

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 04-1107
)
RIVERA & COMPANY OF S.W.)
FLORIDA, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on behalf of the Division of Administrative Hearings (DOAH), on June 11, 2004, in Naples, Florida.

APPEARANCES

For Petitioner: Colin M. Roopnarine, Esquire
Division of Workers' Compensation
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Susan McLaughlin, Esquire
Law Offices of Michael F. Tew
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Fort Myers, Florida 33912

STATEMENT OF THE ISSUES

The issues are whether Respondent materially understated payroll in violation of Section 440.107, Florida Statutes (2003), and, if so, what penalty, if any, should be imposed against Respondent; and whether Respondent's workers are not employees defined in Section 440.02, Florida Statutes.

PRELIMINARY STATEMENT

This proceeding has an extensive procedural history. Because the procedural history may be relevant to the request for attorney's fees and costs, the procedural history is discussed more specifically in the Findings of Fact.

In summary, Petitioner issued numerous orders against Respondent but eventually proposed that Respondent pay a penalty in the amount of \$66,920.26. Respondent had previously paid a penalty in the amount of \$90,131.51 and requested an administrative hearing.

At the hearing, Petitioner presented the testimony of one witness, and submitted 12 exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted two exhibits for admission into evidence. The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on June 28, 2004.

Respondent preserved its right in this proceeding to challenge in another forum the constitutionality of relevant statutes. Although the ALJ has permitted Respondent to preserve its constitutional challenges on the record, DOAH has no jurisdiction to resolve the issues of constitutionality asserted by Respondent.

Respondent has also asserted that Petitioner exceeded its statutory authority and that the ALJ should award attorney's fees and costs to Respondent pursuant to Sections 57.111 and 120.569, Florida Statutes (2003). For reasons stated in the Conclusions of Law, Respondent's claim under the former statute is premature and Respondent is not entitled to attorney's fees and costs under the latter statute.

The ALJ granted Petitioner's unopposed Motion for Extension of Time to file proposed recommended orders (PROs). Petitioner timely filed its PRO on July 16, 2004. Respondent timely filed its PRO on July 6, 2004.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees. § 440.107, Fla. Stat. (2002). Respondent is a corporation domiciled in Florida and engaged in the business of stucco and plastering.

2. On March 2, 2004, Petitioner's compliance officer conducted a random site inspection of a single-family residence under construction at 12061 Cypress Links Drive, Fort Myers, Florida. Two work crews were present on the construction site. One crew was finishing drywall seams inside the house. The other crew was applying stucco to the outside of the house.

3. The compliance officer is the only employee for Petitioner who investigated and developed the substantive information that forms the basis of Petitioner's proposed agency action. Other employees calculated the actual amounts of the proposed penalties.

4. On March 3, 2004, the compliance officer conducted a conference in his office with Ms. Sandra Gomez and Mr. Francesco Zuniga; and Mr. Juan Rivera and Ms. Licia Rivera. Mr. and Mrs. Rivera are the principal officers for Respondent. The compliance officer determined that the crew working inside the house worked for Mr. Zuniga and that the crew working outside the house worked for Ms. Gomez. The compliance officer further determined that Ms. Gomez and Mr. Zuniga were subcontractors for Respondent and that neither Ms. Gomez nor Mr. Zuniga had workers compensation insurance.

5. The compliance officer issued stop work orders against Ms. Gomez and Mr. Zuniga that are not within the purview of this proceeding. The compliance officer determined that Respondent

maintained workers' compensation insurance through the Hartford Insurance Company (Hartford) and took no action against Respondent except to issue an order for Respondent to produce its business records for the preceding three years (the business records) for audit by Petitioner.

6. The compliance officer reported to Hartford that Respondent had uninsured subcontractors working for Respondent. The compliance officer also requested and received from Hartford a copy of the last premium audit report for Respondent (the audit report).

7. On March 10, 2004, Respondent produced the business records previously requested by the compliance officer. The production of records fully satisfied the request issued by the compliance officer.

8. The compliance officer determined there was a discrepancy between the audit report's description of employee duties and related information in the business records. The compliance officer determined that Respondent had materially understated or concealed payroll and had materially misrepresented or concealed employee duties by representing that Respondent was in the drywall business and not in the stucco business.

9. On March 10, 2004, Petitioner issued Stop Work and Penalty Assessment Order Number 04-94-D6 (the Initial Order).

The Initial Order alleged that Respondent violated Subsection 440.107(2), Florida Statutes (2003), by materially understating or concealing payroll and proposed a penalty equal to the greater of 1.5 times the premiums Respondent would have paid over the preceding three years or \$1,000. Petitioner subsequently amended the Initial Order to charge Respondent with materially misrepresenting or concealing employee duties.

10. Petitioner issued the Initial Order without conducting any further review of Respondent or its principals. The compliance officer told Mr. Rivera that it would not be helpful for Respondent to retain counsel and that counsel would only further delay release of the stop work order.

11. The compliance officer did not provide Respondent with any information concerning methods of avoiding the penalty except for Respondent to provide proof of an exemption or proof of insurance for Respondent's subcontractors. The compliance officer did not advise Respondent that proving independent contractor status for some or all of Respondent's subcontractors before the effective date of statutory amendments on October 1, 2003, would reduce the proposed penalty against Respondent.

12. The compliance officer did not interview the Hartford employee who prepared the audit report. The audit report was limited to the period from December 17, 2002, through December 17, 2003. The audit report stated that Hartford had

not provided a copy to Respondent and had not audited Respondent's general ledger.

13. The compliance officer did not identify or interview the Hartford employee who had responsibility for Respondent's account, the Hartford agent responsible for Respondent, or the Hartford underwriter. The compliance officer did not request Hartford's complete file for Respondent.

14. The audit report included a copy of an exemption for a person identified in the record as Mr. Stinnett who was included in Petitioner's penalty calculation. The audit report and penalty calculation each identified Mr. Stinnett by the same social security number.

15. On March 16, 2003, Petitioner amended the amount of the proposed fine to \$526,593.44 pursuant to Amended Order of Penalty Assessment Number 04-094-D7-2 (the Amended Order). Petitioner issued a Second Amended Order of Penalty Assessment Number 04-094-D7-3 (the Second Amended Order) on March 23, 2004. The Second Amended Order reduced the proposed penalty to \$90,131.51.

16. Petitioner reduced the \$526,593.44 fine proposed in the Amended Order by \$426,461.91. The latter sum pertained to penalties assessed for the period preceding October 1, 2003, and for the period following December 31, 2003. The parties agree that statutory amendments authorizing Petitioner to issue a stop

work order to an employer that materially misrepresents employee duties or materially understates or conceals payroll became effective on October 1, 2003, and cannot be applied to Petitioner retroactively. In addition, the parties agree that Hartford's audit report for Petitioner did not cover the period after December 31, 2003.

17. Respondent paid the proposed fine of \$90,131.51. On March 23, 2004, Petitioner issued a Release of Stop Work Order (the Release) that removed the Stop Work Order issued on March 10, 2004.

18. In a Third Amended Order of Penalty Assessment Number 04-094-D7-4 (the Third Amended Order) dated May 26, 2004, Petitioner reduced the proposed penalty by \$21,679.28 to \$68,432.23. Petitioner discovered errors totaling \$16,261.42 that occurred when employees input numbers to calculate the proposed penalties against Respondent. The remaining portion of the reduction in the amount of \$5,417.86 was attributable to the deletion of Mr. Sinnett from the penalty calculation.

19. In a Fourth Amended Order of Penalty Assessment Number 04-094-D7-5 (the Fourth Amended Order) dated June 1, 2004, Petitioner further reduced the proposed penalty by \$1,531.97 to \$66,926.00. Respondent provided additional information concerning exemptions for a few workers.

20. On June 7, 2004, Petitioner issued a Fifth Amended Order of Penalty Assessment Number 04-094-D7-5 (the Fifth Amended Order) deleting the charge that Respondent materially misrepresented or concealed employee duties. Petitioner admits that Hartford committed errors in the audit report and in recording the description of duties that Respondent reported to Hartford. Mr. Rivera personally reported to the appropriate Hartford employee that Respondent's primary business was stucco and that Respondent hired subcontractors to perform drywall plastering.

21. The Fourth Amended Order dated June 1, 2004, as amended by the Fifth Amended Order, remain at issue in this proceeding. The Fourth Amended Order proposes a penalty in the amount of \$66,920.26. The Fifth Amended Order limits the grounds for the proposed penalty to the charge that Respondent materially understated or concealed payroll by excluding subcontractors from Respondent's payroll from October 1 through December 31, 2003 (the relevant period), and by excluding either subcontractors or independent contractors thereafter.

22. If a worker included in the penalty calculation were an independent contractor, within the meaning of former Subsection 440.02(15)(d)1, Florida Statutes (2003), the worker should be excluded from the penalty calculation during the relevant period. Effective January 1, 2004, however,

Subsection 440.02(15)(d)1, Florida Statutes (2003), no longer excluded independent contractors in the construction industry from the definition of an employee. Thus, a determination of whether a worker was an independent contractor is not probative of that portion of the proposed penalty covering any period after December 31, 2003.

23. Prior to January 1, 2004, former Subsection 440.02(15), Florida Statutes (2003), did not except subcontractors from the definition of an employee unless the subcontractor satisfied the definition of an independent contractor. Effective January 1, 2004, Subsection 440.02(15)(c)2, Florida Statutes (2003), excluded from the definition of an employee those subcontractors that did not satisfy the definition of an independent contractor if a subcontractor either executed a valid exemption election or otherwise secured payment of compensation coverage as a subcontractor.

24. There is insufficient evidence to support a finding that subcontractors included in that part of the penalty assessment attributable to the period after December 31, 2003, either elected a valid exemption or otherwise secured payment for compensation coverage. These subcontractors would not be excluded from the definition of an employee after December 31, 2004, even if they were independent contractors. Except for

constitutional arguments raised by Respondent over which DOAH has no jurisdiction, Respondent owes that part of the penalty attributable to any period after December 31, 2003.

25. It is undisputed that the workers included in that part of the penalty assessment attributable to the relevant period were subcontractors. Respondent's ledger clearly treated those workers as subcontractors and reported their earnings on Form 1099 for purposes of the federal income tax. Petitioner treated those workers as subcontractors in the penalty calculation.

26. The Workers' Compensation Law in effect during the relevant period did not expressly exclude from the definition of an employee those subcontractors who executed a valid exemption election or otherwise secured payment of compensation coverage as a subcontractor. Rather, former Subsection 440.02(15)(c), Florida Statutes (2003), required a subcontractor to be an independent contractor to escape the definition of an employee. Former Subsection 440.02(15)(c), Florida Statutes (2003), required a subcontractor to satisfy all of the following requirements in former Subsection 440.02(15)(d)1, Florida Statutes (2003), in order for the subcontractor to be classified as an independent contractor:

- a. The independent contractor maintains a separate business with his or her own work

facility, truck, equipment, materials, or similar accommodations;

b. The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal requirements;

c. The independent contractor performs or agrees to perform specific services or work for specific amounts of money and controls the means of performing the services or work;

d. The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform;

e. The independent contractor is responsible for the satisfactory completion of work or services that he or she performs or agrees to perform and is or could be held liable for a failure to complete the work or services;

f. The independent contractor receives compensation for work or services performed for a commission or on a per-job or competitive-bid basis and not on any other basis;

g. The independent contractor may realize a profit or suffer a loss in connection with performing work or services;

h. The independent contractor has continuing or recurring business liabilities or obligations; and

i. The success or failure of the independent contractor's business depends on

the relationship of business receipts to expenditures.

27. There is insufficient evidence to find that the workers included in that part of the penalty assessment attributable to the relevant period were independent contractors within the meaning of former Subsection 440.02(15)(d)1.a.-i., Florida Statutes (2003). Petitioner did not exceed its statutory authority by proposing a penalty of \$66,920.26 in accordance with the Fourth Amended Order and Fifth Amended Order. Respondent previously paid a fine in excess of that proposed by Petitioner and is entitled to a refund of the excess penalty that Respondent paid.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to Subsections 120.57(1) and 120.569, Florida Statutes (2003). The parties received adequate notice of the administrative hearing.

29. Petitioner has the burden of proof in this case. Petitioner must show by a preponderance of the evidence that Respondent violated the Workers' Compensation Law during and after the relevant period and that the penalty assessments are correct. Department of Labor and Employment Security, Division of Workers' Compensation v. Bobby Cox, Sr., d/b/a C H Well Drilling, DOAH Case No. 99-3854 (Recommended Order

para. 34)(adopted in part by Final Order June 8, 2000);
Department of Labor and Employment Security, Division of
Workers' Compensation v. Eastern Personnel Services, Inc., DOAH
Case No. 99-2048 (Recommended Order para. 24)(adopted by Final
Order Nov. 30, 1999), appeal dismissed, Case No. 1D99-4839 (Fla.
1st DCA April 10, 2000); § 120.57(1)(j), Fla. Stat. (2002).

30. Petitioner satisfied its burden of proof. During the relevant period and thereafter, Respondent was an "employer" engaged in the construction industry and failed to maintain workers' compensation coverage for those workers included in the penalty assessment. Each worker was a subcontractor that did not satisfy the definition of an independent contractor during the relevant period; and thereafter, did not execute a valid exemption election or otherwise secure payment of compensation as a subcontractor; and was a statutory employee within the meaning of Subsection 440.02(15), Florida Statutes (2003).

31. Respondent is not entitled to attorney's fees and costs pursuant to Subsection 120.569(2)(e), Florida Statutes (2003). The only issues in this proceeding are those raised in the Fourth Amended Order and in the Fifth Amended Order. Respondent failed to identify a specific pleading, motion, or other paper that Petitioner interposed for an improper purpose in regard to the issues raised in the Fourth Amended Order or in the Fifth Amended Order.

32. DOAH lacks jurisdiction over Respondent's claim for attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2003). Subsection 57.111(4)(d)2, Florida Statutes (2003), requires Respondent to file its application for attorney's fees and costs after the ALJ determines that Respondent is a prevailing small business party. The ALJ has not made such a determination. Rather, Respondent has not prevailed in the issues raised in the Fourth Amended Order or in the Fifth Amended Order.

33. If it were determined that DOAH has jurisdiction to consider Respondent's claim for attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2003), Respondent is not entitled to any fees and costs. Respondent failed to submit the itemized affidavit required in Subsection 57.111(4)(b), Florida Statutes (2003). In addition, Respondent failed to show that Petitioner was not substantially justified in making the allegations and in proposing the penalties set forth in the Fourth Amended Order and Fifth Amended Order.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a Final Order sustaining the allegations and penalties in the Fourth Amended Order and the Fifth Amended Order.

DONE AND ENTERED this 13th day of August, 2004, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of August, 2004.

COPIES FURNISHED:

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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.