

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF WORKERS' )  
COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-1332  
 )  
H. H. HUDSON & SONS, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on September 23, 2003, in Ocala, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric Lloyd, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Larry Collins, Esquire  
202 South Magnolia, Suite 3  
Ocala, Florida 34474

STATEMENT OF THE ISSUE

The issue is whether Respondent is subject to assessed penalties as set forth in the Amended Stop Work and Penalty Assessment Order dated March 11, 2003.

PRELIMINARY STATEMENT

On March 11, 2003, Petitioner Department of Financial Services, Division of Workers' Compensation (Petitioner), issued an Amended Stop Work and Penalty Assessment Order. The Order directed Respondent H. H. Hudson & Sons, Inc. (Respondent), to cease and desist from all business operations until it complied with the workers' compensation law, including the payment of the total assessed penalty in the amount of \$434,545.57.

On March 25, 2003, Respondent filed a Petition for Formal Administrative Hearings. Petitioner referred the Petition to the Division of Administrative Hearings on April 15, 2003.

A Notice of Hearing dated April 22, 2003, scheduled the hearing for June 18, 2003.

On June 5, 2003, Respondent filed a Motion and Memorandum for Protective Order. On June 11, 2003, Petitioner filed Division's Combined Motion to Compel Discovery, to Extend Time for Responding to the Order of Pre-Hearing Instructions, and for Expedited Ruling.

The undersigned heard oral argument on the pending motions in a telephone conference on June 11, 2003. At the conclusion of the conference, the undersigned reserved ruling on the motions based on representations by the parties that they could resolve the discovery dispute.

On June 12, 2003, Petitioner filed a Motion for Continuance. After a telephone conference on June 16, 2003, the undersigned issued an Order Granting Continuance and Re-Scheduling Hearing to be heard on July 18, 2003.

On July 17, 2003, Petitioner filed an unopposed Motion for Continuance due to a medical emergency affecting Petitioner's counsel. The undersigned issued an Order Granting Continuance dated July 21, 2003.

A Notice of Hearing dated August 7, 2003, scheduled the hearing for September 23, 2003.

During the hearing, Petitioner presented the testimony of one witness and offered one composite exhibit that was accepted into the record as evidence. Respondent did not present any witnesses or offer any exhibits. The parties agreed that all pending discovery motions were moot.

The Transcript of the proceeding was filed on October 7, 2003. Petitioner filed a Proposed Recommended Order on November 5, 2003. As of the date of the issuance of this Recommended Order, Respondent had not filed a proposed findings of facts and conclusions of law.

All references are to Florida Statutes (2002) except as otherwise noted.

## FINDINGS OF FACT

1. Petitioner is the agency charged with enforcing statutory requirements that employers secure the payment of workers' compensation for their employees.

2. Respondent is a Florida corporation, Federal Employer Identification No. 592489849, located in Ocala, Florida, that provides livestock transportation services.

3. Henry Hayes Hudson, III, is Respondent's president. Martha Hudson is Respondent's vice president. Henry and Martha Hudson are Respondent's only officers and shareholders.

4. On or about March 3, 2003, Petitioner received a complaint alleging that Respondent did not carry workers' compensation coverage. That same day, Petitioner's investigator, William Pangrass, conducted a compliance inspection at Respondent's principal place of business, 5879 West County Road 326, Ocala, Florida.

5. During the investigation, Mr. Pangrass interviewed Martha Hudson and Respondent's bookkeeper, Kelly Hadsock. The investigation revealed that Respondent had no proof of workers' compensation for the prior three years.

6. Petitioner personally served Respondent with a Stop Work and Penalty Assessment Order, No. 03-191-D1, on March 3, 2003. The Order required Respondent to cease all business activities. The Order also assessed the minimum statutory

penalty in the amount of \$100.00 under Section 440.107(5) and \$1,000.00 under Section 440.107(7)(b). Martha Hudson refused to sign the Order.

7. Next, Petitioner personally served a Request for Business Owner Affidavit and Production of Business Records on March 3, 2003. Martha Hudson also refused to sign this document.

8. Respondent subsequently provided Petitioner with copies of its payroll records. The records included Respondent's payroll from March 3, 2000, through March 3, 2003. For all or part of that period, Respondent employed 52 individuals. Petitioner used the payroll records to calculate the penalty assessment for the three-year period of time that Respondent did not provide its employees with workers' compensation.

9. On March 11, 2003, Petitioner issued the Amended Stop Work and Penalty Assessment Order, No. 03-191-D1-2. The Amended Order required Respondent to cease all business operations and to pay a penalty in the amount of \$109,500.00, pursuant to Section 440.107(5), and a penalty in the amount of \$325,045.57, pursuant to Section 440.107(7)(a). The total assessed penalty was \$434,545.57.

10. In a telephone conference on July 11, 2003, the parties stipulated that Respondent had no workers' compensation coverage for the period of time at issue here. They also

stipulated that the only remaining issue involved the accuracy of the assessed penalty.

11. During the hearing, Petitioner presented competent evidence to support the accuracy of the assessed penalty. More importantly, Respondent stipulated to the accuracy of the assessed penalty.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

13. Petitioner must prove by a preponderance of the evidence that Respondent failed to provide its Florida employees with workers' compensation insurance and that the penalties assessed are correct. See Department of Employment and Labor Security, Division Of Workers' Compensation v. Eastern Personnel Services, Inc., DLES Case No. 99-275, (Final Order, October 12, 1999), adopting in toto Case No. 99-2048 (DOAH October 12, 1999) (Although violations of Chapter 440 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.)

14. Section 440.015 states as follows in relevant part:

440.015 Legislative intent.--It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer.

15. Section 440.03 states as follows:

440.03 Application.--Every employer and employee as defined in s. 440.02 shall be bound by the provisions of this chapter.

16. Section 440.02 states as follows in pertinent part:

(15)(a) "Employee" means any person engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

\* \* \*

(16) "Employer" means . . . every person carrying on any employment. . . .

\* \* \*

(17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) "Employment" includes:

\* \* \*

2. All private employment in which four or more employees are employed by the same employer. . . .

17. Section 440.10(1)(a) states as follows in relevant part:

(1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16.

18. Section 440.38 requires employers to secure payment of compensation for their employees. The statute allows employers to insure the payment of such compensation through an insurance carrier or by acting as a self-insurer. See Section 440.38(1).

19. The Legislature has determined that "the failure of an employer to comply with the workers' compensation coverage requirements . . . poses an immediate danger to public health, safety, and welfare." Section 440.107(1). Petitioner has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. Section 440.107(1).

20. Section 440.107(5) states as follows:

(5) Whenever the department 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 service by the department 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 department 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.

21. Section 440.107(7) states as follows in pertinent part:

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

(a) An amount equal to at least the amount that the employer would have paid or up to twice the amount the employer would have paid during periods it illegally failed to secure 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 department 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. The division

shall adopt rules to administer this section.

22. In this case, the preponderance of the evidence indicates that Respondent was an employer for each day of the period between March 3, 2000, and March 3, 2003. The evidence also indicates that Respondent did not have workers' compensation insurance in place during this period of time. Therefore, Respondent failed to abide by the coverage requirement of the workers' compensation law.

23. Respondent owes \$109,500.00 under Section 440.107(5) and \$325,045.57 under Section 440.107(7). The total assessed penalty in the amount of \$434,545.57 is the minimum statutory penalty based upon Respondent's payroll.

24. During the hearing, Respondent did not dispute the facts showing that it had not complied with Sections 440.10(1) and 440.38 or the penalty assessed pursuant to Sections 440.107(5) and 440.107(7). Instead, Respondent took the opportunity to preserve constitutional arguments on the record because an Administrative Law Judge does not have jurisdiction over constitutional issues. See Communications Workers Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Petitioner enter a final order affirming the Amended Stop Work Penalty Assessment Order and directing Respondent to pay a penalty in the amount of \$434,545.57.

DONE AND ENTERED this 10th day of November, 2003, in Tallahassee, Leon County, Florida.

*Suzanne F. Hood*

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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 10th day of November, 2003.

COPIES FURNISHED:

Larry Collins, Esquire  
202 South Magnolia, Suite 3  
Ocala, Florida 34474

Eric Lloyd, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

Honorable Tom Gallagher  
Chief Financial Officer  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

Mark Casteel, General Counsel  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

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.