

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

J AND A FRAMING, INC.,)
)
 Petitioner,)
)
vs.) Case No. 06-2648
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on October 24, 2006, in Orlando, Florida.

APPEARANCES

For Petitioner: Dan N. Godfrey, Esquire
1200 North Central Avenue, Suite 209
Orlando, Florida 34741

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

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to file a Petition for hearing to challenge the Stop-Work Order (SWO) and Amended Order

of Penalty Assessment (AOPA) more than 21 days from the date of the SWO and the AOPA?

PRELIMINARY STATEMENT

On March 3, 2006, more than 120 days after the SWO and AOPA were issued, Petitioner filed its Petition requesting permission to file an untimely petition to challenge the SWO and AOPA. Respondent referred the matter to Division of Administrative Hearings for a formal hearing on the limited issue of whether the Petition should be considered on the merits, although it was late filed. Discovery ensued.

At the final hearing, Petitioner presented the testimony of Marisol Hernandez, Jorge Bernales, and Elisa Barron; and Petitioner's Exhibits numbered 1 and 2 were received into evidence. Respondent presented the testimony of Jorge Bernales and Elisa Barron; the deposition of Joseph Higgins was received into evidence; Respondent's Exhibit numbered 1 was received into evidence. The parties jointly submitted Joint Exhibits numbered 1, 2, and 3, which were received into evidence.

The Transcript of the proceeding was filed on December 11, 2006. Respondent timely filed its proposed findings of fact and conclusions of law. Petitioner has not filed its proposals as of the date of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at the final hearing, the following findings of fact are made:

1. Respondent is the state agency charged with the responsibility of enforcing the requirement that employers, in Florida, secure workers' compensation insurance coverage for their employees. § 440.107 (3) Fla. Stat. (2005).¹

2. Petitioner, J and A Framing, Inc., during all times relevant to these proceedings, is a Florida for profit corporation, and is authorized to do business in this state.

3. On October 20, 2005, Respondent's Investigator personally served a Request for Production of Business Records on a representative of Petitioner. On October 26, 2005, Respondent's Investigator personally served a SWO on Jorge Bernales, President of Petitioner. The SWO contained a Notice of Rights, on the second page, advising Petitioner, in bold print, that it had 21 days within which it may file a petition challenging the SWO.

4. On October 31, 2005, Respondent's Investigator personally served an Amended Order of Penalty Assessment (AOPA) on Jorge Bernales, President of Petitioner, which also contained a Notice of Rights, on the second page, advising Petitioner, in bold print, that it had 21 days within which to file a petition challenging the AOPA.

5. Marisol Hernandez, Bernales' girlfriend, who reads and speaks English fluently, was present when Respondent's Investigator served Bernales with the SWO and the AOPA.

6. Petitioner filed its Petition with Respondent on March 6, 2006, which is more than 120 days from the date of the SWO and AOPA.

7. Jorge Bernales testified that he was Petitioner's only corporate officer. Marisol Hernandez stated her only relationship with Petitioner was as the girlfriend of Jorge Bernales, its President, and that she is carrying Bernales' unborn child, and his income pays her rent and utilities. She was not employed by Petitioner. Counsel for Petitioner elicited testimony from Hernandez that she did "nothing" for the company and was not an employee or officer of Petitioner.

8. The testimony of Bernales and Hernandez conflicts with the corporate records, admitted in evidence as a joint exhibit, and filed with the Florida Secretary of State, Division of Corporations. The accuracy of the corporate records has not been challenged.

9. It is found that, the corporate records are more credible than the testimony of Bernales and Hernandez. Effective October 27, 2005, Hernandez was listed as the Vice President and therefore, was an employee of Petitioner. At all

times material hereto, Bernales was the President and an employee of Petitioner.

10. Petitioner's President and Vice President (collectively, "Officers") met with the Respondent's Investigator on several occasions.

11. During their first meeting, Respondent served the Request for Production of Business Records (BRR) on Bernales.

12. During Petitioner's second meeting with Respondent, Bernales and Hernandez were presented and received the SWO. Hernandez was able to read the Notice of Rights on the SWO, and did so at the final hearing when she read aloud, "[f]ailure to file a petition within 21 days of receipt of this Stop-Work Order constitutes a waiver of your right to request a hearing."

13. During Petitioner's third meeting, the Officers received the AOPA. The Officers had every opportunity to read the AOPA, which contains a bold Notice of Rights, virtually identical to the one on the SWO.

14. Bernales concentrated on raising enough money to pay the penalty. Bernales approached several banks, friends, and family members to get enough money in order to put a ten percent down payment on the assessment. Unable to secure sufficient funds, Bernales offered to pay Respondent a lesser amount in exchange for lifting the SWO. This request was denied.

15. Bernales could understand and speak the English language, but was unable to read English. He knew and was present when Hernandez read and spoke English. Bernales did not seek Hernandez's assistance in understanding the SWO or the AOPA. Hernandez had actual possession of the SWO and the AOPA, but chose to read neither.

16. The Officers went to Elisa Barron, Petitioner's accountant, to gather documents responsive to BRR. Both knew she could read and write English. Barron assisted Petitioner in collecting the documents requested on the BRR. Neither Officer asked Barron to assist them in understanding the terms of the SWO or the AOPA. Furthermore, the Officers had the SWO and AOPA with them, but did not show the SWO or the AOPA to Barron while they were at Barron's office.

17. The Officers testified they were unable to recall whether Barron advised them to seek an attorney regarding the penalty assessment. However, Barron testified she advised Bernales to seek an attorney listed in the local Spanish language newspaper. Barron gave Bernales a copy of the newspaper. Barron's testimony is credible.

18. In January 2006, Bernales retained Dan N. Godfrey, Esquire, to advise the company regarding the instant matter. Even after receiving the advice of counsel, Bernales waited

until March 3, 2006, to request permission to file an untimely petition.

19. On March 3, 2006, Petitioner filed a Petition for Hearing with Respondent requesting permission to file an untimely petition to challenge the SWO and AOPA.

20. Petitioner presented no credible evidence that Respondent, or any of its employees, misled Petitioner or lulled it into inaction.

CONCLUSIONS OF LAW

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

22. The Officers, Jorge Bernales and Marisol Hernandez, were officers and employees of Petitioner during all times relevant to this matter. § 607.01401(10), Fla. Stat.

23. "Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision." Fla. Admin. Code R. 28-106.111.

24. The Petition for Hearing is being considered as a request for the application of the doctrine of equitable tolling of the time limits for filing the petition. Equitable tolling

may be raised "as a defense to the untimely filing of a petition." § 120.569(2)(c), Fla. Stat. (2006).

25. To prevail in this matter Petitioner must demonstrate that Respondent misled or lulled it into inaction, by not filing a timely petition to challenge the SWO and AOPA. Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988).

26. The legal doctrine of "[e]quitable tolling is not available if the claimant has failed to exercise due diligence in preserving his or her legal rights, whether the delay is attributable to the plaintiff's attorney, the plaintiff's excusable neglect, or the plaintiff's lack of legal knowledge." 51 Am. Jur. 2d Limitation of Actions § 177 (2006) (footnotes omitted); Jancyn Mfg. Corp. v. State, Dept. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (refusing to apply equitable tolling doctrine where the Department did not mislead the other party but "was the result of appellant's own inattention"); Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306 (Fla. 1st DCA 1997) (reversing an agency's decision to apply equitable tolling when a license application was received one day late and no facts supported application of the doctrine); Environmental Resource Associates of Florida, Inc. v. State, Dept. of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993) (finding equitable tolling is not established when a

petition is mailed on the 21st day, but not received by the agency until four days later).

27. Petitioner must prove by a preponderance of evidence that the doctrine of equitable tolling applies to this situation in order to permit it to file a petition more than 21 days from the date of the SWO and AOPA.

28. Respondent's reliance on Goodwin v. Blu Murray Insurance Agency, 939 So. 2d 1098 (Fla. 5th DCA 2006) and Crutcher v. School Board of Broward County, 834 So. 2d 228 (Fla. 1st DCA 2003) is misplaced. The burden of proof in equitable estoppel cases is different from the equitable tolling doctrine.

29. Petitioner failed to file a timely petition challenging the SWO and the AOPA due to its own lack of due diligence and its inattention. Furthermore, Petitioner voluntarily waived its right to challenge the SWO and the AOPA because it turned a "blind eye" toward the Notice of Rights on the SWO and the AOPA. Lawson v. State, 941 So. 2d 485 (Fla. 5th DCA 2006) (finding defendant committed a willful violation when turning a "blind eye" toward the terms and conditions of probation).

30. Based on the findings of fact above, Petitioner has failed to meet its burden of proving by a preponderance of the evidence that equitable tolling should apply to permit it to file an untimely petition to challenge the SWO or the AOPA.

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 dismissing the Petition, which requests permission to file an untimely petition challenging the SWO and the AOPA.

DONE AND ORDERED this 2nd day of February, 2007, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
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 February, 2007.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes (2005), unless otherwise indicated.

COPIES FURNISHED:

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

Dan N. Godfrey, Esquire
1200 North Central Avenue, Suite 209A
Kissimmee, Florida 34741

Daniel Sumner, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Honorable Alex Sink, 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.