

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
) Case No. 08-2082
vs.)
)
HORACE BRADLEY SHEFFIELD)
BUILDERS, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on July 21, 2008, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Douglas Dolan, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether the Department of Financial Services, Division of Workers' Compensation, correctly assessed and collected an assessment of penalty against Respondent.

PRELIMINARY STATEMENT

The style of this cause is hereby amended as set-out above in order to reflect the burden of proof and the duty to go forward in this proceeding.

On March 25, 2008, Petitioner Agency issued and served a Stop-Work Order and Order of Penalty Assessment on Respondent, alleging that Respondent was not in compliance with the coverage requirements of the Florida Workers' Compensation Law, which is Chapter 440, Florida Statutes, and the Florida Insurance Code. Respondent was ordered to cease all business operations. Respondent filed a Petition challenging the Stop-Work Order and Order of Penalty Assessment, alleging that the employee, because of whom the penalty was assessed, had an election to be exempt from workers' compensation, and requesting a disputed-fact hearing.

On April 11, 2008, the Department issued and served an Amended Order of Penalty Assessment, assessing against Respondent LLC a penalty in the amount of \$1,000.00, pursuant to Section 440.107(7)(d), Florida Statutes.

Respondent agreed not to employ the individual who occasioned the penalty and paid the penalty in order to lift the Stop-Work Order and be able to continue its business endeavors. However, Respondent never withdrew its request for hearing. The

cause was referred to the Division of Administrative Hearings on or about April 24, 2008.

Accordingly, it might be said that the true issue herein is whether or not the Department is entitled to retain Respondent's \$1,000.00.

At final hearing on July 21, 2008, Petitioner presented the oral testimony of Torry McClellan and Mark Mark and had seven exhibits admitted in evidence. Respondent did not appear or present any evidence.

A Transcript was filed with the Division on July 30, 2008. The Department filed its Proposed Recommended Order on August 5, 2008. Despite the entry on July 31, 2008, of a Post-Hearing Order explaining how proposed recommended orders were to be composed and filed, Respondent did not file a proposal on or before August 11, 2008, as permitted by law.

All statutes and rules referenced herein are the same for 2007 and 2008.

FINDINGS OF FACT

1. On March 25, 2008, the Agency's investigator, Torry McClellan, conducted a compliance check at 6472 Tracy Lane, Tallahassee, Florida, to verify compliance with the workers' compensation statutes.

2. At the worksite, Mr. McClellan observed three men carrying out carpentry work.

3. Mr. McClellan interviewed John Harrell and Bradley Sheffield, II, and requested proof of workers' compensation coverage.

4. John Harrell did not have proof of a current valid election to be exempt from workers' compensation.

5. The Agency's Coverage and Compliance Automated System (CCAS) lists active workers' compensation policies and exemptions throughout Florida. Utilizing CCAS, Mr. McClellan was unable to locate a current valid election to be exempt from the requirement of securing the payment of workers' compensation for John Harrell. John Harrell's previous exemption had expired in 2003. Mr. McClellan was also unable to locate proof of either John Harrell or Respondent LLC securing the payment of workers' compensation through the purchase of an insurance policy or by any other means.

6. Mr. McClellan testified that John Harrell admitted, and Horace Bradley Sheffield, Sr., confirmed, to Mr. McClellan that John Harrell was a subcontractor of Respondent Horace Bradley Sheffield Builders LLC, on March 25, 2008. Mr. Sheffield Sr.'s statement is accepted in evidence as an admission by Respondent LLC via its corporate principal and agent. Mr. Harrell's alleged statement is not even supplemental hearsay, pursuant to Section 120.57 (1) (c), Florida Statutes.

7. On March 25, 2008, Mr. McClellan issued and served a Stop-Work Order and Order of Penalty Assessment on Respondent through Horace Bradley Sheffield, Jr., for failure of Respondent to meet the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. Thereby, the LLC was ordered to cease all business operations, and a \$1,000.00 penalty was assessed against the LLC, pursuant to Section 440.107(7)(d)1., Florida Statutes.

8. On March 25, 2008, Mr. McClellan also issued and served on Respondent a Division of Workers' Compensation Request for Production of Business Records for Penalty Assessment Calculation.

9. Respondent complied with the Department's request and submitted the required records.

10. Utilizing the SCOPES Manual, published by the National Council of Compensation Insurance and adopted by Florida Administrative Code Rule 69L-6.021 as guidance, Mr. McClellan determined that carpentry is within the construction industry and assigned Occupation Code 5651 to Respondent's activities.

11. Based on Respondent's business records, Mr. McClellan issued an Amended Order of Penalty Assessment, and served it on Respondent LLC through Horace Bradley Sheffield, Sr., on April 11, 2008, in the amount of \$1,000.00, which is an amount

greater than the calculated amount due per Respondent LLC's payroll. One thousand dollars is the statutory minimum.

12. At some point, Respondent paid the \$1,000.00, in order to get the Stop-Work Order lifted but did not withdraw the request for hearing.

CONCLUSIONS OF LAW

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

14. Petitioner is the state agency responsible for enforcing the requirement of the Workers' Compensation Law that employers secure the payment of compensation for their employees.

15. Petitioner herein bears the duty to go forward and burden of proof by "clear and convincing" evidence, pursuant to Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Triple M Enterprises, Inc. v. Dept. of Financial Services, Division of Workers' Compensation, DOAH Case No. 04-2524 (RO: January 13, 2005; FO: not available); Dept. of Financial Services, Division of Workers' Compensation v. U & M Contractors, Inc., DOAH Case No. 04-3041 (RO: April 7, 2005; FO: April 27, 2005).

16. Pursuant to Section 440.107(3)(g), Florida Statutes:

The department shall enforce workers' compensation coverage requirements including the requirement that the employer secure the payment of workers' compensation. . . . In addition to any other powers under this chapter, the department shall have the power to:

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

17. Pursuant to Florida Administrative Code Rules 69L-6.029(3)(g) and (4) and 69L-6.030(6), if a contractor does not obtain evidence of a valid Certificate of Election to be Exempt and the subcontractor has failed to secure the payment of workers' compensation, the contractor will be issued a Stop-Work Order, and a penalty will be assessed against the contractor, pursuant to Section 440.107(7)(d)1., Florida Statutes, based upon the payroll of all uninsured subcontractors or limited to \$1,000.00, whichever is greater.

18. Section 440.02(16)(a), Florida Statutes, defines "employer" in part as ". . . every person carrying on any employment . . .". Respondent was an "employer," as statutorily defined, because it employed various parties.

19 Section 440.02(15)(c), Florida Statutes, defines "employee" in part as:

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.. . . .

20. Therefore, herein, John Harrell was an "employee" because he had not validly elected to be exempt from securing the payment of workers' compensation.

21. Section 440.02(17)(b) defines "employment" in part as:

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

22. Therefore, it is concluded that Respondent herein engaged in "employment" because he was in the construction industry and employed John Harrell.

23. The Department has adopted construction industry classification codes contained in the Basic Manual (SCOPES Manual), published by the National Council on Compensation Insurance. See Florida Administrative Code Rule 69L-6.021, referencing Section 440.02(8), Florida Statutes, as specific authority and statutes to be implemented.

24. Pursuant to Section 440.02(8), Florida Statutes, the Department may, by rule, establish standard industrial classification codes, and definitions thereof, which meet the criteria of the statutory term "construction industry,"

contained in that subsection. Therefore, it is concluded that Petitioner worked in the construction industry because the SCOPES Manual considers the class code assigned to "carpentry" to be in the construction industry and because building a structure meets the lengthy statutory definition at Section 440.02(8), Florida Statutes.

25. On March 25, 2008, Respondent was a corporation engaged in the construction industry.

26. Florida's Workers' Compensation Law requires employers to secure the payment of workers' compensation for their employees. See §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

27. Pursuant to Section 440.107(2), Florida Statutes, "securing the payment of workers' compensation" means obtaining the coverage that meets the requirements of Chapter 440 and the Florida Insurance Code. Respondent did not secure the payment of workers' compensation.

28. Pursuant to Section 440.05(5), Florida Statutes, a Notice of Election to be exempt shall be effective when issued by the Department. In this case, Petitioner's employee (Harrell) did not have a Notice of Election to be Exempt issued by the Department.

29. Pursuant to Section 440.05(6), Florida Statutes, a construction industry Certificate of Election to be Exempt shall be valid for two years after the effective date stated thereon.

In this case, John Harrell's previous exemption had expired five years previous to any time material.

30. Respondent was an employer, engaged in employment, with an employee, working in the construction industry, and not in compliance with Chapter 440, Florida Statutes. Respondent was correctly assessed a penalty.

31. Pursuant to Section 440.107(7)(d)1.:

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 \$1,000.00, whichever is greater.

32. Petitioner's penalty was correctly assessed by the Department at \$1,000.00.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services that affirms, approves, and adopts the Stop-Work Order and Second Amended Order of Penalty Assessment at \$1,000.00, and which permits the Agency's retention of the \$1,000.00 penalty.

DONE AND ENTERED this 28th day of August, 2008, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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 28th day of August, 2008.

COPIES FURNISHED:

Douglas Dolan, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

Horace Sheffield
Horace B. Sheffield Builders, LLC
4564 Ambervalley Drive
Tallahassee, Florida 32312

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

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.