

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RAINBOW ROOFING SERVICES, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-1879  
 )  
 DEPARTMENT OF FINANCIAL )  
 SERVICES, DIVISION OF WORKERS' )  
 COMPENSATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on August 24, 2007, by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Gary L. Brown, Esquire  
Kelley, Kronenberg, Gilmartin,  
Fichtel and Wander, P.A.  
8201 Peters Road, Suite 4000  
Fort Lauderdale, Florida 33324

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

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner is required to pay to the Department a penalty assessment, as set forth in the 3rd Amended Order of Penalty Assessment issued June 25, 2007.

PRELIMINARY STATEMENT

On June 20, 2006, the Department of Financial Services, Division of Workers' Compensation, issued a Stop Work Order and Order of Penalty Assessment against Petitioner Rainbow Roofing Services, Inc., alleging that Petitioner had failed to secure workers' compensation coverage, and Petitioner timely requested an administrative hearing regarding that allegation. On August 3, 2006, the Department issued its Amended Order of Penalty Assessment. This cause was thereafter transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

The Department's Motion to Amend Order of Penalty Assessment was filed June 14, 2007, and again on June 25, 2007, with the Department's 2nd Amended Order of Penalty Assessment attached to the June 25 Motion. An Order Granting Motion to Amend Order of Penalty Assessment was entered June 26, 2007, and the 2nd Amended Order of Penalty Assessment was deemed filed and served.

On July 16, 2007, the Department filed another Motion to Amend Penalty Assessment, requesting leave to file a third

amended order of penalty assessment. That proposed amended order was not attached to the Motion. An Order Granting Respondent's Motion to Amend Order of Penalty Assessment was entered July 24, 2007. The Department's 3rd Amended Order of Penalty Assessment was admitted in evidence at the beginning of the final hearing in this cause as the Department's Exhibit numbered 26. The parties agree that the 3rd Amended Order of Penalty Assessment is the subject of this proceeding.

The Department presented the testimony of Mark Mark, and by way of deposition, Shawn Snider. Rainbow Roofing presented the testimony of Paul Albert. Additionally, the Department's Exhibits numbered 2-4, 7, 10, 12, 18, 20-24, and 26 were admitted in evidence.

Although both parties requested leave to file proposed recommended orders after the conclusion of the final hearing in this cause, only the Department did so. That document has been considered in the entry of this Recommended Order

#### FINDINGS OF FACT

1. Petitioner Rainbow Roofing Services, Inc., is a Florida corporation transacting business in Broward County, Florida. Paul Albert is the owner and president of Rainbow Roofing.

2. On June 20, 2006, one of the Department's investigators Mark Mark was driving to work when he noticed men working on the

roof of a house. He stopped and learned that Rainbow Roofing was the company performing the work.

3. When he arrived at his office, he checked various records to ascertain who had obtained the building permit for the work and whether the company had workers' compensation coverage. He returned to the job site and spoke with the men present. He then talked with Paul Albert by telephone.

4. Paul Albert had a corporate officer exemption from workers' compensation. He advised Mark that the men on the job site worked for Sampson Riley, a subcontractor of Albert's.

5. Although Albert had seen Riley's exemption when they first started working together, Albert had not requested a copy of the renewed exemption when that one expired. Riley's last exemption had expired December 31, 1999.

6. On that same date, Mark issued and served on Albert a Stop Work Order, together with an Order of Penalty Assessment for an unspecified amount, and a Request for Production of Business Records for Penalty Assessment Calculation due to Rainbow Roofing's failure to have workers' compensation coverage for its employees. The Request for Production included records for the three-year period preceding the issuance of the Stop Work Order.

7. The Stop Work Order recited that it would remain in effect until the Department's Division of Workers' Compensation

issued an order releasing the Stop Work Order. Mark told Albert that he needed to either obtain workers' compensation coverage or enter into an employee leasing agreement in order to have the Stop Work Order released.

8. Albert provided to the Department tax records, business checking account records, business check ledgers, copies of cancelled checks, and checking account statements for the years 2003, 2004, 2005, and 2006. The Department utilized these records to compute the penalty it was assessing against Rainbow Roofing. The Department issued an Amended Order of Penalty Assessment on August 3, 2006, which contained a specific penalty assessment amount. Two subsequent amendments resulted in the 3rd Amended Order of Penalty Assessment, issued June 25, 2007, which is the subject of this proceeding.

9. On June 23, 2006, three days after the Stop Work Order was entered, Albert obtained a quote from an employee leasing company in Texas. He signed the written quote on June 26. On June 28, Rainbow Roofing entered into a Staff Leasing Agreement with AMS Staff Leasing, and on June 30, Rainbow Roofing's employees completed applications for employment by AMS Staff Leasing. On July 6, 2006, the former employees of Rainbow Roofing became covered by workers' compensation insurance, and Albert provided a copy of the certificate of coverage to the

Department's investigator the next day, as he had said that he would.

10. Since Rainbow Roofing had come into compliance with the requirement for workers' compensation coverage, Rainbow Roofing re-commenced business operations on July 7, 2006, using the employees who formerly worked for Rainbow Roofing but now worked for AMS Staff Leasing. At the time that Rainbow Roofing commenced working again, there was no penalty assessment which needed to be paid, or even which could be paid. The Department did not determine the amount of penalty it was assessing against Rainbow Roofing until August 3, 2006.

11. On September 19, 2006, investigator Mark was driving down the street. When he saw two Rainbow Roofing trucks, he followed them to a job site. Albert and one of his leased employees were doing clean-up work at a job site. Mark told Albert that he was in violation of the Stop Work Order, and Albert shut down the job.

12. Albert admits that Rainbow Roofing worked approximately ten jobs between June 20, 2006, when the Stop Work Order was issued, and September 19, 2006. Since the penalty for working while a Stop Work Order is in effect is \$1,000 a day, investigator Mark contacted AMS Staff Leasing to obtain that company's records regarding its employees leased to Rainbow Roofing.

13. The Department obtained records from the Valleon Group, a company that does marketing for AMS Staff Leasing under some type of partnership agreement, according to Shawn Snider's deposition testimony. As such, both companies have access to at least some of each other's business records, and they share control over those records. The records produced by Valleon appear incomplete, and Snider testified that the dates on some of them are not correct dates, but represent some internal record-keeping system.

14. However, the Verification of Wages forms signed by AMS' employees leased to Rainbow Roofing reflect wages paid for five days a week commencing July 7, 2006, and continuing through August 3, 2006. After that date, the records of whichever company they belong to, AMS Staff Leasing or Valleon Group, are not clear as to whether those employees were paid, let alone whether they worked.

15. The Verification of Wages forms demonstrate that those leased employees received wages for working 20 days. In addition, since one employee was observed working by investigator Mark on September 19, 2006, the Department has proven that Rainbow Roofing worked 21 days while the Stop Work Order was in effect.

16. Using the records of Rainbow Roofing which Albert gave to him, investigator Mark calculated a penalty assessment to

cover the time period of June 21, 2003, through June 20, 2006, the three years prior to the issuance of the Stop Work Order. He obtained class codes from the SCOPES Manual, performed the multiplication formula, and added the daily penalty for working while the Stop Work Order was in effect. His calculations were subsequently modified twice, resulting in the 3rd Amended Order of Penalty Assessment, which is the subject matter of this proceeding. His calculations must be again adjusted since the Department only proved that Rainbow Roofing engaged in business operations for 21 days while the Stop Work Order was in effect, not the 41 days assumed by investigator Mark.

#### CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

18. The Department seeks to impose an administrative penalty in this proceeding. The burden of proof, therefore, is on the Department, and the Department must prove by clear and convincing evidence that Rainbow Roofing failed to have workers' compensation coverage and the appropriate amount of penalty Rainbow Roofing should pay. Dept. of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).



19. Section 440.10, Florida Statutes, requires every employer to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. In furtherance thereof, Section 440.107(7), Florida Statutes, provides that failure to secure the payment of workers' compensation is deemed an immediate serious danger to the public health, safety, or welfare. That Subsection further authorizes the Department to issue a Stop Work Order, thus requiring that business to cease operations.

20. That Subsection further provides that a Stop Work Order will remain in effect until released by the Department upon the occurrence of two conditions: the employer has come into compliance and the employer has paid any penalty assessed by the Department. That Subsection further provides that the Department may issue a conditional release if the employer has come into compliance by obtaining workers' compensation coverage and has entered into a payment schedule agreement with the Department. There is no evidence that Rainbow Roofing has paid the penalty assessment or entered into a payment schedule agreement.

21. Subsection 440.107(7)(c), Florida Statutes, requires the Department to assess a penalty of \$1,000 per day against an employer conducting business operations in violation of a stop-work order. Subsection (7)(d) sets forth the formula for

calculating the penalty assessment as follows: a penalty equal to 1.5 times the amount the employer would have paid in premiums within the preceding 3-year period, or \$1,000, whichever is greater. The initial assessment was for \$492,637.92, an amount substantially greater than the statutory \$1,000 minimum fine.

22. Both Subsections (7)(c) and (7)(d) are mandatory. The intent of the employer is, therefore, irrelevant as is the employer's ability to pay. Similarly, there is no deadline by which the Department is required to calculate its penalty assessment so an employer can re-commence business operations. In this case, Rainbow Roofing commenced business operations as soon as it came into compliance with workers' compensation requirements, and there is no evidence that Rainbow Roofing engaged in business operations, except for one day, after August 3, 2006, the day the Department finally determined the amount of penalty it was imposing.

23. Rainbow Roofing's failure to have workers' compensation coverage for its employees on June 20, 2006, required the Department to issue its Stop Work Order. Rainbow Roofing did not contest the issuance of the Stop Work Order at the final hearing in this cause; rather, it contested the amount of penalty assessment sought by the Department.

24. As to the amount of penalty assessment for the lack of coverage, investigator Mark testified that he followed the

statutory formula in making his calculations and used the SCOPES Manual to obtain the appropriate codes for determining the premiums that would have been paid. His testimony regarding that computation being correct was not disputed at the final hearing.

25. The Department's determination of the number of days Rainbow Roofing operated while the Stop Work Order was in effect was disputed, however. Although Albert admitted during the final hearing that Rainbow Roofing had performed roofing work before the Stop Work Order was released, he did not admit to the number of days between June 20 and September 19, 2006, on which such work took place. It was, therefore, the Department's obligation to prove the number of days.

26. The documentation relied on by the Department was inconclusive except for 20 days, and investigator Mark observed Rainbow Roofing working on one additional day. The Department, therefore, has only proven 21 days, rather than the 41 days on which its 3rd Amended Order of Penalty Assessment was based, and the amount assessed in that 3rd Amended Order, \$525,760.08, should be reduced by \$20,000.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered assessing against Rainbow Roofing a penalty in the amount of \$505,760.08.

DONE AND ENTERED this 23rd day of October, 2007, in Tallahassee, Leon County, Florida.

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LINDA M. RIGOT  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of October, 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.