

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 05-3190
)
CLARK GREEN, d/b/a)
CLARK W. GREEN PAINTING,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings, on August 22, 2006, via video-teleconference in Jacksonville and Tallahassee, Florida.

APPEARANCES

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

For Respondent: R. Joseph Dill, Esquire
Eraclides, Johns, Hall, Gelman,
Eikner, Johannessen, L.L.P.
4811 Atlantic Boulevard
Jacksonville, Florida 32207

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 February 25, 2005, the Department of Financial Services, Division of Workers' Compensation (Division) issued a Stop Work Order and Order of Penalty Assessment to Respondent, Clark Green, d/b/a Clark W. Green Painting. On March 22, 2005, the Division issued an Amended Order of Penalty Assessment for \$126,393.87. Respondent contested the Stop Work Order and Amended Penalty Assessment, and requested an administrative hearing.^{1/} The matter was forwarded to the Division of Administrative Hearings on or about September 5, 2005.

The case was originally scheduled to be heard on November 18, 2005. Continuances were granted for good cause shown. On April 21, 2006, the Division filed a Motion to Amend Order of Penalty Assessment, which was granted. The amended amount of the penalty assessment was reduced to \$80,931.29.

At hearing, Petitioner presented the testimony of Katina Johnson, Donald Bowman, and Greg Mills. Petitioner offered Exhibits numbered 1 through 16, which were admitted into evidence. Respondent presented the testimony of Clark Green. Respondent offered Exhibits numbered 1 through 3, which were admitted into evidence.

A Transcript was filed on September 6, 2006. Petitioner filed an unopposed Motion for Extension of Time in which to file proposed recommended orders, which was granted. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2005) 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 Clark Green, d/b/a/ Clark W. Green Painting, is a sole proprietor located in Jacksonville, Florida, and is engaged in the business of painting, which is a construction activity.

3. Katina Johnson is an investigator employed by the Division. Her 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.

4. On February 22, 2005, Ms. Johnson visited a job site in the Northside subdivision in Jacksonville, Florida, and observed two workers coming out of a new construction home. The two workers appeared to have been painting, as they had paint on their clothes, arms, and hands. This visit was a random site check.

5. Ms. Johnson interviewed the two workers, Tikos Johnson and Ricky Reed. As a result of that interview, Ms. Johnson contacted Mr. Clark Green.

6. Shortly thereafter, the file was transferred to another investigator, Donald Bowman. Mr. Bowman checked the database in the Coverage and Compliance Automated System and found no proof of coverage for Mr. Green. Mr. Bowman did find in the records of the Division that Mr. Green had an exemption as a sole proprietor, but that it had expired December 31, 1999.

7. After conferring with his supervisor, Mr. Bowman issued a Stop-Work Order and Order of Penalty Assessment to Respondent on February 25, 2005, along with a request for business records for the purpose of calculating a penalty for lack of coverage.

8. Respondent did not produce business records as requested.

9. On March 22, 2005, Mr. Bowman issued an Amended Order of Penalty Assessment to Respondent for \$126,393.87. Attached to the Amended Order of Penalty Assessment is a penalty worksheet with a list of names under the heading, "Employee Name," listing the names of Tikos Johnson, Rickey Reed, and Mr. Green.

10. The amount of the penalty was imputed using the Florida average weekly wage that was in effect at the time of the issuance of the stop-work order. Through imputation of

payroll for the purported employees, the Department calculated a penalty for the time period of February 25, 2002 through February 25, 2005. Mr. Bowman assigned a class code to the type of work performed by Respondent utilizing the SCOPES manual, multiplied the approved manual rate with the imputed payroll per one hundred dollars, then multiplied all by 1.5. 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. The payroll was imputed back to October 1, 2003. For the period prior to October 1, 2003, Mr. Bowman assessed a penalty of \$100 per day for each calendar day of noncompliance.

11. Mr. Bowman also requested business records from Engle Homes, which had subcontracted with Respondent to provide services at the work site investigated by the Division, in an effort to determine whether Respondent was actually performing services for Engle Homes. While he eventually received records from Engle Homes, Mr. Bowman did not use them in his calculation of the penalty, as they were not received directly from Respondent and were received more than 45 days after his request.

12. On April 21, 2006, a second Amended Order of Penalty Assessment was issued reducing the amount of the penalty to \$80,931.29. This reduction in penalty was the result of the

Department's removing Tikos Johnson and Rickey Reed from the penalty calculation, as they had been served stop-work orders and had separate penalty assessments assessed to them.

Respondent's Exemption

13. On or about November 28, 1996, Respondent was issued a "Construction Industry Certificate of Exemption from Florida Workers' Compensation Law" card. The exemption card bears no expiration date.

14. At the time Respondent received his exemption card, such exemptions were valid "until the sole proprietor . . . revokes his exemption." Section 440.05(3), Florida Statutes (1995). Consequently, the exemptions issued at that time were considered "lifetime" exemptions.

15. Gregory Mills is a Senior Management Analyst I Supervisor. His duties are to supervise and manage the exemption process for the Division. He has been in this position for over two years and prior to this position was employed by the Division as a workers' compensation investigator. He was an investigator, and therefore not in charge of the exemption process, at the time the law changed in 1999.

16. There is a memorandum in evidence entitled "Notice of Change to Exemption Process" dated October 9, 1998. The memorandum is addressed to "Holders of BCM-204s (Construction

Industry Exemptions). The stated purpose of this memorandum is to advise holders of construction industry exemptions of recent changes in the laws which affected the exemption holder's rights and responsibilities. The Notice contained the following language in bold print:

EFFECTIVE JANUARY 1, 1999: construction industry exemptions issued after 1/1/99 will expire two years after the effective date of the exemption. A construction industry exemption issued prior to 1/1/99 (BCM-204) will expire on the last day of the birth month of the exemption holder in the year 1999.

17. The Notice also compared the then current process with the process after January 1, 1999, advising exemption holders that their exemptions would expire in 1999 on the last day of the birth month of the exemption holder, and that exemptions issued after January 1, 1999, would expire every two years.

18. Mr. Mills believes that this letter was mailed to all exemption holders, including Respondent, in October 1998 to their addresses of record. However, because the Division's record retention policy is to retain documents for five years, and because Mr. Mills was not in charge of exemptions at the time of the law change, he cannot say with complete certainty that a copy of this notice was mailed to Mr. Green.

19. Mr. Green insists that he did not receive a copy of this notice and that had he received it, he would have complied. Mr. Green's testimony in this regard is accepted as credible. Whether the Division mailed a copy of the notice to Respondent or not, Mr. Green did not receive it.

20. Further, since the date of this notice and the change in the law, Mr. Green presented his exemption card to general contractors for whom he performed painting work. The general contractors all accepted his card.

CONCLUSIONS OF LAW

21. 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 (2006).

22. 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). Therefore, Petitioner bears the burden of proof herein by clear and convincing evidence.

23. Section 440.02(16), Florida Statutes, defines "employer" as "every person carrying on any employment . . ."

24. 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.

25. 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, and reads in pertinent part:

(7)(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.

* * *

(e) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

26. Florida Administrative Code Rule 69L-6.028(4) provides that for periods in which the employer's non-compliance occurred prior to October 1, 2003, and the employer fails to provide business records, the Department shall assess a penalty of \$100 per day for each calendar day in the period of non-compliance occurring before October 1, 2003.

Respondent's Exemption

27. At the time that Respondent received his exemption, Section 440.05(3), Florida Statutes (1995), provided that as to a sole proprietor who elects and receives an exemption, "[t]he certification of the election is valid until the sole proprietor . . . revokes his election."

28. Section 440.05, Florida Statutes, was amended by s. 2, Ch. 98-174, Laws of Florida, effective January 1, 1999. The amendment added the following language:

(6) A construction industry certificate of election to be exempt which is issued in accordance with this section shall be valid for 2 years after the effective date stated thereon. Both the effective date and the expiration date must be listed on the face of the certificate by the division. The construction industry certificate must expire at midnight, 2 years from its issue date, as noted on the face of the exemption certificate. Any person who has received from the division a construction industry certificate of election to be exempt which is in effect on December 31, 1998, shall file a new notice of election to be exempt by the last day in his or her birth month following December 1, 1998. A construction

industry certificate of election to be exempt may be revoked before its expiration by the sole proprietor, partner, or officer for whom it was issued or by the division for the reasons stated in this section. At least 60 days prior to the expiration date of a construction industry certificate of exemption issued after December 1, 1998, the division shall send notice of the expiration date and an application for renewal to the certificateholder at the address on the certificate.

29. Thus, Mr. Green's exemption, which was issued to him in 1996, expired by operation of law in December 1999.

30. While the 1998 amendment to Section 440.05, Florida Statutes, affirmatively required the Division to send notice of the expiration date and an application for renewal to the certificateholder at the address on the certificate on exemptions issued after December 1, 1998, it did not require notification to those whose certificates of exemption were issued prior to that date. Therefore, any notification sent by the Division to Respondent and other holders of certificates of exemption issued prior to that date was done as a matter of courtesy.

31. While Mr. Green did not receive the notice that the Division believes was sent to him, he was not in compliance with the workers' compensation law. Respondent's other arguments, which raise constitutional issues, are beyond the scope of this tribunal to decide.

RECOMMENDATION

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

RECOMMENDED:

That the Division of Workers' Compensation enter a Final Order affirming the Amended Order of Penalty Assessment issued April 17, 2006, and the Stop Work Order issued to Respondent on February 25, 2005.

DONE AND ENTERED this 2nd day of November, 2006, 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 2nd day of November, 2006.

ENDNOTE

^{1/} Respondent has raised constitutional issues that will not be addressed in this Recommended Order, as the undersigned does not have jurisdiction to decide on constitutional challenges to statutes or existing rules. Department of Administration, Division of Personnel v. Department of Administration, Division of Administrative Hearings, 326 So. 2d 187 (Fla. 1st DCA 1976).

COPIES FURNISHED:

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

R. Joseph Dill, Esquire
Eraclides, Johns, Hall, Gelman
Eikner & Johannessen, L.L.P.
4811 Atlantic Boulevard
Jacksonville, Florida 32207

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

Carlos G. Muñiz, 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.