STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDEZ ENTERPRISES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-1078F
	)	
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on July 18, 2006, in Jacksonville, Florida.

APPEARANCES

For Petitioner: H. Leon Holbrook, Esquire
Tara B. Van Rooy, Esquire
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For Respondent: Colin M. Roopnarine, Esquire
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Division of Workers' Compensation
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STATEMENT OF THE ISSUE

The issue is whether Respondent should reimburse Petitioner for the attorneys' fees and costs Petitioner expended in its successful defense of Respondent's Stop-Work Order.

PRELIMINARY STATEMENT

Petitioner Hernandez Enterprises, Inc. (Hernandez, Inc.) filed a Petition for Award of Attorneys' Fees and Costs on March 23, 2006, with an accompanying Affidavit of Attorneys' Fees and Costs. Earlier, Hernandez, Inc., had contested the Department of Financial Services, Division of Workers' Compensation's (Division) Stop-Work Order (SWO) in Division of Administrative Hearings Case No. 04-1174.

That case resulted in a Recommended Order finding that the SWO issued against Hernandez, Inc., was improvidently issued. The Department of Financial Services adopted the Recommended Order in pertinent part in a Final Order filed January 25, 2006. That Final Order made Hernandez, Inc., a prevailing party and the Petition was an outgrowth of that action. The Affidavit itemized the services rendered to Hernandez, Inc., and the costs expended, as required by Section 57.111, Florida Statutes. On April 17, 2006, the Division of Workers' Compensation filed a response.

The case was set for July 18, 2006, in Jacksonville, Florida, and was heard as scheduled.

Petitioner's principal, Jorge Hernandez testified. Petitioner also presented the testimony of Harold Beckner Bachner, a certified public accountant. The Division presented the testimony of Division employees Katina Johnson and Robert Lambert.

A Transcript was filed on August 31, 2006. After the hearing, Petitioner and Respondent filed their Proposed Final Orders on August 31, 2006, the date for filing agreed upon by the parties at the conclusion of the hearing.

References to statutes are to Florida Statutes (2003) unless otherwise noted.

FINDINGS OF FACT

1. Hernandez, Inc., was a contractor based in the Jacksonville, Florida area, and was in the business of installing dry wall, among other construction-related activities. Its principal owner, Jorge Hernandez, founded the company in 1981.

2. The Department of Financial Services is the state agency responsible for enforcing the Workers' Compensation Law. This duty is delegated to the Division of Workers' Compensation. The Division is a state agency. It is not a nominal party.

3. On February 5, 2004, Hernandez, Inc., was engaged in installing drywall in the Bennett Federal Building in Jacksonville, Florida, using its own personnel, who were leased

from Matrix, Inc., an employee leasing company, and two subcontractors, GIO & Sons (GIO), of Norfolk, Virginia, and U&M Contractors, Inc., (U&M), of Charlotte, North Carolina. The leased employees were properly covered by workers' compensation insurance provided by the lessor.

4. Prior to contracting with GIO and U&M, Hernandez, Inc., asked for and received ACORD certificates of insurance, which on their face indicated that the subcontractors had both liability coverage and workers' compensation coverage. It is the practice of Hernandez, Inc., to ensure that certificates of insurance are provided by subcontractors. The office staff of Hernandez, Inc., at all times prior to going out of business, tracked the certificates and ensured that they were kept current. Hernandez, Inc. had relied on hundreds of these ACORD certificates in the past.

5. During times pertinent, neither GIO or U&M maintained workers' compensation insurance on their employees that complied with the requirements of Section 440.38(7), Florida Statutes.

6. On February 5, 2004, Katina Johnson, an investigator with the Division's Jacksonville office, made a routine visit to the Bennett Federal Building with another investigator. She observed personnel from Hernandez, Inc., and its subcontractors GIO and U&M, installing dry wall. She also determined that Hernandez, Inc., had a contract to install dry wall as a

subcontractor participating in the construction of the Mayport Naval Station BEQ. U&M worked at both the Bennett Federal Building site and the Mayport BEQ site as a subcontractor of Hernandez, Inc. Ms. Johnson discovered that neither U&M nor GIO had workers' compensation coverage for its employers.

7. Ms. Johnson asked for and received the certificates of insurance that Hernandez, Inc., had obtained from GIO and U&M, which facially suggested that Hernandez, Inc., had determined that its subcontractors had appropriate coverage. Nevertheless, she issued a SWO on February 26, 2004, to Hernandez, Inc., as well as GIO, and U&M. By the SWO, Hernandez, Inc., was charged with failure to ensure that workers' compensation meeting the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code, was in place for GIO and U&M. She also issued an Order of Penalty Assessment that eventually became an Amended Order of Penalty Assessment dated March 19, 2004.

8. The SWO stated, in bold print, that Hernandez, Inc., was, "Ordered to Stop Work and Cease All Business Operations in the State." Hernandez, Inc., was, at the time, also engaged in construction at the new Jacksonville Library and at the Carlington Apartments, both of which were located in Florida. By the terms of the SWO, Hernandez was required to stop work in those sites also. The Division had no evidence that might cause

it to believe that Hernandez, Inc., was operating in violation of the law at those sites.

9. The SWO contained with it a Notice of Rights advising that a formal or informal administrative hearing might be had and required that a petition for a hearing be filed within 21 days of receipt of the SWO, if a hearing was desired. Hernandez, Inc., was not informed that it had the right to an immediate hearing.

10. Hernandez, Inc., timely filed a petition demanding a formal hearing. In an effort to get back to work, Hernandez, Inc., entered into an agreement with the Division, whereby it paid a partial penalty of $46,694.03, but admitted no liability. The formal hearing did not take place until August 16, 2005.

11. Ms. Johnson had the power to issue a stop-work order. She did not have to get approval from a neutral magistrate or from the Division. Because she was a recent employee of the Division, she conferred with her supervisor Robert Lambert before taking action, and he approved her action in writing.

12. In February 2004, it was the policy of the Division to issue SWO's for all work sites even though it concluded that a violation had occurred in only the site or sites visited. The Division policy did not require an investigation into all worksites as a prerequisite to shutting down all worksites. The

policy requiring a contractor to cease work at all worksites was not adopted as a rule.

13. In February 2004, the Division asserted that compliance with Section 440.10(1)(c), Florida Statutes, required a general contractor to look beyond an ACORD certificate of insurance to determine if subcontractors had complied with the requirement to maintain the required workers' compensation 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." This policy was not adopted as a rule and was subsequently abandoned.

14. The Division, in implementing this policy, asserted that a general contractor must actually review the policy of a subcontractor presenting an ACORD certificate and determine if it was in effect and if it complied with Florida law. This policy was not adopted as a rule and the policy was subsequently abandoned.

15. The Division further asserted that the employees of the subcontractor of a general contractor were to be viewed as if they were employees of the general contractor, when contemplating workers' compensation coverage. This policy was not adopted as a rule.

16. Ms. Johnson acted in conformance with the Division's policies in effect at the time the SWO was issued.

17. The net worth of Hernandez, Inc., was a negative $1,821,599, on December 31, 2003. Hernandez, Inc., was struggling financially in February 2004, but was on the way to recovery until the SWO was issued. On November 30, 2004, the net worth of Hernandez, Inc., was a negative $1,161,865, and this figure included the sum of $978,000 that Mr. Hernandez put into the business. Accordingly, Hernandez, Inc., was a small business party for purposes of Subsection 57.111(4)(a), Florida Statutes, during times pertinent.

18. The SWO, which terminated work at all Hernandez work sites, torpedoed any chance the company had to continue in business. Mr. Hernandez mortgaged his house, which he subsequently lost to creditors, in an effort to keep Hernandez, Inc., in business. All of his efforts failed. The failure was a direct result of the actions of the Division. The Division's interpretations of the law that precipitated their policies, and thus the failure of the business, were both wrong and unreasonable.

19. Subsequent to the hearing and Recommended Order in Department of Financial Services, Division of Workers' Compensation v. Hernandez, Inc., Case No. 04-1174 (DOAH October 3, 2005), the Chief Financial Officer entered a Final Order styled, In the Matter of: Hernandez, Enterprises, Inc.,

Case No. 75492-05-WC (Florida Department of Financial Services, January 25, 2006).

20. The Final Order noted that the contractor, Hernandez, Inc., complied with the extant law when it, ". . . demanded and received proof of insurance. . . . " The Final Order also noted that there was no authority produced by the Division that would permit the imposition of a fine on Hernandez, Inc.

21. The Final Order further recited that there was no statutory duty on the part of a contractor to ensure (emphasis supplied) that its subcontractors had secured workers' compensation coverage for its employees. It noted that, ". . . without some formal delineation of the specific obligations of a contractor in ascertaining proof of insurance from a subcontractor, the Department cannot impose a penalty upon the facts presented in the instant case."

22. The Division was ordered to rescind the SWO issued February 26, 2004, and the Amended Order of Penalty Assessment dated March 19, 2004, and was further ordered to repay the amount of $46,694.03, which had been paid to persuade the Division to abate the SWO.

23. The action was initiated by the Division, which is a state agency. At the time the SWO was initiated, there was no reasonable basis in law and fact to do so. The actions of the Division were not "substantially justified."

24. Hernandez, Inc., prevailed in the hearing because the Chief Financial Officer entered a Final Order in its favor and the Order has not been reversed on appeal and the time for seeking judicial review of the Final Order has expired. Hernandez, Inc., is, therefore, a "prevailing small business party."

25. Hernandez, Inc., paid its law firm, Holbrook, Akel, Cold, Stiefel & Ray, P.A., $51,815.50 in attorneys' fees, and paid $8,837.00 in costs, in its successful defense of the Division's actions.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 57.111(4) and 120.57(1), Fla. Stat.

27. Section 57.111, Florida Statutes, is the Equal Access to Justice Act (Act). Portions that pertain to this case follow:

> 57.111. Civil actions and administrative proceedings initiated by state agencies; attorneys' fees and costs.
>
> (1) This section may be cited as the 'Florida Equal Access to Justice Act.'
>
> * * *
>
> (3) As used in this section:
>
> (a) The term 'attorneys' fees and costs' means the reasonable and necessary

attorneys' fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding.

(b) The term 'initiated by a state agency' means that the state agency:

1. Filed the first pleading in any state or federal court in this state;

2. Filed a request for an administrative hearing pursuant to chapter 120; or

3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

(c) A small business party is a 'prevailing small business party' when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

* * *

(d) The term 'small business party' means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments;
b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state

agency not more than 25 full-time employees or a net worth of not more than $2 million; or

* * *

(e) A proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

(f) The term 'state agency' has the meaning described in s. 120.52(1).

(4)(a) Unless otherwise provided by law, an award of attorneys' fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

(b) 1. To apply for an award under this section, the attorney for the prevailing small business party must submit an itemized affidavit to the court which first conducted the adversarial proceeding in the underlying action, or to the Division of Administrative Hearings which shall assign an administrative law judge, in the case of a proceeding pursuant to chapter 120, which affidavit shall reveal the nature and extent of the services rendered by the attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.

2. The application for an award of attorneys' fees must be made within 60 days after the date that the small business party becomes a prevailing small business party.

> (c) The state agency may oppose the application for the award of attorneys' fees and costs by affidavit.
>
> (d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorneys' fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. If the court affirms the award of attorneys' fees and costs in whole or in part, it may, in its discretion, award additional attorneys' fees and costs for the appeal.
>
> 1. No award of attorneys' fees and costs shall be made in any case in which the state agency was a nominal party.
>
> 2. No award of attorneys' fees and costs for an action initiated by a state agency shall exceed $ 50,000.

* * *

28. In proceedings to establish entitlement to an award of attorneys' fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying action and that it was a small business party at the time the action was initiated. Once the party requesting the award has met this burden, the burden shifts to the agency to establish that its action in instituting the proceeding was substantially justified or that special

circumstances exist that would make an award of attorneys' fees and costs to Petitioner unjust. Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

29. In order for a party to obtain attorneys' fees from a state agency, it must demonstrate compliance with all of the dictates of Section 57.111, Florida Statutes. In this case, Hernandez, Inc., demonstrated by a preponderance of the evidence that it was a party to an administrative action initiated by a state agency and that it was a prevailing small business party under the Act.

30. Hernandez, Inc., timely applied for an award under the section and submitted the required itemized affidavit, which set forth the nature and extent of the services rendered by its attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.

31. The attorneys' fees and costs exceeded $50,000, so the maximum amount that may be awarded is limited to that figure.

32. The remaining question is whether the agency has a defense in that its actions were substantially justified or that special circumstances exist which would make the award unjust. With regard to the latter requirement, there are no special circumstances which would make the award unjust. With regard to

the former, a further consideration of the laws invoked by the Division in taking its action must be considered.

33. In determining whether the Division's actions were substantially justified, it is the information possessed by the Division, and the Division's application of the law at the time the SWO was issued, that is of paramount importance. Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930 (Fla. 1st DCA 2003).

34. The Act is modeled after the Equal Access to Justice Act, 5 U.S.C. Section 504. When a Florida statute is patterned after a federal law, on the same subject, ". . . it will take the same construction in the Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject." Pasco County School Board v. Florida Public Employees Relations Commission, 353 So. 2d 108 (Fla. 1st DCA 1977).

35. In McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983), the court held that "'substantially justified' does not mean 'nonfrivolous'. . . . It means that the government must have a solid though not necessarily correct basis in fact and law for the position that it took in this action."

36. In this case, the facts adduced by Ms. Johnson in February of 2004 were solid. The interpretation of the law

used, however, was neither solid nor legally correct, as will be discussed below.

37. Section 440.107(7)(a), Florida Statutes, which provides for the issuance of SWO's, provides in part as follows:

> (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. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due. The department may require an employer who is found to have failed to comply with the coverage requirements of s. 440.38 to file with the department, as a condition of release from a stop-work order, periodic reports for 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.
>
> * * *

38. The Division, by ordering Hernandez, Inc., to stop work at two sites it had not even inspected, completely disregarded the language in Section 440.107(7)(a), Florida Statutes, providing that, "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 <u>all employer worksites in the state for which the employer is not in compliance</u> (emphasis added). This action was not substantially justified.

39. Section 440.10(1)(c), Florida Statutes, provides that, "A contractor shall require a subcontractor to provide evidence of workers' compensation insurance." Hernandez, Inc., provided the Division with the ACORD certificates indicating the two noncovered subcontractors were insured. These ACORD certificates were evidence of workers' compensation insurance. The Division's policy that general contractors like Hernandez, Inc., must investigate the subcontractor's policies and make determinations with regard to the details of the coverage, is not found in any statute or rule. The action taken against Hernandez, Inc., based on this policy, was not substantially justified.

40. The Division had, at the time the SWO was issued, a policy, but no rule, that deemed the employees of the subcontractor to be the employees of the general contractor, and acted against Hernandez, Inc., in conformance with this policy. The Division referred to the subcontractors' employees as "statutory employees," pursuant to Section 440.10(1)(b), Florida Statutes.

41. This policy, which was not adopted as a rule, ignored the phrase in that statute that recited, ". . . except to employees of a subcontractor who has secured such payment," and the following subsection (c), recited above, which informed general contractors that they must only require evidence that a

subcontractor who has secured such payment. This policy, and the action taken against Hernandez, Inc., pursuant to it, was not substantially justified.

42. The Final Order recognizes this in its statement that, "In this case, the Petitioner (The Division) has not cited authority in the Florida Administrative Code that would permit the Petitioner, under the particular facts of this case, to impose a fine on a contractor, where the contractor credibly demanded and received proof of insurance, that the subcontractor had failed to secure coverage. . . ." It further recited that, "Without some formal delineation of the specific obligations of a contractor in ascertaining proof of insurance from a subcontractor, the Department cannot impose a penalty under the facts presented in the instant case."

43. The Division cannot claim to have been substantially justified in issuing the SWO when the Department of Financial Services admits it had no legal authority to do so. See Lagoon Oaks, Inc. v. Department of Health and Rehabilitative Services, Case No. 96-4969F (DOAH July 2, 1997).

44. For the several reasons noted, the Division did not have a "solid though not necessarily correct basis in law" upon which it could ground its actions in February 2004. The Division's interpretation of the law was well wide of the mark. There was no reasonable basis in law at the time the Division

commenced its action against Hernandez, Inc. Accordingly, the SWO issued by the Division was not substantially justified.

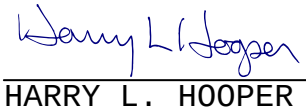
45. Therefore, the dictates of Section 57.111, Florida Statutes, have been wholly satisfied and the Division should pay Hernandez, Inc., the attorneys' fees and costs expended in defense of the Division's action, up to the $50,000 limit provided by the statute.

DISPOSITION

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

ORDERED that Petitioner's Petition for Attorneys' Fees and Costs is granted. Respondent shall pay to Petitioner within 30 days of the date of this Final Order the sum of $50,000 for attorneys' fees and costs incurred by Petitioner in DOAH Case No. 04-1174.

DONE AND ORDERED this 11th day of September, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.