

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 07-5020
)
PLUMB STRUCTURES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on January 15, 2008, by video-teleconference at sites in Tallahassee and Tampa, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Anthony B. Miller, Esquire
Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Nadine Knowles, Esquire
Plumb Structures, Inc.
10197 Frierson Lake Drive
Hudson, Florida 34669

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondent Plumb Structures, Inc., violated state laws applicable to workers' compensation insurance coverage by failing to secure coverage for an employee and, if so, whether the penalty assessed against Respondent by Petitioner Department of Financial Services, Division of Workers' Compensation (Department) was lawful.

PRELIMINARY STATEMENT

On September 25, 2007, the Department issued a stop-work order to Respondent regarding work at its job site located in Land O' Lakes, Florida, for Respondent's failure to secure workers' compensation insurance coverage for Timothy Frees, its vice president. The Department also issued an Amended Order of Penalty Assessment against Respondent for \$8,774.75.

Respondent timely requested an administrative hearing, and the Department referred the matter to DOAH on October 30, 2007, to conduct an evidentiary hearing.

The Department presented the testimony of two of its employees, Lloyd Hillis and Gregory Mills. The Department's Exhibits 1 through 20 were admitted into the record. Respondent presented no witness testimony and no exhibits.

Following the hearing, the Department filed a Notice of Filing Complete Exhibit 17, in which it was represented that the

exhibit offered into evidence at the hearing was incomplete because the Department inadvertently omitted the "reverse" page. Counsel for Respondent did not object to the filing and it was admitted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH. Proposed Recommended Orders were submitted by both parties and carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for the enforcement of the workers' compensation insurance coverage requirements established in Chapter 440, Florida Statutes (2007).¹

2. Respondent is a Florida corporation with its office in Hudson. Timothy Frees is Respondent's vice president and registered agent.

3. On September 25, 2007, Lloyd Hillis, an investigator for the Department, was performing "spot checks" of contractors and subcontractors at job sites in certain subdivisions in Land 'O Lakes to determine compliance with the worker's compensation laws. Mr. Hillis stopped at a house where he observed a worker installing sliding glass doors. The worker identified himself to Mr. Hillis as Timothy Frees and stated that he worked for Plumb Structures, Inc.

4. Upon checking relevant records maintained by the Department on his laptop computer, Mr. Hillis determined Mr. Frees was not covered by workers' compensation insurance. The computerized records showed Mr. Frees had obtained an exemption from coverage for a period of time, but the exemption had expired on August 4, 2005. Subsection 440.05(3), Florida Statutes, provides that each corporate officer of a corporation engaged in the construction industry may elect to be exempt from the requirements of Chapter 440, Florida Statutes, and Subsection 440.05(5), Florida Statutes, provides that, upon written notice of such election, the Department will issue a certificate of exemption which is valid for two years.

5. The Department's records indicated that the Department mailed Mr. Frees a "Notice of Expiration of Certificate of Election to be Exempt" on June 16, 2005. It was undisputed that no application to renew the certificate of exemption for Mr. Frees beyond August 4, 2005, was sent to the Department until after September 25, 2007.

6. Before leaving the job-site, Mr. Hillis issued a stop-work order against Plumb Structures and hand-delivered it to Mr. Frees. Mr. Frees was also given a Request for Production of Business Records for Penalty Assessment Calculation. Business records were requested for the period from August 4, 2005, the

expiration date of Mr. Frees' exemption, to September 25, 2007, the date of the stop-work order.

7. Mr. Frees produced some business records for the Department, including a pay stub from Bill the Window Man, Inc., for which Mr. Frees said he worked as a subcontractor in 2005, showing year-to-date earnings through December 8, 2005, of \$13,526; a W-2 Wage and Tax Statement issued by Plumb Structures showing 2006 income to Mr. Frees of \$27,675; and a single pay stub from 2007 showing a year-to-date income from Plumb Structures of \$17,460.

8. These business records were not sufficient to determine Mr. Frees' wage for these years because they did not indicate his hourly rate of pay. Therefore, the Department imputed his wage by using the statewide approved manual rate for the class code applicable to installation of doors.

9. On September 27, 2007, the Department issued an Amended Order of Penalty Assessment against Plumb Structures for \$8,774.75.

10. Respondent does not dispute the Department's imputed wage for Mr. Frees, but Respondent does dispute that Mr. Frees was an employee of Plumb Structures following the expiration of the certificate of exemption.

11. With regard to work done by Mr. Frees in 2005, Respondent also argues that the evidence only shows Mr. Frees

was an employee of Bill the Window Man, Inc. Mr. Frees told the Department's investigator that "he" was a subcontractor to Bill the Window Man in 2005, but Mr. Hillis assumed, and the Department contends, that Mr. Frees meant that Plumb Structures was the subcontractor to Bill the Window Man. The pay stubs of Bill the Window Man were made out to Timothy Frees, not Plumb Structures. The Department's evidence on this point does not meet the standard of proof applicable in this case, which is "clear and convincing evidence."

12. Respondent's argument that Mr. Frees was not an employee of Plumb Structures in 2006 and 2007 is based solely on Respondent's interpretation of the applicable law and is addressed below.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569, 120.57(1), and 440.107(13), Florida Statutes.

14. Because an administrative fine deprives the person fined of substantial rights in property, such fines are punitive in nature. The Department has the burden of proof and must establish through clear and convincing evidence that Respondent violated the law. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996) (the imposition of administrative

finer which are penal in nature and implicate significant property rights must be justified by a finding of clear and convincing evidence of a related violation).

15. Proceedings under Section 120.57, Florida Statutes, are intended to formulate final agency action, not to review action taken earlier and preliminarily. Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

16. Section 440.10(1)(a), Florida Statutes, provides:

Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees... of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.

17. The term "employer" is defined in Subsection 440.02(16), Florida Statutes, as "every person carrying on any employment." The term "employment" is defined in Subsection 440.02(17)(a), Florida Statutes, as "any service performed by an employee." The term "employee" is defined in Subsection 440.02(15)(b), Florida Statutes, to include each officer of a corporation who performs services for remuneration. Based on these definitions, Mr. Frees was an employee of Plumb Structures.

18. Respondent contends, however, that the key statute applicable to the status of Mr. Frees in this case is Subsection 440.02(15)(d), Florida Statutes, which states that an "employee" does not include an officer of a corporation who elects to be exempt. Subsection 440.05(15)(d)(8), Florida Statutes, states that such officer is not an employee "for any reason" until a notice of revocation of election is filed pursuant to Section 440.05. Respondent argues that these two statutes, taken together, mean that an officer who was issued a certificate of exemption remains in a non-employee status until his certificate is revoked, even if the certificate has expired. Respondent argues further that, because the Department never revoked the certificate of Mr. Frees, he remained a non-employee and Respondent cannot be guilty of failing to secure worker's compensation insurance coverage for him.

19. The only references to the revocation of a certificate are found in Subsection 440.05(3), Florida Statutes, which states that the Department shall revoke a certificate "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," and "[u]pon 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."

It is clear that the purpose of this law is to provide the Department with authority to terminate a certificate prior to its expiration date.

20. Reading the various provisions of the law in pari materia, and in a manner that does not render meaningless the two-year limit on certificates of exemption, it is plain that the expiration of a certificate and the revocation of a certificate are two different ways that an exemption terminates. A certificate holder does not need a notice of revocation before a two-year certificate can actually expire.

21. Subsection 440.05(6), Florida Statutes, states:

At least 60 days prior to the expiration date of a construction industry certificate of exemption issued after December 1, 1998, the department shall send notice of the expiration date and an application for renewal to the certificate holder at the address on the certificate.

Respondent argues that the Department is barred from imposing a penalty against Respondent for failing to renew the certificate of exemption because the Department did not notify Respondent within 60 days that the certificate was expiring. The Department mailed the notice to Respondent 49 days before the expiration of Mr. Frees' certificate.

22. Nothing in Chapter 440, Florida Statutes, suggests that its requirements become unenforceable if the Department sends a notice less than 60 days before a certificate of

exemption expires. There were no cases cited by the Respondent where this particular statutory directive or similar statutory language has been interpreted by the courts to absolve a person from statutorily-imposed duties. Satisfaction of the 60-day notice directive is not a prerequisite to imposing a penalty.

23. The Respondent also contends that it never received the Department's notice that Mr. Frees' certificate of exemption was about to expire. Because the statute states that a certificate is only good for two years and the certificate states on its face that it expires on August 4, 2005, it is probably irrelevant whether Respondent received the notice that the certificate was about to expire. If it is relevant, the Department presented sufficient proof that it mailed the notice of expiration to Respondent and Respondent's claim that it never received the notice was not credible.

24. Section 440.107(7)(d)1., Florida Statutes, states that an employer who fails to secure the payment of workers' compensation is subject to 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 within the preceding 3-year period or \$1,000, whichever is greater.

25. Section 440.107(7)(e), Florida Statutes, provides:

When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

Because the business records produced by Respondent were insufficient to determine Mr. Frees' hourly rate of pay in 2006 and 2007, the Department was authorized to impute his wage.

26. The Department proved by clear and convincing evidence that Mr. Frees worked for Respondent in 2006 and 2007. The Department did not prove by clear and convincing evidence that Mr. Frees worked for Respondent in 2005. Based upon the penalty calculation shown in Department Exhibit 7, if the 2005 component of the penalty were eliminated, the resulting penalty would be \$7,649.72.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order that assesses a penalty against Respondent of \$7,649.72.

DONE AND ENTERED this 9th day of April, 2008, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2008.

ENDNOTE

^{1/} All references to the Florida Statutes are to the 2007
codification.

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.