

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 07-1538
)
KEITH MYER, d/b/a CUSTOM)
INTERIORS & DESIGN, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was convened in this cause on June 21, 2007, in Green Cove Springs, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Keith Myer, pro se
d/b/a Custom Interiors & Design, Inc.
4621 Burdock Court
Middleburg, Florida 32068

STATEMENT OF THE ISSUE

Whether Respondent failed to secure workers' compensation coverage as required by law, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Financial Services, Division of Workers' Compensation, through one of its investigators, issued to, and served on, Keith Myer, d/b/a Custom Interiors & Design, Inc., an Order of Penalty Assessment, Number 07-019-D1, alleging that Mr. Myer had violated Chapter 440, Florida Statutes (the Workers' Compensation Law), and assessing a penalty of \$18,937.37.

Petitioner timely requested a disputed-fact hearing, and the case was referred to the Division of Administrative Hearings on or about April 3, 2007.

This case should have been, but was not, styled to reflect that before the Division of Administrative Hearings, the duty to go forward was upon the Agency. To correct that oversight, the style of this cause is hereby amended as set out above.

Therefore, the Agency is hereafter "Petitioner" and the citizen, Keith Myer d/b/a Custom Interiors & Design, Inc., is hereafter "Respondent."

At the disputed-fact hearing, Petitioner presented the oral testimony of Michael Robinson and had ten exhibits admitted in

evidence. Respondent Myer testified on his own behalf. None of Respondent's exhibits were admitted in evidence.

On June 27, 2007, Petitioner filed a "Notice of Filing Florida Statutes and Florida Administrative Code Rule [Chapter] 69L-6. No timely objection to authentication was filed by Petitioner.^{1/}

A Transcript was filed on July 31, 2007.

Each party's timely-filed Proposed Recommended Order has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner Department is the State Agency responsible for enforcing those portions of Chapter 440, Florida Statutes, requiring that employers secure payment of workers' compensation benefits for their employees.

2. On November 6, 2006, Petitioner's Investigator Michael Robinson, conducted a random visit at the construction site of a new residence at 2631 Bluewave Drive, in Middleburg, Florida. At that time, he observed Respondent Keith Myer, installing metal framing for drywall installation.^{2/} This is a construction industry function.

3. No evidence of current corporate status of Custom Interiors & Design, Inc., was presented at hearing. No evidence of the number of employees employed by the corporation was presented, either. There was no evidence to show which, if any,

corporate officer Mr. Myer might be. The impression given at hearing by Respondent Myer was that he was the corporation's sole employee.

4. At the jobsite on November 6, 2006, Mr. Myer told Mr. Robinson that he had secured the payment of workers' compensation through Staff Masters, which is a staffing company.^{3/}

5. Mr. Myer was unable to provide Mr. Robinson with any documentation that would support Respondent's claim of having secured the payment of workers' compensation through Staff Masters. Mr. Myer presented no such evidence at hearing, either.

6. Investigator Robinson utilized the Agency's Coverage and Compliance Automated System (CCAS) database that contains all policy information from workers' compensation insurance carriers to insureds, and determined that Respondent did not have any State of Florida workers' compensation insurance policy in force and effect on November 6, 2006. Mr. Myer presented no such policy at hearing, either.

7. At all times material, 2000 through 2004, Section 440.05, Florida Statutes, has allowed a sole proprietor, partner, or corporate officer actively engaged in construction to apply for an exemption from workers' compensation benefits. From 2005 through 2006, only corporate officers could elect

"out". Only the named individual on the application was exempt from carrying workers' compensation insurance coverage.

8. Respondent Myer d/b/a Custom Interiors & Design, Inc., has no current valid workers' compensation exemption, but he had an exemption that had expired in September 2002.

9. At all times material, 2000 through 2006, Sections 440.05(3) and 440.05(6), Florida Statutes, have limited the duration of construction workers' compensation exemptions to a period of two years. At the end of two years, the exemption automatically expires or terminates.

10. Respondent Myer testified that he was not aware that his exemption had lapsed, even though the law states that a construction exemption has a duration of two years.

11. Although Respondent denied receiving an expiration notification letter from the Agency, Investigator Robinson testified, and documents were admitted in evidence which show, that on or about June 19, 2002, the Agency sent a letter to Respondent Myer at his last known business address as shown on his exemption card, notifying him that his exemption was due to expire. The documents in evidence also suggest that Respondent or a similar name filed an incomplete exemption application in October 2002, but no witness's testimony addressed this issue.

12. While the Agency's investigator was exploring all possible coverage of Respondent, Respondent was added to the

payroll of the general contractor, Maronda Homes, which was on-site at the Bluewave Drive address, so that Respondent became covered by Maronda Homes' workers' compensation insurance policy. As a result, the Agency did not issue a stop-work order against Respondent.

13. There is no evidence that Respondent Myer or Custom Interiors & Design, Inc., were sub-contractors for, or employees of, any general contractor at any date prior to November 9, 2006, so as to be covered by that general contractor's workers' compensation policy pursuant to Section 440.10, Florida Statutes.

14. On November 20, 2006, Investigator Robinson served Respondent with a "Request for Production of Business Records for Penalty Assessment Calculation," seeking copies of business records for a period of three years, pursuant to Section 440.107(7)(d)1., Florida Statutes. This was for the purpose of determining whether Respondent had secured workers' compensation coverage, whether he or his employees had current valid workers' compensation exemptions, and to determine any civil penalties that might be owed for failing to secure the payment of workers' compensation.

15. At the time the records request was issued, Florida Administrative Code Rule 69L-6.015, stated, in relevant part:

In order for the Division to determine that an employer is in compliance with the provisions of Chapter 440, F.W., every business entity conducting business within the state of Florida shall maintain for the immediately preceding three year period true and accurate records. Such business records shall include original documentation of the following, or copies, when originals are not in the possession of or under the control of the business entity:

(1) All workers' compensation insurance policies of the business entity, and all endorsements, notices of cancellation, nonrenewal, or reinstatement of such policies.

* * *

(3) Records indicating for every pay period a description of work performed and amount of pay or description of other remuneration paid or owed to each person by the business entity, such as time sheets, time cards, attendance records, earnings records, payroll summaries, payroll journals, ledgers or registers, daily logs or schedules, time and materials listings.

(4) All contracts entered into with a professional employer organization (PEO) or employee leasing company, temporary labor company, payroll or business record keeping company. If such services are not pursuant to a written contract, written documentation including the name, business address, telephone number, and FEIN or social security number of all principals if an FEIN is not held, of each such PEO, temporary labor company, payroll or business record keeping company; and

(a) For every contract with a PEO: a payroll ledger for each day period during the contract period identifying each worker by name, address, home telephone number, and

social security number or documentation showing that the worker was eligible for employment in the United States during the contract for his/her services, and a description of work performed during each pay period by each worker, and the amount paid each pay period to each worker. A business entity may maintain such records or contract for their maintenance by the PEO to which the records pertain.

* * *

(6) All check ledgers and bank statements for checking, savings, credit union, or any other bank accounts established by the business entity or on its behalf; and

(7) All federal income tax forms prepared by or on behalf of the business and all State of Florida, Division of Unemployment Compensation UCT-6 forms and any other forms or reports prepared by the business or on its behalf for filing with the Florida Division of Unemployment Compensation.

16. In response to the records request, Respondent provided only W-2 forms for 2003 through 2005, and duplicate checks for 2006. The W-2 forms show the "employer" as Customer Interiors & Design, Inc., and Keith Myer as an "employee." Each of the checks shows the payor as "Custom Interiors & Design, Inc., Keith Myer, Angela Myer," and shows the payee as "Keith Myer."

17. According to the W-2 forms, Respondent Myer's personal gross income from Custom Interiors & Design, Inc., in calendar year 2003 was \$13,250.00; in calendar year 2004 was \$16,500.00, and in calendar year 2005 was \$34,625.00.

18. Using these W-2 forms and checks, the Agency investigator calculated a gross payroll from the period November 9, 2003 to December 31, 2004, as \$17,604.17; for January 1, 2005 to December 31, 2005, as \$34,625.00; and for January 1, 2006 to November 9, 2006, as \$14,600.00.

19. Based on Respondent's materials, Investigator Robinson calculated a penalty for the three-year time period of November 6, 2003, through November 6, 2006. In calculating the penalty, he assigned Class Code 5445, to the framing work performed by Respondent utilizing the SCOPES Manual; multiplied the class code's assigned approved manual rate with the payroll per one hundred dollars, and then multiplied all by 1.5.

20. The approved manual rate for Class Code 5445 fluctuated from year to year, and Mr. Robinson's penalty worksheet reflected such fluctuations.

21. After several tries, the Order of Penalty Assessment, which assessed a penalty of \$18,937.37, was served on Respondent by certified mail on March 1, 2007.

22. Respondent Myer did not dispute any of the formulas or mathematics employed. He did not challenge his "employee" status. He only asserted that the penalty is excessively high for an honest mistake.

CONCLUSIONS OF LAW

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

24. Petitioner Department has the duty to go forward and bears the burden of proof, by clear and convincing evidence, to prove that Petitioner violated the Workers' Compensation Act during the relevant period and that the penalty assessments are correct. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

25. The charging document herein is very vague as to statutory authority, but does set forth the proposed final agency action of invoking a fine. Petitioner cites, within its Proposed Recommended Order, Sections 440.05(3), 440.05(6), 440.10, 440.107(2)(d)1., and 440.38, Florida Statutes.

26. At all times material, i.e. the three-year span of 2003-2006, Section 440.10(1)(a), Florida Statutes, has provided:

(1)(a) Every employer coming within the provisions of this chapter, . . . shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or

private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38. (Emphasis added).

27. Pursuant to Section 440.10 and 440.38, Florida Statutes, at all times material, every "employer" has been 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 is required. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

28. At all times material, "employer" has been defined at Section 440.02(16), Florida Statutes, as:

. . . the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person. . . . If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors and all shareholders who directly own a controlling interest in the corporation, are considered the employer for the purpose of ss. 440.105, 440.106, and 440.107.

29. At all times material, at least 2003-2006 "employee" was defined in Section 440.02(15), Florida Statutes, in pertinent part:

(a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while

engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

(b) "Employee" means any person who is an officer of a corporation and who performs services for remuneration for such

corporation within this state whether or not such services are continuous.

30. As strange as it sounds, Petitioner was both an "employee" and an "employer" for purposes of Chapter 440, Florida Statutes. Also, Section 440.107(17)(b)2. Florida Statutes, has, from 2002 to date, defined "employment" with respect to the construction industry as "all private employment in which one or more employees are employed by the same employer." (Emphasis supplied.)

31. The Workers' Compensation Law is frequently amended. Some of its new provisions take effect July 1, of a year; others take effect October 1, of a different year. Because a statute and rule limit the Agency to assessing a penalty over only three years, the period involved in the instant penalty assessment runs from November 9, 2003 to December 31, 2004; January 1, 2005 to December 31, 2005, and January 1, 2006 to November 9, 2006. (See Finding of Fact 18.) During these periods, Section 440.107(7)(d) has provided for 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 the employer failed to secure the payment of workers' compensation required by Chapter 440.

32. Mr. Myer's claim that he had an exemption or was eligible for an exemption supports the proposition that he was, in fact, a corporate officer. In Hagner v. United States, 285 U.S. 427, 430 (1932), the Court stated that, "[t]he rule is well settled that proof that a letter properly directed . . . creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." See also In re East Coast Brokers & Packers, Inc., 961 F.2d 1543 (1992) (adopting in Florida the standard stated by the United States Supreme Court in Hagner), and Brown v. Griffin Industries, Inc., et al., 281 So. 2d 897 (Fla. 1973). Under such circumstances, Mr. Myer's protestation that he did not receive the Agency's notice of the expiration of his exemption is not persuasive. Received or not, the Agency's notice that an exemption is about to expire does not eliminate the individual's legal duty to re-file for an exemption every two years.

33. In this case, the system sadly penalizes Respondent Myer for incorporating and for not working for someone else, which is a proposition contrary to "The American Dream," but just as incorporation is designed to insulate an individual from certain types of liability, the complicated structure of Chapter

440, is designed to protect those whom that individual might hire as employees and those general contractors who might "sub-out" work to him, in the event he, or one of his employee's, suffers a construction industry accident. Because no one has been injured and due to the hardship upon Respondent, this case might be a situation in which the Agency would want to compromise the fine or work out a payment schedule with Respondent, but the law is clear that the fine is owed.

34. Petitioner Department has satisfied its burden of proving clearly and convincingly, that Petitioner failed to secure the payment of "workers' compensation" as that term is defined in Section 440.107(2), Florida Statutes, and that the Agency correctly assessed the penalty prescribed in Section 440.107(7)(d), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation enter a final order approving the penalty of \$18,937.37 against Respondent.

DONE AND ENTERED this 28th day of September, 2007, in
Tallahassee, Leon County, Florida.

Ella Jane P. Davis

ELLA JANE P. DAVIS
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 28th day of September, 2007.

ENDNOTES

1/ This cause spans September 2002, when Respondent's exemption ended, to January 24, 2007, when the Agency first mailed its charges to Respondent. The materials filed by Petitioner Agency for official recognition do not adequately cover this entire period. Therefore, the undersigned has done additional research on the content of Chapter 440, Florida Statutes, in each intervening year. Also, due to the indicated amendments to Rule Chapter 69L-6, the undersigned has also researched that chapter's evolution. For instance, the following Sections cited by the Agency were frequently amended: Section 440.02 was amended in 2002; Section 440.05 was amended in 2002, 2003, 2005, and 2006; Section 440.10 was amended in 2002 and 2003; Section 440.107 was amended in 2002 and 2004; and Section 440.38 was amended in 2002, 2003, and 2004. Florida Administrative Code Chapter 69L-6 was amended in 2002, 2003 and 2005. Rule 69L-6.012 was frequently amended in its various parts. Rule 69L-6.015 was amended in 2003 and 2005.

2/ Mr. Robinson also observed a Mr. Freeman installing metal framing. There is no evidence Mr. Freeman was an employee of Mr. Myer d/b/a Custom Interiors & Design, Inc., so any evidence concerning Mr. Freeman is irrelevant.

3/ Mr. Robinson's oral recitation of his conversation with a Staff Masters' employee is uncorroborated hearsay and may not form the basis of a finding of fact, regardless of Mr. Robinson's subsequently memorializing the conversation in his investigative report.

4/ The Order of Penalty Assessment constitutes the charging document herein.

COPIES FURNISHED:

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

Keith Myer
d/b/a Custom Interiors & Design, Inc.
4621 Burdock Court
Middleburg, Florida 32068

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

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.