

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TLC STONEWORKS, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 08-3545
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF WORKERS')
 COMPENSATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on August 26, 2008, in Sarasota, Florida.

APPEARANCES

For Petitioner: Thomas Harvey, pro se
TLC Stoneworks, LLC
5920 Bonaventure Place
Sarasota, Florida 34243

For Respondent: Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Petitioner is liable for a penalty for failure to maintain workers' compensation insurance in violation of relevant provisions in Chapter 440, Florida Statutes (2007).¹

PRELIMINARY STATEMENT

On June 4 and 11, 2008, Respondent issued, respectively, a Stop-Work Order and an Amended Order of Penalty Assessment; the latter assessing a penalty in the amount of \$1,218.52, pursuant to Subsection 440.107(7)(d), which is the penalty contested in this proceeding. Petitioner timely requested an administrative hearing, and Respondent referred the request to DOAH to conduct the hearing.

At the hearing, Respondent presented the testimony of one witness and submitted 11 exhibits for admission into evidence. Petitioner presented the testimony of one witness and submitted one exhibit. The identity of the witnesses and exhibits and any associated rulings are reported in the one-volume Transcript of the hearing that was filed with DOAH on September 10, 2008. Respondent filed its Proposed Recommended Order (PRO) on September 22, 2008. Petitioner filed its PRO on September 29, 2008, pursuant to an Order granting Petitioner's unopposed request for extension of time to file its PRO.

FINDINGS OF FACT

1. Respondent 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. Petitioner is a limited liability

company domiciled in Florida and engaged in the sale of stone countertops.

2. The disputed issues of fact arise from a single, integrated transaction involving "one and the same business" within the meaning of Subsection 440.10(1)(b). The "business" includes a contractor, a wholesaler, and two subcontractors, one of which is Petitioner. The integrated transaction is between the business and a homeowner.

3. The contractor is identified in the record as Manasota Land Development (Manasota). The homeowner owns a residence on Agate Road in Port Charlotte, Florida (the homeowner). The contractor referred the homeowner to Petitioner for the purpose of selecting granite countertops. Petitioner's representative visited the residence, took measurements, and received the order for granite from the homeowner. Petitioner placed the order with the wholesaler, the name of which is not material to this proceeding. The wholesaler delivered granite to a fabricator and installer designated by Petitioner and identified in the record as Granite Exclusive (the installer). The installer fabricated the countertops and installed them at the residence. Petitioner visited the residence to ensure customer satisfaction, and Petitioner paid the wholesaler and installer from funds provided by Manasota.

4. Petitioner did not collect payment from the homeowner. Rather, Petitioner agreed with Manasota to a total price of \$7,141.00. Petitioner billed Manasota for \$3,570.00, an amount equal to approximately one-half of the total agreed price, on May 21, 2008, inferentially when the homeowner placed the order with Petitioner. Manasota paid Petitioner the 50 percent deposit. Petitioner billed Manasota for the balance due, in the amount of \$3,571.00, on July 22, 2008, when the work was completed to the satisfaction of the homeowner, and Manasota paid the balance due.

5. Petitioner was a sales agent, order processor, and a collection and payment processor for Manasota. Petitioner paid the wholesaler and installer from funds provided by Manasota. The fact-finder draws a reasonable inference from the evidence that Manasota collected a sum from the homeowner that was equal to or greater than the price Manasota paid to Petitioner.

6. Petitioner and the installer are subcontractors of Manasota. Petitioner had no supervisory control over the installer. Respondent's claim that a written or oral contract existed between Petitioner and the wholesaler and installer is not supported by clear and convincing evidence.

7. It is undisputed that neither the installer nor Petitioner have workers' compensation insurance, and the two subcontractors are, by operation of Subsection 440.10(1)(b), the

employees of Manasota in "one and the same business." Manasota is responsible for providing workers' compensation coverage by operation of the statute.

8. Petitioner mistakenly believed, in good faith, that it was exempt from the requirements of Chapter 440. A company officer of Petitioner obtained an exemption certificate and, reasonably, concluded that the exemption was for Petitioner and both of Petitioner's officers or employees. Such an exemption was the officer's stated purpose when she entered the local state office responsible for issuing exemption certificates. The state employee represented that the exemption certificate actually issued achieved the officer's stated purpose. The express terms of the exemption certificate provide that the exemption is for the person "and" company named in the certificate. However, Subsection 440.05 makes clear that an exemption covers only the company officer named in the certificate and that each of the two officers must be named in the certificate or that each officer must obtain a separate certificate.

9. Petitioner did not engage in the business of fabricating or installing the stone countertop. Petitioner made a sale of the granite countertop and placed an order with a wholesaler. The wholesaler shipped the countertop to a the installer designated by Petitioner based on proximity to the

project site. The fabricator installed the countertop.

Petitioner did not supervise the fabrication or installation of the countertop.

10. The fact-finder has considered and weighed conflicts in the evidence pertaining to the issue of whether Petitioner engaged in the business of fabricating and installing the stone countertop and has resolved any evidential conflicts in favor of Petitioner. The testimony of Petitioner's witness, describing the nature and scope of Petitioner's business, is consistent with Article 5 in Petitioner's Articles of Incorporation which states:

The general purpose for which the Company is organized is to engage in the business of natural stone countertop sales. . . .

11. On June 3, 2008, Respondent's investigator, conducted a compliance check at 8206 Agate, South Gulf Cove, Florida, to verify compliance with the workers' compensation statutes. At the worksite, Respondent's investigator observed three men installing a stone countertop for the installer.

12. Installation of stone countertops is part of the construction industry and is assigned Class Code 5348 in the Scopes Manual, published by the National Council on Compensation Insurance and adopted in Florida Administrative Code Rule 69L-6.021.

13. The investigator interviewed the three men and requested proof of compliance with the workers' compensation law. One of the three men, neither furnished proof of an election to be exempt from workers' compensation nor showed that he had secured workers' compensation coverage.

14. Utilizing the Department of Financial Services' Coverage and Compliance Automated System (CCAS), the investigator was unable to determine that the employee of the installer was exempt from the requirements of the workers' compensation law or that Petitioner had secured the payment of workers' compensation.

15. On June 4, 2008, the investigator issued a Stop-Work Order and Order of Penalty Assessment against Petitioner for failure to meet the requirements of Chapter 440. Respondent ordered Petitioner to cease all business operations and assessed a \$1,000.00 penalty against Petitioner pursuant to Subsection 440.107(7)(d).

16. On June 4, 2008, the investigator issued a Division of Workers' Compensation Request for Production of Business Records for Penalty Assessment Calculation. Petitioner complied with the Request and provided the required records. Based on Petitioner's business records, the investigator issued an Amended Order of Penalty Assessment on June 11, 2008, in the amount of \$1,218.52.

17. Mr. Thomas Harvey, a company officer of Petitioner, did not possess an election to be exempt from workers' compensation. Ms. Leslie Lockett, the other company officer had applied for and obtained an exemption from workers' compensation coverage.

18. Ms. Lockett's exemption from workers' compensation lists the scope of business or trade as countertops, pursuant to instructions from the agency employee who issued the certificate. Ms. Lockett's exemption from workers' compensation is a construction industry exemption. Ms. Lockett applied for a Notice of Election to be Exempt as a member of a limited liability company in the construction industry pursuant to the instructions previously described.

19. In the transaction at issue in this proceeding, Petitioner collected payment for materials and installation of a stone countertop from Manasota. Petitioner did not collect payment from the homeowner and had no control or authority over either the wholesaler or the installer.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008). DOAH provided the parties with adequate notice of the final hearing.

21. An administrative fine deprives Petitioner of substantial rights in property and are punitive in nature. Respondent has the burden of proof. Respondent must show by clear and convincing evidence that Petitioner violated the Workers' Compensation Law and the reasonableness of the proposed penalty assessment. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Dept. of Financial Services, Division of Workers' Compensation v. U&M Contractors, Inc., Case No. 04-3041 (DOAH April 27, 2005); Triple M Enterprises, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 94-2524 (DOAH January 13, 2005).

22. Manasota was a contractor that operated a single countertop business, within the meaning of Subsection 440.10(1)(b), and, by operation of the same statute, Petitioner and the installer were employees of Manasota because neither Petitioner nor the installer had secured workers' compensation coverage. Manasota sublet part of the countertop business to Petitioner and the installer.

In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged in such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for, and shall secure, the payment of

compensation to all such employees, except to employees of a subcontractor who has secured such payment.

§ 440.10(1)(b).

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent issue a final order dismissing the Stop-Work Order and Amended Order of Penalty Assessment against Petitioner and Mr. Harvey.

DONE AND ENTERED this 24th day of October, 2008, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2008.

ENDNOTE

^{1/} References to chapters, sections, and subsections, are to Florida Statutes (2007), unless otherwise stated.

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.