

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES,)
)
Petitioner,)
)
vs.) Case No. 05-2325
)
SNYDER MARTIN, d/b/a AFFORDABLE)
FENCING,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Don W. Davis, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in this case on August 17, 2005, in Jacksonville, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: John M. Iriye, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent complied with coverage requirements of the workers' compensation law, Chapter 440, Florida Statutes. A determination of whether

Respondent functioned as an employer is a preliminary issue to be resolved.

PRELIMINARY STATEMENT

By Stop Work and Penalty Assessment Order (SWO) issued on April 27, 2005, the Department of Financial Services, Division of Workers' Compensation (Petitioner), alleged Martin Snyder (Respondent) failed to secure workers' compensation coverage for workers at a fence construction site in Jacksonville, Florida. Petitioner also requested business records from Respondent, and upon Respondent's failure to produce those records issued an amended penalty assessment order assessing a penalty in the amount of \$198,954.12.

By Petition dated June 13, 2005, Respondent disputed the allegations and requested formal administrative proceedings. The matter was referred to the Division of Administrative Hearings on June 28, 2005.

By Notice of Hearing dated July 14, 2005, final hearing was scheduled for August 17, 2005.

At the final hearing, Petitioner presented the testimony of one witness and offered 15 exhibits which were admitted into evidence. Respondent did not appear and no appearance was made on his behalf.

No transcript of the final hearing was provided. Petitioner timely filed a Proposed Recommended Order, which has

been reviewed and utilized where possible in the preparation of this Recommended Order. Respondent did not file any post-hearing submission.

All references to Florida Statutes are to the 2004 edition unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the agency of state government currently responsible for enforcing the requirement of Section 440.107, Florida Statutes, that employers secure the payment of compensation for their employees.

2. Respondent works in the fence construction industry and employs four people.

3. Petitioner's investigator identified three people preparing a worksite for the erection of a privacy fence at 3000 Majestic Oaks Lane South in Jacksonville, Florida. The investigator then contacted Respondent and confirmed that the three identified individuals in addition to Respondent, were employed by Respondent for a total of four employees.

4. The investigator determined none of the employees had workers' compensation exemptions nor had Respondent secured the payment of workers' compensation to his employees.

5. On April 27, 2005, the investigator served a SWO on Respondent. The SWO required Respondent to cease all business operations in Florida. At the same time, the investigator

served a Request for Business Records for Penalty Calculation on Respondent, requesting payroll records from Respondent for the period April 27, 2002, through April 27, 2005 (the audit period for penalty calculation).

6. Respondent provided no records to the investigator. On May 23, 2005, the investigator determined 520 days had passed between the beginning of the audit period and September 30, 2003, and the penalty for noncompliance during this period was \$52,000.00. The investigator also determined that during the period October 1, 2003, through the end of the audit period, the statewide average weekly wage paid by employers was \$651.38; Respondent had four (4) employees; the imputed weekly payroll for Respondent's employees was \$320,848.00; using approved manual rates Respondent should have paid \$97,969.40 in workers' compensation premium; and the penalty for noncompliance during this period was calculated to be \$146,954.12. On May 26, 2005, Investigator Bowman served the Amended Order of Penalty Assessment on Respondent. The Amended Order assessed Respondent with a penalty for the entire audit period in the amount of \$198,954.12.

7. The investigator obtained records created by Respondent demonstrating Respondent placed a bid on a job on June 1, 2005, and Respondent completed the job on July 1, 2005. On July 19, 2005, the investigator served a Corrected Amended Order of

Penalty Assessment on Respondent, which assessed a penalty in the amount of \$3,000.00 for violating the terms of the SWO. Respondent violated the SWO on two separate days, the day of the bid and the day the work was completed. No competent substantial evidence was presented regarding intervening business operations.

CONCLUSIONS OF LAW

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

9. Petitioner has the burden of proof in this case. Petitioner must show by a preponderance of the evidence that Respondent violated the Workers' Compensation Law during the audit period, that he engaged in business operations in violation of the SWO, and that the penalty assessments are correct. Department of Labor and Employment Security, Division of Workers' Compensation v. Bobby Cox, Sr., d/b/a C H Well Drilling, DOAH Case No. 99-3854 (Recommended Order para. 34)(adopted in part by Final Order June 7, 2000); Department of Labor and Employment Security, Division of Workers' Compensation v. Eastern Personnel Services, Inc., DOAH Case No. 99-2048 (Recommended Order para. 24)(adopted by Final Order Nov. 30, 1999), appeal dismissed, Case No. 1D99-4839 (Fla. 1st DCA April 10, 2000).

10. Respondent employed four people as "employees" within the definition of Section 440.02(15)(a) and (c), Florida Statutes, which reads:

(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.

11. Respondent was an employer within the definition contained in Section 440.02(16)(a), Florida Statutes, which states in pertinent part:

'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. . . .

12. Respondent was required to secure the payment of workers' compensation to his employees pursuant to Section 440.10(1)(a), Florida Statutes (2004), which states:

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.

13. As an employer, Respondent was required to maintain records pursuant to Section 440.107(5), Florida Statutes, the specifics of which Petitioner has set forth in Florida Administrative Code Rule 69L-6.015. As a consequence of Respondent's failure to produce records sufficient to enable Petitioner to determine Respondent's payroll for each employee, Petitioner was required to impute payroll to each employee based upon the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law. § 440.107(e), Fla. Stat.

14. Since Petitioner identified four employees and Respondent produced no records, Petitioner was required to assess \$100.00 per day from the beginning of the audit period until September 30, 2003, and to calculate a penalty based on

imputed payroll to all four employees from October 1, 2003, until the end of the audit period. Petitioner properly calculated a penalty pursuant to Florida Administrative Code Rule 69L-6.028, which states:

(1) In the event an employer fails to provide business records sufficient for the department to determine the employer's payroll for the period requested for the calculation of the penalty pursuant to section 440.107(7)(e), Florida Statutes, the department shall impute payroll at any time after the expiration of fifteen business days after receipt by the employer of a written request to produce such business records.

(2) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for purposes of calculating the penalty provided for in section 440.107(7)(d), Florida Statutes, the imputed weekly payroll for each employee, corporate officer, sole proprietor or partner for the portion of the period of the employer's non-compliance occurring on or after October 1, 2003 shall be calculated as follows:

(a) For employees other than corporate officers, for each employee identified by the department as an employee of such employer at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage as defined in section 440.12(2), Florida Statutes, that is in effect at the time the stop work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.

(b) If the employer is a corporation, for each corporate officer of such employer

identified as such on the records of the Division of Corporations at the time of issuance of the stop-work order, the imputed weekly payroll for each week of the employer's non-compliance for each such corporate officer shall be the statewide average weekly wage as defined in section 440.12(2), Florida Statutes, that is in effect at the time the stop work order was issued to the employer, multiplied by 1.5.

(c) If a portion of the period of non-compliance includes a partial week of non-compliance, the imputed weekly payroll for such partial week of non-compliance shall be prorated from the imputed weekly payroll for a full week.

(3) If subsequent to imputation of weekly payroll pursuant to section (2) herein, but before the expiration of forty-five calendar days from the receipt by the employer of written request to produce business records, the employer provides business records sufficient for the department to determine the employer's payroll for the period requested for the calculation of the penalty pursuant to section 440.107(7)(e), Florida Statutes, the department shall recalculate the employer's penalty to reflect the payroll information provided in such business records.

(4) Where periods of the employer's non-compliance occurred prior to October 1, 2003, and the employer fails to provide business records sufficient to enable the department to determine the employer's payroll for periods of non-compliance prior to October 1, 2003, for purposes of calculating the penalty to be assessed against the employer for periods of non-compliance prior to October 1, 2003, the department shall assess against the employer a penalty of \$100 per day for each and every calendar day in the period of non-compliance occurring prior to October 1, 2003 the employer was not in compliance, pursuant to section 440.107(5), Florida Statutes (2002).

15. Petitioner properly determined the classification code applicable to Respondent pursuant to Florida Administrative Code Rule 69L-6.021, and accurately relied on the appropriate rates for penalty calculation.

16. Petitioner is required to assess Respondent with a \$1,000.00 penalty for every day Respondent conducted business operations in violation of the SWO. § 440.107(7)(c), Fla. Stat. Respondent conducted business operations in violation of the SWO on two separate days. Thus, Petitioner is required to assess an additional \$2,000.00 penalty, which is in addition to any penalty properly assessed under Section 44.107(7)(d) and (e), Florida Statutes.

17. Respondent engaged in business operations, employed four people, failed to secure the payment of workers' compensation to his employees, failed to produce required records, and engaged in business in violation of the SWO. Under these circumstances, Petitioner properly issued the Stop Work Order and Order of Penalty Assessment, Amended Order of Penalty Assessment, and Corrected Amended Order of Penalty Assessment pursuant to Section 440.107(7)(a), (c), (d) and (e), Florida Statutes.

18. Petitioner properly assessed a penalty in the amount of \$198,954.12. Petitioner satisfied its burden of proof that Respondent engaged in business operations in Florida in

violation of the terms of the SWO on two separate dates,
necessitating additional penalty in the amount of \$2,000.00.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order affirming
the Stop Work Order and Order of Penalty Assessment, Amended
Order of Penalty Assessment, and Corrected Amended Order of
Penalty Assessment, requiring Respondent to pay a penalty in the
amount of \$200,594.12 to Petitioner, and requiring Respondent to
cease all business operations in Florida.

DONE AND ENTERED this 15th day of September, 2005, in
Tallahassee, Leon County, Florida.



DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 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.