STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 08-0256
RANDALL LEE SOUTHERLAND,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this case was heard before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 26, 2008, in Fort Myers, Florida.

APPEARANCES

For Petitioner: Kristian Dunn, Esquire
Anthony B. Miller, Esquire
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Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Randall Lee Southerland, pro se
12330 Coyle Road
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STATEMENT OF THE ISSUES

Whether Respondent, Randall Lee Southerland, conducted operations in the construction industry in the State of Florida without obtaining workers' compensation coverage, meeting the requirements of Chapter 440, Florida Statutes (2007),[1] in violation of Subsection 440.107(2), Florida Statutes.

If so, what penalty should be assessed by Petitioner, Department of Financial Services, Division of Workers' Compensation, pursuant to Section 440.107, Florida Statutes (2007), and Florida Administrative Code Chapter 69L.

PRELIMINARY STATEMENT

On November 30, 2007, Petitioner issued and served a Stop-Work Order (SWO) and Order of Penalty Assessment, number 07-364-D7, to Respondent alleging that Respondent failed to abide by the requirements of the Workers' Compensation Law. The SWO required Respondent to cease all business operations. Petitioner then requested business records from Respondent, which when reviewed, caused Petitioner to assess a penalty against Respondent. An Amended Order of Penalty Assessment (Amended Order) was issued and served on Petitioner on March 26, 2008, which assessed a penalty in the amount of $1,168.68. Petitioner timely requested an administrative hearing, and, on January 15, 2008, Respondent filed the petition and other documents with the DOAH. Petitioner raised the issue of whether

Respondent was working in the construction industry when the SWO was issued. The final hearing proceeded under the Amended Order.

The final hearing took place on March 26, 2008. Petitioner presented the testimony of one witness, Investigator Eric Duncan. Respondent proceeded pro se and testified in his own behalf. Petitioner's Exhibits numbered 1 through 5 were offered and received into evidence. Respondent did not offer any documents into evidence at the hearing.

The parties were directed to file proposed findings of fact and conclusions of law within ten days of the filing of the transcript. A one-volume Transcript of the hearing was filed with the DOAH on April 7, 2008.

Respondent filed "Written Arguments for the Respondent," on April 11, 2008. These have been considered. Respondent also included folders containing exerpts from Chapter 440, Florida Statutes; instructions and forms for Schedule C (Form 1040) from the IRS; and other documents which were not offered as an exhibit during the hearing but were submitted along with the written arguments. These have not been considered. Petitioner filed its Proposed Recommended Order on April 17, 2008, which has been considered.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees. § 440.107, Fla. Stat.

2. Respondent is a sole proprietor, allegedly engaged in the construction industry, providing tile and grouting services and carpet removal to private residences in Florida.

3. On November 30, 2007, Eric Duncan and Alison Pasternak, both of whom are workers' compensation investigators for Petitioner, were conducting random compliance checks in Lee County. Investigator Duncan noticed two men working outside of a residence in Cape Coral, one using a power saw and the other mixing a substance in a bucket. Investigators Duncan and Pasternak decided to conduct a compliance check of these two men to ensure they were workers' compensation coverage compliant. The two men identified themselves as Randall Lee Southerland and Tim Weaver.

4. Weaver produced his Exemption Certificate for workers' compensation coverage. No further action was taken in regards to that investigation.

5. Southerland was observed mixing the substance, which was later determined to be tiling grout. Southerland did not

have a workers' compensation insurance policy, a coverage exemption certificate, nor was he employed via a leasing agency.

6. After consulting with his supervisor, Investigator Duncan issued SWO No. 07-364-D7 to Respondent along with a Business Records Request for the time-period of December 1, 2004, through November 30, 2007.

7. Respondent provided records to Petitioner shortly thereafter, and, subsequently, a penalty assessment was calculated. The calculations of Respondent's gross payroll was necessary since it was alleged that he worked in the construction field of tiling.

8. Respondent disputes this classification and argues that grouting is separate from the installation of tiles and is not a classification within the construction field. Therefore, neither a workers' compensation insurance policy, nor an exception is required.

9. The National Counsel on Compensation Insurance (NCCI) established a codification of construction employment activities; all of which have been adopted by Petitioner and are commonly referred to as "class codes." The NCCI class code for tiling is "5348."

10. It is undisputed that Respondent was doing the grout-work for the newly installed tiles. It is further undisputed that the definition of tiling, per the NCCI class code "5348,"

included the finishing, setting, and installation of tiles. It was also established that loose tiles, merely laying on the floor, are not finished, nor set, until the grout is laid.

11. Pursuant to Section 440.107, Florida Statutes, the calculation of the penalty was completed on a penalty calculation worksheet. The worksheet was completed by examining the records received from Respondent and calculating the gross payroll that was paid to him. The penalty was later amended to reflect additional records provided through discovery, the evidence of the payment for the November 30, 2007, job consisting of a $500.00 check from the real estate agent. The Amended Order assessed a penalty of $1,168.68, which is the applicable amount of the premium evaded and includes the 50 percent penalty for the time period of December 1, 2004, through November 30, 2007.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes. The parties received adequate notice of the administrative hearing.

13. Because administrative fines are penal in nature, Petitioner has the burden to prove by clear and convincing evidence that Respondent failed to be in compliance with the coverage requirements set forth, by not securing the payments of

workers' compensation with mandatory coverage. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

14. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees, unless exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is, therefore, required by the employer.

15. Subsection 440.10(1), Florida Statutes, provides in pertinent part:

> (a) 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 [the workers' compensation statute]. . . . 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.

16. The policy or endorsement for such employees must utilize Florida class codes, rates, rules, and manuals that are in compliance with the provisions of Chapter 440, Florida Statutes, as well as the Florida Insurance Code.

See § 440.02(8), Fla. Stat.

17. "Employer" is defined as "every person carrying on any employment." § 440.02(16) Fla. Stat.

18. "Employment" is defined, in pertinent part as, “any service performed by an employee for the person employing him or her.” “Employment includes: . . . All private employments in which four or more employees are employed by the same employer, or with respect to the construction industry [it includes] all private employment in which one or more employees are employed by the same employer.” § 440.02(17)(a) and (b)2., Fla. Stat.

19. "Employee" is defined in Subsection 440.02(15), Florida Statutes, in pertinent part:

> (c) “Employee” includes:
>
> * * *
>
> 2. All persons who are being paid by a construction contractor as a subcontractor . . .
>
> 3. An independent contractor working or performing services in the construction industry.
>
> 4. A sole proprietor who engages in the construction industry . . .

20. Section 440.107, Florida Statutes, also sets out the Petitioner’s duties and powers to enforce compliance with the requirement to provide for the payment of workers’ compensation. Subsection 440.107(3)(g), Florida Statutes, authorizes Petitioner to issue SWOs and penalty assessment orders in its enforcement of workers’ compensation coverage requirements.

21. As to penalties, 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 preceeding 3-year period or $1,000, which ever is greater.

22. Respondent was an "employer" and "employee" for workers' compensation purpose because he was a sole proprietor engaged in the construction industry. §§ 440.02(15)(c)4., 440.02(16)(a), and 440.02(17)(b)2., Fla. Stat.

23. Pursuant to Florida Administrative Code Rule 69L-6.021, tiling includes the act of grouting and installation of tiles.

24. 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 of 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.

The SWO therefore was not only justified, it was mandated.

25. By Florida Administrative Code Rule 69L-6.027, Petitioner adopted a penalty calculation worksheet to use in calculating penalties to assess against employers who do not secure the payment of workers' compensation.

26. The penalty was based on records received from Respondent, and Petitioner applied the proper methodology in calculating the ultimate penalty of $1,686.68. This is the true and correct penalty for Respondent's violation.

27. The testimony of Respondent and the evidence were not persuasive in rebutting Petitioner's evidence. Even though Respondent admitted that he engaged in the trade of grouting tiles, he argued that he should not be assessed a penalty based on his own interpretation of "construction." If Respondent is involved in a construction activity, his claims that his interpretation of what constitutes construction and what does not, are without merit, since Petitioner has already adopted a codification of "construction."

28. The central issue in Respondent's argument appears to be that since he did not place the tile, which Petitioner does not controvert, he was not actually engaged in "tiling," per the NCCI class code definition. That argument is not persuasive

because merely laying the tile is not actually completing the tile job. From the evidence and the adopted NCCI class code definition of tiling, admitted into evidence, it is conclusive that "tiling" includes the finished product such as putting the "quick-set cement" beneath the recently-laid tiles and the grouting and then sealing of the grout between the tiles. The adopted class code considers the finished product as the fruit of the multiple labors and processes involved, not just the simplistic act of bringing in the tiles and putting them on the floor, without the quick-set cement, grout, or grout-sealing agents.

29. Respondent also argues that his activities did not meet the "substantial-ness" requirement of the statute. Respondent argues that his involvement in a minor job of tiling in the house does not rise to the level of "substantial improvement."

30. Subsection 440.02(8), Florida Statutes, states:

> "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.

31. Respondent confuses the application of the term "construction industry," as it relates to his activities. Although Respondent contends that his labor was insubstantial, he admitted that the floor of the house he was working on suffered significant water damage to the point that the carpet had to be replaced and 465 square feet of new tile installed. Although his labor may have only cost $500.00, the amount of improvement to the house would likely be much more.

32. Furthermore, what is allowed for a certificate of occupancy in Lee County was not considered, since this was not offered into evidence at the time of the hearing, and is irrelevant in any event.

33. Respondent also contends that since the house he was working on was not under construction, his activities were not construction. This argument is fallacious because under his definition only new construction would be considered construction, and home improvements, whether roofing, tiling, carpentry, plumbing, and a myriad of other jobs, no matter how large or small, would not be under the umbrella of workers' compensation coverage guidelines. Nowhere in Subsection

440.02(8), Florida Statutes, is it mentioned that construction only means new construction.

34. Respondent further argues that as a sole proprietor he is not liable for non-compliance with workers' compensation coverage requirements. Essentially, his argument is that if a sole proprietor has a worker laboring for him, then the worker is an employee; therefore, the sole proprietor is the employer. Respondent further contends that an employer acting as a sole proprietor is shielded from the requirements of workers' compensation coverage because a sole proprietor with no employees is the worker, the paymaster, and the boss of himself all at once. Respondent attempts to invoke an equitable concept that since exemption certificates for workers' compensation coverage exist for qualified individuals who have gone though the process of incorporating their business, there should be a similar provision for sole proprietors. However, such an assertion is not based on any applicable statute or rule.

35. The allegation that Investigator Duncan violated the law by computing the penalty via bank statements and tax returns is incorrect. Respondent contends that since he did not have payroll receipts to himself that Petitioner improperly calculated the penalty. Respondent asserts that the income derived from his construction activities should not be considered payroll since it went to his bank and not to his

billfold. This ideal of cash-in-hand only equaling effective pay is not logical nor legally consistent with any existing law.

36. In Respondent's third argument, he seeks to introduce evidence not admitted at the hearing. Therefore, any such reference or consideration has not been considered.

37. The amount established by uncontroverted proof was that Respondent earned $500.00 on this job. To now claim that he only earned $465.00 is entirely inappropriate and has been disregarded. Further Respondent claims that the $500.00 job initially observed is now divided into a $232.00 job for grout installation and $233.00 for carpet removal. The use of Respondent's written arguments to introduce new evidence is not appropriate and has not been considered.

38. By clear and convincing evidence, Petitioner has proven that Respondent violated Sections 440.10 and 440.38, Florida Statutes, in the period from December 1, 2004, to November 30, 2007. By not complying with the requirements for workers' compensation coverage, Respondent was in clear violation of the law. Petitioner was justified and mandated by law to issue and serve a SWO to Respondent and was further justified in assessing the mandated penalty of $1,686.68 to him, based on the records provided to Petitioner.

RECOMMENDATIONS

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

RECOMMENDED that Petitioner enter a final order:

1. Finding that Respondent failed to secure the payment of workers' compensation coverage for the sole proprietor, Randall Lee Southerland, in violation of Subsections 440.10(1)(a) and 440.38(1), Florida Statutes; and

2. Assessing a penalty against Respondent, in the amount of $1,168.68, which is equal to 1.5 times the evaded premium based on the payroll records provided by Respondent and the applicable approved manual rate and classification code.

DONE AND ENTERED this 3rd day of June, 2008, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2008.

ENDNOTE

[1/] All references to Florida Statutes are to Florida Statutes (2007), unless otherwise indicated.

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.