

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

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH), held a final hearing in the above-styled matter on February 29, 2008, in Tallahassee, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: William H. Andrews, Esquire
Coffman, Coleman, Andrews
and Grogan, P.A.
Post Office Box 40089
Jacksonville, Florida 32203

For Respondent: Kristian E. Dunn, Esquire
Anthony B. Miller, 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, U.S. Builders, L.P. (USB), timely and effectively requested a final hearing on the issues

related to the Order of Penalty Assessment issued by the Department of Financial Services, Division of Workers' Compensation (Department) in accordance with the requirements of Chapter 120.57, Florida Statutes.

PRELIMINARY STATEMENT

On May 30, 2007, the Department conducted a compliance investigation and determined that USB was not compliant with the coverage requirements of Section 440.107, Florida Statutes. The Department requested of, and received records from, USB.

On June 18, 2007, the Department issued and had served on USB, Order of Penalty Assessment no. 07-143-D10PA (Order), alleging that USB failed to abide by the requirements of the Workers' Compensation Law, by failing to secure the payment of workers' compensation insurance premiums. USB came into compliance with Section 440.107 prior to the issuance of the Order; therefore, no Stop-Work Order was issued. USB was advised by the Order that a request for a formal administrative hearing should be made within 21 days of receipt of the Order.

USB wrote a letter on June 21, 2007, disagreeing with the penalty assessment and requesting that the Department void the penalty as USB was compliant with workers' compensation insurance requirements in the State of Florida. The letter also requested that the Department forward the appropriate appeal procedures to USB, if resolution was not otherwise possible.

The Department did not forward additional information to USB on procedures to appeal the agency's determination as set forth in the Order. Thereafter, on August 23, 2007, a Petition for Hearing (Petition) was filed with the Department's Jacksonville Bureau of Compliance. On September 26, 2007, the Department filed the Petition and other documents with DOAH for the limited issue of determining whether "equitable tolling" applied.

At the final hearing, the Department called one witness, Investigator Robert Lambert, and presented four exhibits which were admitted into evidence. USB presented the testimony of its President, J. Roland Fulton, and offered two exhibits which were admitted into evidence. A one-volume Transcript of the hearing was filed with DOAH on March 19, 2008.

The parties timely-filed Proposed Recommended Orders which have been reviewed and utilized in the preparation of this Recommended Order.

All references to Florida Statutes are to the 2007 edition unless otherwise noted.

FINDINGS OF FACT

1. USB is a general contractor engaged in the construction industry and is properly registered to conduct business in the State of Florida.
2. The Department is the state agency responsible for

enforcing the statutory requirement that employers secure the payment of workers' compensation coverage for the benefit of their employees and corporate officers. § 440.107, Fla. Stat.

3. On May 30, 2007, Department Investigator Teresa Quenemoen conducted an investigation or compliance check of USB to determine liability for workers' compensation coverage. As a result of that investigation, an Order of Penalty Assessment was issued on June 18, 2007, assessing USB a penalty in the amount of \$14,983.95. Attached on the opposite side of the page from the Order was a Notice of Rights directing the recipient how to properly respond if he wished to contest the penalty.

4. Quenemoen received a letter, dated June 21, 2007, from J. Roland Fulton, President of USB, which states that he "strongly disagrees" with the Department's allegations that USB failed to secure adequate workers' compensation coverage and he wants to "resolve" the matter and "void the Order of Penalty." If the Department could not make that happen, he wanted to have the "Appeal Procedures."

5. In a consultation with her Supervisor, Robert Lambert, regarding how to respond to Fulton's letter, Quenemoen was advised to immediately contact USB and advise them of the Notice of Rights and timeline requirements for any petition they may wish to file. This conversation took place well within the 21-day period for request of formal administrative proceedings.

Quenemoen was also advised to provide a copy of the Notice of Rights to USB. Quenemoen, however, delayed taking any action until she contacted USB via letter on August 3, 2007, after the expiration of the timeline requirements for timely filing which occurred on July 9, 2007. Quenemoen indicated within her August 3, 2007 letter to USB that the original date of the Order was the operative date.

6. Robert Lambert testified that the June 21, 2007, letter of USB's president contained most of the requirements considered necessary for the letter to have been viewed as a petition for administrative proceedings and would have been so considered had the words "Petition for Hearing" appeared at the top of the page. He is also unaware of any prejudice that would result to the Department if the matter of penalty assessment against USB were permitted to proceed to a hearing on the merits of the matter.

7. Quenemoen, in her deposition, opines she did not consider the June 21, 2007, letter to be a petition because she thought it lacked crucial items, such as an explanation of how the party's substantial interests would be affected by the agency's decision; disputed items of material fact; and a concise statement of ultimate facts alleged.

8. Quenemoen's August 3, 2007 letter to USB, inquired why USB had neither paid their penalty nor entered into a Payment

Agreement Schedule for Periodic Payment of Penalty, pursuant to Section 440.107, Florida Statutes. The letter re-informed USB that it had 21 days from the receipt of the original Order of Penalty Assessment to file a petition for hearing.

9. On August 23, 2007, the Department received a Petition for Hearing from USB's counsel. The Department determined the Petition filed by USB met the content criteria but failed on timeliness as it was filed more than forty days past the deadline of July 9, 2007.

10. USB, through the testimony of its President, Mr. Fulton, admitted that he was not "familiar with the law. I did not go look it up." He also said, "I did not think I needed to go back and consult the textbook of the law." When asked if he ever decided to consult with a lawyer during the 21-day period, he stated he did not.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to Sections 120.57(1) and 120.569, Florida Statutes. The parties received adequate notice of the administrative hearing.

12. Since the burden of proof rests with the moving party, USB has to prove by a preponderance of evidence that the doctrine of "equitable tolling" would provide relief to USB.

Equitable tolling may extend time limits for deadlines if the responding party has in some way been misled or lulled into inaction. Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988). In Machules, the court stated:

The doctrine [of equitable tolling] serves to ameliorate harsh results that sometimes flow from a strict literalistic construction and application of administrative time limits contained in statutes and rules. 502 So. 2d at 446

13. In Machules, the court found it not unreasonable to excuse the plaintiff, "a lay person, from clearly understanding which avenue of review to pursue when the Employer itself acquiesced in the procedure chosen." Id. at 1135. Additionally, the employer was not prejudiced by the delay because the "[e]mployer obviously was on notice that Petitioner intended to appeal its' termination." As a consequence of the plaintiff being misled or lulled into inaction and delay without prejudice to the employer, the court held the doctrine of equitable tolling to be applicable.

14. In the instant case of USB, the invocation of "equitable tolling" is valid. By her failure to proceed with immediate contact with USB as instructed by her supervisor, the Department's investigator, Quenemoen, misled or lulled USB into inactivity. It is uncontroverted that the Department did nothing until after the expiration of the period covered by the

Notice of Rights on July 9, 2008, although USB had given clear notice in its President's letter of June 21, 2007, that an appeal was requested in the event that resolution was not possible. Further, it is admitted by the Department's representative that prejudice will not accrue to the Department by provision of formal administrative proceedings in regard to the underlying Order of Penalty Assessment.

15. USB has proven by a preponderance of evidence that the Department acted improperly in regards to the treatment of USB.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Financial Services enter a Final Order that Petitioner, U.S. Builders, L.P. (USB), timely and effectively requested a final hearing on the issues related to the Order of Penalty Assessment issued by the Department of Financial Services, Division of Workers' Compensation (Department) in accordance with the requirements of Chapter 120.57, Florida Statutes, and proceed forthwith with provision of such proceedings.

DONE AND ENTERED this 30th day of April, 2008, in
Tallahassee, Leon County, Florida.

Don W. Davis

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 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 issued the final order in this case.