

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 04-2264
)
MIKE FUTCH d/b/a/FUTCH, INC.,)
CONSTRUCTION COMPANY)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case on November 18, 2004, in Tallahassee, Florida, before Florence Snyder Rivas, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joe Thompson, General Counsel
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Patrick C. Cork, Esquire
Cork & Cork
700 North Patterson Street
Valdosta, Georgia 31601

STATEMENT OF THE ISSUES

Whether Mike Futch, d/b/a Futch Construction Company, (Respondent) violated Sections 440.10 and 440.38, Florida

Statutes, and if so, what penalty should be imposed. References to sections are to the Florida Statutes (2004).

PRELIMINARY STATEMENT

By Stop Work Order and Penalty Assessment dated May 12, 2004 (Stop Work Order), Petitioner, the Department of Financial Services, Division of Workers' Compensation (Petitioner), alleged that Respondent failed to secure workers' compensation coverage for its workers.

An Amended Order of Penalty Assessment dated May 25, 2004 (Amended Order), which calculated a penalty assessment as provided by law, was thereafter issued.

Respondent timely requested a formal hearing to contest the penalty.

The identity of the witnesses and exhibits and attendant rulings are set forth in the one-volume transcript of the hearing filed with the Division of Administrative Hearings (DOAH) on December 20, 2004.

The parties requested and were given an extension of time to file their proposed recommended orders. The parties' Proposed Recommended Orders were filed January 25, 2005, and have been duly-considered.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing provisions of Florida law, specifically Chapter 440,

Florida Statutes, which requires that employers secure workers' compensation coverage for their employees.

2. At all times material to this case, Respondent was engaged in the construction business within the meaning of Chapter 440, Florida Statutes. Its individual principal, Mike Futch (Mr. Futch), was responsible for the day-to-day operations of the business.

3. At all times material to this case, Respondent is an employer within the meaning of Section 440.02(16)(a), Florida Statutes.

4. At all times material to this case, Respondent was legally obligated to provide workers' compensation insurance in accordance with the provisions of Chapter 440, Florida Statutes, for all persons employed by Respondent to provide construction services within Florida. Chapter 440 requires that the premium rates for such coverage be set pursuant to Florida law.

5. It is undisputed that Respondent had not furnished the required coverage, and that there was no valid exemption from this requirement.

6. Accordingly, on May 12, 2004, the Stop Work Order was properly entered.

7. Thereafter, Petitioner reviewed Respondent's payroll records, which revealed that Respondent employed individuals whose identities are not in dispute, under circumstances which

obliged Respondent to provide workers' compensation coverage for their benefit.

8. Based upon Respondent's payroll records, Petitioner correctly calculated the penalty amount imposed by law under all the circumstances of the case, and issued the Amended Order imposing a penalty assessment in the amount of \$198,311.82.

9. Respondent did not persuasively dispute the factual or legal merits of Petitioner's case. Rather, Respondent suggested that this forum has some type of general equity powers to lessen the penalty on the grounds that Respondent made a good faith effort to provide coverage for its workers.

10. The record does demonstrate that Mr. Futch in good faith engaged a Georgia insurance agent and instructed him to obtain workers' compensation coverage which would satisfy the requirements of Florida law with respect to Respondent's Florida operations. The Georgia agent's failure to obtain coverage that satisfies Florida's requirements is a regrettable circumstance, but it raises no issue over which this forum has authority.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter.
§§ 120.569, and 120.57(1), Fla. Stat.

12. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has violated the

workers' compensation law, and that the penalty assessments are correct under the law. See Department of Labor and Employment Security, Division of Workers' Compensation v. Genesis Plumbing, Inc., DOAH Case No. 00-3749 (Rec. Order, paragraph 32) (Final Order May 24, 2001); Department of Labor and Employment Security, Division of Workers' Compensation v. Eastern Personnel Servs., Inc., DOAH Case No. 99-2048 (Rec. Order, paragraph 24) (Final Order, November 30, 1999), appeal dismissed, Case No. 1D99-4839 (Fla. 1st DCA 2000).

13. Section 440.10(1)(a), Florida Statutes, provides 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 . . . 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.

14. Pursuant to Sections 440.10 and 440.38, Florida Statutes, Respondent was obliged to secure the payment of workers' compensation for the benefit of its employees and failed to do so.

15. Petitioner has fulfilled its burden of proof. Respondent's good-faith, but mistaken trust in and reliance upon his out-of-state insurance agent, is not a legal defense, and

cannot be considered in mitigation of the penalty to be assessed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order that affirms the Amended Order in the amount of \$198,311.82.

DONE AND ENTERED this 28th day of January, 2005, in Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
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 28th day of January, 2005.

COPIES FURNISHED:

Joe Thompson, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

Patrick C. Cork, Esquire
Cork & Cork
700 North Patterson Street
Valdosta, Georgia 31601

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

Pete Dunbar, 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.