

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAK-A-WAY, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 05-3117
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF WORKERS')
 COMPENSATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 23, 2006, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Young T. Tindall, Esquire
912 South Andrews Avenue
Fort Lauderdale, Florida 33316

For Respondent: David C. Hawkins, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether the Petitioner was required to carry workers' compensation insurance coverage for its employees, and if so, the penalty that should be assessed.

Whether the Petitioner violated the Stop Work Order entered May 18, 2005, and, if so, the penalty that should be assessed.

PRELIMINARY STATEMENT

On May 18, 2005, the Department of Financial Services, Division of Workers' Compensation ("Department"), filed a Stop Work Order against Tak-A-Way, Inc. ("Tak-A-Way"). The Department alleged in the Stop Work Order that Tak-A-Way violated Section 440.107(2), Florida Statutes (2005)¹, by failing to secure the payment of workers' compensation at a work site in Pompano Beach, Florida. On May 31, 2005, the Department filed an Amended Order of Penalty Assessment, in which it calculated a penalty of \$44,617.22 for Tak-A-Way's failure to have workers' compensation insurance coverage for its employees. The Department added a penalty of \$1,000.00 for an alleged one-day violation of the Stop Work Order, for a total penalty assessment of \$45,617.22, pursuant to Section 440.107(7)(c) and (d), Florida Statutes. Tak-A-Way requested a formal administrative hearing, and the Department transmitted the matter to the Department for assignment of an administrative law judge.

On December 19, 2005, the Department filed a Motion to Amend Order of Penalty Assessment, and the motion was granted in an order dated January 13, 2006. The Department's Amended Order of Penalty Assessment was, therefore, superseded by the Department's Second Amended Order of Penalty Assessment, in which it assessed an additional penalty of \$73,000.00 based on Tak-A-Way's alleged continuation of its business operations from May 17, 2005, through September 21, 2005. Based on this amended penalty assessment, the Department sought a total penalty of \$117,617.22.

The final hearing was held on January 23, 2006, in Fort Lauderdale, Florida. At the final hearing, Tak-A-Way presented the testimony of Donald Oppenheim, the president of Tak-A-Way; Petitioner's Exhibit 1 was received into evidence. The Department presented the testimony of Shelly Senfeld, an investigator in the Department's Bureau of Compliance; the testimony of Charlotte Fieselman was presented by the Department in the transcript of her deposition taken January 19, 2006, and received into evidence as DWC's Exhibit 14. DWC's Exhibits 1 through 13 were also received into evidence.

The transcript of the proceedings was filed on January 27, 2006, and the Department timely filed its proposed findings of fact and conclusions of law, which has been considered in the

preparation of this Recommended Order. Tak-A-Way did not file a post-hearing submission.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with the responsibility of enforcing the requirement of Section 440.107, Florida Statutes, that employers in Florida secure workers' compensation insurance coverage for their employees.

§ 440.107(3), Fla. Stat.

2. Tak-A-Way is a Florida corporation which engages in the business of performing small jobs such as removing trash and debris, digging up small driveways, and excavation. Tak-A-Way owns several dump trucks, and it maintains a permanent storage yard for materials and equipment. Tak-A-Way's payroll records for the period January 2003 through May 2005 establish that several persons were listed as "Help" and received regular checks from Tak-A-Way during this period.

3. Donald Oppenheim is the owner and president of Tak-A-Way. He is exempted from workers' compensation coverage.

4. On May 18, 2005, during a routine investigation, an investigator employed by the Department observed two men ripping up an asphalt driveway and loading the asphalt into a truck at a

private residence in Pompano Beach, Florida. One man was operating a backhoe, and the other was operating a bobcat. The equipment and trucks being used at the site displayed the name "Tak-A-Way", and the two men confirmed that they were employed by Tak-A-Way.

5. The men were identified as Andy Oppenheim and Kevin McManus. The Department did not find any record of workers' compensation insurance in its database for employees of Tak-A-Way, and Mr. Oppenheim confirmed during a conversation with the Department's investigator that Tak-A-Way had no workers' compensation coverage for any of its employees.

6. The Department's investigator issued a Stop Work Order against Tak-A-Way on May 18, 2005, because it did not have workers' compensation coverage for its employees; the Stop Work Order was hand-delivered to Mr. Oppenheim on the date of issue. The Stop Work Order required that Tak-A-Way "cease all business operations in this state" and advised that a penalty of \$1,000.00 per day would be imposed if Tak-A-Way were to conduct any business in violation of the Stop Work Order. Finally, the Stop Work Order included the following: "This Stop Work Order shall remain in effect until the Division issues an order releasing the Stop Work Order, or until the Division issues an order of conditional release from Stop Work Order pursuant to

the employer entering into a payment agreement schedule for periodic payment of penalty."

Penalty Assessment for Failure to Have Workers' Compensation Insurance Coverage

7. At the same time that she delivered the Stop Work Order to Mr. Oppenheim, the Department's investigator delivered a Request for Production of Business Records for Penalty Assessment Calculation, in which Mr. Oppenheim was directed to produce business records for the period extending from November 3, 2003, through May 18, 2005.²

8. Mr. Oppenheim produced Tak-A-Way's business records as requested, and the Department's investigator used the payroll information in the records for calculating the penalty to be assessed for Tak-A-Way's failure to have workers' compensation insurance coverage for its employees.

9. The Department uses the National Council of Compensation Insurance, Inc. ("NCCI") Scopes Manual, which includes risk classifications and definitions used to determine rates for workers' compensation insurance coverage. The payroll records provided by Mr. Oppenheim did not indicate the workers' compensation classification codes assigned to Tak-A-Way's employees, so, in accordance with the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance ("Basic Manual"), the Department's investigator assigned all of

Tak-A-Way's operations to what she determined to be the highest-rated classifications of its business operations.

10. As shown in the worksheets attached to both the Amended Order of Penalty Assessment and the Second Amended Order of Penalty Assessment, the Department's investigator classified all of Tak-A-Way's employees under the classification "Excavation," Code 6217, for the period extending from November 3, 2003, through December 31, 2004, which had an approved manual rate of \$13.79 per \$100.00 in payroll for that period; she classified all of Tak-A-Way's employees under the classification "Concrete," Code 5213, for the period extending from January 1, 2005, through May 18, 2005, with an approved manual rate of \$24.66 per \$100.00 in payroll for that period; and she classified all of Tak-A-Way's employees under the classification "Erection Permanent Yard," Code 8227, for the period extending from January 1, 2005, through May 18, 2005, with an approved manual rate of \$9.38 per \$100.00 in payroll for that period.

11. The worksheets showed the premium calculation for each classification to be \$19,248.91, \$10,130.08, and \$365.82, respectively, for a total premium of \$29,744.81. The penalty, calculated as 1.5 times the premium for each classification, was shown on the worksheets as \$28,873.37, \$15,195.12, and \$548.73,

respectively, for a total penalty for the failure to have workers' compensation insurance coverage of \$44,617.22.

12. The operations included in the NCCI Scopes Manual classification "Excavation & Drivers," Code 6217, describe most closely the business operations of Tak-A-Way during the period of time covered by the penalty assessment for the failure to have workers' compensation insurance coverage. There is nothing in the record to indicate that the nature of Tak-A-Way's operations changed on or about January 1, 2005, nor did the Department's investigator provide any explanation for the change in classification from "Excavation" to "Concrete" effective January 1, 2005.³ In the absence of any evidence to support the change in classification, the Department has failed to sustain the \$44,617.22 penalty assessment for the failure of Tak-A-Way to carry workers' compensation insurance coverage from November 3, 2003, through May 18, 2005. Rather, the premium calculation for the period from January 1, 2005, through May 18, 2005, should be based on the classification of "Excavation," Code 6217, which carried the approved manual rate of \$12.77 for that period, and not on the classification of "Concrete," Code 5213.⁴

13. Tak-A-Way maintained a permanent storage yard in which its material and equipment was stored during the times material to this proceeding. The Department's investigator correctly

included a premium calculation for "Erection Permanent Yard," Code 8227, as part of the calculation of the penalty against Tak-A-Way for failure to carry workers' compensation insurance coverage for its employees.

14. Tak-A-Way obtained workers' compensation insurance coverage from Florida Citrus, Business & Industry, effective June 1, 2005.

Penalty Assessment for Violating Stop Work Order

15. On May 24, 2005, the Department's investigator observed a Tak-A-Way truck traveling in front of her on the street and concluded that Tak-A-Way was conducting business in violation of the Stop Work Order issued May 18, 2005.

16. The Amended Order of Penalty Assessment against Tak-A-Way issued on June 1, 2005, included a penalty of \$1,000.00 for Tak-A-Way's violation of the Stop Work Order from May 24, 2005, to May 25, 2005, for a total penalty of \$45.617.22.

17. Tak-A-Way conducted business operations after the Stop Work Order was issued. Mr. Oppenheim rented dump trucks owned by Tak-A-Way to Preston Contractors. Mr. Oppenheim, who was the only Tak-A-Way employee involved in the business operations at the time, would drive a truck to one of Preston Contractors' construction sites, towing his pickup truck. He would park the truck and leave the site, and employees of Preston Contractors would fill the truck with construction debris. Mr. Oppenheim

would return to the construction site and drive the truck to the landfill and dump the load of debris. At times, there were several Tak-A-Way dump trucks at the Preston Contractors' construction site.

18. According to invoices maintained by Preston Contractors, it paid Tak-A-Way for truck rental and dump fees from February 2005 to September 2005.

19. On November 22, 2005, the Department issued a Second Amended Order of Penalty Assessment, increasing the penalty for Tak-A-Way's violation of the Stop Work Order to \$73,000.00, covering the period extending from May 19, 2005, through September 21, 2005, for a total penalty of \$117,617.22.

20. Based on the evidence presented, Tak-A-Way was conducting business operations in violation of the Stop Work Order during the period for which the penalty was assessed and had not obtained either an order releasing the Stop Work Order or an Order of Conditional Release from Stop Work Order.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

22. The Department must prove by a preponderance of the evidence that Tak-A-Way failed to provide its employees with

workers' compensation insurance coverage and that the civil and administrative penalties assessed are correct. Department of Labor and Employment Security, Division of Workers' Compensation v. Patrick Jackey, d/b/a Bert's World of Color, DOAH Case No. 98-2496, page 5 (Recommended Order December 4, 1998)("Although violations of Chapter 440, Florida Statutes, can result in a substantial fine, which may even render an employer insolvent, the employer nonetheless does not have a license or property interest at stake so as to raise the standard of proof to clear and convincing evidence").

23. Every employer is required to secure the payment of compensation for the benefit of its employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

24. An "employee means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment"

§ 440.02(15)(a), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her."

§ 440.02(17)(a), Fla. Stat. An "employer" is defined as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

25. Tak-A-Way is an employer as defined by Section 440.02(16)(a), Florida Statutes, and it engaged in activities of employment as that term is defined in Section 440.02(17)(a), Florida Statutes, between November 3, 2003, and May 18, 2005.

26. The Department has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. § 440.107(3), Fla. Stat.

27. Section 440.107, Florida Statutes,⁵ provides in pertinent part:

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 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. 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. . . .

* * *

(c) The department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

(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.

28. The Department has adopted "the classification codes and descriptions that are specified in the Florida Contracting Classification Premium Adjustment Program, and published in the Florida exception pages of the National Council on Compensation Insurance, Inc. (NCCI), Basic Manual (1996 ed., issued January 21, 2003)": Excavation, Code 6217, and "Construction or Erection - Permanent Yard," Code 8227, are included in the

Florida exception pages of the NCCI Basic Manual. Fla. Admin. Code R. 69L-6.021(1). The Department has also adopted the definitions of the scope of work for each classification set forth in the NCCI Scopes Manual. Fla. Admin. Code R. 69L-6.021(2).

29. Based on the findings of fact herein, the Department has proven by a preponderance of the evidence that Tak-A-Way violated Sections 440.10(1)(a) and 440.38(1), Florida Statutes, because it did not have workers' compensation insurance coverage for its employees from November 3, 2003, through May 18, 2005. Based on the findings of fact herein, the penalty calculation for Tak-A-Way's failure to have workers' compensation insurance coverage is correct with respect to the calculation for the classifications of "Excavation," Code 6217, for the period extending from November 3, 2003, through December 31, 2004, and of "Erection Permanent Yard", Code 8227, for the period extending from January 1, 2005, through May 18, 2005.⁶ The Department's penalty calculation is incorrect, however, with respect to the penalty assessed under the classification "Concrete," Code 5213, for the period extending from January 1, 2005, through May 18, 2005, because there is no evidence to support such a classification. Tak-A-Way's business operations should be classified as "Excavation," Code 6217, for the period extending from January 1, 2005, through May 18, 2005.

30. Based on the findings of fact herein, the Department has met its burden of proving by a preponderance of the evidence that Tak-A-Way violated the Stop Work Order issued June 1, 2005, by continuing to engage in business operations while the Stop Work Order was still in effect. The Department, therefore, correctly assessed a penalty against Tak-A-Way in the amount of \$1,000.00 per day for each day Tak-A-Way violated the Stop Work Order, as prescribed in Section 440.107(7)(c), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order:

1. Finding that Tak-A-Way, Inc., failed to have workers' compensation insurance coverage for its employees, in violation of Sections 440.10(1)(a) and 440.38(1), Florida Statutes;

2. Finding that Tak-A-Way, Inc., engaged in business operations during the pendency of a Stop Work Order, in violation of Section 440.107(7)(a), Florida Statutes;

3. Assessing a penalty against Tak-A-Way, Inc., equal to 1.5 times premium based on the approved manual rate for the classification "Excavation," Code 6217, for the period extending from November 3, 2003, through May 18, 2005, and on the approved manual rate for the classification "Construction & Erection -

Permanent Yard," Code 8227, for the period extending from January 1, 2005, through May 18, 2005 as provided in Section 440.107(7)(a) and (d), Florida Statutes; and

4. Assessing a penalty of \$73,000.00, against Tak-A-Way, Inc., for engaging in business operations in violation of the May 18, 2005, Stop Work Order, as provided in Section 440.107(7)(a) and (c), Florida Statutes.

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



PATRICIA M. HART
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 8th day of March, 2006.

ENDNOTES

^{1/} All references to the Florida Statutes herein are to the 2005 edition unless otherwise indicated.

^{2/} According to the Department's investigator, November 3, 2003, was the "start-up" date for Tak-A-Way.

^{3/} The "Concrete Construction NOC" classification, Code 5213, is described in the NCCI Scopes Manual as including "foundations or

the making, setting up or taking down of forms, scaffolds, false work or concrete distributing apparatus"; "all commercial types of concrete building construction, self-bearing floors, foundations, piers, culverts, silos, grain elevators, etc."; "guniting or waterproofing operations by means of any type of pressure spray gun"; "cleaning or renovation of building exteriors by various methods"; and "the wrecking of concrete or concrete encased buildings or structures." The Department included in its proposed findings of fact a proposed finding that Tak-A-Way's business operations "included demolishing rooms of concrete buildings," but there is no support for this proposed finding in the record. The Department cites the Division's Request for Admissions and Tak-A-Way's responses to the Division's Request for Admissions numbered 1 and 2 to support the proposed finding; Tak-A-Way, however, specifically denied in its response to the Division's Request for Admissions numbered 2 that it engaged in any "concrete construction."

^{4/} The Department's suggestion in its proposed Conclusions of Law that the Department's investigator could have assigned the classification "Concrete" to Tak-A-Way's business activities for the period extending from January 1, 2005, to May 18, 2005, but "showed leniency by assigning the lower rated classifications of Excavation (code 6217) and Erection Permanent Yard (code 8227)" is rejected as not supported by the record.

^{5/} The provisions of Section 440.107(7), Florida Statutes (2005), are the same in all material respects as the provisions of that section effective in 2003 and 2004, except that, in 2003, the Department did not have the authority to issue Orders of Conditional Release from Stop Work Order.

^{6/} It is noted that, for some reason not disclosed in the record, a penalty was assessed for Code 8227 only for this period of time.

COPIES FURNISHED:

David C. Hawkins, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

Young T. Tindall, Esquire
912 South Andrews Avenue
Fort Lauderdale, Florida 33316

Carlos G. Muñiz, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Tom Gallagher, Chief Financial Officer
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.