

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIBERTY TOWING AND)
RECOVERY, INC.,)
)
Petitioner,)
)
vs.) Case No. 07-4869
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held an administrative hearing in this case on April 3, 2008, in Sanford, Florida.

APPEARANCES

For Petitioner: John Douglas Daw, Esquire
2250 Lucien Way, Suite 100
Maitland, Florida 32751

For Respondent: Thomas H. Duffy, Esquire
Department of Financial Services
200 East Gaines Street, Sixth Floor
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUES

The issues are whether Respondent appropriately issued a "Stop Work" Order; whether certain employees were exempt from workers' compensation coverage; whether Respondent correctly

calculated the assessed penalty; and whether Petitioner was given three days to produce certain records.

PRELIMINARY STATEMENT

On September 7, 2007, Respondent, Department of Financial Services, Division of Workers' Compensation, issued a Stop Work Order to Petitioner, Liberty Towing and Recovery, Inc., alleging that Petitioner had failed to obtain workers' compensation insurance coverage for its employees and ordering Petitioner to immediately stop work and cease all business operations. On September 10, 2007, based on records obtained during the investigation, Respondent issued an Amended Order of Penalty Assessment of \$66,762.01. On September 28, 2007, Petitioner filed a Petition for Administrative Hearing.

On October 24, 2007, Respondent forwarded the case to the Division of Administrative Hearings. On October 25, 2007, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. Based on the response of the parties, on December 3, 2007, the case was scheduled for final hearing on January 11, 2008, in Sanford, Florida.

Pursuant to an Order of Pre-hearing Instructions, on January 2, 2008, the parties filed a Pre-hearing Statement that included stipulated facts. Where appropriate, these stipulated facts are included in the Findings of Fact herein. On January 7, 2008, Petitioner filed an unopposed Motion for

Continuance; the motion was granted. The case was rescheduled for February 12, 2008. On February 11, 2008, Respondent filed an unopposed Motion for Continuance; that motion was granted. The case was rescheduled for April 3, 2008, at the request of the parties.

At the rescheduled final hearing, Respondent presented the testimony of Hector Beauchamp, an investigator for the Division of Workers' Compensation, and offered Exhibits numbered 1 through 7, which were admitted into evidence. Petitioner presented the testimony of Warren Samuels and offered no exhibits. At Respondent's request, official notice was taken of Chapter 440, Florida Statutes (2007), and Florida Administrative Code Rule Chapter 69L-6.

A Transcript was filed on April 28, 2008. Respondent filed Proposed Findings of Fact and Conclusions of Law on May 7, 2008.

Unless otherwise noted all references are to Florida Statutes (2007).

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following facts were established by clear and convincing evidence:

1. Respondent is the state agency responsible for enforcing the statutory requirement that employers secure the

payment of workers' compensation for the benefit of their employees.

2. Petitioner, Liberty Towing and Recovery, Inc., a Florida corporation, was engaged in business operations from September 7, 2004, through September 7, 2007.

3. A Stop Work Order was issued to Petitioner on September 7, 2007, and an Amended Order of Penalty Assessment (with a penalty worksheet) was served on Respondent on September 10, 2007.

4. In September 2007, Hector Beauchamp received information that Petitioner was possibly in violation of the coverage requirements of Chapter 440, Florida Statutes. Mr. Beauchamp researched the matter by reviewing Petitioner's Unemployment Compensation Tax records on the Florida Department of Revenue website; its corporate filings on the Florida Department of State, Division of Corporations', database; and his own agency's database known as the Coverage and Compliance Automated System, or the acronym, "CCAS."

5. From the aforementioned records, he determined that Petitioner had at least four employees from September 2004, through September 2007, that Farrell Samuels and Warren Samuels were listed as Petitioner's corporate officers, that Petitioner did not have workers' compensation insurance coverage, and that

no one in the company had workers' compensation coverage exemption.

6. On September 7, 2007, Mr. Beauchamp visited Petitioner's place of business in DeBary, Florida. There he spoke with Warren Samuels, who identified himself as Petitioner's vice president. Mr. Beauchamp verified that neither Warren Samuels nor Farrell Samuels, the corporate president, had a valid workers' compensation exemption from September 7, 2004, through September 7, 2007; that no other employee of Petitioner had a workers' compensation exemption while employed from September 7, 2004, through September 7, 2007; and that Petitioner did not have workers' compensation insurance coverage for its employees during that time.

7. Before leaving Petitioner's office on that day, Mr. Beauchamp served upon Mr. Samuels a Stop Work Order, which directed Petitioner to cease all business operations. Mr. Beauchamp also served a Request for Production of Business Records on Mr. Samuels, requiring the production within five business days. The request for business records asked for, among other things, payroll documents and certificates of exemption from workers' compensation coverage.

8. In response to the request, Petitioner provided certain business records consisting of, among other things, Federal Income Tax Returns for 2004, 2005, and 2006; employee W-2 forms

for 2005; a list of wages paid for seven employees for the final quarter of 2005; a spreadsheet purporting to show wages paid to nine employees in 2006; and a payroll report showing wages paid to four employees in 2007. After reviewing these records on September 10, 2007, Mr. Beauchamp determined them to be less complete than the quarterly wage reports he had retrieved from the Unemployment Compensation Tax database. He used the Unemployment Compensation Tax figures to calculate a penalty, using Respondent's Penalty Calculation Worksheet (Penalty Worksheet) and arrived at a total penalty of \$66,762.01. He served an Amended Order of Penalty Assessment for that amount personally upon Mr. Warren Samuels at 2:53 p.m., on September 10, 2007. (The initial penalty assessment was served with the Stop Work Order and references a penalty "in an amount equal to 1.5 times," the cost of appropriate insurance.)

9. In accordance with standard procedure, as dictated by appropriate Florida Statutes, Mr. Beauchamp first calculated the payroll for each employee for the last three months of 2004, all of 2005, all of 2006, and the first nine months of 2007. The payroll for each employee for each year was then divided by 100 and multiplied by an "approved manual rate." The product of 1/100th of the payroll and the approved manual rate provided the amount that would have been paid in premiums for that employee for that year, i.e., the evaded (unpaid) premium. The evaded

premium is then multiplied by the statutorily-mandated penalty multiplier of 1.5 to determine the penalty for each employee for each period of non-compliance. All these calculations were reflected in Respondent's Penalty Worksheet that was delivered to Petitioner.

10. Remuneration was paid to Farrell Samuels in 2007, and remuneration was paid to Warren Samuels in 2004, 2005, 2006 and 2007. Payment to these corporate officers was included in the penalty calculation.

11. The Unemployment Compensation Tax records revealed that for each quarter between September 7, 2004, and September 7, 2007, Petitioner had at least four employees.

12. Petitioner provided no workers' compensation coverage at any time during September 7, 2004, through September 7, 2007.

13. Respondent correctly identified the classification code for each of Petitioner's employees it listed in its Penalty Worksheet.

14. The approved manual rates listed on the Penalty Worksheet of the Amended Order of Penalty Assessment were correct for the years in question.

15. The payroll amounts listed on the Penalty Worksheet of the Amended Order of Penalty Assessment were correct for the relevant periods.

16. There was no computation error on the Penalty Worksheet attached to the Amended Order of Penalty Assessment.

17. The records Petitioner provided were incomplete, but those records confirmed that Petitioner had at least four employees during the relevant time.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this controversy. §§ 120.569 and 120.57(1), Fla. Stat.

19. Because administrative fines are penal in nature, Respondent is required to prove by clear and convincing evidence that Petitioner failed to provide its employees with workers' compensation coverage from September 7, 2004, through September 7, 2007. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern Inc., 670 So. 2d 932, 935 (Fla. 1996).

20. Petitioner's case focused on the suggestion that Respondent should not have counted the two corporate officers, Warren Samuels and Ferrell Samuels, as employees since they could have been exempt, and also alleged that the Department did not give Petitioner three days to produce records.

21. Subsection 440.10(1)(a), Florida Statutes, states, in part:

(1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, . . . the compensation payable under ss. 440.13, 440.15, and 440.16.

22. Compliance with the coverage requirements of the workers' compensation law is enforced pursuant to Subsection 440.107(2), Florida Statutes, which reads, in relevant part:

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.

23. Employers in non-construction industries that employ at least four persons are required to secure the payment of workers' compensation for their employees. Petitioner was an "employer" for workers' compensation purposes, because it employed four or more persons during the relevant time period. §§ 440.02(16)(a) and 440.02(17)(b)2., Fla. Stat.

24. All persons receiving remuneration are considered employees. Subsection 440.02(15)(b), Florida Statutes, states, in part:

"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.

25. Certain corporate officers can become exempt from the coverage requirements of Chapter 440, Florida Statutes, but must

affirmatively make that election. Subsection 440.02(15)(b)1., Florida Statutes, states:

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.

No evidence was presented that Petitioner's corporate officers had secured the required exemption.

26. Section 440.107, Florida Statutes, outlines Respondent's duties and powers to enforce compliance with the requirement to provide for the payment of workers' compensation and authorizes Respondent to issue stop work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements. Subsection 440.107(7)(a), Florida Statutes, states, in relevant part:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

On the date the Stop Work Order was issued, September 7, 2007, Petitioner had four employees; the Stop Work Order was not only justified, it was mandated.

27. Regarding the penalty that has been assessed, Subsection 440.107(7)(d)1., Florida Statutes, states:

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.

28. Respondent adopted a Penalty Calculation Worksheet to use in calculating penalties to assess against employers who do not secure the payment of workers' compensation. That worksheet was properly completed in this case.

29. Respondent applied the proper methodology in calculating the penalty. Subsection 440.107(d)(1), Florida Statutes, requires Respondent to penalize non-compliant employers by requiring them to pay 1.5 times the evaded premium, i.e., the premiums the employer should have been paying for the previous three years.

30. Petitioner did not dispute the accuracy of Respondent's calculation of the penalty, only that the two

corporate officers' payroll totals should not have been included, inasmuch as they were entitled to be exempt from having to be covered. That argument is unpersuasive, inasmuch as it is undisputed that the two officers were not exempt at any time during the three-year period.

31. Petitioner raised an issue concerning a purported three-day deadline to provide records. The meaning of this argument is unclear, inasmuch as the evidence shows that Respondent's Request for Production of Business Records for Penalty Assessment gave Petitioner five days to produce records and those records were voluntarily produced within three days.

32. Subsection 440.05(11), Florida Statutes, states:

Any corporate officer permitted by this chapter to claim an exemption must be listed on the records of this state's Secretary of State, Division of Corporations, as a corporate officer. The department shall issue a stop-work order under s. 440.107(7) to any corporation who employs a person who claims to be exempt as a corporate officer but who fails or refuses to produce the documents required under this subsection to the department within 3 business days after the request is made.

This statute applies to a situation where a corporation employs someone who claims to be a corporate officer, but who does not provide records showing that he or she has that status. In this case, there was never an issue that Warren or Ferrell Samuels

were, in fact, corporate officers or that neither had exemptions.

33. Petitioner did not produce, nor did it argue, that it had less than four employees at all times during the three-year period. Respondent produced Unemployment Compensation Tax records that showed at least four employees for each quarter, and that in each quarter, at least four people had received pay substantial enough to demonstrate that the person was a full-time employee. In the absence of contrary evidence, the records produced by Respondent demonstrate that Petitioner had four employees continuously from September 7, 2004, through September 7, 2007.

34. The evidence has clearly and convincingly proved that Petitioner violated Sections 440.10 and 440.38, Florida Statutes, from the period from September 7, 2004, through September 7, 2007, by failing to provide workers' compensation insurance and that its penalty was accurately calculated.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law it is

RECOMMENDED that Respondent, Department of Financial Services, Division of Workers' Compensation, enter a final order:

1. Finding that Petitioner, Liberty Towing and Recovery Services, Inc., failed to secure the payment of workers' compensation for its employees, in violation of Subsections 440.10(1)(a) and 440.38(1), Florida Statutes; and

2. Assessing a penalty against Petitioner in the amount of \$66,762.01, which is equal to 1.5 times the evaded premium based on the Unemployment Compensation Tax records and the applicable approved manual rate and classification code.

DONE AND ENTERED this 16th day of May, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 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.