

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERSA-TILE AND MARBLE, INC.,)
)
 Petitioner,)
)
vs.) Case No. 07-3837
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on November 30, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: Michael James Rudicell, Esquire
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Pensacola, Florida 32504

For Respondent: Kristian E. Dunn, Esquire
Department of Financial Services
Division of Workers' Compensation
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STATEMENT OF THE ISSUE

The issue is whether the Stop Work Order issued on July 27, 2007, and the Amended Order of Penalty Assessment were lawful.

PRELIMINARY STATEMENT

Petitioner Versa-Tile and Marble, Inc. (Versa-Tile) was served a Stop Work Order (SWO) on July 27, 2007, by the Division of Workers' Compensation (Division), which is a subordinate unit of the Department of Financial Services (Department). The Division subsequently provided an Amended Order of Penalty Assessment to Versa-Tile. Versa-Tile filed a Petition for Administrative Hearing on August 17, 2007. The matter was forwarded to the Division of Administrative Hearings in a letter filed on August 27, 2007.

A hearing was scheduled for October 30, 2007, in Pensacola, Florida. Pursuant to Versa-Tile's Motion for Continuance, the hearing was re-scheduled for November 30, 2007, and was heard in Pensacola as scheduled.

At the hearing, the Department presented the testimony of two witnesses. Four Joint Exhibits were accepted into evidence. Versa-Tile presented the testimony of three witnesses and offered two exhibits that were accepted into evidence.

At the request of the parties, 20 days subsequent to the filing of the transcript were allowed for the filing of proposed recommended orders. The one-volume Transcript of the final hearing was filed on December 26, 2007. After the hearing, Petitioner and Respondent timely filed their proposed findings of fact and conclusions of law on January 15, 2008.

Although Versa-Tile is listed as Petitioner in this cause, it was the Division that had the burden of proof and the burden of going forward with the evidence in this case.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

1. The Division is a component of the Department of Financial Services. The Department is charged with the administration of portions of the "Workers' Compensation Law."

2. Versa-Tile is a corporation headquartered in Mary Esther, Florida. Versa-Tile is engaged in flooring, which is a construction activity.

3. Michelle Newcomer is an Insurance Analyst II with the working title of Workers' Compensation Compliance Investigator. She maintains an office in Pensacola, Florida. It is her job to travel to work sites and to verify compliance with the Workers' Compensation Law. She is authorized by the Division to issue an SWO and to calculate and assess penalties.

4. On July 24, 2007, Ms. Newcomer was conducting compliance investigations at random sites in the Alys Beach area of Walton County, Florida. While doing so she noticed three individuals in the garage at the rear of a house at 23 Whitby. They were removing tools from a toolbox and "working."

5. Ms. Newcomer identified the men as Adrian Womack and Kent Degallerie. The third man on the site was named "Barker." Barker asserted that he was not doing any work, but was there just to give the men a ride. He was deemed not involved in the work being accomplished at the site.

6. Ms. Newcomer interviewed Adrian Womack and Kent Degallerie. They both told her that they were exempt officers of Versa-Tile. It is found as a fact that the 2006 For Profit Corporate Annual Report of Versa-Tile signed on April 26, 2006, and filed with the Department of State on May 1, 2006, listed Adrian Womack and Kent Degallerie as corporate officers of Versa-Tile. They were not corporate officers of Versa-Tile prior to April 26, 2006.

7. Adrian Womack worked for Versa-Tile from July 29, 2005, until April 25, 2006, as an employee. He was not an officer and was not, and could not be, exempt. Kent Degallerie worked for Versa-Tile from May 6, 2005, until April 25, 2006, as an employee. He was not an officer and was not, and could not be, exempt. Nicholas Womack, who was not present at the Alys Beach site, is listed therein as president of Versa-Tile and has been exempt during all times pertinent.

8. As corporate officers, Adrian Womack and Kent Degallerie could be exempt from the usual requirement that workers be covered by workers' compensation insurance even

though they were also employees of Versa-Tile who were paid wages. Ms. Newcomer obtained their full names and social security numbers so that she could verify their claimed exemption. She determined from the Department's Coverage and Compliance Automated System that there were no records of exemption being obtained for them.

9. Ms. Newcomer confirmed with an examiner in the Pensacola office that Adrian Womack and Kent Degallerie were not on the list of exempt persons. She issued a Request for Production of Business Records dated July 24, 2007. She personally served these documents on Adrian Womack and Kent Degallerie. She issued an SWO, dated July 27, 2007, and personally served it on Nicholas Womack.

10. If a person is a ten percent owner of a corporation or limited liability company they are entitled to obtain an exemption from the Department. An exemption is obtained by completing the "Notice of Election to be Exempt" form. This form when properly completed and accompanied by certain required documents, a \$50 application fee, and submitted to the Division, will cause the Division to grant an exemption.

11. If the Department determines that a person is exempt upon receiving a properly submitted form and payment, the Department will issue a card reflecting exemption. Neither Adrian Womack nor Kent Degallerie had such a card on July 24,

2007. During all times pertinent, the Department had no record indicating it had received any payment from Nicholas Womack, Adrian Womack, or Kent Degallerie that would have been tendered on behalf of Adrian Womack or Kent Degallerie.

12. On July 27, 2007, Ms. Newcomer met with Nicholas Womack, president of Versa-Tile in her office in Pensacola and personally served him a Request for Production of Business Records. Later, Nicholas Womack provided employment records to Ms. Newcomer. On July 30, 2007, the Department and Versa-Tile entered into an agreement that permitted Versa-Tile to go back to work.

13. Using workers' compensation class code 5348 for employees Adrian Womack and Kent Degallerie, Ms. Newcomer correctly calculated the premium that should have been paid, if they were mere employees, as \$8,455.56, and multiplied that figure by the statutory penalty of 1.5. She correctly determined the total to be \$12,683.35. The parties stipulated that to the extent the figure applies, it is correct.

14. Nicholas Womack at all times pertinent had an exemption. Adrian Womack and Kent Degallerie were granted exemptions by the Department on July 30, 2007. These were the first exemptions from workers' compensation coverage that they had ever received while in a business relationship with Versa-Tile.

15. The Division receives from 90,000 to 96,000 construction exemption applications yearly. They also receive between 30,000 to 35,000 non-construction exemption applications annually. The applications may be provided by applicants to the Department by hand-delivery at a field office or to the Department headquarters in Tallahassee, or by mail to a field office or to the Department headquarters in Tallahassee.

16. Errors may occur in this process because of mistakes or omissions in the applications filed by the applicant or because of data entry errors by personnel in the Department. However, the process is sufficiently simple and automated that usually, when a complete application is filed, the exemption issues, and the applicant is, thereafter, provided a card reflecting the exemption via mail.

17. There are ten field offices in the state to which applicants may file applications for exemptions. The field office in Panama City, Florida, at least the portion that accepted exemption applications, closed in 2005. However, the forms still listed Panama City as an address to which one might mail an application for exemption.

18. The president of Versa-Tile, Nicholas Womack, has filed for and obtained three exemptions since he created Versa-Tile. Prior to incorporating Versa-Tile, he owned another business by the name of Nicholas Womack Flooring, Inc. He

previously had two officers, Michael Smith and Mitchell Smedley, working with him at Versa-Tile, but he removed them as corporate officers so that Adrian Womack and Kent Degallerie could be corporate officers. Mr. Smith's exemption was revoked April 27, 2006, by the filing of a Notice of Revocation of Election to be Exempt with the Department. This roughly coincided with the naming of Adrian Womack and Kent Degallerie as corporate officers.

19. Department of State corporate records, as of May 1, 2006, reflected that Versa-Tile had three officers: Nicholas Womack, Adrian Womack, and Kent Degallerie.

20. In order to obtain a certificate of exemption, Nicholas Womack filed the appropriate form with the Department, along with proof that he held a contractor's license, stock certificates, and \$50.00. He followed this process on three occasions while president of Versa-Tile. The evidence of record reveals exemptions granted to Nicholas Womack on January 25, 2005, and May 18, 2006, while president of Versa-Tile. He claims not to ever have received a certificate evidencing exemption from the Department while president of Versa-Tile.

21. Nicholas Womack testified that on only one of the occasions, when he was operating Nicholas Womack Flooring, Inc., did the Department mail him a card reflecting his exemption and stated that occurred in 2001 or 2002.

22. Nicholas Womack understands that by not obtaining coverage under workers' compensation insurance he and the other two corporate officers of Versa-Tile would not be compensated should they be injured on the job.

23. Nicholas Womack explained to Adrian Womack and Kent Degallerie that they were eligible for an exemption, and if they got an exemption and were injured, they would not be covered by workers' compensation insurance. Nicholas Womack testified that thereafter he helped the two men fill out the appropriate forms and ensured that all necessary attachments, including two money orders in the correct amount, were present and then mailed the applications, one in each envelope, to the Department's Panama City office.

24. As soon as the applications were mailed, Nicholas continued allowing the men to work for Versa-Tile without waiting for the exemptions to be granted. Adrian Womack and Kent Degallerie first received exemption on July 30, 2007. Subsequent to July 30, 2007, Nicholas asked Adrian Womack if he had received an exemption card. Adrian Womack said that he had not. Adrian Womack and Kent Degallerie both stated that they had not received an exemption card after filing for exemption in July 2007.

25. Nicholas Womack's testimony that he only received one certificate of exemption in seven years of enjoying an exempt

status lacks credibility. Even considering that the Department is large and it annually processes huge amounts of paperwork, it is quite improbable that on six occasions they would fail to send Nicholas Womack a certificate. That being the case, Nicholas Womack's testimony that he mailed completed applications for Adrian Womack and Kent Degallerie to the Department's Panama City office and never received any type of response, when considered in concert with his other testimony, is not credible.

26. It is a fact that Nicholas Womack, Adrian Womack, and Kent Degallerie were eligible for an exemption subsequent to April 26, 2006. If exempt, they were responsible for their own expenses should they suffer an injury while on the job. If they failed to get an exemption, they were likewise responsible for their own expenses should they suffer an injury while on the job. This situation is very different from that where an employer fails to obtain coverage for workers not having an ownership interest in the employer, as was the case with Versa-Tile prior to April 26, 2006.

CONCLUSIONS OF LAW

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

28. Because administrative fines are penal in nature, the Department has the burden to prove by clear and convincing evidence that Versa-Tile failed to be in compliance with the coverage requirements set forth, by not securing the payment of workers' compensation or a certificate of exemption for Adrian Womack and Kent Degallerie, both of whom were entitled to a certificate of exemption for the period April 26, 2006 through the time they were designated exempt on July 30, 2007.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996) and L and W Plastering and Drywall services, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 06-3261 (DOAH, March 16, 2007).

29. The Florida Legislature has determined that the failure of an employer to comply with the requirement to provide workers' compensation coverage to employees ". . . poses an immediate danger to public health, safety, and welfare."

§ 440.107(1), Fla. Stat.

30. Subsections 440.10(1) and 440.38(1), Florida Statutes, require every employer coming within the provisions of Chapter 440 to secure coverage under that Chapter.

31. Section 440.107, Florida Statutes, authorizes the Department to issue stop-work orders and penalty assessment

orders in its enforcement of workers' compensation coverage requirements, and reads in pertinent part:

* * *

(2) For purposes of this section, 'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. . . .

* * *

(7)(d)1. 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.

32. The definition of employee and the status of corporate officers as employees for purposes of workers' compensation is outlined in Subsections 440.02(15)(a) and (b), Florida Statutes, which provides in part:

440.02. Definitions --When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

* * *

(15)(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" includes 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.

1. Any officer of a corporation may elect to be exempt from this chapter by filing written notice of the election with the department as provided in s.440.05.

2. As to officers of a corporation who are engaged in the construction industry, no more than three officers of a corporation or of any group of affiliated corporations may elect to be exempt from this chapter by filing written notice of the election with the department as provided in s. 440.05. Officers must be shareholders, each owning at least 10 percent of the stock of such corporation and listed as an officer of such corporation with the Division of Corporations of the Department of State, in order to elect exemptions under this chapter. For purposes of this subparagraph, the term "affiliated" means and includes one or more corporations or entities, any one of which is a corporation engaged in the construction industry, under the same or substantially the same control of a group of business entities which are connected or associated so that one entity controls or has the power to control each of the other business entities. The term "affiliated" includes, but is not limited to, the officers, directors, executives, shareholders active in management, employees, and agents of the affiliated corporation. The ownership by one business entity of a controlling interest in another business entity or a pooling of equipment or

income among business entities shall be prima facie evidence that one business is affiliated with the other.

3. An officer of a corporation who elects to be exempt from this chapter by filing a written notice of the election with the department as provided in s. 440.05 is not an employee.

Services are presumed to have been rendered to the corporation if the officer is compensated by other than dividends upon shares of stock of the corporation which the officer owns.

33. Section 440.05, Florida Statutes, provides the procedure for corporate officers to exempt themselves from workers' compensation coverage. It provides in relevant part, as follows:

§ 440.05. Election of exemption; revocation of election; notice; certification

(1) Each corporate officer who elects not to accept the provisions of this chapter or who, after electing such exemption, revokes that exemption shall mail to the department in Tallahassee notice to such effect in accordance with a form to be prescribed by the department.

* * *

(3) Each officer of a corporation who is engaged in the construction industry and who elects an exemption from this chapter or who, after electing such exemption, revokes that exemption, must mail a written notice to such effect to the department on a form prescribed by the department. The notice of election to be exempt from the provisions of this chapter must be notarized and under oath. The notice of election to be exempt

which is submitted to the department by the officer of a corporation who is allowed to claim an exemption as provided by this chapter must list the name, federal tax identification number, social security number, all certified or registered licenses issued pursuant to chapter 489 held by the person seeking the exemption, a copy of relevant documentation as to employment status filed with the Internal Revenue Service as specified by the department, a copy of the relevant occupational license in the primary jurisdiction of the business, and the registration number of the corporation filed with the Division of Corporations of the Department of State along with a copy of the stock certificate evidencing the required ownership under this chapter. The notice of election to be exempt must identify each corporation that employs the person electing the exemption and must list the social security number or federal tax identification number of each such employer and the additional documentation required by this section. In addition, the notice of election to be exempt must provide that the officer electing an exemption is not entitled to benefits under this chapter, must provide that the election does not exceed exemption limits for officers provided in s. 440.02, and must certify that any employees of the corporation whose officer elects an exemption are covered by workers' compensation insurance. Upon receipt of the notice of the election to be exempt, receipt of all application fees, and a determination by the department that the notice meets the requirements of this subsection, the department shall issue a certification of the election to the officer, unless the department determines that the information contained in the notice is invalid. The department shall revoke a certificate of election to be exempt from coverage upon a determination by the department that the person does not meet the requirements for

exemption or that the information contained in the notice of election to be exempt is invalid. The certificate of election must list the name of the corporation listed in the request for exemption. A new certificate of election must be obtained each time the person is employed by a new or different corporation that is not listed on the certificate of election. A copy of the certificate of election must be sent to each workers' compensation carrier identified in the request for exemption. Upon filing a notice of revocation of election, an officer who is a subcontractor or an officer of a corporate subcontractor must notify her or his contractor. Upon revocation of a certificate of election of exemption by the department, the department shall notify the workers' compensation carriers identified in the request for exemption.

34. A letter properly addressed, stamped, and mailed is presumed to have been received by the addressee. Brown v. Griffen Industries, Inc., 281 So. 2d 897 (Fla. 1973) (on rehearing); Home Insurance Co. v. C & G Sporting Goods, Inc., 453 So. 2d 121 (Fla. 1st DCA 1984); Berwick v. Prudential Property & Casualty Assurance Co., 436 So. 2d 239 (Fla. 3d DCA 1983). Conversely, if a letter has not been received that one claims was properly addressed, stamped, and mailed, it may be presumed that it was not properly mailed. Accordingly, and in conjunction with other testimony provided by Nicholas Womack, it is found that he did not submit an application on behalf of Adrian Womack and Kent Degallerie.

35. Even though a person meets all of the requirements for an exemption, that person does not become exempt until the process outlined by Subsection 440.05(3), Florida Statutes, has been accomplished. Accordingly, Adrian Womack and Kent Degallerie were employees during all times pertinent, and Versatile Tile was required to obtain coverage and failed to do so.

36. However, subsequent to April 25, 2006, Adrian Womack and Kent Degallerie were eligible for exemption and in terms of carrying out the legislative intent set forth in Subsection 440.107(1), nothing is gained by the Department in assessing penalties. In other words, if they were exempt and were injured on the job, they would have no coverage. Likewise, if they failed to obtain exemption, and were injured on the job, they would have no coverage. Applying the maximum penalties set forth in Subsection 440.107(7)(d)1., Florida Statutes, for the time they worked from April 26, 2006, going forward, is too harsh and does not further the purposes of Chapter 440.

37. Nevertheless, the "shall" language found in Subsection 440.107(7)(d)1., Florida Statutes, prevents the Department from mitigating the penalty. Accordingly, the SWO issued on July 27, 2007, and the Amended Order of Penalty Assessment were lawful.

RECOMMENDATION

Based upon the forgoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services enter a final order requiring Versa-Tile and Marble, Inc., to pay a penalty of \$12,683.35.

DONE AND ENTERED this 25th day of January, 2008, in Tallahassee, Leon County, Florida.

S

HARRY L. HOOPER
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2008.

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.