STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

U.S. BUILDERS, L.P.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4428
	)	
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 September 24 and November 17, 2008, by video teleconference between sites in Tallahassee and Jacksonville, Florida.

APPEARANCES

For Petitioner: William H. Andrews, Esquire
Gray Robinson, P.A.
50 North Laura Street, Suite 1100
Jacksonville, Florida 32202

For Respondent: Kristian E. Dunn, Esquire
Justin Faulkner, 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 Petitioner had the workers' compensation insurance coverage required by Florida law, and if not, what penalty should be imposed.

PRELIMINARY STATEMENT

On June 18, 2007, the Department of Financial Services (Department) issued an Order of Penalty Assessment imposing a penalty of $14,983.96 on Petitioner for its failure to have the workers' compensation insurance coverage required by Florida law. On August 23, 2007, Petitioner filed a Petition for Hearing challenging the penalty assessment.

On September 25, 2007, the Department referred this matter to the Division of Administrative Hearings (DOAH) for the limited purpose of determining whether Petitioner should be afforded a hearing on its petition based upon the doctrine of equitable tolling. The referral was received by DOAH on September 26, 2007, and the case was assigned to Administrative Law Judge Don W. Davis.

Judge Davis scheduled the hearing on the equitable tolling issue for November 19, 2007. The hearing was rescheduled several times at the request of the parties, and was ultimately held on February 29, 2008.

On April 30, 2008, Judge Davis issued a Recommended Order finding that equitable tolling applied and recommending that the

Department afford Petitioner a hearing on the merits of its petition. On June 25, 2008, the Department issued a Final Order adopting Judge Davis' recommendation and "remanding" the case to DOAH for further proceedings.

The Final Order was filed with DOAH on July 1, 2008, and DOAH's file in this case was re-opened on July 3, 2008. The case was assigned to the undersigned as a result of Judge Davis' retirement.

The final hearing was convened on September 24, 2008. At the outset of the hearing, the undersigned granted the parties' ore tenus motion to continue the hearing to allow them to take the depositions of two witnesses in Texas who had been impacted by Hurricane Ike. The hearing reconvened on November 17, 2008.

At the final hearing, the Department presented the testimony of Robert Lambert, and the parties jointly presented the deposition testimony of Teresa Quenemoen, Nancy Bingham, and Norman Adams. Joint Exhibits 1 through 4 were received into evidence. Official recognition was taken of Sections 440.10, 440.107, and 440.38, Florida Statutes (2007),[1/] and Florida Administrative Code Rules 69L-6.019 and 69L-6.030.

The Transcript of the final hearing was filed with DOAH on December 9, 2008. The parties were given 21 days from that date to file proposed recommended orders (PROs). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

1. Petitioner is a Texas corporation that provides general contracting services.

2. Petitioner has had employees working in Florida since at least October 1, 2006.

3. On May 30, 2007, Department investigator Teresa Quenemoen initiated a workers' compensation compliance investigation at a job-site in Jacksonville where Petitioner's employees were supervising the construction of a retail shopping facility.

4. At the time of Ms. Quenemoen's investigation, Petitioner had a Workers' Compensation and Employers' Liability Insurance Policy (the policy) that covered the period of October 1, 2006, to October 1, 2007.

5. The policy was issued by EMC Insurance Companies (EMC), which is authorized to issue workers compensation insurance in Florida.

6. The policy included an "Information Page" on National Council on Compensation Insurance (NCCI) Form WC7002.

7. Item 3.A of the Information Page lists Texas as the only state for which the workers' compensation section of the policy applies. Florida is not listed in Item 3.A.[2/]

8. Item 3.C of the Information Page states that Part Three of the policy applies to all states except for those

specifically excluded. Florida is not one of the excluded states and, therefore, is implicitly included in the coverage afforded by Part Three of the policy.

9. Part Three of the policy, entitled "other states insurance," provides in pertinent part:

> A. How This Insurance Applies
>
> 1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.
>
> 2. If you begin work in any one of those states after the effective date of this policy and are not insured or are not self insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A of the Information Page.
>
> 3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to receive them.
>
> 4. If you have work on the effective date of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.
>
> B. Notice
>
> Tell us at once if you begin work in any state listed in Item 3.C of the Information Page.

10. Item 4 of the Information Page does not make specific reference to the Florida-approved classification codes, rates or manuals; it states that "the premium for the policy will be

determined by our manuals of rules, classifications, rates and rating plans."

11. One of the class codes used to calculate the premium for the policy was 5606, which applies to "Contractor Executive Supervisor or Construction Superintendent." The "rate per $100 remuneration" used to calculate the premium for that class code was $3.85. That rate was applied to an estimated annual payroll of $1 million for Petitioner's employees in class code 5606.

12. Although Petitioner had employees working in Florida since at least October 1, 2006, EMC was unaware that Petitioner was working in Florida until June 1, 2007, when it was contacted by Ms. Quenemoen during the course of her investigation.

13. It is questionable whether Petitioner's employees working in Florida would have been covered had they been injured on the job site in Jacksonville. The "other states insurance" provision of the policy quoted above states that coverage will not be provided unless EMC is notified within 30 days of starting work in a state not listed in the policy, and that did not happen in regards to Petitioner's work in Florida. However, an EMC representative testified that it was her understanding that coverage would, nevertheless, have been provided for Petitioner's employees since they were hired in Texas.[3/]

14. A specific Florida endorsement was added to Petitioner's policy on or about June 19, 2007,[4/] as a direct

result of Ms. Quenemoen's investigation. The endorsement was "back-dated" to October 1, 2006, which was the effective date of the original policy, because the policy had the "other states insurance" provision since its inception.

15. Petitioner paid an additional premium for the Florida endorsement. The premium appears to have been calculated using the Florida-approved classification code and rate.[5/]

16. On June 18, 2007, the Department issued an Order of Penalty Assessment based upon the fact that Petitioner was not in compliance with Florida law at the time of Ms. Quenemoen's investigation.

17. The Order of Penalty Assessment imposed a penalty of $14,983.96, which is 1.5 times the workers' compensation premium that Petitioner should have paid on its employees working in Florida between October 1, 2006, and May 30, 2007.

18. The penalty was calculated using the payroll information provided by Petitioner to Ms. Quenemoen and the Florida-approved class code and rate for construction supervisors.

19. Petitioner does not dispute the calculation of the penalty.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

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

22. The Department has the burden of proof in this case even though it is designated as the Respondent. See Department's PRO, at ¶ 20; Chapman Ti, Inc. v. Dept. of Financial Servs., Case No. 07-2463, 2007 Fla. Div. Adm. Hear. LEXIS 474, at ¶ 25 (DOAH Aug. 22, 2007; DFS Nov. 9, 2007). The applicable standard of proof is clear and convincing evidence. Id.

23. The Department met its burden of proof, as discussed below.

24. Section 440.10(1)(g), Florida Statutes, provides in pertinent part:

> Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code. . . . .

25. Section 440.38(7), Florida Statutes, provides:

> Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in this state by such employees.

26. Florida Administrative Code Rule 69L-6.019 provides in pertinent part:

> (1) Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)(g) and 440.38(7), F.S.
>
> * * *
>
> (3) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., for any workers' compensation policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state:
>
> (a) The policy information page (NCCI form number WC 00 00 01 A) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.
>
> (b) The policy information page endorsement (NCCI form number WC 89 06 00 B) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

> (4) A workers' compensation policy that lists "Florida" in Item 3.C. of the policy information page (NCCI form number WC 00 00 01 A) does not meet the requirements of Sections 440.10(1)(g) and 440.38(7), F.S., and is not valid proof of workers' compensation coverage for employees engaged in work in this state.

27. The evidence clearly and convincingly establishes that the policy maintained by Petitioner failed to comply with the requirements of Florida Administrative Code Rule 69L-6.019 from October 1, 2006, to June 18, 2007. First, Florida was not listed in Item 3.A of the Information Page as required by paragraphs (3)(a) and (3)(b) of the rule. Second, even though Florida was included in the "other states' coverage" provided for in Item 3.C. of the Information Page, that is insufficient as a matter of law under subsection (4) of the rule. Third, Florida-approved classification codes, rates, and estimated payroll were not used to calculate the premium in Item 4 of the Information Page as required by paragraphs (3)(a) and (3)(b) of the rule, even though the premium paid by Petitioner appears to have been calculated using a higher rate than the Florida rate.

28. The fact that Petitioner's employees working in Florida may have been covered by virtue of the "other states insurance" provision of the policy is immaterial under the Department's rules. Coverage and compliance are separate concepts. See Dept. of Financial Servs. v. Raylin Steel

Erectors, Inc., Case No. 05-2289, 2005 Fla. Div. Adm. Hear. LEXIS 1336, at ¶¶ 28, 31 (DOAH Oct. 19, 2005) (explaining that "other states insurance" coverage was no longer sufficient to meet the requirements of Florida law after the 2003 amendments to Section 440.38(7), Florida Statutes), adopted in pertinent part, Case No. 78712-05-WC (DFS Jan. 19, 2006); Triple M Enterprises, Inc. v. Dept. of Financial Servs., Case No. 04-2524, 2004 Fla. Div. Adm. Hear. LEXIS 2509 (DOAH Jan. 13, 2005) (concluding that the employer failed to comply with Florida law even though employees would have received benefits under an "other states insurance" provision nearly identical to the one at issue in this case).

29. The fact that EMC issued Petitioner a Florida endorsement in June 2007, and "back-dated" it to October 1, 2006, is also immaterial. The endorsement was not in place at the time of the Department's investigation, and Florida law does not recognize retroactive compliance or coverage. See Dept. of Labor & Employment Security v Eastern Personnel Services, Inc., Case No. 99-2048, 1999 Fla. Div. Adm. Hear. LEXIS 5569, at ¶ 33 (DOAH Oct. 12, 1999).

30. The Department is authorized, but not required 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. See § 440.107(7)(a), Fla. Stat.

31. The Department is, however, required to impose a penalty on an employer who has failed to secure the required workers' compensation insurance coverage. See § 440.107(7)(d)1., Fla. Stat. ("[T]he 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); Fla. Admin. Code R. 69L-6.030(1) (stating that an employer who comes into compliance with the workers' compensation coverage requirements prior to the issuance of a stop work order "shall be assessed a penalty pursuant to Section 440.107(7)(d)1., F.S." but that a stop-work order "will not be issued") (emphasis supplied).

32. It is undisputed that the application of the statutory formula in this case results in a penalty of $14,983.96.

33. The undersigned is sympathetic to Petitioner's argument in its PRO that the imposition of the statutory penalty is "excessively harsh" under the circumstances of this case, but

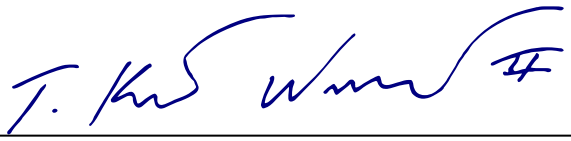
based upon the mandatory language in Section 440.107(7)(d)1., Florida Statutes, the Department has no discretion to not impose a penalty, nor does it (or the undersigned) have any discretion to deviate from the penalty calculated pursuant to the statutory formula. See Chapman Ti, supra, at ¶ 32.

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order assessing Petitioner a penalty of $14,983.96 for its failure to comply with the requirements of Florida law concerning workers' compensation insurance coverage between October 1, 2006, and June 18, 2007.

DONE AND ENTERED this 14th day of January, 2009, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2009.

ENDNOTES

[1/] Unless otherwise indicated, all statutory references are to the 2007 version of the Florida Statutes officially recognized at the request of the parties.

[2/] See Joint Exhibit 3, at page 53. Unlike the copy of the policy received into evidence, the copy that Ms. Quenemoen was initially sent by Petitioner's Texas insurance agent had "FL" printed in Item 3.A of the Information Page. Ms. Quenemoen subsequently learned from EMC that Florida was not on the policy, and the agent acknowledged that he just typed "FL" onto the information page before sending it to Ms. Quenemoen. A Florida endorsement was later properly added to the policy. See Findings of Fact 14 and 15.

[3/] See Joint Exhibit 2 (testimony of Nancy Bingham):

> When we had issued the policy in May, I was aware that they had employees hired in Texas. And I knew at the time that those employees could go anywhere in the United States depending upon where they had a job. And they had the All States endorsement on there, which as long as the employees were hired in Texas, it was our understanding that they could go into other states to perform work and we would provide coverage for them in the event of a claim.

Id. at 11. See also Joint Exhibit 4, at 6, 8-9, 13, 14, 15, 18 (testimony of Norman Adams, the Texas insurance agent who sold the policy, that Petitioner's employees would have been covered under Florida law by virtue of the "other states insurance" provision of the policy).

[4/] This was the "date of issue" reflected on the endorsement. See Joint Exhibit 1, at Exhibit 2C. See also Joint Exhibit 2, at 14 (testimony of Ms. Bingham that the separate policy needed to add Florida to Petitioner's original policy was issued on "June 18th, I believe").

[5/] The premium was calculated using classification code 5606 ("Contractors Executive Supervisor or Construction Superintendent") and a "rate per $100 of remuneration" of $3.41. See Joint Exhibit 1, at Exhibit 2C. The same code and rate were used in the penalty calculation. Id. at Exhibit 5.

COPIES FURNISHED:

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

William H. Andrews, Esquire
Gray Robinson, P.A.
50 North Laura Street Suite 1100
Jacksonville, Florida 32202

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.