

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 05-0958
)
AFS, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings, on June 3, 2005, via video-teleconference in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: Colin M. Roopnarine, Esquire
Douglas D. Dolin, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Mark K. Eckels, Esquire
Boyd & Jenerette, P.A.
201 North Hogan Street, Suite 400
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether The Department of Financial Services properly imposed a Stop Work Order and Amended Order of Penalty

Assessment pursuant to the requirements of Chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On January 10, 2005, the Department of Financial Services, Division of Workers' Compensation (Division) issued a Stop Work Order and Order of Penalty Assessment to Respondent, AFS, LLC. The Division subsequently amended the amount of the penalty assessment to \$45,643.84, by issuing an Amended Order of Penalty Assessment on February 16, 2005. On February 18, 2005, Respondent filed a petition for a formal administrative hearing.

The matter was forwarded to the Division of Administrative Hearings on or about March 14, 2005. A Notice of Hearing was issued scheduling the final hearing for June 3, 2005. The case was heard as scheduled.

At hearing, the Division presented the testimony of Allen DiMaria, Robert Lambert, and the deposition testimony of Robert Sampson, Chuck Szopinski, and Debra Cochran. Petitioner offered Exhibits numbered 1 through 25, which were admitted into evidence. Respondent presented the testimony of Braman Avery and the deposition testimony of Lee Arsenault, Bobby Walton, and Debra Cochran. Respondent offered Exhibits numbered 1 through 10, which were admitted into evidence.

A Transcript was filed on June 21, 2005. The parties timely filed Proposed Recommended Orders. Subsequent to filing

a Proposed Recommended Order, Respondent filed a Notice of Supplemental Authority. The Division filed a Motion to Dismiss the Notice of Supplemental Authority in which the Division included argument regarding the merits of the case cited and its applicability to the instant case. Respondent filed a Response to Petitioner's Motion to Dismiss. Upon consideration, Petitioner's Motion to Dismiss the Notice of Supplemental Authority is denied.^{1/}

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.

2. Respondent AFS, LLC. (AFS), is a corporation located in Jacksonville, Florida, and is involved in the construction industry, primarily framing houses. Braman Avery is the owner and manager of AFS.

3. Lee Arsenault is a general contractor whose business is located in Jacksonville, Florida. Mr. Arsenault contracted with AFS to perform framing services at a construction site located at 1944 Copperstone Drive in Orange Park, Florida.

4. At all times material to this proceeding, AFS maintained workers' compensation coverage for its employees through a licensed employee leasing company.

5. AFS contracted with Greenleads Carpentry, Inc. (Greenleads) to perform work at the job site in question.

6. Prior to subcontracting with Greenleads, Mr. Avery requested from Greenleads, among other things, a certificate of insurance showing that Greenleads had general liability coverage and workers' compensation insurance.

7. Greenleads provided a certificate of insurance to Mr. Avery showing that Greenleads had workers' compensation coverage. The certificate of insurance contains a policy number, dollar limits, and effective and expiration dates of June 1, 2004 through June 1, 2005.

8. Debra Cochran is office manager of Labor Finders, an employee leasing company. According to Ms. Cochran, Labor Finders' corporate office issued the certificate of insurance to Greenleads. At the time of issuance, the certificate of insurance was valid.

9. Greenleads did not follow through on its obligations to Labor Finders in that Green Leads did not "run its workers through" Labor Finders. Consequently, Greenleads' workers were not covered by workers' compensation as indicated on the certificate of insurance. Labor Finders did not issue any document showing cancellation or voiding of the certificate of insurance previously issued.

10. Mr. Avery relied upon the face of the certificate of insurance believing AFS to be in total compliance with statutory requirements regarding workers' compensation for subcontractors. That is, he believed that the Greenleads' workers were covered for workers' compensation as indicated on the face of the certificate of insurance. Mr. Avery was not informed by Labor Finders or Greenleads that Greenleads did not, after all, have workers' compensation coverage in place on the workers performing work under the contract between AFS and Greenleads on the worksite in question.

11. Bobby Walton is president of Insure America and has been in the insurance business for 35 years. His company provides general liability insurance to AFS. According to Mr. Walton, Mr. Avery's reliance on Greenleads' presentation to him of a purportedly valid certificate of insurance is the industry standard. Further, Mr. Walton is of the opinion that there was no obligation on behalf of Mr. Avery to confirm coverage beyond receipt of the certificate of insurance provided by the subcontractor. That is, there is no duty on behalf of the contractor to confirm coverage beyond receipt of the certificate of insurance.

12. Allen DiMaria is an investigator employed by the Division. His duties include investigating businesses to ensure

that the employers in the state are in compliance with the requirements of the workers' compensation law and related rules.

13. On January 5, 2005, Mr. DiMaria visited the job site in question and observed 13 workers engaged in construction activities. This visit was a random site check.

14. Mr. DiMaria interviewed the owner of Greenleads and checked the Division's database. Mr. DiMaria determined that Greenleads did not have workers' compensation coverage.

15. After conferring with his supervisor, Mr. DiMaria issued a stop-work order to Greenleads, along with a request for business records for the purpose of calculating a penalty for Greenleads.

16. In response to the business records request, Greenleads submitted its check ledger along with an employee cash payment ledger, both of which were utilized in calculating a penalty for Greenleads.

17. On January 11, 2005, Mr. DiMaria issued an Amended Order of Penalty Assessment to Greenleads for \$45,623.34. Attached to the Amended Order of Penalty Assessment issued to Greenleads is a penalty worksheet with a list of names under the heading, "Employee Name", listing the names of the employees and amounts paid to each employee.

18. During the investigation of Greenleads, Mr. DiMaria determined that Greenleads was performing subcontracting work

for Respondent. This led to the Division's investigation of AFS.

19. Mr. DiMaria spoke to Mr. Avery and determined that AFS paid remuneration to Greenleads for work performed at the worksite. He checked the Division's data base system and found no workers' compensation coverage for AFS. He determined that AFS had secured workers' compensation coverage through Southeast Personnel Services, Inc. (SPLI), also a licensed employee leasing company. However, the policy with SPLI did not cover the employees of Greenleads performing work at the job site.

20. Mr. DiMaria requested business records from Mr. Avery. Mr. Avery fully complied with this request. He examined AFS' check registry and certificates of insurance from AFS. Other than the situation involving Greenleads on this worksite, Mr. DiMaria found AFS to be in complete compliance.

21. On January 10, 2005, after consulting with his supervisor, Robert Lambert, Mr. DiMaria issued a Stop Work Order to AFS. A Stop Work Order issued by the Division requires the recipient to cease operations on a job site because the recipient is believed to be not in compliance with the workers' compensation law. The Stop Work Order issued by Mr. DiMaria was site specific to the work site in question.

22. Based upon the records provided by Mr. Avery, Mr. DiMaria calculated a fine. 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.

23. Mr. DiMaria's calculation of the fine imposed on AFS was based solely on the Greenleads' employees not having workers' compensation coverage. On February 16, 2005, Mr. DiMaria issued an Amended Order of Penalty in the amount of \$45,643.87, the identical amount imposed upon Greenleads. A penalty worksheet was attached to the Amended Order of Penalty Assessment. The penalty worksheet is identical to the penalty worksheet attached to Greenleads' penalty assessment, with the exception of the business name at the top of the worksheet and the Division's case number.

24. Greenleads partially paid the penalty by entering into a penalty payment agreement with the Division. Greenleads then received an Order of Conditional Release.

25. Similarly, AFS entered into a penalty payment agreement with the Division and received an Order of Conditional Release on February 16, 2005. Moreover, AFS terminated its contract with Greenleads.

26. Lee Arsenault is the general contractor involved in the work site in question. AFS was the sole framing contractor on this project, which Mr. Arsenault described as a "pretty significant project." He has hired AFS to perform framing

services over the years. However, because the Stop Work Order was issued to AFS, Mr. Arsenault had to hire another company to complete the framing work on the project.

27. Mr. Avery estimates economic losses to AFS as a result of losing this job to be approximately \$150,000, in addition to the fine.

28. Mr. Arsenault, Ms. Cochran, as well as the Division's investigator, Mr. DiMaria, all agree with Mr. Walton's opinion, that it is customary practice in the construction industry for a contractor who is subcontracting work to rely on the face of an insurance certificate provided by a subcontractor.

29. Robert Lambert is a workers' compensation district supervisor for the Division. When asked under what authority the Division may impose a penalty on both Greenleads and AFS for the same infraction, he replied that it was based on the Division's policy and its interpretation of Sections 440.02, 440.10, and 440.107, Florida Statutes.

CONCLUSIONS OF LAW

30. 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

31. Administrative fines are penal in nature. Department of Banking and Finance, Division of Securities and Investor

Protection v. 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., v. Department of Financial Services, Division of Workers' Compensation, DOAH Case No. 04-2524 (RO January 13, 2005), and Department of Financial Services, Division of Workers' Compensation v. U and M Contractors, Inc., DOAH Case No. 04-3041 (RO April 7, 2005).

32. This is apparently a case of first impression, as no cases are cited by the parties in their Proposed Recommended Orders on the issue of the Division's authority to classify two businesses as employers of the same employees resulting in the imposition of two identical penalties for the same infraction. The Division relies on established case law for the proposition that an agency's interpretation of the law is entitled to great weight. That is generally the case unless the agency's interpretation is clearly erroneous or if special agency expertise is not required or the agency's interpretation conflicts with the plain and ordinary meaning of the statute. Florida Hospital v. Agency for Health Care Administration, 823 So. 2d 844 (Fla. 1st DCA 2002); Ocampo v. Department of Health, 806 SO. 2d 633 (Fla. 1st DCA 2002). Moreover, an administrative

agency is a creature of statute and can only do what it is authorized to do. Id.

33. Section 440.02(15)(a), Florida Statutes, defines "employee" as "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 of hire" The Division argues in its Proposed Recommended Order that by not securing workers' compensation coverage, the subcontractors became employees of AFS by operation of this definitional section and Section 440.10(1)(a), Florida Statutes.

34. Subsection 440.10(1)(a), Florida Statutes, reads in pertinent part as follows:

440.10. Liability for Compensation.

(1)(a) . . . 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 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 employees 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. . . .

(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.
(emphasis added)

35. 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 Respondent.

36. When the Division imposed the fine on Greenleads, it did so because it determined that Greenleads was the "employer" for purposes of workers' compensation coverage. When the Division imposed the fine on AFS, it did so because it determined that AFS was the "employer" for purposes of workers' compensation coverage. The Division has defined two businesses 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; essentially, that is what the Division is doing.

37. AFS complied with the plain and ordinary meaning of Subsection 440.10(1)(c), Florida Statutes, by requiring a subcontractor, Greenleads, to provide evidence of workers' compensation insurance.

38. 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)(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.)

39. In this instance, the contractor, AFS, required the subcontractor, Greenleads, to provide evidence of workers' compensation insurance, satisfying the requirements of Section 440.10(1)(c), Florida Statutes.

40. Applying the analysis of the court in Criterion Leasing Group v. Gulf Coast Plastering & Drywall and LaCroix Construction Company v. Bush, supra, Respondent reasonably relied upon the certificate of insurance regarding Greenleads' coverage. Further, the undersigned is not persuaded that, pursuant to Section 440.10, two businesses can be defined as the employer of the identical workers for the identical job. Accordingly, a penalty is not warranted here.

RECOMMENDATION

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

RECOMMENDED:

That the Division of Workers' Compensation rescind the Amended Order of Penalty Assessment issued February 16, 2005, and the Stop Work Order issued to Petitioner on January 10, 2005.

DONE AND ENTERED this 26th day of August, 2005, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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 26th day of August, 2005.

Endnote

^{1/} While this Recommended Order does not rely upon the case cited by Respondent in its Notice of Supplemental Authority, Respondent was entitled to file it.

COPIES FURNISHED:

Colin M. Roopnarine, Esquire
Douglas D. Dolin, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399

Mark K. Eckels, ESquire
Boyd & Jenerette, P.A.
201 North Hogan Street, Suite 400
Jacksonville, Florida 32202

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

Carlos G. Muniz, 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.