in part, that Petitioner intended to rely upon the testimony of Linda Burtchett (via deposition), Stanley Benner (via deposition), and Nora O'Connell (live and via deposition). A copy of Ms. Burtchett's deposition was included with Petitioner's pre-filed exhibits as Exhibit 9. Petitioner's List of Exhibits indicated that Petitioner was awaiting receipt of the deposition transcripts of Stanley Benner (Exhibit 10) and Nora O'Connell (Exhibit 11).

On August 13, 1999, by facsimile transmission, Respondent provided Petitioner with additional responses to Petitioner's discovery requests. The documents produced did not include Respondent's proposed hearing exhibits.

On August 13, 1999, Petitioner filed an Amended Notice of Filing Exhibits, List of Exhibits, and List of Witnesses. This amended notice stated that, in addition to the exhibits filed the

day before, Petitioner was filing copies of the deposition of Stanley M. Benner as Exhibit 10 and the deposition of Nora O'Connell as Exhibit 11, both of which were received by Petitioner on August 13, 1999. The amended notice also states that Petitioner was filing a copy of Respondent's discovery responses as Exhibit 13.

On August 16, 1999, Petitioner filed a Second Amended Notice of filing Division's Exhibits, List of Exhibits, and List of Witnesses. The second amended notice stated that Petitioner was filing a second copy of Ms. O'Connell's deposition as Exhibit 11 due to the inadvertent omission of three pages of the deposition transcript during the photocopying process.

On August 16, 1999, Respondent furnished Petitioner with a facsimile transmission in response to prior discovery requests. The transmittal letter represented for the first time that Respondent did not have employees at the Foley & Associates construction site before the second quarter in 1998.

On August 16, 1999, Respondent furnished the undersigned and Petitioner with copies of 6 exhibits by facsimile transmission. Respondent's cover letter dated August 13, 1999, states that Respondent intended to present the 6 exhibits as evidence at the hearing. The 6 exhibits included the following: (a) a letter dated August 9, 1999, from Stanley Benner's attorney relative to Mr. Benner's claim against Respondent for an alleged workers' compensation injury that occurred on November 9, 1998; (b) a

Georgia State Board of Workers' Compensation form entitled Employer's First Report of Injury or Occupational Disease relative to an alleged January 18, 1999, injury of Linda Rix in Fernandina, Florida, listing Respondent as employer; (c) a Certificate of Insurance representing that Respondent had workers' compensation insurance in Florida, Georgia, and South Carolina with Safeco Insurance Company of America, from December 29, 1998, through December 29, 1999, covering employees provided to Saxon & Associates; (d) a Notice of Class Code Approval form dated March 2, 1999, indicating that Class Code 8227 was approved for Respondent's Safeco Insurance Company of America policy number 7260735 and including coverage in Florida for employees provided to Foley & Associates; (e) a Workers' Compensation Change Endorsement, issued on March 16, 1999, relative to Safeco Insurance Company of America policy number WC7260735, representing that Respondent had workers' compensation insurance in Florida effective December 29, 1998, through December 29, 1999; and (f) a memorandum prepared by Respondent to show the amount of its lost billing and lost gross profits since March 2, 1999.

At the hearing on August 17, 1999, Petitioner presented the testimony of 3 witnesses. Petitioner also offered 14 exhibits, which were accepted into evidence.

Respondent presented the testimony of 1 witness. Respondent also offered the above-referenced 6 exhibits, which were not accepted in evidence.

The undersigned granted Petitioner's Renewed Motion for Order Imposing Sanctions for Discovery Violations by Eastern Personnel Services, Inc., ore tenus, by excluding Respondent's exhibits for several reasons. First, Respondent failed to provide responses to any of Petitioner's discovery requests until after the August 3, 1999, telephone conference. Second, Respondent failed to comply in a complete and/or timely fashion to the undersigned's Order Granting Motion to Compel and Setting Forth Pre-hearing Instructions. Finally, Respondent's failure to disclose his exhibits until the day before the hearing left Petitioner with no opportunity to question Linda Burtchett regarding inconsistencies between her testimony, as the authorized representative of Safeco Insurance Company of America, and the offered exhibits.

The court reporter filed a copy of the hearing Transcript on September 7, 1999. The parties' proposed recommended orders were due to be filed ten days thereafter.

On September 10, 1999, the court reporter filed a copy of Petitioner's Exhibit 14. This exhibit, which should have been attached to the original Transcript, was Petitioner's rebuttal evidence to Respondent's representation on August 16, 1999, that

Respondent did not have employees at the Foley & Associates construction site before the second quarter of 1998.

On September 15, 1999, Respondent filed an ex parte letter. Respondent's letter requested an extension of time in which to file a proposed recommended order due to complications associated with a forced hurricane evacuation in Savannah, Georgia.

On September 16, 1999, the undersigned issued an Order Granting Extension of Time to File Proposed Recommended Orders. That same day, the undersigned issued a Notice of Ex Parte Communication, publishing Respondent's letter.

On September 21, 1999, the undersigned issued an Amended Order Granting Extension of Time to File Proposed Recommended Orders. Said order advised the parties that proposed recommended orders were due to be filed on September 24, 1999.

Respondent filed its Proposed Recommended Order on September 22, 1999. Petitioner filed its Proposed Recommended Order on September 23, 1999.

FINDINGS OF FACT

1. Petitioner is the state agency that is charged with the responsibility of enforcing the statutory requirements for employers to provide their employees with workers' compensation coverage.

2. Respondent is a business, located in Savannah, Georgia, that supplies workers on a temporary basis to client businesses. The services that Respondent provides to its client businesses

include the payment of payroll, taxes, and workers' compensation insurance for the temporary employees.

3. American Interstate Insurance Company (AIIC) provided Eastern Personnel Services II, Federal Employers Identification Number (FEIN) 58-2340211, with workers' compensation insurance from November 18, 1997, through November 18, 1998, in the state of Georgia. AIIC's policy number 97WAGA1109996 did not provide coverage for any of Respondent's workers in Florida. AIIC is not authorized in Florida to write insurance for an employer with Respondent's assigned risk classification.

4. Safeco Insurance Company of America (SICA) provided Respondent, FEIN 58-2340211, with workers' compensation insurance from December 29, 1998, through December 29, 1999, in the states of Georgia and South Carolina only. SICA's policy number WC7260735 as originally drafted, and as it existed on March 2, 1999, did not provide coverage for any workers in Florida.

5. Paul Day is Respondent's president and sole officer and shareholder. He is also the owner of Eastern Personnel Services II, a sole proprietorship. According to AIIC's and SICA's insurance policies, both entities have the same FEIN.

6. The record here indicates that there is no substantive difference between Respondent and Eastern Personnel Services II. Respondent's testimony to the contrary is not persuasive. 1/
For all practical purposes, Respondent and Eastern Personnel

Services II were under the exclusive management and control of Mr. Day at all relevant times.

7. Beginning as early as August 28, 1997 and continuing through March 2, 1999, Respondent provided employees to Foley & Associates Construction Co., Inc. (Foley) at one or more work sites on Amelia Island, Florida. Respondent did not secure workers' compensation insurance for these workers.

8. Stanley Benner was one of the first of Respondent's employees to begin working at Foley's Amelia Island job site. On November 9, 1998, Mr. Benner was injured while working for Respondent.

9. Mr. Benner filed a workers' compensation claim against Respondent and AIIC seeking compensation for his injuries. He subsequently learned that AIIC did not provide workers' compensation insurance for Respondent in Florida. Mr. Benner has received no compensation from Respondent or any insurance carrier for his work-related injury.

10. On March 2, 1999, Mr. Benner's attorney filed a complaint with Petitioner regarding Respondent's lack of workers' compensation coverage. Robert Lambert, Petitioner's investigator immediately went to Foley's job site to investigate the complaint.

11. Upon his arrival at the construction site, Mr. Lambert learned that Respondent had 21 employees performing general contract labor for Foley that day. Foley's office manager

informed Mr. Lambert that Respondent had provided Foley with between 15 and 20 laborers per day for one year.

12. Next, Mr. Lambert called Mr. Day who provided a certificate of insurance from SICA by facsimile transmission. However, the certificate listed Saxon and Associates, a business located in Georgia, as the certificate holder. It did not reference coverage for employees provided to Foley in Florida.

13. Mr. Lambert then called Linda Burtchett of HGI, Inc. She is an insurance agent and the authorized representative of SICA. HGI, Inc. is the producer of SICA's policy number WC7260735.

14. Ms. Burtchett informed Mr. Lambert that SICA's policy number WC7260735 did not cover Respondent's employees in the state of Florida. To her knowledge, Respondent had never reported any wages on a Florida payroll.

15. Mr. Lambert issued a Stop Work Order dated March 2, 1999. The Stop Work Order required Respondent to immediately cease all work at the Foley construction site. It advised Respondent that a civil penalty in the amount of \$100 would be assessed for each day that it failed to provide the required workers' compensation coverage.

16. Later on March 2, 1999, Respondent requested HGI, Inc. to provide coverage for its Florida employees working at the Foley job site under SICA's policy number WC7260735. HGI, Inc. complied with Respondent's request. Accordingly, Petitioner

correctly assessed Respondent with a civil penalty in the amount of \$100 in conjunction with the Stop Work Order.

17. Mr. Day testified that the endorsement to the SICA policy provided coverage for Respondent's Florida employees retroactive to September 29, 1998. He also testified that another of Respondent's Florida employees was injured at the Foley construction site on January 18, 1999, and received compensation under the SICA policy. Mr. Day's testimony is not credited in light of Ms. Burtchett's testimony.

18. On March 2, 1999, Petitioner informally requested Respondent to provide business records to establish the value of its Florida payroll during the three years before Petitioner issued the Stop Work Order. Respondent refused to provide Petitioner with any payroll records.

19. Petitioner obtained records maintained by Foley regarding Respondent's employment activities at the Amelia Island job site. Foley's records showed the number of employees that Respondent employed, the number of hours worked by each employee, and their hourly rate of pay. Respondent admitted and Foley's records confirmed that Respondent's payroll at the Foley construction site was \$209,249.86 between January 5, 1998 and March 1, 1999.

20. The National Council of Compensation Insurance (NCCI) classifies Respondent as a temporary labor service. According to the NCCI, the employment activities conducted by Respondent's

employees at the Foley construction site have an assigned insurance premium rate in the conservative amount of \$22.34 for each \$100 of payroll. Therefore, Respondent's evaded insurance premium on a payroll of \$209,249.86 is \$46,746.

21. The administrative penalty is twice the evaded premium of \$46,746 or \$93,492. On March 31, Petitioner properly issued a Notice and Penalty Assessment Order requiring Respondent to pay an administrative penalty in the amount of \$93,492.

22. Respondent's untimely discovery responses indicated that its Florida payroll was \$196,701.62 in 1998 and \$65,165.36 in 1999. Petitioner could have assessed Respondent with an administrative penalty in the amount of \$115,743.26.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

24. Petitioner must prove by a preponderance of the evidence that Respondent failed to provide his Florida employees with workers' compensation insurance and that the civil and administrative penalties assessed are correct. Department of Labor and Employment Security, Division of Workers' Compensation v. Patrick Jackey, d/b/a Bert's World of Color, DOAH Case No. 98-2496 (Recommended Order December 4, 1998)(Although violations of Chapter 440, Florida Statutes, can result in a substantial

fine, which may even render an employer insolvent, the employer nonetheless does not have a license or property interest at stake so as to raise the standard of proof to clear and convincing evidence).

25. Every employer is required to secure the payment of compensation for the benefit of its employees. Sections 440.10(1)(a) and 440.38, Florida Statutes (1997).

26. Respondent is an employer as defined by Section 440.02(14), Florida Statutes (1997). Beginning as early as August 1997 and continuing through March 2, 1999, Respondent was engaged in activities of employment as that term is defined in Section 440.02(15), Florida Statutes (1997).

27. Petitioner has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. Section 440.107(1), Florida Statutes (Supp. 1998).

28. Section 440.107(5), Florida Statutes (Supp. 1998), states as follows:

(5) Whenever the division determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to do so, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify sever by the division of a stop-work order on the employer, requiring the cessation of all business operation at the place of employment or job site. The order shall take effect upon the date of service upon the employer, unless the employer provides evidence satisfactory to the division of having secured any necessary insurance or self-insurance and pays a civil penalty to the

division, to be deposited by the division into the Workers' Compensation Administration Trust Fund, in the amount of \$100 per day for each day the employer was not in compliance with this chapter.

29. Section 440.107(7), Florida Statutes (Supp. 1998), states as follows:

(7) In addition to any penalty, stop-work order, or injunction, the division may assess against any employer, who has failed to secure the payment of compensation as required by this chapter, a penalty in the amount of:

(a) Twice the amount the employer would have paid during periods it illegally failed to secure the payment of compensation in the preceding 3-year period based on the employer's payroll during the preceding 3-year period; or

(b) One thousand dollars, whichever is greater.

Any penalty assessed under this subsection is due within 30 days after the date on which the employer is notified, except that, if the division has posted a stop-work order or obtained injunctive relief against the employer, payment is due, in addition to those conditions set forth in this section, as a condition to relief from a stop-work order or an injunction. Interest shall accrue on amount not paid when due at the rate of 1 percent per month.

30. Section 440.107(2), Florida Statutes (Supp. 1998) requires employers to keep business records to enable Petitioner to determine whether employers have complied with the workers' compensation law. Because Respondent refused to provide those records pursuant to Petitioner's request on March 2, 1999, Petitioner had to base its Notice and Penalty Assessment Order on examination of records provided by Foley.

31. Respondent's failure to have workers' compensation insurance in place when Petitioner's investigator arrived at the Foley construction site on March 2, 1999, violated the workers' compensation law. Petitioner properly issued a Stop Work Order and correctly assessed a \$100 civil penalty.

32. Respondent failed to carry workers' compensation insurance in the three years preceding March 2, 1999, during which period Respondent had a Florida payroll of at least \$209,249. Based on that payroll, Petitioner properly issued a Notice and Assessment of Penalty Order and assessed an administrative penalty in the amount of \$93,492. In retrospect, Petitioner's penalty assessments are conservatively imposed.

33. It is not a defense to the issuance of the Stop Work Order or the Notice and Penalty Assessment Order and associated penalties, that Respondent obtained workers' compensation coverage for its employees after Petitioner's investigator visited the work site and correctly determined that Respondent was not in compliance with the law. Respondent could not evade its responsibilities under the law even if it had secured retroactive coverage for its Florida employees.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That Petitioner enter a final order affirming the Stop Work Order and Notice and Penalty Assessment Order with their associated penalties, plus any lawful interest.

DONE AND ENTERED this 12th day of October, 1999, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 1999.

ENDNOTE

1/ Mr. Day initially testified that Eastern Personnel Services, Inc. (FEIN 57-1040201) provided employees to Foley prior to the second quarter of 1998. According to Mr. Day, he created a sole proprietorship under the name of Eastern Personnel Services II (FEIN 58-2340211) in April 1998 and provided Foley with employees until the stop-work order was issued in March 2, 1999. Mr. Day claimed that Eastern Personnel Services II was incorporated in South Carolina on April 28, 1998. Mr. Day then testified that Eastern Personnel Services, a sole proprietorship with FEIN 57-1020401 was the first entity to provide employees to Foley in Florida and that it was later incorporated using the FEIN 58-2340211. However, the documents related to AIIC's and SICA's insurance policies (including the ones included with Respondent's excluded exhibits), and the payroll records furnished by Foley, indicate the following: (a) Eastern Personnel Services II was insured under AIIC's policy for Georgia employees from November 18, 1997, through November 18, 1998; (b) Eastern Personnel Services, Inc. was insured under SICA's policy for Georgia and South Carolina employees from December 29, 1998, to December 29, 1999; (c) Foley paid Eastern Personnel Services,

Inc. for payroll services from December 18, 1997, to March 18, 1998; and (d) SICA added Florida as a covered state to Eastern Personnel Services, Inc.'s policy in March 1999. The only conclusion is that Mr. Day was operating illegally in Florida, whether as a corporation or a sole proprietorship, and attempted to evade responsibility for his actions using a corporate eggshell theory.

COPIES FURNISHED:

David C. Hawkins, Esquire
Department of Labor and
Employment Security
Hatman Building, Suite 307
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

Paul L. Day, President
Eastern Personnel Services, Inc.
Building Three
7373 Hodgson Memorial Drive
Savannah, Georgia 31406

Sherri Wilkes-Cape, General Counsel
Department of Labor and
Employment Security
Hartman Building, Suite 307
2017 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

Mary Hooks, Secretary
Department of Labor and
Employment Security
Hartman Building, Suite 303
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2152

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.