

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENNIS LAMAR FLINT,)
)
 Petitioner,)
)
 vs.) Case No. 07-5480
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF WORKERS')
 COMPENSATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On February 7 and May 13, 2008, an administrative hearing in this case was conducted by William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Kyle Shoemaker, Esquire
Post Office Box 1601
Fort Myers, Florida 33902

For Respondent: 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 in the case is whether Dennis Lamar Flint (Petitioner) should be assessed a penalty for an alleged failure to obtain workers' compensation insurance as charged in a Stop Work Order and Amended Order of Penalty Assessment.

PRELIMINARY STATEMENT

On October 24, 2007, the Department of Financial Services, Division of Workers' Compensation (Respondent), issued a Stop Work Order and Order of Penalty Assessment against the Petitioner, asserting that he has failed to "secure the payment of workers' compensation in violation of sections 440.10(1), 440.38(1), and 440.107(2), Florida Statutes," specifically by his "failure to obtain coverage that meets the requirements of Chapter 440 F.S. and the Insurance Code."

The Petitioner disputed the alleged violations and requested a formal hearing. The Respondent forwarded the request to the Division of Administrative Hearings.

By Notice of Hearing dated December 18, 2007, a four-hour video teleconference hearing was scheduled for February 7, 2008. The time allotted was based upon the parties' response to the Initial Order. The case was transferred to the undersigned Administrative Law Judge on January 29, 2008.

The hearing did not conclude on February 7. Before the hearing was rescheduled, the video conferencing equipment located in Fort Myers malfunctioned and became permanently unavailable. After consultation with the parties, the remainder of the hearing was conducted on May 13, 2008, in Fort Myers.

At the hearing, the Petitioner testified on his own behalf. The Respondent presented the testimony of four witnesses and had

Exhibits identified as A through C, E through G, K through O, and Q admitted into evidence.

The Petitioner filed a "Proposed Final Order" on May 22, 2008. The two-volume Transcript of the hearing was filed on June 16, 2008. On June 18, 2008, the Respondent filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, which was granted by an Order dated June 20, 2008. The Respondent filed a Proposed Recommended Order on July 7, 2008.

FINDINGS OF FACT

1. On October 24, 2007, an investigator employed by the Respondent observed two men and a truck parked at a shopping center located at 3704 Cleveland Avenue in Fort Myers, Florida.

2. According to a permit posted at the shopping center, a general contractor identified as "Sams Property Investment" was apparently responsible for a construction project at the shopping center.

3. The investigator determined that one of the men was the Petitioner. The other man was initially identified as "Steve Nolan," but was subsequently identified as "Steve Miller."

4. At the time the investigator arrived at the shopping center, she observed a ladder leaning against the building. The ladder belonged to the Petitioner. The truck contained

equipment that the investigator asserted was utilized in construction or carpentry trades.

5. The Petitioner and Mr. Miller were at the shopping center location to determine the condition of the stucco surface on the building.

6. The shopping center's owner was apparently interested in improving the appearance of the property. The owner's son, Geoffrey Hatter, familiar with the Petitioner through work the Petitioner had done at the personal residence of the owner's son, contacted the Petitioner and asked him to evaluate the condition of the structure.

7. The Petitioner and Mr. Miller traveled together to the shopping center on the morning of October 24, 2007. Mr. Miller was the boyfriend of the Petitioner's daughter.

8. The Petitioner testified that the truck belonged to Mr. Miller.

9. The investigator who spoke to the Petitioner at the site testified that the vehicle tag was registered to the Petitioner.

10. The Petitioner testified that Mr. Miller removed a plywood board to reveal the structure below.

11. Neither inspector observed either the Petitioner or Mr. Miller handling or removing any material from the structure.

12. The investigator who initially arrived at the scene testified that she had "asked them to come down from the ladder," but then testified that Mr. Miller was standing on the ladder and that the Petitioner was standing on the ground nearby the truck and ladder.

13. A second inspector who traveled to the location separately from the first initially testified that she observed two men on the building, but as she was questioned about the observation, the testimony became less than convincing, lacked sufficient clarity to be reliable, and conflicted with the other inspector's testimony that the Petitioner was standing on the ground near the truck.

14. The Respondent's lead investigator testified that when she asked the men how they were to be compensated, they responded that there was no agreement between them or with any contractor and that they did not know how much they would be paid or by whom.

15. The Respondent's investigator also testified that the Petitioner told her that he thought he would be paid and that he usually received about \$2,000 for similar work.

16. The evidence fails to establish that there was any commitment by anyone to pay \$2,000 to the Petitioner for his activities at the shopping center location on October 24, 2007.

17. There is no evidence that the Petitioner was compensated in any manner for any task performed at the shopping center location on October 24, 2007.

18. There is no evidence that the Petitioner directed Mr. Miller to remove the plywood board from the structure.

19. There is no evidence that there was any agreement between the Petitioner and Mr. Miller under which Miller would receive any compensation for any tasks performed at the shopping center on October 24, 2007.

20. There is no evidence that the Petitioner ever employed Mr. Miller in any capacity or provided any compensation of any kind to Mr. Miller.

21. Sams Property Investment did not have workers' compensation coverage for the two men on October 24, 2007.

22. The Respondent's investigator testified without contradiction that neither the Petitioner nor Mr. Miller had workers' compensation coverage on October 24, 2007, and that there was no statutory exemption or exclusion applicable to this case.

23. The investigator requested the Petitioner to provide certain business records to facilitate computation of a proposed penalty.

24. The Petitioner earns his living as a laborer, taking whatever work comes to him. In a letter to the Respondent,

counsel for the Petitioner asserted that the Petitioner does not have any banking accounts, has not filed a tax return in many years, and was unable to provide business records because there were none.

25. Because the Petitioner provided no business records in response to the Respondent's request, the Respondent determined an imputed penalty as provided by statute, reflecting a determination that the Petitioner was Mr. Miller's employer.

26. On December 6, 2007, the Respondent issued an Amended Order of Penalty Assessment setting forth an imputed penalty of \$175,199.16. There is no evidence that the mathematical calculation of the imputed penalty was performed incorrectly.

27. The Petitioner and Mr. Miller became employed by Sams Property Investments in November 2007, which provided workers' compensation coverage during the period of employment.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

29. The administrative fine at issue in this proceeding is penal in nature. In order to prevail, the Respondent must demonstrate by clear and convincing evidence that the Petitioner was required to be in compliance with the applicable statutes on the referenced date, that he failed to meet the requirements,

and that the proposed penalty is appropriate. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

30. In this case, the burden has not been met.

31. Every employer is required to obtain workers' compensation coverage for employees unless a specific exemption or exclusion is provided by law. See §§ 440.10 and 440.38, Fla. Stat. (2007).

32. Section 440.02, Florida Statutes (2007), provides the following applicable definitions:

(8) "Construction industry" means for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land. However, "construction" does not mean a homeowner's act of construction or the result of a construction upon his or her own premises, provided such premises are not intended to be sold, resold, or leased by the owner within 1 year after the

commencement of construction. The division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term "construction industry" as set forth in this section.

* * *

(15)(a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

* * *

(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.

* * *

(17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) "Employment" includes:

* * *

2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

(Emphasis supplied)

33. As the term is defined, "construction industry" activities must be "for profit." In this case, there is no evidence that the Petitioner received any compensation for his activities at the shopping center on October 24, 2007. There is no evidence whatsoever that any party was obligated to compensate the Petitioner, financially or otherwise, for his appearance at the site on the date in question. There is no credible evidence that the Petitioner's subsequent employment by the general contractor was contingent upon his review of the structure on October 24, 2007. The Petitioner was at the shopping center on October 24, 2007, with little more than a hopeful assumption that he would be compensated for his activities.

34. Additionally, there is no credible evidence that the Petitioner was an employer or that Mr. Miller was the Petitioner's employee. There is no evidence that the Petitioner ever employed any person at any time.

35. There is no evidence that the Petitioner directed Mr. Miller to remove the plywood board from the structure or that the Petitioner directed the activities of Mr. Miller at any time.

36. There is no evidence that Mr. Miller received remuneration from the Petitioner on October 24, 2007, or at any other time. The evidence fails to establish that anyone was obligated to compensate Mr. Miller for pulling the board off the building.

37. Section 440.107, Florida Statutes (2007), provides the Respondent with the authority to assess an imputed penalty against an employer who fails to provide business records within five days of a request from the Respondent. In this case, the Respondent requested the records and received none; accordingly, a penalty of \$175,199.16 was assessed against the Petitioner. As stated herein, the evidence is insufficient to establish that the Petitioner was an employer, and the referenced section is inapplicable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner enter a final order dismissing the Amended Order of Penalty Assessment issued against Dennis Lamar Flint.

DONE AND ENTERED this 20th day of August, 2008, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 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.