STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 05-2289
RAYLIN STEEL ERECTORS, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on August 18, 2005, in Jacksonville, Florida.

APPEARANCES

For Petitioner: John M. Iriye, Esquire
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Division of Workers' Compensation
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For Respondent: Allen P. Clark, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Raylin Steel Erectors, Inc., employed persons in the State of Florida without obtaining

workers' compensation coverage meeting the requirements of Chapter 440, Florida Statutes. If Respondent failed to obtain the required insurance, the subsequent issue is whether the penalty in the amount of $140,975.32, was properly assessed by Petitioner, Florida Department of Financial Services, Division of Workers' Compensation, pursuant to Section 440.107, Florida Statutes, and Florida Administrative Code Chapter 69L.

PRELIMINARY STATEMENT

Petitioner issued a Stop Work Order and Order of Penalty Assessment against Respondent, ordering Respondent to stop work and cease all business operations in Florida. Petitioner then requested business records from Respondent, which it used to assess a penalty of $150,598.05 against Respondent. In the Pre-Hearing Stipulation jointly filed by the parties prior to hearing, Petitioner moved for leave to amend the penalty assessment to $140,975.32. At the commencement of the hearing, the motion was granted, and the latter penalty amount became that which Petitioner seeks to impose upon Respondent.

At the hearing, Petitioner presented the testimony of Allen DiMaria, Investigator for the Division of Workers' Compensation (the "Division"), and Robert Lambert, District Supervisor for the Division, and offered Exhibit Letters A through R, all of which were admitted into evidence. Respondent presented the testimony of Linda Rowan, secretary/treasurer of Respondent, and

John F. Scarborough, vice president and part owner of Respondent, and offered Exhibit Nos. 1A through E, 2A through E, 3A and B, 4A through C, and 5, all of which were admitted into evidence.

A Transcript was filed on August 31, 2005. After the hearing, Petitioner and Respondent filed Proposed Findings of Fact and Conclusions of Law on September 21, 2005.

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

FINDINGS OF FACT

1. The Division is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees. The Division maintains records of all Notices of Coverage for workers' compensation reported to it. Insurers are required by law to report all Florida workers' compensation policies to the Division.

2. Respondent is a Georgia corporation located in Adel, Georgia. Respondent is in the business of erecting pre-engineered metal buildings not exceeding two stories in height.

3. Respondent, at all times involved in this matter, was engaged as a subcontractor to various general contractors for construction work performed in the State of Florida. All of the work performed in Florida for purposes of these proceedings was

actually performed by sub-subcontractors of Respondent. Respondent testified that it did not use any of its own employees to perform work at any of the sites involved in these proceedings.

4. Petitioner, based upon field interviews, determined that at least some of the employees working at Respondent's job site in Jacksonville, Florida, claimed to be employed by Respondent.

5. Respondent had obtained workers' compensation coverage in Georgia which provided for out-of-state coverage for Florida under Section 3C of the policy, but no listed coverage for Florida under Section 3A.

6. Four of the sub-subcontractors used by Respondent to perform work in Florida, Celaya Steel Co., DC Construction, Ronald Weeks, d/b/a RTW Construction, and JCB Steel Erectors, Inc., had "other states coverage" in force, including Florida, in Section 3C (but not 3A) of their workers' compensation policies. Two companies used by Respondent to perform work in Florida, Edward Leggett and Southern Steel Erectors, were not covered by the "other states coverage" provision of Georgia workers' compensation policies.

7. On September 16, 2004, Edward Leggett, as a sub-subcontractor to Respondent, was engaged in the construction of a pre-engineered metal building located at 3615 Dupont Center,

Jacksonville, Florida. The general contractor on this job was BEKKA Corporation. Allen DiMaria, Petitioner's investigator, observed the type of work being performed on the project, patch work on the roof. No steel erection, or any other type of work was observed being performed on this project.

8. Respondent's workers' compensation code as its principal business is listed under sheet metal work, NCCI Code No. 5538. Petitioner admitted that this was the most appropriate code classification to describe Respondent's principal type of work.

9. The type of pre-engineered metal buildings erected by Respondent's sub-subcontractors required various types of work. The first phase of the work is steel erection, also known as "red iron work." The next phase is erecting walls and performing various types of trim work involved with sheet metal. The third phase is roof work, and the final phase is trim work and any punch list work required to complete the project.

10. Respondent's standard payment draw requests to its customer, the general contractor, follows a sequencing under which 25 percent is paid for steel erection, 50 percent for sheet metal work and trim out, and 25 percent for roofing. Respondent's sub-subcontractors are also paid in this same manner. Further, Respondent's sub-subcontractors, who all were

out-of-state Georgia employers, generally provide per diem travel expenses to their employees and account for overhead and profit.

11. On September 17, 2004, after conducting a CCAS database search which resulted in his finding no record of workers' compensation coverage for either Respondent or Edward Leggett, Mr. DiMaria issued a Stop Work Order and Order of Penalty Assessment on Respondent. The Order required Respondent to cease all business operations in Florida.

12. After the Stop Work Order was issued, Mr. DiMaria sent a request for business records to Respondent. Linda Rowan, Respondent's secretary/treasurer, responded that Respondent had no employees doing any work at any job sites in Florida, and that all work was being performed by sub-subcontractors of Respondent.

13. Mr. DiMaria then requested that Respondent send copies of any subcontracts, payment records, and insurance information regarding work performed in Florida by Respondent's subcontractors from 2002 to September 17, 2004, the date of the Stop Work Order. In response to this request, Ms. Rowan mailed copies of all subcontracts Respondent had with its sub-subcontractors, all payment records related to these contracts, and insurance certificates furnished by the sub-subcontractors.

Because Respondent had no employees performing any of the work, it had no payroll records to send to Petitioner.

14. Petitioner requested no business records from Respondent's sub-subcontractors to determine what actual payroll was performed on the jobs in question.

15. Once the information was furnished to Petitioner, Respondent heard nothing further from Petitioner until the Amended Order of Penalty Assessment was issued in the amount of $150,598.05. Petitioner, on the eve of hearing, further amended the penalty assessment to the amount of $140,975.32.

16. In calculating the further Amended and Final Penalty Assessment, Petitioner asserted that it utilized the total payments made by Respondent to its sub-subcontractors in lieu of any payroll records, as the calculation of gross payroll. The actual amounts paid to DC Construction on the BEKKA Corporation job, performed from June 18, 2004 to August 19, 2004, and from July 29, 2004 to September 23, 2004, were overstated by $5,518.00. The amount of assumed payroll for the work performed by Southern Steel from April 12, 2002 to April 30, 2002, was understated by $800.00, based upon the actual payments received. These assumed payroll amounts were then multiplied by the NCCI classification code rates for steel erection for all work

performed by Respondent's sub-subcontractors in Florida during 2002, 2003, and 2004. That figure was then multiplied by 1.5 to arrive at the penalty assessment.

17. Celaya Steel performed work in Florida between August 28, 2003, and September 30, 2003, for which it was paid $7,602.00, by Respondent. On a separate job, Celaya Steel was paid $7,000.00, for work performed between September 24, 2003, and September 30, 2003. These precise breakdowns by job performed by Celaya Steel are not included in the further Amended Stop Work Order and Penalty Assessment, but were included in the original Penalty Assessment dated October 14, 2004. After deducting amounts paid for equipment rentals, the cost of work performed by Celaya Steel after October 1, 2003, is $13,528.00.

18. Southern Steel Erectors performed work as a sub-subcontractor of Respondent from April 12, 2002, to April 30, 2002, for which it was paid $7,300.00.

19. Ronald Weeks, d/b/a RTW Construction, performed work on May 14, 2004, with a gross payroll of $1,420.00.

20. JCB Steel Erectors, Inc., performed work from October 30, 2003 to December 04, 2003, with a gross payroll of $5,873.00.

21. Based upon insurance certificates received from its sub-subcontractors, Respondent believed that its sub-subcontractors' workers were covered by workers' compensation insurance.

22. Petitioner calculated its original and final Amended Penalty Assessments using Florida premium rates and the class code for steel erection only. In the Final Penalty Assessment, the penalty was revised slightly due to equipment charges that were offset against the sub-subcontract amounts so that the assumed payroll was calculated based upon actual payments received by the sub-subcontractors, not the original subcontract amounts, except as to DC Construction where the subcontract amount, not the actual payments made to DC on the BEKKA Corporation job were used. Celaya Steel started this job, was later replaced by DC Construction, which was further replaced by Edward Leggett which finished the remaining roof-patching work on the project and was paid $4,000.00 for its work.

CONCLUSIONS OF LAW

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

24. Since an administrative fine deprives the person fined of substantial rights in property, such fines are punitive in nature. Accordingly, pursuant to the reasoning in Department of

Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996) and the Recommended Order, adopted in toto by Petitioner in Dept. of Financial Services, Division of Workers' Compensation v. U & M Contractors, Inc., DOAH Case No. 04-3041 (FO April 27, 2005), it is concluded that Petitioner bears the burden of proof herein by clear and convincing evidence. See also Triple M Enterprises Inc., v. Department of Financial Services, Division of Workers' Compensation, DOAH Case No. 04-2524 (RO January 13, 2005).

25. Section 440.10(1)(a), Florida Statutes (2003), states:

> (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.

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

> (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 within 72 hours. The order shall take effect when served upon the employer or, for a particular employer work site, when served at that work site. In addition to serving a stop-work order at a particular work site which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer work sites in the state for which the employer is not in compliance. A stop-work order may be served with regard to an employer's work site by posting a copy of the stop-work order in a conspicuous location at the work site. 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 require an employer who is found to have failed to comply with coverage requirements of s. 440.38 to file with the department, as a condition of release from a stop-work order, periodic reports of 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.

27. Section 440.38, Florida Statutes (2003), states, in part:

> (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.

28. Subsection (7) of Section 440.38, Florida Statutes was added by the 2003 Florida Legislature, effective October 1, 2003. The statute in effect prior to that date did not expressly require an employer, for workers' compensation purposes, as cited in Section 440.38(7), Florida Statutes, above to "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." Further, Petitioner's rule concerning the

requirement, Florida Administrative Code Rule 69L-6.019, was not adopted until June 17, 2004. All of the work performed by Respondent's sub-subcontractors prior to October 1, 2003, was not required to meet the standards imposed by the "new" Section 440.38. This does not excuse Respondent from having workers' compensation coverage for work performed by his employees in Florida prior to October 1, 2003, but, clearly, a different standard must apply. In this case, Respondent provided undisputed proof that it had "other states coverage" in its Georgia-issued workers' compensation policy for itself and for four of the sub-subcontractors it employed in Florida: Celaya Steel Co., DC Construction, Ronald Weeks d/b/a RTW Construction, and JCB Steel Erectors, Inc., but did not have coverage for Edward Leggett and Southern Steel.

29. Section 440.02(16)(a), Florida Statutes (2003), defines "employer" in relevant part as "every person carrying on an employment. . . ." Further, "employment" is defined in relevant part in Section 440.02(17)(a), Florida Statutes (2003) as "any service performed by an employee for the person employing him or her."

30. Respondent is an "employer" for the purposes of Chapter 440, Florida Statutes, because during the proposed penalty period of 2002 through September 17, 2004, Respondent, as a subcontractor who engaged sub-subcontractors to perform

work in Florida, was an "employer engaged in employment activities in Florida." The sub-subcontractors' employees were also the statutory employees of Respondent as contended by Petitioner. See, e.g., Fidelity Construction Co. v. Arthur J. Collins & Sons, Inc., 130 So. 2d 612 (Fla. 1961); McCollough v. Bush, 868 So. 2d 1271 (Fla. 1st DCA 2004).

31. It is found by clear and convincing evidence that Respondent failed to comply with Section 440.38(7), Florida Statutes (2003), because during that portion of the penalty period subsequent to October 1, 2003, Respondent was working in Florida without the required endorsement to its workers' compensation insurance policy that would base its coverage on Florida premium rates and rules. Respondent's policy indicates that Respondent's coverage was issued in Georgia and was based on Georgia's premium rates, not Florida premium rates. The policy, including the "Other States Insurance" endorsement, does not satisfy the requirements of Section 440.38(7), Florida Statutes (2003). Respondent failed to maintain, at all times, the Florida premium rate endorsement required by Section 440.38(7), Florida Statutes (2003). However, for the period of any work performed prior to October 1, 2003, Petitioner failed to prove by clear and convincing evidence that Respondent's "other states coverage" would not cover its sub-subcontractors and their employees who worked on Respondent's projects in

Florida. Accordingly, no penalties or assessments are due to Petitioner for work performed in Florida by Celaya Steel Co., DC Construction, Ronald Weeks d/b/a RTW Construction, or JCB Steel Erectors, Inc., from 2002 through September 17, 2004.

32. Petitioner has failed to prove by clear and convincing evidence that Respondent violated any applicable Florida Statutes or rules prior to October 1, 2003. The penalties assessed for work performed by Celaya Steel Co., between August 28, 2003, and September 30, 2003, and from September 24, 2003, through September 30, 2003, were assessed without Division authority under Section 440.38(7), Florida Statutes, and Florida Administrative Code Rule 69L-6.028(2) and (4), since neither of those provisions was effective until after the dates the work was performed.

33. Had Respondent produced evidence of workers' compensation coverage for Southern Steel Erectors for the time period at issue, April 12, 2002 and April 30, 2002, it would have avoided Petitioner's assessment of penalty for the same reasons Celaya Steel Co., is found not to have violated Chapter 440, Florida Statutes. Respondent did not produce at hearing evidence of direct workers' compensation coverage for Southern Steel Erectors, other than an out-of-date Certificate of Liability Insurance for the period of November 1, 1999, through November 1, 2000. However, Respondent produced its own workers'

compensation policy for the relevant time period of Southern Steel Erector's work in Florida. Since, statutorily, Southern Steel Erectors is an "employee" of Respondent for its work done in Florida, Respondent's "other states coverage" extends to cover Southern Steel Erectors' work performed in Florida from April 12, 2002, through April 30, 2002. Accordingly, Respondent has no liability for penalties for not providing evidence of coverage from April 12, 2002, through April 30, 2002.

34. Even if Southern Steel Erectors were not covered by Respondent's workers' compensation policy, Petitioner erred in how it calculated the penalties due for the work performed by Southern Steel Erectors. Pursuant to Florida Administrative Code Rule 69L-6.028(4), when the records produced are not sufficient to compute actual payroll, the penalty to be assessed is $100 per day for each calendar day of noncompliance occurring prior to October 1, 2003, pursuant to Section 440.107(5), Florida Statutes. In this case, if Southern Steel Erectors were not covered by Respondent's workers' compensation policy, the penalty would be $100 per day for 18 days, or $1,800.00 for the work performed by Southern Steel Erectors.

35. Section 440.107(7)(d)1., Florida Statutes (2003), states that an employer who fails to secure the payment of workers' compensation is subject to

> 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. The evidence was clear at hearing that the work performed by Edward Leggett on the job inspected by Petitioner on September 17, 2004, consisted solely of roof patching work. Therefore, the penalties assessed as to Edward Leggett in the amount of $5,758.20, were improperly assessed by Petitioner's employing the steel erection code rate for 2004, which did not apply to any of the work performed by Edward Leggett. The roofing code rate for 2004, NCCI Code No. 5551, was $46.17 per hundred dollars of payroll. Applying that rate to the $4,000 assumed payroll times 1.5 yields a penalty of $2,770.20.

37. It is undisputed that Respondent had no payroll records for employees performing work in Florida because none of its own employees performed such work. Under these circumstances, where no payroll information is available, the NCCI classification code to be applied can be established by other evidence. The only evidence in this case, other than that related to Edward Leggett, who performed only roof patching work, demonstrated that Respondent's sub-subcontractors performed multiple tasks consisting of steel erection work,

sheet metal work, trimming out, and roofing work. Respondent provided the percentages of work performed by these sub-subcontractors not as an estimate of the work each performed, but as an accurate reflection of how these sub-subcontractors were actually paid for the work performed. Therefore, Petitioner incorrectly applied the highest rated labor classification when the work should have been divided into three categories to reflect the proportionate values of the work performed: 25 percent for red iron work (steel erection), 50 percent for sheet metal and trim, and 25 percent for roofing. Even if the actual payment made for the various types of work performed is ignored, Respondent's principal business classification was coded under its own insurance policy as sheet metal work, which classification was not used by Petitioner in any of its penalty calculations.

38. Respondent's "estimates" of per diem travel expenses and accounting for overhead and profit were not supported by Rule 18 of the NCCI Basic Manual, which does not allow estimates of non-payroll items to be made. Therefore, these non-payroll items must be included in any penalty assessed by Petitioner.

39. The final amended penalty assessment was improperly computed by showing the total amount paid to DC Construction as $48,839.58, when, based upon Respondent's payroll records, the actual amount paid was $43,321.58. Petitioner apparently used

the total subcontract price for DC Construction when, in fact, Edward Leggett finished the job when DC failed to complete it. Therefore, the final penalty assessed against DC Construction was overstated by $7,943.43 ($5,518.00 x 95.97 x 1.5).

40. Petitioner also incorrectly included in its final penalty computations the amount paid to Southern Steel Erectors at $5,700.00, whereas the actual payments made to Southern Steel Erectors totaled $6,500.00.

41. No penalty is applicable to Southern Steel Erectors or to Celaya Steel Co., for work performed prior to October 1, 2003. Even if a penalty were to be imposed for this time period, the appropriate rate would be $100 for each day of noncompliance.

42. Based upon the foregoing, it is found by clear and convincing evidence that the original and final amended penalties assessed in this matter were improperly calculated and/or assessed.

RECOMMENDATION

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

RECOMMENDED that the Division of Workers' Compensation issue a further and final Amended Penalty Assessment Order as follows:

1. Edward Leggett. The gross payroll of $4,000.00 should be multiplied at the rate of 40 times the Roofwork NCCI approved manual rate of $46.17 per hundred, then times 1.5 for a revised final penalty of $2,770.20.

2. DC Construction. The actual payments made to DC Construction were $43,321.58 which should be applied at the rate of 25 percent of the payment times the NCCI steel erection code 5059 rate, 50 percent of the payment times the sheet metal and trim NCCI code 5538 rate, and 25 percent of the payment times the roofing work NCCI code 5551 rate. This results in a revised penalty for the DC Construction work of $28,971.32.

3. Celaya Steel Co. Only the amounts for work performed after October 1, 2003, $13,528.00 shall be applied for assessment purposes. Applying the appropriate codes as used for the DC Construction work (25 percent steel erection, 50 percent sheet metal and trim, and 25 percent roofing) yields a final revised penalty of $9,047.07.

4. Southern Steel. No work was performed by Southern Steel Erectors after October 1, 2003. Accordingly, no penalty is to be assessed for any work performed by Southern Steel Erectors.

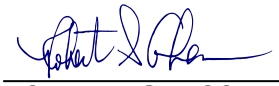
5. Ronald Weeks d/b/a RTW Construction. Applying the same NCCI codes as applied to the work performed by DC Construction and Celaya Steel Co. (25 percent steel erection, 50 percent

sheet metal and trim, and 25 percent roofing), yields a final revised penalty of $768.33.

6. JCB Steel Erectors. Applying the same NCCI codes as applied to the work performed by DC Construction, Celaya Steel Co., and Ronald Weeks d/b/a RTW Construction (25 percent steel erection, 50 percent sheet metal and trim, 25 percent roofing) yields a final revised penalty of $2,883.73.

7. The total revised penalties and assessments (Items 1-6 above) are $44,440.65.

DONE AND ENTERED this 19th day of October, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.