

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 07-5059
)
LOCKHART BUILDERS, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on February 7, 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: Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Keith A. Mann, Esquire
Mann Legal Group
1952 Field Road
Sarasota, Florida 34231

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondent Lockhart Builders, Inc., violated state laws

applicable to workers' compensation insurance coverage by failing to secure coverage for three employees and failing to produce records requested by Petitioner Department of Financial Services, Division of Workers' Compensation (Department) and, if so, what penalty should be assessed for the violations.

PRELIMINARY STATEMENT

On September 21, 2007, the Department issued a stop-work order to Respondent regarding its job site located in Bradenton, Florida for Respondent's failure to secure workers' compensation insurance coverage for three employees of its subcontractor, BY Construction Services, Inc. (BY Construction). The stop-work order required Respondent to cease all business operations at the worksite specified in the order.

Respondent timely requested an administrative hearing, and the Department referred the matter to DOAH on April 27, 2007, to conduct an evidentiary hearing.

An Amended Order of Penalty Assessment and a Second Amended Order of Penalty Assessment were subsequently served on Respondent. The Second Amended Order assessed a penalty against Respondent of \$70,272.51.

Petitioner presented the testimony of Germaine Green and Colleen Wharton. It also presented the testimony, through deposition transcripts, of Burak Yavalar and Stacey Green. Petitioners Exhibits 1 through 19, 40 and 41 were admitted into

the record. Respondent presented the testimony of William Lockhart. Respondent's Exhibits 20 through 39 were admitted into the record.

The one-volume Transcript of the final hearing was filed with DOAH. Proposed Recommended Orders were submitted by both parties which were 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 Bradenton. William Lockhart is Respondent's president. Respondent is licensed to engage in construction activity in Florida.

3. Respondent was engaged to construct a two-story duplex at 2315 Gulf Drive in Bradenton. Respondent began work at the job site on or about February 21, 2007.

4. On August 22, 2007, Lockhart received a proposal from Burak Yavalar, owner of BY Construction, to do the exterior stucco work on the duplex building for a flat fee of \$10,750. The proposal was accepted by Respondent on August 23, 2007.

5. Yavalar presented Lockhart with a certificate of liability insurance which indicated that he had obtained workers' compensation coverage for his employees. The certificate was issued by Employee Leasing Solutions, Inc. (ELS), a professional leasing company in Bradenton. ELS provides mainly payroll services and workers' compensation insurance coverage for its clients. Lockhart did not ask for, and Yavalar did not provide Lockhart with, a list of the names of the BY Construction employees who were covered by the insurance.

6. Lockhart made a call to ELS to verify that BY Construction had workers' compensation insurance coverage, but he did not ask for a list of BY Construction employees covered by its insurance policy.

7. BY Construction began work at Respondent's job site on or about September 10 or 11, 2007. On September 12, 2007, BY Construction had eight employees at the job site. One employee, Justin Ormes, had previously worked for BY Construction, had quit for a while, and had just returned. Two other employees, Carlos Lopez and Jaime Alcatar, had been working on a nearby job site and were asked by Yavalar to come to work at Respondent's job site.

8. Yavalar claims that on the morning of September 12, 2007, Ormes, Lopez, and Alcatar had not yet been employed or authorized to start work for BY Construction.

9. On September 12, 2007, Petitioner's investigators Germaine Green and Colleen Wharton performed a random compliance check at Respondent's job site. Without being specific about what particular work was being performed at the site by Ormes, Lopez, and Alcatar, the investigators testified that when they arrived at the job site they observed all eight men performing stucco work.

10. The investigators spoke to Yavalar, Lockhart and the workers at the job site to determine their identities and employment status. Yavalar told the investigators his eight employees had workers' compensation insurance coverage through ELS. However, upon checking relevant records, the investigators determined that insurance coverage for Ormes, Lopez, and Alcatar had not been secured by either BY Construction or Respondent.

11. Wharton issued a statewide stop-work order to BY Construction for its failure to obtain workers' compensation coverage for the three employees. After the stop work order was issued, Yavalar left the job site with Lopez and Alcatar to complete their paperwork to obtain insurance coverage through ELS. Yavalar's wife was able to re-activate Ormes' insurance

coverage with ELS over the telephone. By the end of the day on September 12, 2007, insurance coverage was secured by BY Construction for Ormes, Lopez, and Alcatar.

12. The business records of BY Construction produced for the Department indicated that Ormes had been paid by BY Construction in the period from March to July 2007, and then on September 12, 2007; Lopez had been paid on August 24, 2007, and then on September 12, 2007; Alcatar had been paid on September 12, 2007.

13. All three men were paid only \$28 on September 12, 2007. This evidence supports the testimony of Yavalar that these three had arrived at Respondent's job site for the first time on September 12, 2008.

14. BY Construction was later served with an amended order of penalty for its failure to obtain workers' compensation coverage for the three employees. It arranged with the Department to pay the penalty through installments and was conditionally released from the stop-work order.

15. When the Department's investigators were at the job site on September 12, 2007, they informed Lockhart about the stop-work order being issued to BY Construction and gave Lockhart a Request for Production of Business Records for the purpose of determining whether Respondent had obtained proof of workers' compensation insurance coverage from BY Construction

before BY Construction commenced work at Respondent's job site. Respondent produced the requested records.

16. As discussed in the Conclusions of Law, Florida law charges a contractor with the duty to secure workers' compensation insurance coverage for any uninsured employees of its subcontractors. On this basis, the Department served Respondent with a Stop-Work Order and an Order of Penalty Assessment on September 21, 2007, for failing to secure coverage for Ormes, Lopez, and Alcatraz.

17. On September 21, 2007, the Department served a Request for Production of Business Records for Penalty Assessment Calculation to Respondent. The Department's request asked Respondent to produce records for the preceding three years, including payroll records, tax returns, and proof of insurance. Respondent produced some records in response to this second request, which the Department deemed insufficient to calculate a penalty. However, the evidence shows Respondent produced the only records that it possessed regarding its association with BY Construction. The Department's proposed penalty does not include an assessment based solely on Respondent's failure to produce requested records.

18. When an employer fails to provide requested business records within 15 days of the request, the Department is authorized to assess a penalty by imputing the employer's

payroll using "the statewide average weekly wage as defined in Section 440.12(2), multiplied by 1.5." § 440.107(7)(e), Fla. Stat., and Fla. Admin. Code R. 69L-6.028.

19. Imputing the gross payroll for Ormes, Lopez and Alcatar for the years 2004, 2005, 2006, and 2007, by using the average weekly wage for the type of work, the Department assessed Respondent with a penalty of \$138,596.67 and issued an Order of Penalty Assessment to Respondent on October 31, 2007.

20. Petitioner later amended the penalty to \$70,272.51, based on the fact that BY Construction was not incorporated until January 1, 2006, and issued a Second Amended Order of Penalty Assessment on December 20, 2007.

CONCLUSIONS OF LAW

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

22. 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 fines 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).

23. 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).

24. 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.

25. It is undisputed that Respondent is a "contractor," as the party responsible for the general contract at the job site, and that BY Construction is a "subcontractor" for the stucco work at the job site.

26. It is undisputed that Ormes, Lopez, and Alcatar were present at Respondent's job site on September 12, 2007, and that they were there at Yavalar's request for the purpose of doing stucco work for BY Construction. Petitioner's investigators claim that all three were working when the investigators arrived at the job site. Yavalar claimed the three were not yet employed and not working when the investigators arrived. BY

Construction and Respondent cannot escape the requirements of the law by claiming that Ormes, Lopez, and Alcatar were not actually working, because they were present to do stucco work and were exposed to job-site injuries for which the workers' compensation insurance requirements were established.

27. Section 440.10(1)(b), Florida Statutes, imposes on contractors the duty to secure workers' compensation insurance coverage for any employees of a subcontractor who are not insured under the subcontractor's insurance policy. The law makes the contractor the "statutory employer" of the subcontractor's uninsured employees for the purpose of the workers' compensation law. Therefore, Respondent was responsible for securing insurance coverage for Ormes, Lopez, and Alcatar.

28. Section 440.10(1)(c) requires a contractor to obtain evidence of workers' compensation insurance coverage from its subcontractors. Florida Administrative Code Rule 69L-6.032(3) provides that if a subcontractor is a client company of an employee leasing company, the evidence of insurance from a subcontractor shall be a Certificate of Liability Insurance and a list of the employees leased to the subcontractor as of the date the subcontractor commenced work for the contractor on each project.

29. Respondent should have verified that Ormes, Lopez, and Alcatar were covered by BY Construction's workers' compensation insurance policy before allowing them to work at his job site. By failing to obtain a list of covered employees from BY Construction before BY Construction commenced work at Respondent's job site, Respondent violated Section 440.10(1)(c), Florida Statutes.

30. The Department is authorized to issue a stop-work order to employers who are unable to provide proof of workers' compensation coverage. Failure to provide such proof is deemed an immediate serious danger to public health, safety, or welfare. § 440.107(7)(a), Fla. Stat.

31. 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 required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

32. Petitioner assessed a penalty against Respondent based on the premise that Respondent was the statutory employer of Ormes, Lopez, and Alcatar from the date that BY Construction was first incorporated, January 1, 2006. However, Respondent could

not have become the statutory employer of any of BY Construction's uninsured employees until those individuals became employees of BY Construction to do work at Respondent's job site. The record evidence shows Respondent did not engage BY Construction to do the stucco work until August 23, 2007, and the three employees did not start work at Respondent's job site until September 12, 2007.

33. The Department argues that when an employer fails to provide requested business records, the Department is "statutorily obligated" to impute the payroll for the entire period for which the requested business records were not produced, but it cites no statute or rule which expressly authorizes it to assess a penalty based on dates other than dates of actual non-compliance.

34. 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.

Similar language can be found in Florida Administrative Code Rule 69L-6.028(2)(a), but nothing in the statute or rule suggests that, not only can the Department impute a wage for the

uninsured workers, it can impute a time-period of non-compliance. The statute says "the imputed weekly payroll . . . shall be the statewide average weekly wage." (emphasis supplied). Similarly, Florida Administrative Code Rule 69L-6.035, entitled "Definition of Payroll for Calculating Penalty," refers only to forms of income to employees.

35. There is a substantial difference between imputing a wage and imputing a period of non-compliance. State-wide average wages are established public statistics that can be used when the actual wage of an employee is unknown. On the other hand, there are no established state-wide statistics on periods of non-compliance. Furthermore, a state-wide average wage for a particular class code is just a number, while non-compliance is a determination of wrongdoing.

36. The "non-compliance" referred to in the governing statutes and rules logically refers to the employer's failure to provide required insurance coverage. Even if the Department construed the references to non-compliance to include the employer's failure to produce requested business records, that period of non-compliance would only run from the deadline for producing the records.

37. The only case cited in support of the Department's argument that it can impute a time period of non-compliance is a 2006 DOAH case, Department of Financial Services, Division of

Workers' Compensation v. Simpro Homes, Inc., DOAH Case 06-0731

(Final Order September 29, 2006), where the Department imputed the payroll for the entire three-year period for which the requested business records were not produced. However, that case involved an insurance policy that the Department determined did not meet the requirements for such a policy. Therefore, the entire term of the deficient policy was a period of non-compliance. The period of non-compliance was supported by record evidence regarding the date when the deficient policy was issued.

38. The Department's interpretation of its statutes and rules to allow it to calculate a penalty on its unilateral determination of what time period to use in its request for records from the employer, without regard to contradictory, competent evidence regarding the actual period of non-compliance, is an unreasonable interpretation that would often lead to absurd results. In fact, the Department acknowledged the arbitrariness of such an application of the law in this case when it conceded that it was inappropriate to impute a penalty against Respondent for a time period prior to the existence of BY Construction, notwithstanding that the Department had requested documents from Respondent that covered a longer time period.

39. The Department points out that Yavalar paid Ormes, Lopez and Alcatar at various times prior to September 12, 2007. However, this case is not about the appropriate penalty against BY Construction. The period of non-compliance by BY Construction and the period of non-compliance by Respondent are not the same. For Respondent, the period of non-compliance is the period of time for which it failed to secure workers' compensation insurance coverage for the uninsured employees of its subcontractor, BY Construction, which cannot have been sooner than the date Ormes, Lopez, and Alcatar began work on Respondent's job site, which was September 12, 2007.

40. Another factor that indicates the unreasonableness of the Department's interpretation of the law is that the evidence shows Respondent produced the only records that existed regarding its association with BY Construction. There were no other business records Respondent possessed that the Department could have used to determine a period of non-compliance. If it is the Department's position that Respondent was required to produce the records of BY Construction, the evidence presented in this case shows that those records (which the Department obtained from BY Construction) did not indicate a period of non-compliance by Respondent greater than one day, September 12, 2007.

41. Finally, the Department's argument that it can impute the period of non-compliance renders meaningless the fundamental principle that, to impose a penalty, an agency must prove a violation of law by clear and convincing evidence. The Department is arguing that it needs no evidence of actual non-compliance; it can impute dates of non-compliance and it can do so even when the imputed dates are contradicted by competent evidence.

42. The courts are not required to defer to an implausible or unreasonable interpretation by an agency of its rules or the statutes it administers. See Atlantis at Perdido Association, Inc. v. Dept. of Environmental Protection, 932 So. 2d 1206 (Fla. 1st DCA 2006).

43. The Department satisfied its burden to prove clearly and convincingly that Respondent failed to secure the payment of workers' compensation for Ormes, Lopez, and Alcatar for one day, September 12, 2007. The Department did not meet its burden of proof to show Respondent failed to secure the payment of workers' compensation for any other dates.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order that amends its penalty assessment to reflect one day of non-compliance by Respondent.

DONE AND ENTERED this 31st day of March, 2008, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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 31st day of March, 2008.

ENDNOTE

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

COPIES FURNISHED:

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 32399-0307

Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

Keith A. Mann, Esquire
1952 Field Road
Sarasota, Florida 34231

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.