

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 08-2105
)
CAPELLA VENTURES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On August 4, 2008, a hearing was held via videoconference in Jacksonville and Tallahassee, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Kristian Dunn, Esquire
Assistant General Counsel
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Peter King
1446 Silver Street
Jacksonville, Florida 32206

STATEMENT OF THE ISSUE

Whether Respondent has committed the acts alleged in the Stop Work Order and Order of Penalty Assessment and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This case arose with the filing of a request for hearing on a Stop Work Order and Order Penalty Assessment issued by the Department of Financial Services, Division of Workers' Compensation (The Department). The case was originally docketed at the Division as Case No. 06-3355 and assigned to the undersigned. On March 19, 2007, Case No. 06-3355 was closed based on a Joint Motion of the parties that asserted they had achieved a settlement. On April 21, 2008, the Department filed a Motion to Re-Open the Case, alleging that the parties had reached an impasse. On April 30, 2008, the case was re-opened as DOAH Case No. 08-2105 and the parties were directed to provide several mutually acceptable dates for hearing.

In a Joint Status Report, counsel for both parties notified the undersigned that counsel for Respondent, Capella Ventures, Inc. (Capella Ventures), had diligently attempted to contact his client, with no response. The parties requested that a notice be sent by the Division informing Respondent that it needed to respond within a reasonable period of time or waive their representation of counsel. The undersigned declined to issue such an order, and directed the parties to the Uniform Rules of Procedure governing motions for leave to withdraw.

Counsel for Respondent, Gordon Nicol, Esquire, filed a Motion to Withdraw in accordance with Florida Administrative Code Rule 28-106.105, and an Order issued granting the Motion to

Withdraw and requiring a response from Respondent. The Order, sent to Peter King at 308 East 4th Street, Jacksonville, Florida 32206, was returned to the Division as undeliverable.

In order to ensure that the only known representative for Capella Ventures, Inc., received notice of these proceedings, the undersigned consulted the Secretary of State's website for the Division of Corporations. The website indicated that an address change for Respondent was filed with the Secretary of State's office on August 17, 2006, and that Capella Ventures, Inc., filed for voluntary dissolution on January 9, 2008. An Order issued June 17, 2008, which chronicled the proceedings in this case and required both parties to respond concerning whether proceedings were still necessary.

Both parties responded to the Order. The Department indicated its intention to file a Motion for Leave to Amend the Style of the Case to reflect the new entity/person that Capella Ventures has become. However, no such motion was filed. Respondent filed a response through one of its officers, Peter King, indicating he had not known the proceedings still existed.

Petitioner then filed an Unopposed Motion to Continue Final Hearing based upon a scheduling conflict. The matter was rescheduled to August 4, 2008, and proceeded as scheduled. At hearing, the Department called one witness and Petitioner's Exhibits numbered 1-5 were admitted into evidence. Respondent presented one witness and no offered no exhibits. At the close

of hearing, the parties were directed to include in any proposed recommended orders argument related to the responsibilities of a dissolved corporation.

The hearing was recorded and the transcript was filed with the Division on August 15, 2008. A Proposed Recommended Order was timely filed by the Department; a late-filed Proposed Recommended Order was filed by Respondent on September 8, 2008. Both submissions have been carefully considered in the preparation of this Final Order. All references are to the 2005 edition of Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

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

2. On August 11, 2006, Robert Lambert, the Jacksonville District Supervisor for the Division of Workers' Compensation, Bureau of Compliance, was contacted by Katina Johnson, an investigator for the Division.^{1/}

3. Based on the information provided to him by Ms. Johnson, Mr. Lambert approved the issuance of a Stop Work Order against Capella Ventures, Inc.

4. The investigator served a Stop Work Order and Order of Penalty Assessment, both by posting at the worksite and by hand delivery, on Capella Ventures. The Department investigator also

issued a Request for Production of Business Records for Penalty Assessment, requesting records for a period of three years, from July 31, 2003. These records were requested in order to calculate the penalty required pursuant to Section 440.107, Florida Statutes, for not having workers' compensation insurance. The records were to be used in conjunction with the classification codes contained in the Basic Manual (Scopes Manual) published by the National Council on Compensation Insurance.

5. Records were provided by Capella Ventures' counsel. Based on the records provided, an Amended Order of Penalty Assessment was prepared, assessing a penalty of \$8,769.16.

6. Mr. Peter King was, at all times material to this case, an officer of Capella Ventures, along with his father. His father is now deceased.

7. Mr. King admitted that workers from Capella Ventures were assisting his father with a construction project on a home next to the home where they lived. He did not dispute that the workers were performing construction work and that the company had no workers' compensation coverage for them at the time. Nor did he dispute the amount of the penalty reflected in the Amended Order of Penalty Assessment. He contended that while his father performed the framing on the property, one of the two other employees did not have the skill to actually perform framing.

8. The class code used by the Department to determine the appropriate penalty was 5645, which is used for carpentry operations on residential structures. Use of this code was appropriate.

9. Capella Ventures filed for an address change in August of 2006, and voluntarily dissolved in January of 2008.

10. No evidence was presented regarding what actions were taken by Capella Ventures with respect to the dissolution of the corporation.

11. No evidence was presented regarding what, if any, distribution of assets was undertaken at the time of dissolution.

12. No evidence was presented to indicate that any successor corporation or entity was formed upon the dissolution of Capella Ventures.

CONCLUSIONS OF LAW

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

14. Given the penal nature of these proceedings, Petitioner has the burden of proof and must demonstrate by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessment is correct. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

15. Every "employer" is required to secure the payment of workers' compensation insurance for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. §§ 440.10 and 440.38, Fla. Stat. "Employer" is defined in part as "every person carrying on any employment." § 440.02(16), Fla. Stat. An "employee" is defined as including "a partner or partnership that is engaged in the construction industry." § 440.02(15)(c)4., Fla. Stat.

16. In accordance with Section 440.02(8), Florida Statutes, the Department has adopted construction industry classification codes contained in the Basic Manual (Scopes Manual) published by the National Council on Compensation Insurance. Fla. Admin. Code R. 69L-6.021. The Scopes Manual lists framing and carpentry as parts of the construction industry.

17. Section 440.107(7), Florida Statutes, provides in pertinent part:

(7)(a) Whenever the department determines that an employer . . . has failed to secure the payment of workers' compensation required by this chapter or to produce the required business records under subsection (5) within 5 business days after receipt of the written request of the department, 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 cessation of all business operations. . . . The Department may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this chapter and has agreed to remit periodic payments of the

penalty pursuant to a payment agreement
schedule with the department. . . .

* * *

(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, whichever is greater.

18. The Department has met its burden of proof in demonstrating that Respondent, Capella Ventures, violated the provisions of Section 440.07, Florida Statutes. Moreover, the method used by the Department for assessing the penalty is mandated by Section 440.107, Florida Statutes.

19. At hearing, the parties were directed to include in their proposed recommended orders argument regarding the effect dissolution of Capella Ventures would have on these proceedings. In the Department's Proposed Recommended Order, it claims that the voluntary dissolution does not remove the liability attached to its prior activity. It points to Florida Administrative Code Rule 69L-6.031 (Stop Work Orders in Effect Against Successor Corporations or Business Entities). However, Rule 69L-6.031 was adopted initially on October 29, 2006, after the events occurred in this case. While the rule has no application to the events giving rise to this case, the rule specifically implements

Section 440.07(7)(b), Florida Statutes, which provides in pertinent part:

(b) Stop work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

20. There is no evidence presented in this case to indicate that there is any successor corporation or business entity engaged in the same or equivalent trade or activity. While the Stop Work Order and Order of Penalty Assessment would clearly apply to such an entity, this provision has no application where, as here, there is no indication that such a successor entity exists.

21. Respondent points to the limitation of liability contained in Section 607.1405, Florida Statutes. That provision, which describes the effect of corporate dissolution, states in pertinent part:

607.1405 Effect of dissolution.--

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will not be distributed in kind to its shareholders;

(c) Discharging or making provision for discharging its liabilities;

(d) Distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share of transfer records;

(c) Subject its directors or officer's to standards of conduct different from those prescribed in ss. 607.0801-607.0850 except as provided in s. 607.1421(4);

(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(e) Prevent the commencement of a proceeding by or against a corporation in its corporate name;

(f) Abate or suspend a proceeding by or against a corporation on the effective date of dissolution; or

(g) Terminate the authority of the registered agent of the corporation.

(3) The directors, officers and agents of a corporation dissolved pursuant to s. 607.1403 shall not incur any personal liability thereby by reason of their status as directors, officers, and agents of a dissolved corporation, as distinguished from a corporation which is not dissolved.

22. While Capella Ventures has dissolved, the corporation, to the extent that it has assets, is still responsible for debts incurred prior to its dissolution. In re Southern Cinemas, Inc., 256 B.R. 250, 259 (Bank. M.D. Fla. 2000) (Florida law allows a corporation to temporarily exist beyond dissolution; the Florida Legislature did not intend for a corporation's debts to disappear upon dissolution). That being said, Section 607.1405(3) makes it clear that the debt remains the debt of the corporation and does not impose individual liability on the remaining shareholders. See also § 607.1406 (14) ("The aggregate liability of any shareholder of a dissolved corporation . . . may not exceed the amount distributed to the shareholder in dissolution."). Moreover, in this case, the Department has not brought action against the individual shareholder. It has limited its action to the now dissolved corporation, Capella Ventures. Any attempt to collect against the individual shareholder is beyond the scope of this proceeding.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding that Respondent, Capella Ventures, Inc., violated Section 440.107, Florida Statutes, by failing to secure workers' compensation for its employees, and assessing a penalty of \$8,769.16.

DONE AND ENTERED this 10th day of September, 2008, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of September, 2008.

ENDNOTE

^{1/} Ms. Johnson no longer works for the Department, and while the Investigative Report she prepared was accepted into evidence without objection, the narrative portion of her report is clearly hearsay. Unless it supplements or corroborates other evidence presented, the narrative summary cannot form the basis for a finding of fact. § 120.57(1)(c), Fla. Stat.

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.