

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OLENDER CONSTRUCTION CO., INC.,)
)
Petitioner,)
)
vs.) Case No. 06-5023
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Diane Cleavinger, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on August 23, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jeremy T. Springhart, Esquire
Broad and Cassel
390 North Orange Avenue, Suite 1500
Orlando, Florida 32801

For Respondent: Colin M. Roopnarine, 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 obtain workers' compensation insurance meeting the requirements of Chapter 440, Florida Statutes, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On June 22, 2006, the Department of Financial Services, Division of Workers' Compensation (Department) issued a Stop Work Order directing Olender Construction Co., Inc. (Olender or Petitioner) to immediately "stop work and cease all business operations" in Florida because it had failed to obtain workers' compensation insurance coverage meeting the requirements of Chapter 440, Florida Statutes (2006), and the Florida Insurance Code. On the same date, the Department issued an Order of Penalty Assessment against Olender imposing a penalty pursuant to Section 440.107(7)(d), Florida Statutes. On July 18, 2006, the Department issued an Amended Order of Penalty Assessment in which it assessed a penalty of \$2,236,307.41 for Olender's failure to obtain workers' compensation insurance coverage as required by statute. Petitioner timely requested an administrative hearing on the Department's order and penalty. The Department forwarded the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

On June 26, 2007, the Department issued its Second Amended Order of Penalty Assessment, lowering the penalty for failure to secure workers' compensation insurance coverage to \$1,324,260.05. Finally, on July 3, 2007, the Department issued its Third Amended Order of Penalty Assessment, again lowering the penalty to \$1,205,535.40.

At the hearing, the Department presented the testimony of Margaret Cavazos, and offered Exhibits numbered 1 through 12, 14, 15, 17, 19, 20 and 24 into evidence. The Department also offered the deposition testimony of Robert Belvieu, Elizabeth Murray, Primitivo Torres and Daniel Campbell, numbered as Exhibits 21, 22, 25 and 26, respectively. Olender offered the testimony of Ruben Rojo, Jonathan Olender and Donna Knoblauch. Olender also offered Exhibits numbered 6 and 9 into evidence.

After the hearing, Olender filed its Proposed Recommended Order on September 28, 2007. The Department filed its Proposed Recommended Order on October 5, 2007. The Department also filed a Notice of Supplemental authority on December 21, 2007. The parties' submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Olender is a Delaware corporation that is registered to do business in Florida and engaged in the business of construction. Primarily, Olender frames the walls of structures

and installs siding, windows and moisture barriers to such structures. Such activities are construction activities under the Florida's workers' compensation law. See Ch. 440, Fla. Stat., and Fla. Admin. Code R. 69L-6.

2. On June 22, 2006, an investigator for the Department visited the Alta Westgate Apartment complex construction project, located at 6872 Alta Westgate Drive, Orlando, Florida. The visit was prompted by a "confidential tip" received by the Department from Tyler Balsinger, a former employee of Petitioner. The Alta Westgate complex is owned by Alta Westgate, LLC. The general contractor responsible for the construction of the complex was W.P. South Builders. The overall project manager for the general contractor was Robert Beliveau. The on-site representative for the general contractor was Danny Campbell.

3. Mr. Campbell provided the Department's investigator with a list of subcontractors on the project worksite. The list reflected that the subcontractor for framing was Olender and that John Olender was the person in charge of the company's work at the project site. Among other things, the contract also included the installation of a moisture barrier, generally known as Tyvek, on the framed structures. Because of the nature of construction work, it is not unusual to have several subcontractors on a construction worksite at the same time. It

is unlikely that Olender was the only subcontractor working on the day the Department's investigator visited the Alta Westgate project.

4. The subcontract required that Olender secure the payment of workers' compensation on its employees. The evidence was not clear regarding whether the general contractor, under its subcontract with Olender, would provide workers' compensation insurance on the employees of Olender's subcontractors. However, the evidence was clear that J.P. Builders did not secure such workers' compensation insurance on the employees of Olender's subcontractors.

5. Mr. Campbell also provided the certificate of insurance for Petitioner. The certificate reflected that Modern Business Associates, Inc. (MBA), an employee leasing company, provided workers' compensation for Olender's leased employees. See § 468.520, Fla. Stat.

6. MBA entered into a client service agreement with Olender. Under the agreement, Olender would lease employees from MBA and MBA would provide payroll services and workers' compensation coverage for the employees it leased to Petitioner. The agreement terminated on August 30, 2006.

7. MBA's Client Service Agreement with Petitioner states on p. 3:

Insurance Coverage. MBA is responsible for providing Workers' Compensation coverage to

workers employed by MBA and assigned to Client, in compliance with applicable law, and as specified in the Proposal. Workers performing services for Client not covered by this Agreement and not on MBA's payroll shall not be covered by the workers' compensation insurance. Client understands, agrees, and acknowledges that MBA shall not cover any workers with workers' compensation coverage who has not completed and submitted to MBA an employment application and tri-fold, and which applicant has not been reviewed and approved for hire by MBA. (emphasis supplied)

8. Other than information necessary to supply its services, MBA was not aware of any specific project or projects on which Olender was working when it leased employees from MBA.

9. John Olender and Ruben Rojo were two employees that Olender leased from MBA and for whom MBA provided workers' compensation insurance. The workers' compensation policy complied with Florida's workers' compensation requirements.

10. After speaking with Mr. Campbell, the Department's investigator, who is fluent in Spanish, walked around the complex's worksite. She did not have a hardhat on. She eventually saw about 10 to 12 workers on the third floor of one of the buildings under construction (Building 8 or 9). The Department's investigator could not say if they were framing. At some point, John Olender, the company's project superintendent, saw the Department's investigator, noticed she did not have any safety equipment on, and went to meet her. The investigator yelled to the workers on the third floor and showed

her Department badge or identification. She was speaking Spanish to them. The workers ran in an effort to avoid the Department's investigator.

11. Mr. Olender, who does not speak or understand Spanish, sent for Ruben Rojo. Mr. Rojo is the assistant superintendent for Olender and works under John Olender. He is fluent in Spanish. He does not hire employees for Olender, but oversees the work being performed under Olender's subcontracts.

12. The Department's investigator continued to attempt to explain to the workers that she was not interested in their immigration status, but was there to make sure they were covered by workers' compensation insurance.

13. At least some of the workers came down to talk to her. Mr. Rojo thought the investigator was asking about the workers' immigration status and told them that they did not have to talk to her. However, apparently some workers very reluctantly gave her limited information. The workers who talked to her were Pedro Antonio Mendez, Jaco Sarmentio, Juan Cardenas, Alvaro Don Juan Diaz, Jose Varela Orellana, Nesto Suarez Ventura, Miguel Martinez Diaz, Jose Perez Renaldo and Antonio Hernandez. She did not obtain any addresses, phone numbers or other identifying information from the employees. The evidence did not show whether these individuals gave the Department's investigator the correct information. Importantly, they did not tell her who

their employer was or what duties they were performing. None of these individuals testified at the hearing. John Olender did not recognize these workers. Mr. Rojo told the investigator that Olender subcontracted the framing portion of its contract to "T-Bo".

14. T-Bo was also known as Primitivo Torres. In his deposition testimony, Mr. Torres did not recognize these workers' names. He also thought that most of the workers he employed for his framing subcontract with Olender were illegal immigrants. Mr. Torres was unclear in his testimony regarding his status with Olender. He did indicate that he worked in both Orlando and Tampa. Apparently, at times, he was an employee and at other times he was a subcontractor. He was listed as a leased employee under MBA's contract with Olender. The evidence suggests, but does not prove, that Mr. Torres was a person who supplied immigrant workers to construction sites.

15. In Orlando, Mr. Torres lived in an apartment complex in the Rosemond area with his employees. The rent was sometimes paid by Olender and then deducted from the remuneration paid to Mr. Torres. Mr. Torres paid his employees from the money he received under his subcontract with Olender.

16. Mr. Torres also testified that when the Department's investigator contacted him in June 2006, to discuss workers' compensation insurance, he told her that he neither secured the

payment of workers' compensation for himself nor for the other workers in both Tampa and Orlando.

17. Donna Knoblauch, who oversaw Olender's main office, received a faxed copy of a certificate of workers' compensation insurance from Mr. Torres. However, the faxed certificate was an illegible copy of what appeared to be a certificate of liability insurance issued by a company in Texas. The certificate does not have a legible "sent date," a legible workers' compensation policy number, legible dates of coverage, a legible producer name, or any information indicating that coverage includes the State of Florida. The document is insufficient to demonstrate that Mr. Torres provided workers' compensation coverage for his employees that worked under his subcontract with Olender.

18. John Olender testified that Mr. Torres utilized, at most, 20 framers for the construction at Alta Westgate. Mr. Torres corroborates that number and indicates that various people worked in crews of around five. On the other hand, Danny Campbell testified that Olender had approximately 20 workers when the project started, increased to approximately 75 people performing framing duties on the worksite and decreased to about 20 workers by the time the Department's investigator visited the worksite. Mr. Campbell testified that on January 22, 2006, he believed that Olender had approximately five individuals for the

punch-out group, three-to-five cleaners, a forklift operator, approximately two individuals installing the Tyvek moisture-barrier paper, two individuals performing window installation and approximately 15-to-20 individuals installing siding at the worksite. No other testimony supports the number of workers Mr. Campbell believed to be at the jobsite on June 22. On balance, the best evidence of the approximate number of workers was that of Mr. Olender and Mr. Torres. However, these figures were only estimates of the actual number which may have been less than 20 workers. In any event, the employment of these 12 workers on the third floor was not demonstrated by the evidence. Their names did not appear on the list of employees leased by Olender from MBA and were otherwise, unknown to the Mr. Olender, Rojo and Torres.

19. While at the jobsite, the Department's investigator also spoke with Victor Ibarra. Mr. Ibarra drove a forklift and indicated that he worked for Olender. Again, no address or other identifying information was supplied to the investigator. Later, the investigator spoke with a woman who purported to be Mr. Ibarra's wife. There was no information on the forklift indicating that it belonged to Olender and Olender denies employing a person named Victor Ibarra. Mr. Campbell testified in his deposition that Olender had forklifts on the jobsite. However, he did not testify that the forklift Victor Ibarra

drove on June 22, 2006, was owned by Olender. Likewise, Mr. Campbell did not testify that Mr. Ibarra was an employee of Olender. Mr. Ibarra's name did not appear on the list of leased employees provided by MBA. The Department's investigator included Mr. Ibarra as an employee of Olender based on Mr. Ibarra's statements. However, the evidence presented by the Department is not sufficient to establish that Mr. Ibarra was an employee of Olender, since Mr. Ibarra did not testify at the hearing. Mr. Campbell's testimony does not corroborate the hearsay statements of Mr. Ibarra since the testimony does not indicate the forklift Mr. Ibarra drove belonged to Olender or to another subcontractor on the project.

20. After talking to Mr. Ibarra, the Department's investigator met Rosa Barden, Martha Alvarado and Ismael Ortiz, who were applying a moisture barrier paper known as "Tyvek" to a building at the construction site. The three individuals told the investigator that that they had been hired by Mr. Rojo on behalf of Olender and had only worked for about a day. The investigator included these three individuals as employees of Olender. No addresses or other contact information was obtained by the investigator. None of these individuals testified at the hearing. Mr. Rojo testified that he did not know the three individuals on the "paper crew" and did not hire them. None of the three individuals were listed as leased employees with MBA.

However, Olender's subcontract clearly lists the application of Tyvek as a part of its contract. Additionally, the payment information supplied by the general contractor shows that Olender was paid for Tyvek application on all the buildings in the complex. Unlike Mr. Ibarro's testimony, the contract and payment evidence independently corroborates the otherwise hearsay statements of these three individuals and Olender should have provided workers compensation insurance on them. There was no evidence that Olender provided such workers' compensation insurance; such failure violates Chapter 440, Florida Statutes. See §§ 440.10(1)(g) and 440.38(7), Fla. Stat., and Fla. Admin. Code R. 69L-6.019.

21. In total, the Department's inspector met with John Olender for approximately one hour discussing the work performed by Olender and the employees retained by Olender. During this meeting, Mr. Olender, identified members of a "punch-out" crew who had worked on the project. The punch-out crew repaired any defects in framing prior to inspection. The names supplied by Mr. Olender were Juan Gonzalez, Miguel, Sal, William, WI Gerardo (noted as El Guardo in the third Amended Order of Penalty assessment), Pedro, Jacobo and Boso. Mr. Olender did not know their last names. The evidence did not show the period of time that the punch-out crew would have been working at the project site. Presumably, they would have begun some time after the

initial building was framed. The Department's investigator did not personally see the punch-out crew at the project.

Mr. Olender also informed the Department's investigator that he did not handle matters concerning workers' compensation insurance and that she would have to contact the Company's main office in Missouri. He provided the number for the office. He also gave the investigator the number for Michael Olender, the president of the company and the number for Mr. Torres. The investigator issued a Workers' Compensation Request for Production of Business Records to Olender. She left the Request with John Olender.

22. The request for records asked for certain categories of Olender's business records for the period of January 22, 2004 to June 22, 2004. Of importance here, the Department requested records in categories 1, 4, 5 and 6. In general, category 1 covers all payroll records, including checks and check stubs, time sheets, attendance records and cash payment records. Categories 4, 5 and 6 cover all records that relate to subcontractors, including their identity, contract, payment thereof, workers compensation coverage for all the subcontractor's employees, and/ or the employees' exemption status. These records are required to be maintained by a company doing business in Florida.

23. Mr. Campbell testified that some members of the punch-out crew often approached him about whether he had paid Olender so that they in turn could be paid. Again, none of these individuals testified at the hearing. However, given the admissions of Olender's employee and Mr. Campbell's testimony, the evidence supports the conclusion that the eight individuals on the punch-out crew were employed by Olender. None of these employees were leased employees and therefore, were not covered by the workers' compensation policy provided by MBA. There was no evidence that Olender secured any workers' compensation insurance on these eight employees. Such failure violates Chapter 440, Florida Statutes. See §§ 440.10(1)(g) and 440.38(7), Fla. Stat., and Fla. Admin. Code R. 69L-6.019.

24. The Department's investigator contacted Ms. Knoblauch while she was on her way to a medical appointment. The investigator requested Olender's proof of workers' compensation insurance. Ms. Knoblauch told the investigator that she was not at the office where the records were kept, but on the way to a medical appointment. She said she would be returning to the office after the appointment. The investigator said she needed the records immediately. Ms. Knoblauch offered to skip her appointment and requested time to turn around and return to the office. The investigator refused to permit her the time to return to the office.

25. At some point, MBA supplied the Department's investigator with a list of Olender's leased employees. The list did not contain any of the names she had gathered during her visit to the worksite.

26. Within a few hours from the beginning of the investigation, the Department's investigator issued a Stop Work Order and an Order of Penalty Assessment on June 22, 2006. The Order was served via certified mail on Michael Olender and Olender's legal counsel. The Stop Work Order required that Olender "cease all business operations in this state" and advised that a penalty of \$1,000.00 per day would be imposed if Olender were to conduct any business in violation of the Stop Work Order. Additionally, along with the Order, the Department issued and served on Petitioner via certified mail a Division of Workers' Compensation Request for Production of Business Records for Penalty Calculation, requesting records for a period of three years. The request, made pursuant to Section 440.107(7), Florida Statutes, asked the employer to produce, for the preceding three years, documents that reflected payroll, proof of insurance, workers' compensation audit reports, identity, duration, contracts, invoices and check stubs reflecting payment to subcontractors, proof of workers' compensation coverage for those subcontractors, employee leasing company information, temporary labor service information, and any certificate of

workers' compensation exemption. The request asked for the same type of records that had been requested earlier. Neither request for records was specific to a particular construction job that Olender may have performed work on.

27. The investigator informed Mr. Campbell that Petitioner was being issued a Stop-Work Order and gave him a copy of the Order. Mr. Campbell faxed the Order to Olender's office in Missouri.

28. The Department's investigator also checked the Department's Coverage and Compliance Automated System ("CCAS") database. The system tracks workers' compensation insurance policy information provided by workers' compensation carriers on an insured employer. The database did not contain an entry that reflected a current State of Florida workers' compensation insurance policy for Olender. The database did reference that Olender had a stop-work order served on it on July 12, 2002, which had been lifted on July 31, 2002, with payment of the penalty.

29. Florida law requires that employers maintain a variety of business records involving their business. See § 440.107(5), Fla. Stat., and Fla. Admin. Code R. 69L-6.015. The Rule is limited to records regarding a business' employees and any payout by the employer to any person. In this case, under the Rule, the only records Olender was required to maintain related

to its employees and its subcontractor, Mr. Torres. There was no evidence regarding any other subcontractors Olender may have contracted with. The only records supplied by Olender to the Department were the records from MBA that included workers' compensation information and W-2 forms for Olender's leased employees, the illegible proof of insurance for Mr. Torres and copies of checks from Olender to Mr. Torres for the subcontract. Those records reflected that John Olender, Ruben Rojo and Primitivo Torres were leased employees and covered by workers' compensation insurance under Olender's contract with MBA. Olender supplied no records regarding workers' compensation coverage for the eight employees who were members of the punch-out crew, the three workers who were members of the paper crew or the 12 workers who were on the third floor.

30. When an employer fails to provide requested business records that the statute requires it to maintain, the Department is required to impute the employer's payroll using "the statewide average weekly wage as defined in Section 440.12(2)." § 440.107(7)(e), Fla. Stat., and Fla. Admin. Code R. 69L-6.028. The penalty for failure to secure the workers' compensation insurance coverage required by Florida law is 1.5 times the premium that would have been charged for such coverage for each employee identified by the Department. The premium is calculated by applying the approved manual rate for workers'

compensation insurance coverage for each employee to each \$100.00 of the gross payroll for each employee.

31. In this case, the Department, after several amended assessments, imputed the payroll for Olender for the period beginning January 22, 2004, Petitioner's date of incorporation, and ending June 26, 2006. Included in the calculation were the eight individuals on the punch-out crew identified by John Olender, the 12 employees who were working on the third floor, the forklift driver Victor Ibarra, and the three individuals on the paper crew.

32. In calculating the premium for workers' compensation insurance coverage, the Department's investigator used the risk classifications and definitions of the National Council of Compensation Insurance, Inc. ("NCCI") SCOPES Manual. The appropriate code for Olender's employees was classification code 5561 which covers framing of multiple family dwellings. The gross payroll imputed to each of the 27 employees was \$683.00 per week. The Department then utilized the imputed payroll for same employees for the years 2004 and 2005. The Department's calculation resulted in an assessed penalty of \$1,205,535.40.

33. However, the evidence establishes that Olender had 11 direct employees rather than 27 employees during the period of the Alta Westgate contract. Olender's performance under that contract began on April 3, 2006. Other than the period of time

involved with the Alta Westgate project, there was no evidence regarding the period of time Olender conducted business in Florida that would require it to comply with Florida law. The date of incorporation of Olender is insufficient to demonstrate that Olender engaged in any business in Florida that would require it to comply with Florida's workers' compensation law. Therefore, the penalty calculation must be modified to reflect only those eleven employees for the time period Olender performed under its contract on the Alta Westgate project.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

35. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is, therefore, required by the employer. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989). The Department has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. § 440.107(3), Fla. Stat.

36. Section 440.10(1), Florida Statutes (2006), provides in pertinent part:

(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees . . . of the compensation....

37. "Employer" is defined as "every person carrying on any Employment . . .". § 440.02(16), Fla. Stat. (2006).

38. "Employment . . . means any service performed by an employee for the purpose of employing 'him or her' and 'with respect to the construction industry, [includes] all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) and (b)2., Fla. Stat. (2006).

39. The Department must prove by a preponderance of the evidence that Olender failed to provide its employees with workers' compensation insurance coverage and that the civil and administrative penalties assessed are correct. See 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"); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla.

1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.' Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)."). See also § 120.57(1)(j), Fla. Stat.

40. It is undisputed that Petitioner was an "employer" carrying on "employment" in the State of Florida for the period Olender performed its contract on the Alta Westgate contract.

41. The question to be resolved in this case is who of the many people the Department's investigator interviewed on June 22, 2006, were employed by Olender and the period of time Olender engaged in business in the State of Florida for which it was required to provide workers' compensation insurance.

42. The penalty assessed by the Department was based on the date of incorporation of Olender. However, that date does not indicate the period of time that Olender employed any employees who performed work in Florida which required Olender to provide workers' compensation insurance under Florida law. The record is devoid of any evidence that Olender conducted any business in Florida except during the period it was the subcontractor on the Alta Westgate project. There was some indication in the record that Olender was the subcontractor on a project in Tampa, but there was no credible evidence of the time

during which Olender performed work on the Tampa project. Therefore, the only time period for assessment purposes demonstrated by the evidence was the time period Olender performed work under its subcontract with the general contractor on the Alta Westgate project.

43. Olender maintained that it never employed anyone named Victor Ibarra. Based on the findings of fact herein, the Department has failed to prove by a preponderance of the evidence that Victor Ibarra was employed by Olender. The Department relied exclusively on statements by Mr. Ibarra made to the Department's investigator in reaching its conclusion that he was an employee of Olender. The Department presented no other persuasive, non-hearsay evidence relating to the status of Mr. Ibarra. Moreover, the evidence did not establish Mr. Ibarra's statements were "admissions" that could be used against Olender pursuant to the exception to the hearsay rule found in Section 90.803(18), Florida Statutes. Because of the limitation on the use of hearsay evidence in administrative proceedings, the hearsay statements of Mr. Ibarra cannot be used to establish that he was, in fact, an employee of Olender. See § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

44. On the other hand, there was sufficient non-hearsay evidence to establish that Rosa Barden, Martha Alvarado and Ismael Ortiz were employees of Olender. These three individuals were applying Tyvek to the framed buildings at Alta Westgate when the Department's investigator talked to them. They told her that they had been hired by Mr. Rojo who was Olender's employee. The subcontract and payment information from the general contractor corroborated the fact that Olender was responsible for the application of Tyvek and was also paid for that work. This evidence corroborated the hearsay statements of these three individuals. Since the evidence demonstrated that these three individuals were employees of Olender, Olender should have provided workers' compensation insurance on them. There was no evidence that Olender provided such insurance.

45. The evidence demonstrated that Mr. Torres was a subcontractor who variously employed people to work under his subcontract with Olender. The evidence did not demonstrate that Mr. Torres secured the payment of workers' compensation on his employees. Olender did have an illegible certificate of insurance that purported to show that Mr. Torres may have had workers' compensation insurance. However, that document is both unreliable and unpersuasive, since there are no discernable dates, policy number, named insured or legible insurance company on the document. The certificate does not appear to possess a

State of Florida endorsement as required by Section 440.38, Florida Statutes, and Florida Administrative Code R. 69L-6.019.

46. In pertinent part, Section 440.10(1)(g), Florida Statutes, (2006) states:

Subject to § 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code.

47. Subsection 440.38(7), Florida Statutes (2006), provides in relevant part:

Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required 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.

See also Fla. Admin. Code R. 69L-6.019(3) and (4).

48. Section 440.10, Florida Statutes (2006), states:

(b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. . . .

49. Read together, these statutes, at a minimum, require a contractor, like Olender here, to maintain records that reflect who their subcontractors are and that such subcontractors have supplied the contractor with reasonable documentation that the subcontractor has secured workers' compensation insurance on its employees. The statute does not require that the contractor maintain records regarding the subcontractor's employees. However, the documentation of such insurance must at least be legible and demonstrate that it provides coverage according to Florida law. The illegible certificate of insurance supplied by Olender to the Department did not meet these requirements. Thus, even though Mr. Torres was a subcontractor of Olender, Petitioner is liable for failing to secure the payment of workers' compensation for Mr. Torres' employees. The difficulty arises in the fact that there is no credible, non-hearsay evidence that demonstrates the 12 workers on the third floor were employees of Mr. Torres. Indeed, other than an estimate of the number of individuals employed by Mr. Torres, there is no evidence that any Torres employees worked at the Alta Westgate project. A vague estimate of the number of employees of a subcontractor is insufficient to impute an amount of gross payroll for penalty assessment purposes.

50. The Department is required by Section 440.107(7)(d)1., Florida Statutes, to:

assess against any employer who has failed to secure the payment of workers' 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.

51. The Department is authorized by Section 440.107(9), Florida Statutes, to enact rules to implement Section 440.107, and it has done so in Florida Administrative Rule Chapter 69L-6, which requires employers in Florida to "maintain employment records pertaining to every person to whom the employer paid or owes remuneration for the performance of any work or service in connection with any employment" for "the current calendar year to date and for the preceding three calendar years" and to "produce the records when requested by the division pursuant to Section 440.107." Fla. Admin. Code R. 69L-6.015(1), (3), and (11).

52. Section 440.107(7)(d)1., Florida Statutes, states that an employer who fails to secure the payment of workers' compensation is subject to

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.

53. It was undisputed that the work being performed by Petitioner was framing and other duties on the Alta Westgate project. Thus, the penalty calculated utilizing the approved manual rate assigned to class code 5651 was properly assessed.

54. It is also undisputed that Petitioner failed, in part, to provide the records regarding all of its direct employees and reasonable documentation that its subcontractor, Mr. Torres, secured workers' compensation insurance on his employees. Under these circumstances, the Department is charged with assessing a penalty through imputation of the gross payroll of Olender. Section 440.107(7)(e), Florida Statutes, states, in relevant part:

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 § 440.12(2) multiplied by 1.5.

55. Florida Administrative Code Rule 69L-6.028(2)(a) states,

For employees other than corporate officers, for each employee identified by the department as an employee of such employer

at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.

56. In this case, the evidence did not identify any employees of Mr. Torres. Therefore, no penalty can be assessed for those employees.

57. Section 440.12(2), Florida Statutes, provides in pertinent part:

For the purpose of this subsection, the "statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law as reported to the Agency for Workforce Innovation for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Agency for Workforce Innovation on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. The statewide average weekly wage determined by the Agency for Workforce Innovation shall be reported annually to the Legislature.

58. In Florida Administrative Code Rule 69L-6.021(1), 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)" to determine the approved manual rates for different types of construction activities.

59. As noted in the findings of fact, the Department assigned classification code 5651 to the employees of Olender. That code encompasses framing activities involved in the construction of multi-family dwellings. The evidence showed that the classification code used by the Department was appropriate for ascertaining the approved manual rate to be used in calculating the workers' compensation premium that would have been paid by Olender had it secured workers' compensation insurance coverage pursuant to Florida law.

60. Based on the findings of fact in this Recommended Order, the Department has proven by a preponderance of the evidence that it correctly calculated the imputed payroll for the eight employees of Olender that were members of the punch-out crew and the three employees that were members of the punch-out crew. The evidence did not support the Department's calculation with regards to any other individuals listed in the third Amended Penalty Assessment or to the time period that Olender conducted business in Florida. Therefore, the Department's total penalty calculation is incorrect, and should be adjusted to reflect the findings in this Recommended Order.

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 Olender Construction Co., Inc., failed to have Florida workers' compensation insurance coverage for 11 of its employees, in violation of Sections 440.10(1)(a) and 440.38(1), Florida Statutes; and

2. Recalculating the penalty against Olender.

DONE AND ENTERED this 14th day of March, 2008, in Tallahassee, Leon County, Florida.



DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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this 14th day of March, 2008.

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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.