

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TRIPLE M ENTERPRISES, INC.,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 04-2524  
  )  
DEPARTMENT OF FINANCIAL                )  
SERVICES, DIVISION OF WORKERS'        )  
COMPENSATION,                            )  
  )  
      Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on November 9, 2004, in Pensacola, Florida.

APPEARANCES

For Petitioner: Dwain Sanders, Corporate Representative  
                  Celina Sanders, Corporate Representative  
                  Triple M Enterprises, Inc.  
                  24393 North 71  
                  Robertsdale, Alabama 36567

For Respondent: Joe Thompson, Esquire  
                  Department of Financial Services  
                  Division of Workers' Compensation  
                  200 East Gaines Street  
                  Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Petitioner, Triple M Enterprises, Inc., employed persons in the State of Florida without obtaining

workers' compensation insurance meeting the requirements of Chapter 440, Florida Statutes. If Petitioner did not obtain the required insurance, the subsequent issue is the amount of any penalty.

PRELIMINARY STATEMENT

The event giving rise to this hearing occurred on June 4, 2004, when a Stop-Work Order was issued to Petitioner by Respondent Division of Workers' Compensation Insurance (Division). On June 25, 2004, Petitioner Triple M Enterprises, Inc. (Triple M), filed a petition for a formal administrative hearing. The matter was forwarded to the Division of Administrative Hearings on July 19, 2004.

The case was set for hearing on September 9, 2004, in Pensacola, Florida. Pursuant to a Motion for Continuance filed by the Division, the case was rescheduled for November 9, 2004, and was heard as scheduled.

At the hearing the Division presented the testimony of Patricia Jean Krossman and had eight exhibits admitted into evidence. The Division's exhibits were considered by the Administrative Law Judge in the preparation of this Recommended Order. Triple M presented the testimony of Dwain and Celina Sanders, and offered one exhibit into evidence. Triple M's exhibit was admitted and considered by the Administrative Law Judge in the preparation of this Recommended Order.

A Transcript was filed on December 7, 2004. After the hearing, Triple M filed a letter dated November 17, 2004, which was in the nature of Proposed Findings of Fact and Conclusions of Law and which was considered in the preparation of this Recommended Order. The Division requested an enlargement of time in which to present its Proposed Findings of Fact and Conclusions of Law, which was granted. The Division's Proposed Findings of Fact and Conclusions of Law were eventually filed on December 29, 2004, and were considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

#### FINDINGS OF FACT

1. The Division is charged with the regulation of workers' compensation insurance in the State of Florida and is responsible for enforcing the statutory requirement that employers secure workers' compensation insurance for the benefit of their employees.

2. Triple M, is a corporation located at 24393 North 71, Robertsdale, Alabama, and is a framing and drywall contractor.

3. Dwain Sanders and Celina Sanders are principals of Triple M.

4. On June 4, 2004, Triple M was engaged as a subcontractor in the construction of a building on the premises located at 334 Gulf Breeze Parkway, Gulf Breeze, Florida.

5. On June 4, 2004, Patricia Jean Krossman was an investigator employed by the Division. Her duties include ensuring that the employers in the state are in compliance with the requirements of the Workers' Compensation Law. More specifically, she visits work sites, and determines if the workers are covered by workers' compensation insurance.

6. The morning of the aforementioned date, Ms. Krossman visited 334 Gulf Breeze Parkway, in Gulf Breeze, Florida, and observed four men engaged in construction activities, including framing a building.

7. Dwain Sanders, who was at the site, identified himself as the owner and president of Triple M, which was the employer of the four men who were working at the site. Ms. Krossman requested that Mr. Sanders provide her with proof that he had workers' compensation coverage effective in Florida.

8. Mr. Sanders made an immediate effort to supply the requested proof. Pursuant to Mr. Sanders' request, his insurance agent in Montgomery, Alabama faxed a portion of Triple M's policy to the Division's Pensacola office. The documents received by Ms. Krossman caused her to conclude that Triple M had not complied with Florida law because she believed the

document did not demonstrate that Florida premium rates were paid, or that Florida class codes were used, or that there was a Florida endorsement in place.

9. Ms. Krossman conducted a database search of the Coverage and Compliance Automated System database and the National Council on Compensation Insurance database. The search did not demonstrate that Triple M had a policy then effective in Florida. Having concluded that the documents produced by Triple M failed to demonstrate coverage in accordance with Chapter 440, Florida Statutes, and after noting the absence of policy information in the databases, Ms. Krossman issued a Stop-Work Order to Triple M on June 4, 2004.

10. The portion of Triple M's policy, provided by Triple M's insurance agent by facsimile, number 748-36-79, which was issued by the American Home Assurance Company to Triple M, had a classifications of operations page which related solely to work to be performed in Alabama. This page provided class codes, the rates, and the premium basis which provided the total estimated annual premium that Triple M was required to pay, based on Alabama law.

11. The faxed document included a policy information page that provided in Item 2, that the policy period ran from January 1, 2004 until January 1, 2005. It provided in Item 3A,

as follows: "Workers Compensation Insurance: Part One of the policy applies to the Workers' Compensation Law of the states listed here: AL."

12. The policy information page provided in Item 3C that, "Part Three of the policy applies to the states, if any, listed here:" and lists 44 states, including Florida.

13. The policy provides in Item 4, "Classifications of Operation," a statement of the rating group, and the "total classification premium increase limits," under the heading, "State of Alabama Totals."

14. On June 25, 2004, Ms. Krossman received via facsimile machine, an endorsement to policy no. WC 748-36-79. This was the first time Ms. Krossman had seen this endorsement. It purported to add Florida coverage using Florida premium rates and class codes. It also purported to add the Gulf Breeze Parkway work-site where Ms. Krossman found Triple M engaged in construction activities. The base policy, on its face, indicated a date of January 1, 2004. The issue date of the endorsement was June 16, 2004. This endorsement was not in effect on June 4, 2004, the date of the Stop Work Order.

15. Ms. Krossman served Triple M a "Request for Production of Business Records for Penalty Assessment Calculation." The Division has the statutory authority to request payroll records from an employer working in Florida and the "Request for

Production of Business Records for Penalty Assessment

Calculation" is the vehicle through which those records are sought. The payroll records provide the data required to calculate any penalties for failure to maintain required coverage.

16. Penalties are calculated by determining the premium amount the employer would have paid based on his or her Florida payroll, and multiplying by a factor of 1.5.

17. In response to the "Request for Production of Business Records for Penalty Assessment Calculation," Triple M provided payroll records. The records indicated that Triple M had employed workers in Florida in 2001, 2002, 2003, and 2004. Using the records provided by Triple M, the penalty was calculated by Ms. Krossman. After some interaction with Ms. Celina Sanders, of Triple M, she eventually determined that the proper penalty to be assessed was \$36,521.61.

18. The penalty was calculated using Florida premium rates and class codes in accordance with the dictates of Section 440.38, Florida Statutes. The penalty is correct.

19. Triple M depends on its agent, the Goff Group, of Montgomery, Alabama, to provide proper insurance coverage.

20. As noted above, Item 3.A of the policy listed the primary state of coverage as being Alabama. The policy plainly states at "Part Three - Other States Insurance, How This

Insurance Applies," in paragraph 1, that "This other states insurance applies only if one or more states are shown in Item 3.C of the Information Page." One of the other states shown is Florida.

21. At paragraph 2, of the section noted immediately above, the policy states, "If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A of the Information Page."

22. At paragraph 3 of the policy, the following sentence is found: "We will reimburse you for the benefits required by the workers' compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them."

23. At paragraph 3, the following sentence is found: "If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days."

24. After that language is the following: "B. Notice. Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page."



25. The plain language of the policy reveals that Triple M's employees were covered by the policy, and that the employees would receive the same benefits, in case of injury, as if it were a Florida Policy with Florida rates and classifications, so long as the work at Gulf Breeze Parkway had not been going on for more than thirty days.

26. Ms. Sanders testified under oath that she notified Triple M's carrier within 30 days of the inception of the work at the Gulf Breeze Parkway site. A letter to the Department of Financial Services signed by Dwain and Celina Sanders on behalf of Triple M, dated June 24, 2004, asserted that Triple M had just begun working in Florida, for the first time in 2004, the week that Ms. Krossman entered the work site.

27. Triple M has been in business for 22 years and has never been bankrupt. Triple M has 401K plans for its employees as well as health insurance. Triple M would have difficulty paying the fine proposed by the Division.

28. Triple M believed its workers were covered by workers' compensation insurance and they were covered. The parties agree that American Home Assurance Company is authorized to write insurance in Florida.

CONCLUSIONS OF LAW

29. 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.

30. The Division must prove by clear and convincing evidence that Triple M failed to provide its Florida employees with workers' compensation insurance in accordance with the requirements of Chapter 440, Florida Statutes, and that the civil and administrative penalties assessed are correct.

Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996).

31. The Division cites Dept. of Labor and Employment Security, Div. Of Workers' Compensation v. Genesis Plastering Inc., Case No. 00-3749 (DOAH April 27, 2001) and Dept. of Labor and Employment Security, Div. Of Workers' Compensation v. Bobby Cox, Sr. d/b/a C H Well Drilling, Case No. 99-3854 (DOAH March 20, 2000), for the proposition that the standard of proof is by a preponderance of the evidence. However, nothing in those cases, or any of the additional cases cited by the Division, reveals why, in a case where a severe administrative penalty may be imposed, the higher standard required by Osborne Stern, Inc., should not apply.

32. It is recognized that two-thirds of the penalty represents premiums that should have been paid based on Florida rates but were not. However, the remaining one third is pure penalty. Upon consideration of the entire penalty scheme found at Section 440.107(7)(c)1., Florida Statutes, which is recited in its entirety at paragraph 36, it is found that the interests of justice require a standard of proof of clear and convincing evidence.

33. Section 440.10(1)(a), Florida Statutes, provides in 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.

34. Section 440.107, Florida Statutes, provides in part as follows:

**440.107. Department powers to enforce employer compliance with coverage requirements**

(1) The Legislature finds that the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare.

\* \* \*

(7)(a) 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 secure the payment of workers' compensation required by this chapter or to produce the required business records under subsection (5) within 5 business days after receipt of the written request of the department, 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 operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours. The order shall take effect when served upon the employer or, for a particular employer worksite, when served at that worksite. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance. A stop-work order may be served with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The order shall remain in effect until the department issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this chapter and has paid any penalty assessed under this section. The department may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this chapter and has agreed to remit periodic payments of the penalty pursuant to a payment agreement schedule

with the department. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due. The department may require an employer who is found to have failed to comply with the coverage requirements of s. 440.38 to file with the department, as a condition of release from a stop-work order, periodic reports for a probationary period that shall not exceed 2 years that demonstrate the employer's continued compliance with this chapter. The department shall by rule specify the reports required and the time for filing under this subsection.

35. Section 440.38, Florida Statutes, states in part:

**440.38. Security for compensation;  
insurance carriers and self-insurers**

(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.

\* \* \*

(d) 1. 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 equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

36. Section 440.02(16)(a), Florida Statutes, defines "employer" as "every person carrying on an employment...." "Employment" is defined in Section 440.02(17)(a), Florida Statutes, as "any service performed by an employee for the person employing him or her." Triple M, during relevant times, was an employer engaged in employment activities in Florida.

37. It is found by clear and convincing evidence that Triple M was employing persons in Florida without maintaining at all times 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.

38. It is found by clear and convincing evidence that Triple M should pay a fine of \$36,521.61, in accordance with the requirements of Section 440.107(7)(d)1., Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Division of Workers' Compensation affirm the Stop-Work Order issued to Petitioner on June 4, 2004, and assess a fine of \$36,521.61.

DONE AND ENTERED this 13th day of January, 2005, in Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of January, 2005.

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.