

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHAMAN TI, INC., d/b/a D.J.)
DISCOUNT MARKET,)
)
 Petitioner,)
)
vs.) Case No. 07-2463
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on July 18, 2007, in Orlando, Florida.

APPEARANCES

For Petitioner: Todd Baldwin
 Baldwin Accounting, CPA
 5728 Major Boulevard, Suite 501
 Orlando, Florida 32819

For Respondent: Thomas H. Duffy, Esquire
 Department of Financial Services
 200 East Gaines Street, 6th Floor
 Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Petitioner violated Chapter 440, Florida Statutes, by not having workers' compensation insurance coverage, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On November 2, 2006, the Department of Financial Services, Division of Workers' Compensation (Department), served Petitioner with a Stop-Work Order and Order of Penalty Assessment. On November 6, 2006, the Department served an Amended Order of Penalty Assessment that imposed a penalty of \$70,599.78 on Petitioner.

On November 6, 2006, the parties entered into a Payment Agreement Schedule for Periodic Payment of Penalty, and the Department issued an Order of Conditional Release from Stop-Work Order. On November 27, 2006, Petitioner requested a hearing on the Amended Order of Penalty Assessment.

Petitioner's request for a hearing was initially assigned to a Department hearing officer for an informal hearing pursuant to Section 120.57(2), Florida Statutes. However, on May 31, 2007, the case was referred to the Division of Administrative Hearings (DOAH) for a hearing pursuant to Section 120.57(1), Florida Statutes, because of disputed issues of fact raised by Petitioner prior to the informal hearing.

The final hearing was scheduled for and held on July 18, 2007. Petitioner was represented at the hearing by Todd Baldwin, a non-lawyer. Mr. Baldwin was authorized to serve as Petitioner's qualified representative.

At the final hearing, the Department presented the testimony of Margaret Cavazos, and Petitioner presented the testimony of Mohammad Sultan and Mr. Baldwin. The Department's Exhibits 1 through 11 were received into evidence, as was Petitioner's Exhibit 1.

The Transcript of the final hearing was filed on July 27, 2007. The parties were initially given 10 days from that date to file proposed recommended orders (PROs), but the deadline was subsequently extended to August 17, 2007, upon Petitioner's unopposed motion. The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. Petitioner operates a gas station and convenience store in Winter Garden. Mohammad Sultan is Petitioner's owner and president.

2. On November 2, 2006, Margaret Cavazos conducted an unannounced inspection of Petitioner's store. Ms. Cavazos is a workers' compensation compliance investigator employed by the Department.

3. Petitioner had nine employees, including Mr. Sultan and his wife, on the date of Ms. Cavazos' inspection.

4. Petitioner had more than four employees at all times over the three-year period preceding Ms. Cavazos' inspection.

5. Petitioner did not have workers' compensation insurance coverage at the time of Ms. Cavazos' inspection, or at any point during the three years preceding the inspection.

6. On November 2, 2006, the Department served a Stop-Work Order and Order of Penalty Assessment on Petitioner, and Ms. Cavazos requested payroll documents and other business records from Petitioner.

7. On November 6, 2006, the Department served an Amended Order of Penalty Assessment,¹ which imposed a penalty of \$70,599.78 on Petitioner. The penalty was calculated by Ms. Cavazos, using the payroll information provided by Petitioner and the insurance premium rates published by the National Council on Compensation Insurance.

8. The parties stipulated at the final hearing that the gross payroll attributed to Mr. Sultan for the period of January 1, 2006, through November 2, 2006, should have been \$88,000, rather than the \$104,000 reflected in the penalty worksheet prepared by Ms. Cavazos.

9. The net effect of this \$16,000 correction in the gross payroll attributed to Mr. Sultan is a reduction in the penalty to \$68,922.18.²

10. On November 3, 2006, Mr. Sultan filed a notice election for exemption from the Workers' Compensation Law. His wife did not file a similar election because she is not an

officer of Petitioner. The election took effect on November 3, 2006.

11. On November 6, 2006, Petitioner obtained workers' compensation insurance coverage through American Home Insurance Company, and Petitioner also entered into a Payment Agreement Schedule for Periodic Payment of Penalty in which it agreed to pay the penalty imposed by the Department over a five-year period. On that same date, the Department issued an Order of Conditional Release from Stop-Work Order.

12. Petitioner made the \$7,954.30 "down payment" required by the Payment Agreement Schedule, and it has made all of the required monthly payments to date.

13. The payments required by the Payment Agreement Schedule are \$1,044.09 per month, which equates to approximately \$12,500 per year.

14. Petitioner was in compliance with the Workers' Compensation Law at the time of the final hearing.

15. Petitioner reported income of \$54,358 on gross receipts in excess of \$3.1 million in its 2005 tax return. Petitioner reported income of \$41,728 in 2004, and a loss of \$8,851 in 2003.

16. Petitioner had total assets in excess of \$750,000 (including \$540,435 in cash) at the end of 2005, and even though

Petitioner had a large line of credit with Amsouth Bank, its assets exceeded its liabilities by \$99,041 at the end of 2005.

17. Mr. Sultan has received significant compensation from Petitioner over the past four years, including 2003 when Petitioner reported a loss rather than a profit. He received a salary in excess of \$104,000 in 2006, and he was paid \$145,333 in 2005, \$63,750 in 2004, and \$66,833 in 2003.

18. Mr. Sultan's wife is also on Petitioner's payroll. She was paid \$23,333.40 in 2006, \$25,000 in 2005, and \$12,316.69 in 2004.

19. Mr. Sultan characterized 2005 as an "exceptional year," and he testified that his business has fallen off recently due to an increase in competition in the area. Todd Baldwin, Petitioner's accountant, similarly testified that 2006 was not as good of a year as 2005, but no corroborating evidence on this issue (such as Petitioner's 2006 tax return) was presented at the final hearing.

20. Mr. Sultan testified that payment of the penalty imposed by the Department adversely affects his ability to run his business. The weight given to that testimony was significantly undercut by the tax returns and payroll documents that were received into evidence, which show Petitioner's positive financial performance and the significant level of

compensation paid to Mr. Sultan and his wife over the past several years.

21. The effect of the workers' compensation exemption elected by Mr. Sultan is that his salary will no longer be included in the calculation of the workers' compensation insurance premiums paid by Petitioner. If his salary had not been included in Ms. Cavazos' calculations, the penalty imposed on Petitioner would have been \$40,671.36.

22. Ms. Cavazos properly included Mr. Sultan's salary in her penalty calculations because he was being paid by Petitioner and he did not file an election for exemption from the Workers' Compensation Law until after her inspection.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).³

24. The Department is the state agency responsible for enforcing the coverage requirements of the Workers' Compensation Law. See § 440.107, Fla. Stat.

25. The Department has the burden of proof in this case even though it is identified as the Respondent, and the applicable standard of proof is clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Dept. of Financial Servs. v.

Whitehurst, 2007 Fla. Div. Adm. Hear. LEXIS 164, at ¶ 12 (DOAH Mar. 22, 2007), adopted, Case No. 86357-06-WC (DFS May 11, 2007); Department's PRO, at ¶ 13.

26. Generally, every non-exempt employer subject to the Workers' Compensation Law is liable for and is required to secure the payment of benefits due to its employees under the law by obtaining workers' compensation insurance coverage. See §§ 440.10, 440.107(2), 440.38(1), Fla. Stat.

27. The evidence establishes that Petitioner is subject to the Workers' Compensation Law; that it is not exempt from the insurance coverage requirements in the law; and that Petitioner did not have workers' compensation insurance on the date of Ms. Cavazos' inspection or at any point during the three years preceding the inspection.

28. Section 440.107(7)(a), Florida Statutes, authorizes the Department to issue a stop-work order when it determines that an employer subject to the Workers' Compensation Law has failed to secure the required workers' compensation insurance coverage, and Section 440.107(7)(d)1., Florida Statutes, requires the Department to impose a penalty on the employer in such circumstances.

29. Section 440.107(7)(d)1., Florida Statutes, provides:

In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to

secure the payment of 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. (Emphasis supplied)

30. Application of the statutory formula in this case results in a penalty of \$68,922.18.

31. Petitioner argues that the penalty is excessive and imposes "an extreme burden" on Petitioner and Mr. Sultan, and that the penalty should be reduced to reflect the exemption elected by Mr. Sultan. These arguments are rejected.

32. First and foremost, there is no statute or rule that authorizes mitigation of the penalty required by Section 440.107, Florida Statutes, and absent such, DOAH and the Department cannot deviate from the statutory penalty. Second, the exemption elected by Mr. Sultan is prospective in nature and cannot be applied retroactively to reduce the Petitioner's gross payroll upon which the penalty was calculated. Finally, the evidence was not persuasive that Petitioner is unable to pay the penalty imposed by the Department or that the monthly penalty payments agreed to by Petitioner in the Payment Agreement Schedule impose an undue hardship on Petitioner or Mr. Sultan.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order imposing a penalty of \$68,922.18 on Petitioner to be paid in accordance with a modified payment schedule reflecting the reduced penalty and the payments made through the date of the final order.

DONE AND ENTERED this 22nd day of August, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2007.

ENDNOTES

^{1/} The Amended Order of Penalty Assessment received into evidence as Department Exhibit 7 was actually the second Amended Order issued by the Department. The first Amended Order incorrectly calculated the penalty based upon Mr. Sultan's actual salary in 2005 and 2006, instead of capping his salary at \$104,000 per year, or \$2,000 per week, as required by the National Council on Compensation Insurance guidelines.

^{2/} The reduction is calculated as follows: $\$16,000 \div 100 \times 6.99 \times 1.5 = \$1,677.60$. Thus, the correct penalty is $\$70,699.78$ less $\$1,677.60$, or $68,922.18$.

^{3/} All statutory references in this Recommended Order are to the 2006 version of the Florida Statutes.

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.