STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 04-1174
HERNANDEZ ENTERPRISES,	)	
Respondent.	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on August 16, 2005, in Jacksonville, Florida.

APPEARANCES

For Petitioner: Joe Thompson, Esquire
Colin Roopnarine, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
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For Respondent: H. Leon Holbrook, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent complied with Sections 440.10 and 440.38, Florida Statutes, with regard to workers' compensation insurance for his subcontractors, and if not, the appropriate amount of penalty that should be assessed.

PRELIMINARY STATEMENT

Respondent, Hernandez Enterprises, Inc., (Hernandez, Inc.), is a dry wall, painting, and stucco contractor in the Jacksonville, Florida, area. Hernandez was served a Stop Work Order on February 26, 2004, by the Division of Workers' Compensation (Division), based, in part, on the Division's assertion that Hernandez, Inc., was employing two subcontractors who allegedly did not have valid workers' compensation insurance in place.

In response to the Stop Work Order, Hernandez, Inc., filed a Petition for Formal Hearing. On April 7, 2004, the Division forwarded Hernandez, Inc.'s, Petition for Hearing to the Division of Administrative Hearings. Subsequent to the Petition for Hearing, the alleged penalty assessment was recalculated and at the time of the hearing the amount alleged was $157,794.49.

Numerous motions for continuances were filed and granted, with the concurrence of the parties. Eventually the case was set for hearing on August 16, 2005, and was heard on that date.

At the hearing, the Division presented the testimony of Katina Johnson and the Division's Exhibit Nos. 1 through 22 were accepted into evidence. The Division also submitted the deposition testimony of William D. Hager (Mr. Hager), an expert in the field of workers' compensation which was accepted into evidence. Hernandez, Inc., presented the testimony of George Hernandez, the principal of Hernandez, Inc., and Michael Sapourn (Mr. Sapourn), who testified as an expert in the field of workers' compensation insurance. He also presented the testimony of Jonathan Sallas, who addressed the calculation of the penalty assessment in the Amended Order of Penalty Assessment. Hernandez, Inc., also offered Exhibit Nos. 1 through 7 into evidence, and they were accepted.

The two-volume Transcript was filed on August 23, 2005. After the hearing, Petitioner and Respondent timely filed Proposed Recommended Orders on September 16, 2005. They were considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2003) unless otherwise noted.

FINDINGS OF FACT

1. Hernandez, Inc., is a contractor based in the Jacksonville, Florida area, and is in the business of installing dry wall, among other construction related activities.

2. The Department of Financial Services is the state agency responsible for enforcing the Workers' Compensation Law. This duty is delegated to the Division of Workers' Compensation.

3. On February 5, 2004, Hernandez, Inc., was engaged in installing drywall in the Bennett Federal Building in Jacksonville, Florida. Hernandez, Inc., was a subcontractor for Skanska, Inc., who was the general contractor for the building. Hernandez, Inc., was accomplishing the installation of drywall by using two subcontractors, GIO & Sons (GIO), of Norfolk, Virginia, and U&M Contractors, Inc., (U&M), of Charlotte, North Carolina. Hernandez, Inc., was also using its own personnel, who were leased from Matrix, Inc., an employee leasing company.

4. Prior to contracting with GIO and U&M, Hernandez, Inc., asked for and received ACORD certificates of insurance, which on their face indicated that the subcontractors had both liability coverage and workers' compensation coverage. It is the practice of Hernandez, Inc., to ensure that certificates of insurance are provided by subcontractors and the office staff of Hernandez, Inc., tracks the certificates so that they are kept current.

5. Since the beginning of 2001, Hernandez, Inc., has received approximately 310 certificates of insurance from subcontractors. These certificates listed Hernandez, Inc., as the certificate holder. Though most of the producers and insureds on these certificates are from Florida, a substantial

number are from other states. Hernandez, Inc., relied on the certificates as evidence that the subcontractor's workers were covered by workers' compensation insurance. Hernandez, Inc., has relied on certificates of insurance for more than twenty years and, with the exception of this case, has never known an instance where the underlying policy was invalid.

6. On February 5, 2004, Katina Johnson, an investigator with the Division, made a routine visit to the Bennett Federal Building with another investigator. She observed personnel from Hernandez, Inc., and its subcontractors, installing dry wall.

7. On February 5, 2004, Ms. Johnson determined that Hernandez, Inc., also had a contract to install dry wall as a subcontractor participating in the construction of the Mayport BEQ. L. C. Gaskins Company was the general contractor engaged in the construction of the Mayport BEQ. U&M worked at both the Bennett Federal Building site and the Mayport BEQ site as a subcontractor of Hernandez, Inc.

8. Ms. Johnson issued a Stop Work Order on February 26, 2004, to Hernandez, Inc., GIO, and U&M. By the Stop Work Order, Hernandez, Inc., was charged with failure to ensure that workers' compensation meeting the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code, was in place for GIO and U&M. The Stop Work Order indicated that the penalty amount assessed against Respondent would be subject to amendment

based on further information provided by Hernandez, Inc., including the provision of business records.

9. An Amended Order of Penalty Assessment dated March 19, 2004, was served on Hernandez, Inc., which referenced the Stop Work Order of February 26, 2004. The Amended Order of Penalty Assessment was in the amount of $157,794.49. The Amended Order of Penalty Assessment reached back to September 29, 2003.

10. An Amended Order of Penalty Assessment dated March 22, 2004, was served on GIO. This Amended Order of Penalty Assessment was in the amount of $107,885.71. An Amended Order of Penalty Assessment with a March 2004 date (the day is obscured on the document by a "filed" stamp), was served on U&M. This Amended Order of Penalty Assessment was in the amount of $51,779.50. The sum of these numbers is $159,665.21. However, the parties agreed at the hearing that the amount being sought by the Division was $157,794.49, which represented the total for GIO and U&M.

11. Hernandez, Inc.'s, employees leased from Matrix were covered by workers' compensation insurance through a policy held by Matrix. The Matrix policy did not cover the employees of GIO and U&M.

12. Although Skanska, Inc., and L. C. Gaskins Company had workers' compensation insurance in force, their policies did not

cover the workers used by Hernandez, Inc., or the employees of GIO or U&M.

13. GIO and U&M employees were considered by the Division to be "statutory employees" of Hernandez, Inc., for purposes of the Workers' Compensation Law. This meant, according to the Division, that Hernandez, Inc., was required to ensure that the employees of GIO and U&M would receive benefits under the Workers' Compensation Law if a qualifying event occurred, unless the subcontractors had workers' compensation insurance policies in force that satisfied the Division.

14. GIO had a policy of workers' compensation insurance evidenced by an ACORD certificate of liability insurance for the period December 3, 2002, until December 3, 2003. The policy was produced by Salzberg Insurance Agency in Norfolk, Virginia. It listed Hernandez as the certificate holder. The policy was issued by Maryland Casualty Company, a subsidiary of the Zurich American Insurance Company. These companies are admitted carriers in Florida.

15. The Classification of Operations page of this policy indicated class code 5022, masonry work. GIO employers were installing drywall during times pertinent. Rates for drywall installation are substantially higher than for masonry work. In the policy section titled "Other States Insurance," Florida is not mentioned.

16. William D. Hager, an expert witness, reviewed the certificate of insurance and the policy supporting the certificate. Mr. Hager is a highly qualified expert in insurance and workers' compensation coverage. Among other qualifications, he is an attorney and a former member of the National Association of Insurance Commissioners by virtue of his position as Insurance Commissioner for the State of Iowa. He concluded that this policy did not conform to the requirements of Chapter 440 because the policy was Virginia based and did not apply Florida rates, rules, and class codes.

17. Mr. Sapourn, testified as an expert witness. Mr. Sapourn has a degree from the University of Virginia in economics with high distinction and a juris doctorate from Georgetown. He is a certified insurance counselor and owned an insurance agency in the District of Columbia area. As an insurance agent he has issued tens of thousands certificates of insurance and written hundreds of workers' compensation policies. Mr. Sapourn, opined that this certificate represented workers' compensation coverage that complied with Chapter 440, Florida Statutes.

18. Upon consideration of the testimony of the experts, and upon an examination of the documents, it is concluded that the policy represented by the certificate of insurance for the

period December 3, 2002, to December 3, 2003, did not comply with the requirements of Chapter 440.

19. Subsequently, someone forged an ACORD certificate of liability insurance, which indicated that it was produced by Salzberg Insurance Agency, and that indicated that GIO was covered from December 4, 2003, until December 4, 2004. The forged certificate was presented to Hernandez, Inc., upon the expiration of the policy addressed above. It was accepted by Hernandez, Inc., and considered to be a valid certificate.

20. Both of the experts pointed out that with their practiced eye they could easily determine that the certificate was a forgery. However, there was no evidence that Mr. Hernandez, or his employees, had training in forgery detection. Accordingly, it was reasonable for them to accept the certificate as valid.

21. U&M presented Hernandez, Inc., with an ACORD certificate which indicated insurance coverage from October 24, 2003, until October 24, 2004. The producer was Insur-A-Car Commercial Division of Charlotte, North Carolina. The insurer was The St. Paul, an admitted carrier in Florida. The insured was U &M. The certificate holder was Hernandez Enterprises, Inc.

22. William D. Hager reviewed the certificate of insurance and the policy supporting the certificate.

23. He noted that The St. Paul policy upon which the certificate was based did not apply in Florida because U&M was not working temporarily in Florida and because it included a policy endorsement that stated: "The policy does not cover work conducted at or from 3952 Atlantic BLVD #D-12 Jacksonville, FL 32207." U&M's mailing address in Jacksonville was 3952 Atlantic Boulevard, Suite D-12.

24. The information page of the policy, at Part 3.A. states that Part One applies to North Carolina. Part 3.C., Other States Insurance states that Part 3 of the policy applies to the states listed, and then refers to the "residual market limited other states insurance." Mr. Hager testified that the policy did not indicate compliance with Chapter 440, because the policy is North Carolina based, applies only North Carolina rates, and does not provide Florida coverage.

25. Mr. Sapourn, on the other hand, opined that the policy provided workers' compensation that complied with Chapter 440. Although it is possible that a worker who was injured during times pertinent may have received benefits, it is clear that the policy did not comply with the requirements of Chapter 440.

26. The Division instituted a Stop Work Order against U&M and sought to impose penalties upon it for failure to comply with Chapter 440 for offenses committed at the exact times and

places alleged in this case. U&M demanded a hearing and was provided one.

27. In a Recommended Order entered April 7, 2005, an Administrative Law Judge recommended that the Division enter a final order affirming the Stop Work Order and assessing a penalty in the amount of $51,779.50. See Department of Financial Services, Division of Workers' Compensation vs. U and M Contractors, Inc., Case No. 04-3041 (DOAH April 7, 2005). The recommendation was adopted in toto by the Department of Financial Services on April 27, 2005. See In the Matter of: U and M Contractors, Inc., Case No. 75537-05 WC (DFS April 27, 2005).

28. The evidence taken as a whole demonstrates that U&M did not have workers' compensation coverage in Florida that complied with the requirements of Chapter 440, during times pertinent.

29. Mr. Sapourn testified that the theory behind ACORD certificates of insurance is that they provide a uniform document upon which business people may rely. This testimony is accepted as credible.

30. In order to continue working on a project not addressed by the Stop Work Order, Hernandez, Inc., entered into and agreement with the Division which provided for partial payments of the penalty in the amount of $46,694.03. This

payment was made with the understanding of both parties that payment was not an admission of liability.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

32. Administrative fines are penal in nature. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996). Pursuant to the court's reasoning therein, it is concluded that Petitioner bears the burden of proof herein by clear and convincing evidence. Accord Triple M Enterprises Inc., vs. Department of Financial Services, Division of Workers' Compensation, Case No. 04-2524 (DOAH January 13, 2005), and Department of Financial Services, Division of Workers' Compensation vs. U and M Contractors, Inc., Case No. 04-3041 (DOAH April 7, 2005), adopted in toto in, In the Matter of: U and M Contractors, Inc., Case No. 75537-05-WC (DFS April 27, 2005).

33. The Division argues in its Proposed Recommended Order that the subcontractors became employees of Hernandez, Inc., by operation of Section 440.10(1). In particular, the Division asserts that Subsection (1)(a) means that the employees of a subcontractor employed by a general contractor, are exactly like

the employees of the general contractor, and therefore the general contractor must secure workers' compensation for his own employees and those of his subcontractors.

34. Section 440.10(1) provides in pertinent part as follows:

> (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. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.
>
> (b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.
>
> (c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

> (d)1. If a contractor becomes liable for the payment of compensation to the employees of a subcontractor who has failed to secure such payment in violation of s. 440.38, the contractor or other third-party payor shall be entitled to recover from the subcontractor all benefits paid or payable plus interest unless the contractor and subcontractor have agreed in writing that the contractor will provide coverage.

35. Section 440.38 provides in pertinent part as follows:

> (1) Every employer shall secure the payment of compensation under this chapter:
>
> (a) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the state;
>
> * * *
>
> (7) Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in this state by such employees.

36. As was noted in Triple M Enterprises, supra, a contractor, including a contractor whose base is in another state, must secure workers' compensation coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in this state by such employees. This is a reasonable requirement which should be strictly construed against the employer. This

is because the employer deals directly with his or her insurance agent and can easily ensure that compliance with Section 440.38(7) is had. See also Department of Labor and Employment Security, Division of Workers' Compensation vs. Eastern Personnel Services, Inc., Case No. 99-2048 (DOAH October 12, 1999).

37. The statutory scheme, when addressing the employment of a subcontractor, is different. In the case where a subcontractor is employed, two possible scenarios are contemplated by Section 440.10(1)(b). Either the contractor secures workers' compensation coverage that satisfies Section 440.38(7) for the employees of the subcontractor or the contractor must contract with subcontractors who have obtained their own workers' compensation coverage.

38. A contractor cannot escape responsibility for the provision of workers' compensation insurance by claiming that the contractor's employees are subcontractors, when they are not. See Department of Financial Services, Division of Workers' Compensation vs. Retrospec Painting & Reconstruction, Inc., Case No. 03-4014 (DOAH February 4, 2004), adopted in toto in, In the Matter of: Retrospec Painting & Reconstruction, Inc., Case No. 71818-03-WC (DFS April 9, 2004), Department of Financial Services, Division of Workers' Compensation vs. Susie Riopelle, Case No. 03-1757 (DOAH January 16, 2004), adopted in toto in, In

the Matter of: Susie Riopelle; Case No. 74322-04-WC (DFS April 27, 2005), and Orlando Sentinel vs. Chow, 652 So. 2d 982 (Fla. 1st DCA 1995). In this case, GIO and U&M were indisputably independent contractors.

39. If the contractor contracts with a subcontractor who obtains its own workers' compensation coverage, the contractor has a duty under Section 440.10(1)(c) to ensure that the subcontractor provides "evidence of workers' compensation insurance." Typically, and in this case, the "evidence" obtained is a certificate of insurance. A certificate of insurance is not a policy of insurance and does not contain the sort of detail found in an insurance policy.

40. Certificates of insurance are commonly used to represent coverage which is evidenced in its particulars by an actual policy or master policy. Certificates of insurance, for example, were considered to be evidence of insurance in a group life policy in Equitable Live Assurance Society of the United States v. Wagoner, 269 So. 2d 747 (Fla. 4th DCA 1972); evidence of an automobile policy in Avis Rent A Car and I.T.T. Hamilton Life Insurance Company, 318 So. 2d 565 (Fla. 4th DCA 1975); and evidence of mortgage guarantee insurance in Federal Deposit Insurance Corporation v. Verex Assurance, Inc., 645 So. 2d 427 (Fla. 1994).

41. The practice of reliance on the face of a certificate of insurance by a contractor who has been presented with a purportedly valid certificate of insurance, has been addressed by the courts within the context of Section 440.10, Florida Statutes. In Criterion Leasing Group v. Gulf Coast Plastering & Drywall, 582 So. 2d 799, 801 (Fla. 1st DCA 1991), the court found that an insurance company should have reasonably expected that a contractor would rely on a certificate of insurance presented to that contractor:

> We find that it was foreseeable to Hartford that Evans Blount would use the certificate of insurance as proof of workers' compensation coverage. First . . . [t]he certificate of insurance listed both Criterion and Evans Blount as coinsureds. The certificate was presented to Gulf Coast as proof of workers' compensation coverage.
>
> Second, Section 440.10(1), Florida Statutes, requires a general contractor to provide workers' compensation coverage for a subcontractor's employees except when the subcontractor already has obtained coverage. Therefore, Hartford should have reasonably expected that Gulf Coast would rely on the certificate of insurance naming Evans Blount as a coinsured. This promise of coverage induced Gulf Coast to subcontract with Evans Blount.

See also LaCroix Construction Company v. Bush, 471 So 2d 134, 136 (Fla. 1st DCA 1985). In LaCroix the court found that subcontractor relied on general contractor's representation that it carried workers' compensation coverage for all employees who

were not covered by subcontracting and changed his position to his detriment by continuing to work without procuring appropriate insurance coverage.

42. Reliance on a certificate of insurance as proof of coverage is permissible unless there is extant a question as to its validity. To require a contractor to evaluate the underlying policy held by a subcontractor is not contemplated by the statutory scheme. Bearing in mind that two experts in this case had diametrically opposed opinions with regard to whether or not the policies at issue in this case complied with Chapter 440, the Florida Legislature in its wisdom declined to require Florida contractors to have a well-developed expertise in insurance policy analysis.

43. Section 440.107, Florida Statutes, authorizes the Division to issue stop work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements. The method used to make the calculation of the penalty is not at issue here. At issue is whether the Division is authorized under the law to impose the penalty it imposed upon Hernandez, Inc.

44. When the Division issued the Stop Work Order on Hernandez, Inc., it did so because it determined that Hernandez was the "employer" for purposes of workers' compensation coverage. When the Division issued the Stop Work Order on GIO

and U&M, it did so because it determined GIO and U&M were the "employers" for purposes of workers' compensation coverage. The Division has defined Hernandez and GIO as being the "employer" of the identical employees working at the same work site earning the identical dollars. Likewise, the Division has defined Hernandez and U&M as being the "employer" of the identical employees working at the same work site earning the identical dollars. There is nothing in the statutes cited by the Division that authorizes the Division to define two businesses as the employer of the same employees or that requires an employee to be covered by two employers.

45. Florida Administrative Code Rule 69L-6.019, addressing policies and endorsements covering employees engaged in work in Florida, was adopted in June 2004 and amended in November 2004. This rule addresses the requirement that workers' compensation policies utilize Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of Chapter 440.

46. This rule was adopted after the events giving rise to this case. It is specific and comprehensive in setting out the requirements of a workers' compensation policy deemed adequate under Chapter 440. It is notable that it did not address the assertion made by the Division in this case that a contractor is required to provide workers' compensation coverage for the

employees of its subcontractors. The Division did not avail itself of the opportunity to state in the rule that a contractor must guarantee that a subcontractor's policy of workers' compensation insurance complies with Chapter 440.

47. In any event, Hernandez, Inc., complied with the plain and ordinary meaning of Subsection 440.10(1)(c), Florida Statutes, by requiring its subcontractors, GIO and U&M, to provide evidence of workers' compensation insurance, and should not be penalized because of the failures of GIO and U&M to obtain proper insurance or because of the fraud perpetrated by GIO. See Department of Financial Services, Division of Workers' Compensation vs. AFS, LLC, Case No. 05-0958 (DOAH August 26, 2005).

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

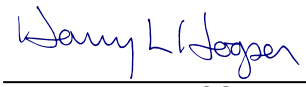
RECOMMENDED

1. That the Division rescind the Stop Work Order issued February 26, 2004, and

2. That the Division rescind the Amended Order of Penalty Assessment dated March 19, 2004, and

3. That the Department refund to Hernandez, Inc., the amount of $46,694.03, which was paid to obtain a release from the improvidently issued Stop Work Order of February 26, 2004.

DONE AND ENTERED this 3rd day of October, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.