

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 08-3078
)
JESUS SOSA, d/b/a JESUS SOSA)
CORP.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 14, 2008, a duly-noticed hearing was conducted by means of video teleconferencing with sites in Tallahassee and Jacksonville, Florida, by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Thomas H. Duffy, Esquire
Department of Financial Services
Division of Legal Services
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For Respondent: Seth Schwartz, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

This case arose with the issuance of a Stop Work Order and, thereafter, an Amended Order of Penalty Assessment by the Department of Financial Services, Division of Workers' Compensation (Department or Agency) against Jesus Sosa, d/b/a Jesus Sosa Corp. (Sosa). Sosa filed an Amended Petition to Set Aside Stop Work Order and Petition to Strike Amended Order of Penalty Assessment, and Petition for Temporary Release from Stop Work Order (request for hearing). On June 24, 2008, the request for hearing was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

Hearing was originally noticed for August 15, 2008. At the request of both parties, the case was continued and rescheduled for September 19, 2008. The Department's second request for a continuance was granted and the case was rescheduled a second time for October 14, 2008. At the hearing conducted that date, the Department presented the testimony of two witnesses, and the Department's Exhibits numbered 1-13 were admitted into evidence. Respondent presented the testimony of two witnesses and presented no exhibits.

The proceedings were recorded and a transcript was filed with the Division October 29, 2008. The Department's Unopposed Motion for Extension was granted, and the parties were afforded until November 17, 2008, to file post-hearing submissions. Both parties timely filed Proposed Recommended Orders, which have been

carefully considered in the preparation of this Recommended Order. The style of the case is changed to reflect the burden of proof. All references are to the 2007 version of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. The Division of Workers' Compensation is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees.

2. Lucio Cabrera is a workers' compensation compliance investigator for the Department. On April 1, 2008, he visited a work site in Jacksonville where 16 men were working on a multi-family apartment complex. Mr. Cabrera spoke to the workers and asked several questions designed to determine for whom the men worked and whether they were covered by workers' compensation insurance.

3. At the time of the site visit, Mr. Cabrera prepared a Field Interview Worksheet, upon which he recorded the names and other information regarding the men seen at the work site. He also created a separate document, which he requested the men to sign. The people present at the worksite on the day in question were Jose Sosa Santibanez, Alvaro Gaona, Edegun Gonzalez, Pablo Rodriguez, Jose Antonio Chavez, Jose Manuel Camacho, Crisoforo Chavez, Vicente Urbina Arreola, Francisco Zapata, Maximino Sanchez Simon, Francisco Javier Ortiz, Juan Rodriguez, Homero

Moreno Martinez, Pascual Castillo Moreno, Luis Manuel Rodrigues and Cipriano Patino Zabaleta.^{1/}

4. The men worked for Jesus Sosa Corp. Present at the job site was the company representative, Jesus Sosa Santibanez (Sosa). The company provided workers' compensation coverage through an employee leasing company, Convergence Employee Leasing, Inc. (Convergence). However, Sosa also paid the employees additional funds directly, for which no workers' compensation coverage was obtained.

5. Cabrera was able to confirm that while coverage was provided through Convergence, there was no separate coverage for the portion of salary provided directly by Sosa, and Sosa had not filed for an exemption from coverage as an owner or director of Jesus Sosa Corp.

6. On April 2, 2008, Mr. Cabrera served Mr. Sosa with a Request for Production of Business Records, which requested that Sosa provide certain enumerated business records for the period "12/22/08 through 3/21/08." Clearly, this request means to convey that records from December 22, 2007, through March 21, 2008, were to be supplied. The request specified that the records should be supplied within five business days, which would have made the responses due on or before April 9, 2008.

7. On April 1 and April 7, 2008, the Department received records related to the relationship between Convergence and Jesus Sosa Corp., including a copy of the employee leasing contract,

timecard verification reports for the period requested, a list of employees and their listed hire dates for purposes of payroll by Convergence. On April 17 and 29, 2008, additional records were produced, including a copy of Jesus Sosa's business license from the City of Jacksonville and copies of check stubs dating from December 27, 2007, through March 21, 2008.

8. On April 30, 2008, a Stop-Work Order was issued against Jesus Sosa, d/b/a Jesus Sosa Corp., a dissolved Florida corporation, requiring that Sosa and the company cease all business operations for all worksites in the state for failure to secure the payment of workers' compensation. The Stop-Work Order was served on counsel for Mr. Sosa by hand delivery May 1, 2008.

9. On May 1, 2008, Mr. Cabrera also provided to counsel for Mr. Sosa, a second Request for Production of Business Records for the period of February 17, 2006, through April 30, 2008, for the purpose of enabling the Department to determine the appropriate penalty for violation of the provisions of Section 440.07, Florida Statutes. Like the prior request, records were to be produced within five business days.

10. Although not entirely clear when they were received, sometime in May 2008, additional records in the form of a handwritten disbursement ledger were provided to the Department. However, no records such as traditional payroll records, tax records, quarterly earnings reports or certificates of exemption

were received. The check stubs for the additional period of time requested could not be located.

11. Mr. Sosa admitted freely that he paid additional amounts to his employees over and above what they were paid through his arrangement with Convergence. He insisted that employees were paid this additional compensation by check and not by cash. There is no admissible, credible evidence to refute this assertion, and Mr. Sosa's testimony is credited.

12. The Department decided that the records provided were insufficient to determine the payroll for the company. Accordingly, the Department decided that salary would be imputed, based upon the statewide average weekly wage as defined in Section 440.12(2), Florida Statutes, multiplied by 1.5.

13. The Department entered an Amended Order of Penalty Assessment on May 27, 2008. The Amended Order of Penalty Assessment assessed a penalty of \$909,941.76.

14. There are two aspects of imputing payroll relevant to these proceedings. First, whether there was sufficient information to determine the amount that would be considered salary for the employees involved, and second, the duration of their employment by Sosa.

15. Sosa appeared in this hearing with the assistance of an interpreter. Clearly, he is more comfortable communicating in Spanish than he is in English. Although the investigator spoke Spanish to the individuals at the worksite, neither the Stop Work

Order nor the Requests for Production of Business Records are in Spanish.^{2/} Mr. Sosa admitted that his records were disorganized and in some respects incomplete. However, he indicated that he provided what records he had in his possession.

16. The Convergence records provided indicate that a contract was entered into between Sosa and Convergence on October 15, 2007, and payments for workers compensation were made on behalf of relevant employees from that date forward for the period records were originally requested. The Convergence records also include an employee roster with hire dates for each employee.

17. For the requested time period prior to December 22, 2007, Sosa provided a handwritten disbursement record. The record includes four columns: 1) the date; 2) the payee; 3) what appear to be reimbursement amounts for items such as gas, rent, tools, etc.; and 4) what appears to be a total amount provided to the payee.

18. It would be difficult from the information provided to determine how much salary each employee was paid. Based on the admissible evidence provided, imputation of salary was appropriate based on the statewide average weekly wage for framing.

19. The Department imputed salary for each employee from February 17, 2006. It determined that the period of employment for each employee could not be determined from the records

provided, and therefore, imputed salary for all sixteen men from the date of incorporation.

20. Sosa testified that many of his employees were hired not long before the site visit because he had received more work framing out the buildings of an apartment complex. In the normal course of business, he would not have sufficient work for so many employees. His testimony is consistent with the increase in the number of employees covered by Convergence over the period of time Convergence records were provided, and is credited.

21. A careful comparison of the Convergence records, the check stubs and the handwritten ledger give a fairly consistent indication of how long each employee worked for Mr. Sosa. The Department had sufficient information to determine the length of employment for each person listed as being present April 1, 2008. While there are some variations in spelling for some names provided, it is sufficiently clear to be able to determine who is being referenced.

22. Jose Sosa Santibanez ran the company. Although he testified that he did not actually perform any work for a few months after incorporating the company, there are no records to support his assertion, and he provided no actual "start date." Therefore, it is appropriate to impute salary for Mr. Sosa for the full period beginning February 17, 2006.

23. The list provided to the Department by counsel for Respondent indicated that Alvaro Gaona (also spelled Garna) was

hired June 16, 2006. The earliest record of payment to Mr. Gaona was October 14, 2006. Payments were made on his behalf by Convergence since October 15, 2007. For the purpose of imputing salary, Goana's start date should be listed as June 16, 2006.

24. Edegun Gonzalez (also listed as Edeon Gonzales) was listed as being hired November 2, 2007. The earliest record on the disbursement ledger for him is November 2, 2007, and Convergence lists his hire date as November 8, 2007. For the purpose of imputing salary, Edegun Gonzalez' start date should be listed as November 2, 2007.

25. Pablo Rodriguez was listed as being hired November 2, 2007. The earliest record related to Pablo Rodriguez on the disbursement ledger is also November 2, 2007. The hire date listed by Convergence is March 10, 2008. For the purpose of imputing salary, Pablo Rodriguez's start date is November 2, 2007.

26. José Chavez is listed as being hired November 30, 2007. The earliest record of payment to José Chavez in the disbursement ledger is November 30, 2007. Convergence lists his hire date as November 8, 2007. For the purpose of imputing salary, José Chavez' start date is November 8, 2007.

27. José Manuel Camacho (also spelled Clamacho) is listed as beginning employment November 30, 2007. The earliest record of payment to Camacho is November 30, 2007. Convergence lists

his hire date as December 10, 2007. For the purpose of imputing salary, Camacho's start date is November 30, 2007.

28. Crisoforo Chavez is listed as being hired September 28, 2007, and the earliest record of payment to him is also September 28, 2007. Convergence lists his hire date as November 8, 2007. For the purpose of imputing salary, Crisoforo Chavez' start date is September 28, 2007.

29. Vicente Urbina Arreola is listed as being hired February 29, 2008. The earliest record of any payment to him is also February 29, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Urbina's start date is February 29, 2008.

30. Francisco Zapata is listed as being hired February 29, 2008. The earliest record of any payment to him is also February 29, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Zapata's start date is February 29, 2008.

31. Maximino Sanchez Simon listed as being hired February 29, 2008. The earliest record of any payment to him is also February 29, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Maximino Sanchez' start date is February 29, 2008.

32. Francisco Javier Ortiz is listed as being hired March 7, 2008. The earliest record of any payment to him is also March 7, 2008. Convergence lists his hire date as March 10,

2008. For the purpose of imputing salary, Ortiz' start date is March 7, 2008.

33. Luis Manuel Rodrigues is listed as being hired March 7, 2008. The earliest record of any payment to him is March 14, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Luis Rodrigues' start date is March 7, 2008.

34. Juan Rodriguez is listed as being hired March 7, 2008. The earliest record of any payment to him is also March 7, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Juan Rodriguez's start date is March 7, 2008.

35. Homero Moreno Martinez is listed as being hired March 7, 2008, and the earliest record of payment to him is also March 7, 2008. Convergence lists his hire date as March 10, 2008. For the purpose of imputing salary, Homero Martinez's start date is March 7, 2008.

36. Pascual Castillo Moreno is listed in Petitioner's Exhibit 12 as being hired April 11, 2008. There is no record of any payments to him in the check stubs or disbursement ledger. Convergence lists his start date as March 10, 2008, and payments were made on his behalf. The listed start date in Exhibit 12 is in error, as Mr. Moreno was present at the work site on April 1, 2008. However, because there is no admissible evidence of

additional payments to him, there is no basis for imputing salary for Pascual Castillo Moreno.

37. Cipriano Patino Zabaleta is also listed in Exhibit 12 as being hired April 11, 2008. There is no record of any payments to him in the check stubs or disbursement ledger. Convergence lists his start date as March 10, 2008, and payments were made on his behalf. Like Moreno, Cipriano Zabeleta was present on April 1, 2008, and was covered by Convergence at that time. Inasmuch as there is no admissible evidence of additional payments to him, there is no basis for imputing salary for Mr. Zabaleta.

38. The Department imputed salary for all 16 employees through April 30, 2008. Records were requested through April 30, 2008, and no additional records beyond March 22, 2008, were provided. However, Sosa admitted that the men were employed through April 25, 2008. Imputation of salary for the employees for which imputation of salary is appropriate should be calculated through April 30, 2008.

CONCLUSIONS OF LAW

39. 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 (2008).

40. The Department is seeking an administrative fine. Because administrative fines are penal in nature, the Department

is required to prove by clear and convincing evidence that Mr. Sosa failed to provide his employees with workers' compensation insurance coverage. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); 2 Friends, Inc. d/b/a La Paz Mexican Grill v. Department of Financial Services, Division of Workers' Compensation, Case No. 07-2041 (DOAH July 30, 2008). The Department in its Proposed Recommended Order acknowledged this burden of proof.

41. The following provisions of the Florida Statutes are relevant to the resolution of this case:

440.015 Legislative Intent.-- It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. . . . It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department, agency, the Office of Insurance Regulation, the Department of Education and the Division of Administrative Hearings shall administer the Workers' Compensation law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. (Emphasis supplied).

440.107 Department powers to enforce employer compliance with coverage requirements.--

(2) For the purpose of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section. . . .

* * *

(7)(a) Whenever the department determines that an employer who is required to secure the payment to 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 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 the 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. . . .

* * *

(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 the 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.

* * *

(e) 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. (Emphasis supplied.)

42. An "employer" is defined as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her." § 440.02(17)(a), Fla. Stat. "Employee means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment" § 440.02(15)(a), Fla. Stat.

43. Jesus Sosa Corp. is an "employer" as defined by Section 440.02(16)(a), Florida Statutes, and the 16 individuals at the worksite April 1, 2008, are "employees."

44. In this case, there is no dispute that Sosa provided workers' compensation coverage by means of an employee leasing company, Convergence, for the period beginning October 15, 2007, through March 22, 2008. However, there is also no dispute that in addition to the salaries paid through Convergence, some employees were paid additional amounts directly by Mr. Sosa. No

workers' compensation coverage was secured for the portion of salary paid directly by Mr. Sosa.

45. Having demonstrated that Mr. Sosa violated the provisions of Section 440.107, Florida Statutes, the question becomes one of penalty. The parties' views on this issue are disparate: the Department takes the position that it must impute salary from the date of incorporation for all sixteen employees and that there is no recognition of the workers' compensation premiums actually paid. The Respondent takes the view that it provided sufficient records to determine actual payments for Jesus Sosa Corp.

46. In determining whether sufficient records were provided to the Department, Sosa's records have been compared to those required to be provided by Florida Administrative Code Rule 69L-6.015. This rule requires, among other things, that each employer maintain records that show each day, month and year, or pay period that each employee was employed; how much was paid to each employee, including the number of hours worked for hourly employees; all checks, Form 1099s, W-2 Wage and Tax Statements for all employees; all employment and unemployment reports filed pursuant to Florida law; tax records; account records and disbursement records. Clearly, the records provided by Sosa fall woefully short of this requirement.

47. While the disbursement records and checks provided show amounts paid to some of the employees, the records are not clear

enough to determine what portion of the funds paid would be considered salary. Given the nature of the documents provided, imputation of salary was appropriate.

48. Imputation of salary for the entire time the company was in existence, however, is another matter. Section 440.107(7)(d)1., Florida Statutes, provides that the penalty to be imposed will be equal to "1.5 times the amount the employer would have paid in premium . . . for the periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period" Subsection 440.107(e), provides for imputation of payroll "when the 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). . . ." Section 440.107(7)(d)1., Florida Statutes, clearly requires that the Department must first demonstrate the periods for which Sosa failed to secure the payment of workers' compensation. Clearly, in a penal proceeding such as this one, the Department must show that the individuals it claims were not covered were actually employed. The Department's interpretation of the statute assumes that Section 440.107(7)(d)1. states that the penalty will be imposed for a three-year period, as opposed to the demonstrated failure within that period. Such an interpretation is both contrary to the plain language of the statute and contrary to the stated legislative intent expressed

in Section 440.015, Florida Statutes, mandating that the system must not be an economic or administrative burden.

49. The Department relies on the First District Court of Appeal's decision in Twin City Roofing Construction Specialists, Inc. v. State, Department of Financial Services, 969 So. 2d 563, 566 (Fla. 1st DCA 2007), wherein the court stated, "When, as here, an employer refuses to provide business records, the Division is required to impute the missing payroll for the period requested in order to assess the penalty." Twin City is distinguishable for two reasons. First, there was evidence presented regarding the employment status of the employees of the company, and Twin City admitted that "for the time period" those individuals were employees of the company. Here, there was no such admission. While it was admitted that the 16 individuals were employees on April 1, 2008, Sosa disputed that they were employees for the entire period at issue. The greater weight of the evidence presented indicates that no one other than Sosa and Gaona was employed for the entire period, and most were employed for a much shorter period of time.

50. Second, in Twin City, the employer did not submit any records. Here, Sosa submitted what records he had, but the records submitted were inadequate to determine payroll. They were, however, adequate to determine length of employment. As recounted in the Findings of Fact, a simple comparison of the roster of employees at the jobsite with the check stubs,

Convergence records and disbursement records, provides a fairly reliable basis from which to determine each man's length of employment. While there are minor variations in the spellings of some names, their identities are fairly clear. Giving the Department the benefit of the longest period of employment in each case, the lengths of employment for each employee are listed in the Findings of Fact. There is no competent evidence upon which to find that all 16 men were employed since February 2006.

51. Finally, there is the issue of whether any credit should be given based upon the payments made through Convergence. There appears to be no question that, to the extent their salary was paid through Convergence, there was some workers' compensation coverage for the workers during the period identified in the Convergence documentation, i.e., October 15, 2007 through March 22, 2008. At hearing, the Department indicated that this was "irrelevant" because the penalty was imputed.

52. The undersigned has carefully reviewed the rules of the Department to determine if it had any rules expressly addressing dual employment. It does not appear to have such a rule, and Section 440.107 likewise does not address the issue. It neither authorizes nor prohibits giving credit for the amounts paid. However, Florida Administrative Code Rule 69L-6.035, which identifies matters to be considered in determining payroll for the purposes of calculating penalty, specifically includes wages

or salaries paid to employees by or on behalf of an employer. Fla. Admin. Code R. 69L-6.035(1)(a), (b). This definition would include payments made to employees by Convergence. Likewise, Section 440.107(7)(b), Florida Statutes, allows for the use of payment schedules to address penalty. Although imputation of salary is clearly appropriate in this case, it violates any sense of fairness to refuse to recognize the amount that was actually paid through Convergence. It also violates the legislative directive in Section 440.015, Florida Statutes, that the workers' compensation system not be an economic burden. Sosa should be penalized for failing to meet his workers' compensation premium responsibilities. However, to the extent applicable, his attempts to comply at least in part, should be taken into account.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered that finds Jesus Sosa, d/b/a Jesus Sosa Corp., is guilty of failing to secure workers' compensation insurance as required by Chapter 440, Florida Statutes; recalculates the penalty in light of the dates of employment reflected in the Findings of Fact; and gives credit against the final penalty calculation for the amount paid in workers' compensation premium through Convergence.

DONE AND ENTERED this 10th day of December, 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 December, 2008.

ENDNOTES

^{1/} Respondent objected to the hearsay nature of Petitioner's Exhibits 1, 5 and 6. The workers present at the jobsite did not testify in these proceedings, and any statements attributed to them are hearsay. The only basis for which these exhibits have been used is to identify the names of the people at the jobsite.

^{2/} The undersigned is not implying that the documents are in any way required to be in Spanish. Further, Sosa was represented by counsel in these proceedings who clearly understands what needed to be provided. However, it is possible that Respondent did not totally understand all of the instructions provided to him.

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.