

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOUDREAU'S CONCRETE, INC.,)
)
 Petitioner,)
)
vs.) Case No. 06-4891
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

This case was heard, pursuant to notice, on February 12, 2007, and on March 21, 2007, by video teleconference at sites in Tallahassee and West Palm Beach, Florida, before Administrative Law Judge Eleanor M. Hunter, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Morris, Esquire
Morris & Morris, P.A.
224 Datura Street, Suite 300
West Palm Beach, Florida 33401

For Respondent: John M. Iriye, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
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STATEMENT OF THE ISSUE

Whether Petitioner failed to secure worker's compensation coverage for seven employees who worked from February 28, 2006, to March 3, 2006, in violation of Chapter 440, Florida Statutes, and whether, as a result, Petitioner should be assessed a penalty in the amount of \$1,115.52.

PRELIMINARY STATEMENT

The Department of Financial Services, Division of Workers' Compensation issued a Stop Work Order and Order of Penalty Assessment against Boudreau's Contracting, Inc., ordering it to stop work and cease all business operations in Florida, and to pay a penalty of \$148,277.36 for failing to carry workers' compensation insurance coverage, as required by law.

Before the final hearing the amount of the penalty was reassessed and reduced to \$1,115.52, for failure to carry workers' compensation coverage on seven employees for one week. Without conceding any liability for wrongdoing, Petitioner agreed to the substitution of the amended assessment at the beginning of the final hearing.

At the final hearing on February 12, 2007, counsel for Respondent complained that certain witnesses were not available at the hearing, one he believed to be avoiding service and another who had an out-of-state family emergency. To accommodate those who were in attendance, Respondent presented

the testimony of John Cipyak, Lynn Cornelius, William R. Yocum, Vance Akins, and Robert Barnes; and, when the hearing reconvened on March 21, 2007, presented the testimony of Dimas Zelaya, Thomas Puglis, and Richard Boudreau. Respondent's Exhibits 1 through 9, 10 (pages 55 through 60), 12 through 18, and 20 were received into evidence.

Petitioner, Boudreau's Concrete, Inc., presented the testimony of Richard Boudreau and Petitioner's Exhibit 1 which was received into evidence.

FINDINGS OF FACT

1. Respondent, Department of Financial Services, Division of Workers' Compensation ("the Division"), is the state agency responsible for enforcing the statutory requirement that employers provide workers' compensation coverage for their employees. Subsection 440.107, Florida Statutes (2006).

2. Petitioner, Boudreau Concrete, Inc. (BCI), was, at all relevant times, an employer and engaged in concrete construction work in Florida.

3. John Cipyak is a vice president with Builders Plus, a Boynton Beach Company hired to work on a Westview Office Building Site, in Port St. Lucie, Florida. Builders Plus subcontracted with BCI to perform pre-concrete form carpentry work at the site, including construction of the foundation and panels into which the concrete slab would be poured.

4. Near the end of February 2006, Mr. Cipyak told Mr. Boudreau that the Westview project was falling behind schedule and that BCI needed more laborers on the job. Mr. Cipyak testified that Mr. Boudreau specifically agreed that his company, BCI, would hire sufficient additional manpower and would not use subcontractors. That agreement was not reduced to writing.

5. In response to the need for additional laborers, the Division claims that BCI violated the applicable statutes and the insurance code by hiring seven carpenters, who worked at the Westview site from February 27, 2006, through March 3, 2006, as employees of BCI without providing workers' compensation insurance coverage for them. The seven carpenters are Dimas Zelaya, Francisco Figueroa, Gerardo Nava, Hector Sevilla, Jeremias Martinez, Carlos Quevedo and Jesse Hernandez.

6. BCI claims that the seven carpenters were employees of a subcontractor, J. A. J. Construction Company, owned by Jose Alfredo Jiminez, and that Mr. Jiminez, BCI believed, carried the required workers' compensation insurance. The arrangements to have the additional workers on the project were made during a telephone call between Mr. Boudreau, Mr. Jiminez and Mr. Zelaya, who got the other six men to come with him and once they reported to the job, served as a translator for them.

7. On March 2, 2006, Lynn Cornelius, a manager with Woodland Construction Company, Inc. ("Woodland"), sent an e-mail to Thomas Puglis, of the Division, listing the names of seven former employees of Woodland who had left Woodland's employment, on February 24, 2006, to work for a subcontractor on another project. He named the same seven people who started work on the Westview site on the following Monday, February 27, 2006.

8. On March 3, 2006, Mr. Puglis and Lieutenant Vance Akins, both investigators for the Division, visited the construction site where the seven former Woodland employees were working. With the assistance of an interpreter over the telephone, because no Spanish speaker was available for the site visit, the investigators instructed the seven workers to fill out Spanish language questionnaires for public works contractor licensing, provided by St. Lucie County. The investigators also tape recorded a statement from the only one of the seven men who spoke some English, Dimas Zelaya, during which, at best, he could be understood to have recognized and identified a picture of Mr. Boudreau.

9. Lieutenant Akins telephoned another Division investigator Robert Barnes from the work site. Mr. Barnes testified that he telephoned someone who identified himself as Todd Freeman, a BCI employee, from whom he got the name of

William Yocum of First Financial Employee Leasing, Inc., as the leasing company that provided workers' compensation coverage for BCI.

10. Although he had no personal knowledge about where the seven carpenters were working from February 27 through March 3, 2006, Mr. Yocum noted that they were not covered on the policy for BCI and that the failure of BCI to report the names of all of its employees to the leasing company would violate the agreement between those two companies.

11. Mr. Boudreau, on behalf of BCI, wrote a check dated March 10, 2006, to J. A. J. Construction Services, Inc., for \$3860.00, with the notation "7 men - 2/27-3/3." BCI had no evidence of a written agreement with J. A. J. and the compensation to J. A. J. was solely for the wages earned by the carpenters.

12. The Division's case is essentially based on the inference, without corroborating evidence, that Mr. Boudreau fabricated the subcontractor relationship and furthered that deception by writing the check after he knew BCI was being investigated for failure to secure workers' compensation insurance. The Division based its assertion on the fact that Mr. Boudreau could not name the subcontractor during his first interviews by Mr. Barnes, saying that he was dealing with the subcontractor through Mr. Zelaya.

13. The Division also presented evidence to demonstrate that the nature of the working relationship between BCI and the seven men was that of employer and employee, not independent contractors. That evidence was inconclusive. Although Mr. Boudreau kept their time sheets and personally supervised the work at the job site everyday from Monday through Thursday, with the assistance of Mr. Zelaya, as a translator, the carpenters brought their own tools and used materials and supplies provided by Builders Plus. The argument that J. A. J.'s role was administrative in nature is not convincing, since the same can be said of the leasing company, with which the Division asserted BCI should have obtained coverage.

14. Mr. Barnes testified that he reviewed records of J. A. J., that someone from his office questioned Mr. Jiminez, and that they determined that the seven carpenters were not covered by J. A. J.'s workers' compensation policy during the time that they were working for Mr. Boudreau, based on some sworn statement made by Mr. Jiminez to the investigators. Mr. Jiminez did not appear as a witness in this case. The Division's investigator conceded that the Division did not determine whether or not the seven workers should have been on the J. A. J. policy.

15. Mr. Zelaya testified that he spoke to Mr. Jiminez about getting more pay and understood that he would ". . . work with the license and insurance of Jose Jiminez. Mr. Boudreau was going to pay Jose and Jose was to pay me." Further, he stated that "Jose gets the workers, Jose makes a dollar off of the pay

that we make. Mr. Boudreau was to give Jose a check, and Jose was to pay us, but Jose never paid us."

16. Before he paid Mr. Jiminez, Mr. Boudreau requested and received from J. A. J. a workers' compensation policy, but that certificate of insurance was dated March 6, 2006, and did not appear to cover BCI for the prior week. At the same time, Mr. Boudreau added some of the workers to his own lease company policy, in an apparent attempt to continue the job, but was unable to do so after the stop work order was issued.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Subsections 120.57(1) and 120.569, Florida Statutes (2006).

18. The Division must prove by clear and convincing evidence that BCI failed to provide its employees with workers' compensation insurance coverage and that the penalties assessed are correct. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Dept. of Financial Services, Division of Workers' Compensation v. U & M Contractors, Inc., Case No. 04-3041 (DOAH April 27, 2005); See also Triple M Enterprises, Inc., v. Department of Financial Services, Division of Workers' Compensation, Case No. 04-2524 (DOAH Jan. 13, 2005).

19. The Division failed to meet its burden of proof by not presenting evidence to support its determination that it was BCI

that failed to comply with the workers' compensation law for the audit period.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order rescinding the Stop Work Order and Order of Penalty Assessment, Amended Order of Penalty Assessment, and Second Amended Order of Penalty Assessment.

DONE AND ENTERED this 8th day of June, 2007, in Tallahassee, Leon County, Florida.

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ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of June, 2007.

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.