

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 04-2965
)
H.R. ELECTRIC, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on March 13, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Colin M. Roopnarine, Esquire
Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Did not appear and was not represented

STATEMENT OF THE ISSUES

The issues presented are (1) whether Respondent properly secured the payment of workers' compensation insurance coverage and, if not, what penalty is warranted for such failure; and (2)

whether Respondent conducted business operations in violation of a stop-work order and, if so, what penalty is warranted for such violation.

PRELIMINARY STATEMENT

On July 7, 2004, Petitioner issued and served Stop Work Order and Order of Penalty Assessment Number 04-416-D1 on Respondent, alleging that Respondent failed to abide by the requirements of Florida's Workers' Compensation Law. The Order required Respondent to cease all business operations. Respondent timely requested an administrative hearing regarding the allegations in that Order, and this cause was transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

An Amended Order of Penalty Assessment was subsequently served on Respondent and was amended twice thereafter. On October 7, 2005, the fourth Amended Order of Penalty Assessment was served on Respondent, and that Order was the subject of the final hearing in this cause.

Petitioner presented the testimony of its investigator Katina Renee Johnson. Petitioner's Exhibits numbered 1 through 24 were admitted in evidence. In addition, official recognition was granted for Sections 440.02, 440.021, 440.05, 440.06, 440.10, 440.107, and 440.38, Florida Statutes, and for Chapter 69L-6, Florida Administrative Code.

A transcript of the hearing was filed on April 12, 2006, and Petitioner filed its proposed recommended order on April 21, 2006. No pleading or other document has been filed post-hearing by the Respondent.

FINDINGS OF FACT

1. Respondent is a corporation domiciled in Georgia and engaged in the business of electrical work, which is a construction activity.

2. On July 2, 2004, Petitioner's investigator Katina Johnson visited 6347 Collins Road, Jacksonville, Florida, on a random job site visit.

3. Investigator Johnson inquired of Respondent's superintendent at the job site whether Respondent had secured the payment of workers' compensation coverage. She was informed that Respondent had done so and was subsequently provided with a Certificate of Liability Insurance from Respondent's agent in Georgia, the Cowart Insurance Agency, Inc.

4. Investigator Johnson also obtained a copy of Respondent's workers' compensation insurance policy which had a policy period of September 23, 2003, to September 23, 2004. The policy and the information contained in the Certificate of Liability Insurance were not consistent. Keith Cowart, Respondent's insurance underwriter in Georgia, testified in

deposition that the certificate of insurance is not correct because it conflicts with Respondent's workers' compensation policy, 01-WC-975384-20, which does not have a Florida endorsement.

5. Subsequent to the site visit, Investigator Johnson continued the investigation of Respondent utilizing the Department's Coverage and Compliance Automated System ("CCAS") database that contains information to show proof of coverage. She determined that Respondent did not have a Florida workers' compensation insurance policy. Johnson also checked the National Council for Compensation Insurance ("NCCI") database and further confirmed that Respondent did not have a workers' compensation insurance policy for the State of Florida.

6. Petitioner also maintains a database of all workers' compensation exemptions in the State of Florida. In consulting that database, Johnson did not find any current, valid exemptions for Respondent.

7. Florida law requires that an employer who has employees engaged in work in Florida must obtain a Florida workers' compensation policy or endorsement for such employees utilizing Florida class codes, rates, rules, and manuals to be in compliance. Further, any policy or endorsement used by an employer to prove the fact of workers' compensation coverage for employees engaged in Florida work must be issued by an insurer

that holds a valid certificate of authority in the State of Florida.

8. The insurance policy held by Respondent did not satisfy these standards. First, Respondent's policy was written by Cowart Insurance Agency, a Georgia agency which was not authorized to write insurance in Florida. Second, the premium was based on a rate that was less than the Florida premium rate; the policy schedule of operations page shows that Safeco Business Insurance insured Respondent for operations under class codes utilizing Georgia premium rates.

9. On July 6, 2004, Investigator Johnson received a copy of another insurance policy declaration page from the Cowart Insurance Agency for Respondent that still did not have Florida listed as a covered state under Section 3A. In fact, none of Respondent's workers' compensation policies had a Florida endorsement with Florida listed in Section 3A.

10. On July 7, 2004, after consulting with her supervisor, Investigator Johnson issued and served on Respondent a stop-work order and order of penalty assessment for failure to comply with the requirements of Chapter 440, Florida Statutes, specifically for failure to secure the payment of workers' compensation based on Florida class codes, rates, rules and manuals.

11. After the issuance of the stop-work order, Respondent produced a certificate of insurance with a Florida endorsement that would allegedly confer workers' compensation coverage retroactively for Respondent. Such retroactive coverage does not satisfy Respondent's obligation.

12. Employers on job sites in Florida are required to maintain business records that enable Petitioner to determine whether the employer is in compliance with the workers' compensation law.

13. Investigator Johnson issued to Respondent a request for the production of business records on July 7, 2004. The request asked the employer to produce, for the preceding three years, documents that reflected payroll and proof of insurance. Respondent produced payroll records for a number of employees.

14. On August 2, 2004, Investigator Johnson issued a second business records request to Respondent because she noticed that the names of the workers that she interviewed during her site visit were not the same as the list of employees submitted by Respondent. Respondent failed to produce the requested records.

15. When an employer fails to provide requested business records which the statute requires it to maintain and to make available to the Department, effective October 1, 2003, the Department is authorized by Section 440.107(7)(e), Florida

Statutes, to impute that employer's payroll using the statewide average weekly wage multiplied by 1.5. Petitioner therefore imputed Respondent's payroll for the entire period for which the requested business records were not produced.

16. From the payroll records provided by Respondent, and through imputation of payroll from October 1, 2003, the Department calculated a penalty for the time period of July 7, 2001, through July 7, 2004, by assigning a class code to the type of work utilizing the SCOPES Manual. The Amended Order of Penalty Assessment which assessed a penalty of \$115,456.14 was served on Respondent through its attorney on September 27, 2004.

17. The Department issued and served on Respondent a second Amended Order of Penalty Assessment on November 10, 2004, with the penalty imputed back three years to July 7, 2001. The Department assessed a penalty of \$100 per day for each day prior to October 1, 2003, for a total of \$216,794.50.

18. On April 28, 2005, the Department issued to Respondent a third Amended Order of Penalty Assessment with an assessed penalty of \$63,871.02. The reduction in the amount of penalty was due to the Department's determination that it did not have the authority at the time to impute the \$100 per day penalty prior to October 1, 2003.

19. On July 7, 2005, Respondent entered into a Payment Agreement Schedule for Periodic Payment of Penalty and was

issued an Order of Conditional Release from Stop-Work Order by the Department. Respondent made a down payment of ten percent of the assessed penalty; provided proof of compliance with Chapter 440, Florida Statutes, by obtaining a Florida endorsement on its workers' compensation insurance policy; and agreed to pay the remaining penalty in sixty equal monthly payment installments. Respondent has since defaulted on those payments.

20. Section 440.107(7)(c), Florida Statutes, requires the Department to assess a penalty of \$1,000 per day for each day that the employer conducts business operations in violation of a stop-work order.

21. Several months after issuing the stop-work order, Investigator Johnson was informed that Respondent was conducting business operations in Miami in violation thereof. She obtained documentation that showed Respondent was performing electrical work as part of a contract it entered into with KVC Constructors, Inc., on August 4, 2004.

22. Investigator Johnson obtained the daily sign-in sheets of KVC Constructors, Inc., that indicated the names of each entity that performed work on the job site for each particular day. She determined from the records that Respondent had worked 187 days in violation of the stop-work order prior to entering

into the Payment Agreement Schedule and obtaining the Order of Conditional Release from the Department.

23. On October 7, 2005, the Department issued to Respondent a fourth Amended Order of Penalty Assessment which assessed a penalty of \$250,871.02. That amount was comprised of the \$63,871.02 from the third Amended Order plus \$187,000 for the 187 days of violation of the stop-work order.

CONCLUSIONS OF LAW

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

25. Petitioner has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments it seeks are correct. Dept. of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

26. Pursuant to Sections 440.10(1) and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under Chapter 440.

27. "Employer" is defined as ". . . every person carrying on any employment" § 440.02(16), Fla. Stat. "Employment . . . means any service performed by an employee for the person

employing him or her," and, specifically, for the ". . . .
construction industry, all private employment in which one or
more employees are employed by the same employer."

§ 440.02(17)(a) and (b)2., Fla. Stat.

28. An employer who elects to secure the payment of
workers' compensation by obtaining a commercial insurance policy
must assure that the policy comports with Florida law. In
pertinent part, Section 440.10(1)(g), Florida Statutes, provides
as follows:

Subject to s. 440.38, any employer who has
employees engaged in work in this state shall
obtain a Florida policy or endorsement for
such employees which utilizes Florida class
codes, rates, rules, and manuals that are in
compliance with and approved under the
provisions of this chapter and the Florida
Insurance Code.

29. Similarly, Subsection 440.38(7), Florida Statutes,
provides in relevant part as follows:

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.

30. Petitioner has promulgated Florida Administrative Code
Rule 69L-6.019(3) and (4), which provides as follows:

(3) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., for any workers' compensation policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state:

(a) The policy information page (NCCI form number WC 00 00 01 A) must list 'Florida' in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(b) The policy information page endorsement (NCCI form number WC 89 06 00 B) must list 'Florida' in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(4) A workers' compensation policy that lists 'Florida' in Item 3.C. of the policy information page (NCCI form number WC 00 00 01 A) does not meet the requirements of Sections 440.10(1)(g) and 440.38(7), F.S., and is not valid proof of workers' compensation coverage for employees engaged in work in this state.

31. Respondent did not have an endorsement that listed Florida in Item 3.A. and, thus, did not comport with the above-quoted legal requirements. Additionally, the endorsement on the Certificate of Liability Insurance produced on July 2, 2004, conflicted with Respondent's Safeco Business Insurance policy. The actual policy is the most accurate and reliable source of information.

32. Section 440.107(7)(a), Florida Statutes, provides, in part, as follows:

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 has failed to produce the required business records . . . 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. . . . 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.

33. Respondent continued its business operations for a period of 187 days when it performed work for KVC Constructors, Inc. Respondent was, therefore, in violation of Section 440.107(7)(a), Florida Statutes, and Petitioner properly assessed the penalty of \$1000 per day for 187 days pursuant to Section 440.107(7)(c). The penalty represents the number of days worked by Respondent, in violation of the stop-work order, prior to Respondent entering into the Payment Agreement Schedule for Periodic Payment of Penalty and obtaining the Order of Conditional Release from Stop-Work Order from the Department.

34. Petitioner satisfied its burden of proving that Respondent failed to secure the payment of workers' compensation and correctly assessed the statutory penalty prescribed for such failure and for performing work in violation of the stop-work order.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a Final Order imposing a penalty against Respondent in the amount of \$250,871.02 minus the amount of payments previously made by Respondent to the Department.

DONE AND ENTERED this 8th day of June, 2006, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of June, 2006.

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.