

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SCOTTS EXTERIORS, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-4144  
 )  
 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 29, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: Michael James Rudicell, Esquire  
Michael J. Rudicell, P.A.  
4303 B Spanish Trail Road  
Pensacola, Florida 32504

For Respondent: Kristian E. Dunn, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

The issue is whether the Department's Stop-Work Order and Amended Order of Penalty Assessment were lawful.

PRELIMINARY STATEMENT

On August 23, 2007, Angelia Brown of the Division of Workers' Compensation (Division), Department of Financial Services (Department), issued a Stop-Work Order (SWO) in the case of Petitioner Scotts Exteriors, Inc. (Scotts). Ms. Brown followed up with an Amended Order of Penalty Assessment reflecting a penalty totaling \$18,581.80. On September 1, 2007, Scotts filed a request for hearing that contested the lawfulness of the Department's actions.

The Division forwarded the matter to the Division of Administrative Hearings in a letter filed September 13, 2007. The case was set for hearing in Pensacola, Florida, on October 31, 2007. Pursuant to Petitioner's Motion for Continuance, the case was re-scheduled for November 29, 2007, and was heard on that date.

At the hearing, Respondent presented the testimony of three witnesses and offered four exhibits into evidence. Scotts presented the testimony of two witnesses and offered two exhibits into evidence and they were admitted. Although Scotts 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.

The one-volume Transcript of the final hearing was filed on January 18, 2008. At the request of the parties, 20 days

subsequent to the filing of the transcript were allowed for the filing of proposed recommended orders. Scotts and the Division timely filed their proposed findings of fact and conclusions of law on February 4, 2008.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

#### FINDINGS OF FACT

1. The Division is a component of the Department of Financial Services. The Department is a state agency charged with the administration of portions of the "Workers' Compensation Law." Among the Division's duties is enforcing the statutory requirement that employers secure the payment of workers' compensation coverage for the benefit of their employees and corporate officers who are required to be covered.

2. Scotts is a corporation engaged in the business of installing siding on buildings. Scotts is engaged in construction as that term is used in Chapter 440, Florida Statutes. Scotts' headquarters is located at 4130 Bayfront Terrace, Pace, Florida.

3. Angelia Brown has worked for the Department since June 2007. She is a workers' compensation compliance investigator, and on August 23, 2007, she was doing random checks on Pensacola Beach, Florida. In the course of her work, and while accompanied by Investigator Vanessa Hernandez,

Ms. Brown came upon 801 Ariola Drive, Pensacola Beach, Florida. There the two investigators observed an individual on the ground floor of a home and another on a ladder on the exterior of the home. These two men were working on the house.

4. Ms. Brown also observed a white van parked by the home that had painted on it the words, "Scotts Exterior, Inc."

Ms. Brown exited her vehicle and approached the man using the circular saw and identified herself. The individual identified himself as Timothy Willard, an employee of Scotts.

5. Ms. Brown asked Mr. Willard for contact information, including his social security number. He provided the requested information and stated that he had a workers' compensation exemption form and that it was in the white van.

6. At this time, the man who had been on the ladder descended and stated that he was Scott Henderson and that he was the owner of Scotts. He provided contact information, including his social security number.

7. Using the information provided by the two men, Investigator Hernandez searched the Coverage and Compliance Automated System (CCAS), an online database maintained by the Department. The investigators observed that the CCAS revealed that Mr. Henderson had a current exemption and that Mr. Willard's exemption had expired September 8, 2006.

8. One is eligible for an exemption if one owns at least ten percent of the stock of the corporation for which one is working and is an officer of the corporation. If such a person correctly completes the appropriate form, and pays the required fee, the Department will declare that person exempt from the requirement to obtain workers' compensation insurance.

9. Subsequent to relaying the information she received on the job site to her supervisor, and after obtaining his approval, Ms. Brown issued an SWO, dated August 23, 2007, to Scotts. She served it on Mr. Henderson. She also served a "Request for Production of Business Records for Penalty Assessment Calculation" (Request for Production), which was provided to Scotts on the same day.

10. Scotts responded to the Request for Production with their ledgers and other business records for the three years prior to August 23, 2007. These documents indicated that Scotts paid Mr. Willard as an employee from at least, September 8, 2006, until August 23, 2007. Ms. Brown used these figures to determine the penalty that should be assessed for Mr. Willard's noncompliance. In 2006, the penalty was \$5,644.94 and for 2007, it was \$12,936.86. The parties stipulated that these figures were correct, and if owed, would amount to \$18,581.80 in the aggregate.

11. On August 24, 2007, Mr. Henderson and Mr. Willard entered into a Penalty Payment Agreement, whereby Scotts agreed to pay ten percent of the penalty, provide proof of compliance, and make periodic payments for 60 months. After Mr. Willard correctly completed a Notice of Election to be Exempt, the Department agreed to allow them to work. The Department did not require the payment of another \$50 fee.

12. Mr. Willard's previously obtained exemption expired on September 8, 2006, and subsequent to that date he worked for Scotts without an exemption and without making any effort to obtain one until December 5, 2006. On December 7, 2006, he filed a Notice of Election to be Exempt in the Bureau of Compliance Office in Pensacola that was notarized on December 5, 2006. The Pensacola Office of the Bureau of Compliance is authorized to receive such notices. Mr. Willard paid the \$50 fee, and the Department eventually negotiated the money order he submitted with the form.

13. The application of Mr. Willard failed to note the scope of business or trade, the Federal Employer Identification Number was incorrect, and the fraud notice was not signed. The failure to accomplish the foregoing rendered the application unacceptable. The Department informed Scotts by mail that the form was incomplete. This information was accompanied by the incomplete application he submitted.

14. Mr. Henderson provided the letter informing Mr. Willard that his application was incomplete and returned the application to Mr. Willard. Although Mr. Willard testified that he received this material, completed it, and returned it to the Department via the U. S. Postal Service, there is no record that the Department received it. There is no evidence in the record that Mr. Willard, or anyone on behalf of Scotts, thereafter inquired as to the status of the exemption request.

15. On more than one occasion Mr. Willard had previously applied for exemption, was determined to be exempt, and received a card reflecting exemption from the Department. Mr. Willard testified that he understood that it was his responsibility to know when his exemptions expired. It was not the fault of the Department that Mr. Willard failed to obtain an exemption. It was Scotts' or Mr. Willard's failure.

16. It is a fact that Mr. Willard was eligible for an exemption from September 9, 2006, until he actually obtained one on August 24, 2007. If officially exempt, he was responsible for his own medical expenses should he suffer an injury while on the job. If he failed to get an exemption, he was likewise responsible for his own expenses should he 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.

CONCLUSIONS OF LAW

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

18. Because administrative fines are penal in nature, the Department has the burden to prove by clear and convincing evidence that Scotts 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 Mr. Willard, who was entitled to a certificate of exemption for the period September 8, 2006, through the time he was designated exempt on August 24, 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).

19. 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.



20. 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.

21. Subsections 440.107(2), (3), and (7), Florida Statutes, authorize the Department to issue stop-work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements, and read in pertinent part:

440.107 --Department powers to enforce employer compliance with coverage requirements

\* \* \*

(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. . . .

\* \* \*

(3) The department shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

\* \* \*

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

(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.

22. The definition of employee and the status of corporate officers as employees for purposes of workers' compensation are outlined in Subsections 440.02(15)(a) and (b), Florida Statutes, which provide 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.

23. 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.

24. Florida Administrative Code Rule 69L-6.012 illuminates the requirement for a person in the construction industry, like Mr. Willard, to be exempt. It requires the applicant to provide his or her Federal Employment Identification Number; Social Security Number or the individual taxpayer identification number; the Florida Department of State, Division of Corporations, registration number of the corporation or limited liability company, as applicable, named on the Notice of Election to be Exempt; and a copy of the stock certificate(s) issued to the applicant by the corporation named on the Notice of Election to be Exempt evidencing at least ten percent ownership of the named corporation by the applicant on the date that the Notice of Election to be Exempt is filed with the Department.

25. Florida Administrative Code Rule 69L-6.009, Forms and Instructions, adopts the DWC 250 Notice of Election to be Exempt, which has on it the "Fraud Notice" that Mr. Willard failed to sign.

26. 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 Mr. Willard, it is found that he did not submit an application subsequent to his attempt to secure exemption in December 2006.

27. Florida Administrative Code Rule 69L-6.012(8) provides that "Any Notice of Election to be Exempt (DWC 250) which is returned to the applicant by the Department within 30 days after receipt by the Department for failure to meet the eligibility requirements of Section 440.05, F. S. and this rule is not 'received' for purposes of Section 440.05(5), F. S."

28. A review of the forgoing requires the conclusion that despite Mr. Willard's protestations to the contrary, he did not return the defective application sent to him by the Department, and the Department is not required to process applications that they do not receive.

29. 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, Mr. Willard was an employee during all times pertinent, and Scotts was required to obtain coverage and failed to do so.

30. However, during all times pertinent, Mr. Willard was eligible for exemption. In terms of carrying out the legislative intent set forth in Subsection 440.107(1), Florida Statutes, nothing is gained by the Department in assessing penalties of the magnitude proposed by the Department. 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 Mr. Willard worked for Scotts from September 8, 2006, going forward, is too harsh and does not further the purposes of Chapter 440.

31. Despite the fact that the \$18,581.80 penalty is completely out of proportion to the failure of Mr. Willard to comply with the workers' compensation law, 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 August 23, 2007, and the Amended Order of Penalty Assessment were lawful, and the \$18,581.80 penalty may be assessed.



RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a final order requiring Scotts Exteriors, Inc., to pay a penalty of \$18,581.80.

DONE AND ENTERED this 7th day of February, 2008, in Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
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Filed with the Clerk of the  
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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.