

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

C. R. HIGDON DEVELOPER, )  
L. L. C., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-4479  
 )  
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 20, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: Michael James Rudicell, Esquire  
Michael J. Rudicell, P.A.  
4303 B Spanish Trail Road  
Pensacola, Florida 32504  
  
Douglas F. Miller, Esquire  
125 Romana Street, Suite 800  
Pensacola, Florida 32591  
  
For Respondent: Douglas D. Dolan, Esquire  
Colin Roopnarine, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

The issue is whether the Stop-Work Order and Amended Order of Penalty Assessment are lawful.

PRELIMINARY STATEMENT

The Division of Workers' Compensation (Division), acting on behalf of the Department of Financial Services (Department), issued a Stop-Work Order (SWO) and Order of Penalty Assessment to C. R. Higdon Developer, L. L. C. (Higdon, L. L. C.). The SWO was issued at a construction site located at 6404 Rambler Drive, Pensacola, Florida, on September 7, 2007. Higdon, L. L. C., duly requested an administrative hearing.

The Division forwarded the matter to the Division of Administrative Hearings in a letter that was filed September 27, 2007. The hearing was set for November 20, 2007. On October 12, 2007, the Division filed a Motion to Amend the Order of Penalty Assessment, and on November 1, 2007, the Motion was granted.

Although Higdon, L. L. C., was the nominal Petitioner, the Division had the burden of proof and of going forward with the evidence. At the hearing, Higdon, L. L. C., presented the testimony of one witness. The Division presented the testimony of one witness and offered seven exhibits that were accepted into evidence.

A Transcript was filed on December 24, 2007. The parties were granted an enlargement of time for filing their proposed findings of fact and conclusions of law. Subsequently, Petitioner timely filed its proposed findings of fact and conclusions of law on January 15, 2008. Respondent filed its proposed findings of fact and conclusions of law on January 16, 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 charged with the administration of portions of the "Workers' Compensation Law."

2. Higdon, L. L. C., is a limited liability corporation. It is solely owned by Charles R. Higdon (Mr. Higdon). Mr. Higdon also owns all of the stock of Barefoot Developers, Inc. He is a licensed general contractor.

3. Michelle Newcomer is an Insurance Analyst II with the working title of Workers' Compensation Compliance Investigator and 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 to issue an SWO and to calculate and assess penalties.

4. On September 5, 2007, Ms. Newcomer went to a work site located at 6404 Rambler Drive, Pensacola, Florida. This premise was owned by Barefoot Developers, Inc. She observed several men erecting a steel frame structure. She made inquiry into the employment relationships of these workers and attempted to determine whether the workers on the site were covered by appropriate workers' compensation insurance.

5. Ms. Newcomer stated at the hearing that she was told by several of the workers that they were employed by Higdon, L. L. C.

6. Higdon, L. L. C., and its owner Mr. Higdon, was in the residential development business and in the conduct of that business, engaged in excavating and earth moving. On or about September 5, 2007, Ms. Newcomer conducted a search in the Coverage and Compliance Automated System (CCAS), a database that reliably reveals whether or not a person is covered by a workers' compensation policy of insurance. This search revealed that Mr. Higdon was exempt from coverage by workers' compensation insurance.

7. The CCAS search revealed that neither Mr. Higdon, nor Higdon, L. L. C. held a policy of workers' compensation insurance. However, according to the sworn testimony of Mr. Higdon, it was the practice of Higdon, L. L. C., to lease employees in the conduct of its business. Leased employees are

typically provided workers' compensation coverage by the leasing company. Higdon, L. L. C., accomplished this through Kite Insurance Company of Pensacola, Florida. Kite further arranged for workers through a company named Howard Leasing.

8. Based on the information she had at the time, and after consulting with her supervisor, Ms. Newcomer issued SWO number 07-386-1A on September 5, 2007. She also calculated a penalty assessment. She posted the SWO at the job site and personally served Mr. Higdon. Based on the information she then had, this action was reasonable.

9. Ms. Newcomer also provided Mr. Higdon with a request for business records. On advice of counsel, Mr. Higdon refused to respond to the request for business records. Ms. Newcomer then calculated a penalty by imputing the statewide average weekly wage per employee for the period of noncompliance to determine gross payroll for each employee.

10. Ms. Newcomer had compiled a list that identified the workers she found at the site. She used a class code of 5040. This code applies to persons erecting steel structures. She used this code because the persons she observed at the work site were engaged in that particular activity. She used this code to produce the Amended Order of Penalty Assessment issued on October 2, 2007.

11. In order to complete the worksheet resulting in the Amended Order of Penalty Assessment, Ms. Newcomer figured the gross payroll for the period she found to be the period of noncompliance, in the case of each assumed employee, and divided that by 100. She multiplied that figure by the approved manual rate for each claimed employee. The approved manual rate is the premium that is assigned for class code 5040, and it can vary over time. The approved manual rate is set by the National Council on Compensation Insurance.

12. The product obtained resulted in the theoretical amount of premium that should have been paid for the assumed employees. This figure was multiplied by 1.5 in order to obtain the penalty for failure to obtain workers' compensation coverage for each employee. The figures for each employee used in the calculation were added and resulted in a total penalty assessment of \$853,036.80, which was the ultimate sum reported in the Amended Order of Penalty Assessment.

13. Ms. Newcomer's calculations were accomplished in accordance with the requirements of Subsection 440.107(7), Florida Statutes, and Florida Administrative Code Rules 69L-6.027 and 69L-6.028.

14. Mr. Higdon testified under oath that the steel building that was being constructed at the Rambler Drive premises was being built by J and T Home Improvements (J and T)

pursuant to a contract entered into between Mr. Higdon and J and T. Mr. Higdon stated that he wanted a big building in which he could store his recreational vehicles, boats, and antique cars. He also wanted extra storage space for his son's possessions. This testimony was unrebutted.

15. Mr. Higdon signed a contract with J and T in his own name, not as president of Higdon L. L. C. He paid for the construction work from his personal funds. The construction of the steel building was not related to Mr. Higdon's usual business of residential subdivision development. The building was not to be used in any commercial endeavor. It was completed in September 2007.

16. Ms. Newcomer did not learn of Mr. Higdon's contract with J and T until the time of the hearing.

#### 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 Division has the burden to prove by clear and convincing evidence that Higdon L. L. C., failed to be in compliance with Chapter 440, Florida Statutes, by not securing the payment of workers' compensation. 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. Section 440.107, Florida Statutes, announces a Legislative finding that "the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare." It further provides a scheme for enforcing that policy, including the imposition of penalties.

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

21. Subsection 440.02(16)(a), Florida Statutes, provides as follows:

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

\* \* \*

(16)(a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the



employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

22. Mr. Higdon was not a "person carrying on any employment" with regard to the steel building. He was not an employer "coming within the provisions of Chapter 440." In this case, he simply contracted for the construction of a steel building for his own personal use and, therefore, was not an employer.

23. Mr. Higdon was an employer when engaged in his business of development as a licensed general contractor but that fact does not make him an employer with regard to every construction activity in which he engages.

24. Mr. Higdon was not the contractor, as that term is used in Subsection 440.10(1)(b), Florida Statutes. J and T was not his subcontractor. To the contrary, Mr. Higdon was an "owner," and J and T was the contractor. See Cuero v. Ryland Group, 849 So. 2d 326 (Fla. 2d DCA 2003). As was the case with Ryland Group, Mr. Higdon, through his solely owned corporation Barefoot, Inc., was the owner of the Rambler Drive property, and he entered into a contract with another for the purpose of having a building constructed.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order dismissing the Stop Work Order and Amended Order of Penalty Assessment.

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

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HARRY L. HOOPER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of January, 2008.

COPIES FURNISHED:

Douglas D. Dolan, Esquire  
Colin Roopnarine, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

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

Douglas F. Miller, Esquire  
125 Romana Street, Suite 800  
Pensacola, Florida 32591

Daniel Sumner, General Counsel  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0307

Honorable Alex Sink  
Chief Financial Officer  
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.