

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 04-3188
)
RONNIE W. MARSTON, JR.,)
d/b/a MARSTON BUILDERS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on January 31, 2005, at 2:00 p.m., a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2004). The hearing location was the Alachua County Civil Courthouse, 201 East University Avenue, Gainesville, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

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

For Respondent: Ronnie W. Marston, pro se
d/b/a Marston Builders
25506 North West County Road 241
Alachua, Florida 32615

STATEMENT OF THE ISSUES

Has Respondent failed to secure that payment of workers' compensation for his employees, Section 440.107(2), Florida Statutes (2004), justifying the entry of a stop-work order, Section 440.107(7)(a), Florida Statutes (2004), and the entry of a financial penalty against Respondent, Section 440.107(7)(d), Florida Statutes (2004)?

PRELIMINARY STATEMENT

On June 27, 2004, Petitioner entered a stop-work order against Respondent for the alleged failure to secure payment of workers' compensation in violation of Section 440.107(2), Florida Statutes (2004). This was followed by an Amended Order of Penalty Assessment in the amount of \$106,135.46 in association with the alleged failure to secure the payment of workers' compensation. The penalty assessment was entered in accordance with Section 440.107(7)(d), Florida Statutes (2004). The Amended Order of Penalty Assessment was dated August 4, 2004.

Respondent, in a Petition for Administrative Hearing received by Petitioner on August 25, 2004, contested the allegations that he had failed to secure the payment of workers' compensation for his employees, to the extent that some employees were leased employees, that some parties named as employees were not employees and that certain profits from the

venture under consideration were not subject to workers' compensation. By its terms the Petition for Administrative Hearing contested the stop-work order and Amended Order of Penalty Assessment.

In turn, Petitioner referred the case to the Division of Administrative Hearings (DOAH) for conduct of a hearing consistent with Sections 120.569 and 120.57, Florida Statutes (2004). On September 8, 2004, DOAH received the case. At that time Barbara J. Staros, Administrative Law Judge, was assigned to conduct the proceeding. She noticed the hearing to be heard on December 1, 2004. The case was reassigned to Ella Jane P. Davis, Administrative Law Judge, who continued the hearing until January 31, 2005. Another case assignment was made to the undersigned who conducted the final hearing on the latter hearing date.

At final hearing, Petitioner presented the testimony of Investigator William Pangrass. Petitioner's Exhibits numbered 1 through 9 were admitted. Respondent testified in his own behalf. Respondent did not offer other witnesses or exhibits.

Petitioner requested that official recognition be made of Chapter 440, Florida Statutes (2004), and Florida Administrative Code Chapter 69L-6. Those requests were granted.

On February 14, 2005, the hearing transcript was filed with DOAH. Petitioner elected to submit proposed findings of facts

and orders through a proposed recommended order filed February 23, 2005. That submission was made pursuant to Section 120.57(1)(b), Florida Statutes (2004). It has been considered in preparing the Recommended Order. Respondent did not avail himself of the opportunity to submit proposed findings of facts and orders.

FINDINGS OF FACT

1. William Pangrass is a workers' compensation investigator for Petitioner. On July 27, 2004, following a public complaint, Mr. Pangrass went to a work site location in Gainesville, Florida. This visit was made to ascertain whether Respondent had secured workers' compensation for persons employed at the work site. He observed several persons doing framing and related activities that constituted construction. Respondent was at the work site supervising activities. Mr. Pangrass asked Respondent to provide proof of workers' compensation insurance for persons employed at the work site. Respondent told Mr. Pangrass that Respondent had a leasing arrangement with Modern Business Associates, Inc. (MBA) to provide lease employees for the job, which would make the leasing company responsible for workers' compensation coverage. The personnel leasing company (MBA) takes employees that would ordinarily work for an employer, hires them and leases them

back, making the leasing company the employer for purposes of providing workers' compensation insurance.

2. Petitioner's Exhibit numbered 8 is a certificate of liability insurance for MBA in relation to Respondent. However, on the date in question, July 27, 2004, there was a dispute concerning coverage for the employees Travis Guarino and Thomas Hunter. On that subject, Respondent first told Mr. Pangrass that those two employees had just walked on the job that morning and that Respondent had not had time to inform MBA, so that the leased employees could be covered for workers' compensation insurance. Later Respondent told Mr. Pangrass that the employee names had been called into MBA so that workers' compensation insurance could be provided.

3. Mr. Pangrass received a written communication from MBA concerning workers' compensation coverage for the employees at the work site, to include Messrs. Guarino and Hunter. This document is dated July 28, 2004. It is Petitioner's Exhibit numbered 9. It says "the two new employees were covered from the time they began work for Mr. Marston." It refers to them by name with the date of hire/coverage reflected as 7/27/04. When Mr. Pangrass received Petitioner's Exhibit numbered 9, he called MBA and someone, who is not identified in the record, told Mr. Pangrass that they had received his application, taken to mean Respondent's application and that the subject employees

were covered as of 5:30 that day. This is taken to mean 5:30 p.m. July 27, 2004.

4. As part of the investigation Mr. Pangrass utilized the Coverage and Compliance Automated System (CCAS). The CCAS printout, Petitioner's Exhibit numbered 1, shows that Respondent and Marston Builders did not have separate workers' compensation insurance coverage apart from that provided by MBA.

5. On July 27, 2004, at 3:27 p.m., Mr. Pangrass served Respondent with a written request for production of business records for penalty assessment calculation, Petitioner's Exhibit numbered 4, requesting various categories of records maintained by Respondent. The next day Mr. Pangrass received from Respondent copies of cancelled checks drawn on the account of Ronnie W. Marston, Jr., d/b/a Marston Builders, Petitioner's Exhibit numbered 5. Some checks were paid to the order of Respondent. Some were paid to Lisa Marston for child support, day care, insurance and registration. One check was written to an auto sales company for the purpose "Nissan Sentra." Some checks were written to named individuals reflected in the list of employees on the work site July 27, 2004. Other checks were written to named individuals not at the work site on that date. The other persons referred to were in addition to Respondent and Lisa Marston. Some checks written to the third-party individuals noted the purposes, such as "sub-work" or

"contracting labor." Other checks written to named individuals did not identify the purpose.

6. Concerning payments made to Respondent in the checking account, all checks that were written to Respondent had dates in 2004.

7. Prior to 2004, Respondent personally had been exempt from receiving workers' compensation coverage as a sole proprietor, notwithstanding his status as an employee. He is no longer entitled to elect exemption from coverage under terms set forth in Section 440.05, Florida Statutes, effective December 31, 2003. This is further reflected in the employer exemptions report pertaining to Respondent maintained by Petitioner, Petitioner's Exhibit numbered 2. When the law changed, corporate officers could still elect exemption, sole proprietors could not. At all times relevant to the inquiry, Respondent was a sole proprietor.

8. Based upon his belief that Messers. Guarino and Hunter were employed at the work site without workers' compensation coverage, Mr. Pangrass issued a stop-work order on July 27, 2004, at 3:27 p.m., Petitioner's Exhibit numbered 6. This decision was supported by the field interview worksheet completed by Mr. Pangrass, Petitioner's Exhibit numbered 3.

9. Based upon information discovered in the cancelled checks showing the payments that have been referred to,

Mr. Pangrass entered an Amended Order of Penalty Assessment on August 4, 2004, calling for \$106,135.46 in penalties under authority set forth in Section 440.107(7)(d), Florida Statutes (2004). The Amended of Order of Penalty Assessment is Petitioner's Exhibit numbered 7. It has attached a worksheet setting forth calculations pertaining to the persons who received the checks described. These calculations include class codes, the period of non-compliance, the gross payroll, the payroll column divided by 100, approved manual rate, premium calculations and penalty calculations the product of the proper premium multiplied by 1.5. The class codes were derived from the Scopes Manual, a listing published by NCCI that includes all occupations with job descriptions and classification numbers assigned to them. The Scopes Manual is used in the insurance industry and has been adopted by Petitioner in Florida Administrative Code Rule 69L-6.021. The classification code selected to perform penalty calculations was that of "Carpentry-Detached One or Two Family Dwellings." This classification is Number 5645.

10. The calculation of an assessed penalty included workers found at the work site on July 27, 2004, who were paid by MBA. As reflected in the cancelled checks, Petitioner's Exhibit numbered 5, those workers were also paid by Respondent. For this reason, they were considered to be dually employed and

payments not received from the lease company entitled the employees to workers' compensation coverage from Respondent.

11. Calculations in the penalty worksheet supporting the assessment included payments to Respondent and Lisa Marston. The portion of the check payments received in the name of Respondent were outside the December 21, 2003 date, when the right to select to exemption from workers' compensation coverage as an employee who was a sole proprietor had expired. The calculations and the worksheet include checks written to Lisa Marston upon the theory that the payments benefit Respondent no less so had they been paid to Respondent directly, who in turn paid Lisa Marston.

12. Calculations in the worksheet leading to the assessed penalty included checks written to individuals regardless of the stated purpose for the check, as well as those for whom the purpose of the payments was not made known.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this action consistent with Sections 120.569 and 120.57(1), Florida Statutes (2004).

14. Petitioner's purpose here is two-fold. Petitioner wishes to maintain in effect the stop-work order issued July 27, 2004, and to assess a monetary penalty under the Amended Order

of Penalty Assessment entered August 4, 2004. Petitioner has exercised its authority pursuant to Section 440.107(7)(a) and (d), Florida Statutes (2004). It is understood that Petitioner wishes to maintain the stop-work order dependant upon a decision sustaining any penalty assessed under terms of the Amended Order of Penalty Assessment and subject to the payment of the penalty if sustained.

15. Proof that Respondent failed to secure the payment of workers' compensation as required, leading to a penalty assessment as contemplated by the Amended Order of Penalty Assessment must be by clear and convincing evidence. See Department of Banking and Finance, Division of Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); and Section 120.57(1)(j), Florida Statutes (2004).

16. Pertaining to this case certain categories of employees are subject to the protection of the workers' compensation law. Those employees are defined in at Section 440.02(15), Florida Statutes (2004), as:

(a) 'Employee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

* * *

(c) 'Employee' includes:

* * *

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.

17. Employers who are subject to the requirements for providing workers' compensation coverage are set out in Section 440.02(16)(a), Florida Statutes (2004), where it states:

(a) 'Employer' means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. 'Employer' also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. . . .

18. The nature of employment which is under consideration here is defined at Section 440.02(17)(a) and (b), Florida Statutes (2004), where it states:

(a) 'Employment,' subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) 'Employment' includes:

* * *

2. All private employments in which four or more employees are employed by the same

employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

19. The liability for employers to provide workers' compensation is set forth in Section 440.10(1)(a), Florida Statutes (2004), which states:

440.10 Liability for compensation.--

(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.

20. Employers are obligated to secure the payment for compensation in the manner described in Section 440.38, Florida Statutes (2004).

21. To the extent that Respondent used MBA as an employee leasing company to provide employees for his work site, it is under terms that explain the relationship between the employee leasing company and the client company. In this example MBA was the employee leasing company and Respondent was the client company. Provisions within Section 468.520, Florida Statutes (2004), placed the relationship in context where it is stated:

(4) 'Employee leasing' means an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client. . . .

(5) 'Employee leasing company' means a sole proprietorship, partnership, corporation, or other form of business entity engaged in employee leasing.

(6) 'Client company' means a person or entity which contracts with an employee leasing company and is provided employees pursuant to that contract.

22. The obligation of MBA as the leasing company to provide workers' compensation insurance for leased employees is set forth Section 468.529(1), Florida Statutes (2004), which states:

A licensed employee leasing company is the employer of the leased employees, . . . and shall be responsible for providing workers' compensation coverage pursuant to chapter 440. . . .

23. Section 440.05, Florida Statutes (2004), controlling this case did not allow Respondent to elect an exemption from protection under the statute in his capacity as sole proprietor beyond December 31, 2003. This voiding of the certificate of election to be exempt for periods beyond December 31, 2003, is further explained in Florida Administrative Code Rule 69L-6.012. These changes were brought about under Chapters 2003-412 and 2003-422, Law of Florida, which left only certain corporate

officers engaged in the construction industry with the right to file a notice of election to be exempt from the requirements within the Workers' Compensation Law.

24. Section 440.107(3), Florida Statutes (2004), explains Petitioner's authority to enforce workers' compensation coverage requirements where it states:

The department shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

(a) Conduct investigations for the purpose of ensuring employer compliance.

* * *

(c) Examine and copy business records.

* * *

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

(h) Enforce the terms of a stop-work order.

25. The records that were requested from Respondent in this case were in keeping with Section 440.107(3)(c), Florida Statutes (2004), and Florida Administrative Code Rule 69L-6.015.

Pursuant to that request Respondent made available the cancelled checks.

26. In relation to the service of the stop-work order and the Amended Order of Penalty Assessment, Section 440.107(7)(a) and (d) states in pertinent part:

(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. . . .

* * *

(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.

27. Mr. Pangrass went to the work site on July 27, 2004, and entered the stop-work order effective 3:27 p.m. that date. He was justified in issuing the stop-work order given Respondent's explanations concerning the status of the employees Guarino and Hunter. Their status was only clarified the following day concerning workers' compensation coverage. The status was made known in the communication dated July 28, 2004, from MBA the leasing company. It makes no difference whether one reads the communication to say that the coverage began July 27, 2004, when they began work or at 5:30 p.m. that date as referred to by an unknown person in conversation with Mr. Pangrass. What is significant is that the beginning point of their employment was only made known July 28, 2004, beyond the place and time where the stop-work order was issued, given

Respondent's vague explanation of the status of coverage for the subject employees.

28. Mr. Pangrass was entitled to seek the production of the business records from Respondent. They were timely provided, but they revealed Respondent's failure to secure payment of compensation for workers, aside and apart from the obligation by MBA to provide payment of compensation for the lease employees on the work site July 27, 2004.

29. To the extent that the cancelled checks evidence receipt of remuneration by those persons named, to include Respondent, it is concluded that it was for the performance of work. Those persons were Respondent's employees entitled to payment of workers' compensation and that payment had not been secured. The exception to this conclusion would be payments to Lisa Marston. These were not payments to an employee.

30. The evidence presented to sustain these conclusions was clear and convincing.

RECOMMENDATION

Upon the consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a Final Order be entered keeping the stop-work order in effect pending payment of the modified penalty assessed for failure to secure payment of workers' compensation.

DONE AND ENTERED this 23rd day of March, 2005, in
Tallahassee, Leon County, Florida.



CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of March, 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.