

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 08-3739
)
VALOU ENTERPRISES, INC., d/b/a)
MR. ROOTER PLUMBING,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 7, 2008, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kristian E. Dunn, Esquire
Justin H. Faulkner, Esquire
Department of Financial Services,
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Leslie McMillan, President
Valou Enterprises, Inc.
15980 Southwest 109 Street
Miami, Florida 33196

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Second Amended Order of Penalty Assessment filed October 17, 2008, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On July 1, 2008, the Department of Financial Services, Division of Workers' Compensation ("Department"), issued a Stop Work Order directing Valou Enterprises, Inc., d/b/a Mr. Rooter Plumbing ("Valou Enterprises"), to immediately stop work and cease all business operations in Florida because it had failed to obtain workers' compensation insurance meeting the requirements of Chapter 440, Florida Statutes (2008),¹ and the Florida Insurance Code. Based on the records the Department received during its investigation, the Department calculated an Amended Order of Penalty Assessment, which was issued on July 9, 2008, and which included an assessment of \$95,652.93 in penalties. Valou Enterprises timely filed its request for an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for the assignment of an administrative law judge. Pursuant to notice, the final hearing was held on November 7, 2008.

On October 20, 2008, the Department filed a Motion to Amend Order of Penalty Assessment by decreasing the penalty to \$60,652.93. The motion was granted in an order entered

October 30, 2008, and the Second Amended Order of Penalty Assessment was substituted for the Amended Order of Penalty Assessment.

At the final hearing, the Department presented the testimony of Ann Johnson, and Petitioner's Exhibits 1 through 11 were offered and received into evidence. Valou Enterprises presented the testimony of Pedro Rolle, and Respondent's Exhibits 2 through 8, 10, and 13 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on December 5, 2008. After an extension of time for filing proposed recommended orders was granted on December 12, 2008, the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of Section 440.107, Florida Statutes, that employers in Florida secure workers' compensation insurance coverage for their employees. § 440.107(3), Fla. Stat.

2. Valou Enterprises is a Florida corporation located in Miami, Florida, which does business under the fictitious name of "Mr. Rooter Plumbing" ("Mr. Rooter"). Leslie McMillan is part-owner and the President of Valou Enterprises. Pedro Rolle is part-owner and the Treasurer of Valou Enterprises, and he is responsible for the business's day-to-day management. Welthial McMillan is part-owner and the Secretary of Valou Enterprises.

3. Mr. Rooter is a franchise that engages in the business of providing plumbing services and repairs. According to franchise documents, among the services offered by Mr. Rooter are HydroScrubbing™ sewer lines to remove blockages; water heater installation; kitchen and bath installation and repairs, including faucets, sinks, tubs and toilets; and leak detection and water line repair and installation.² On its website, Valou Enterprises advertises that Mr. Rooter provides full-service plumbing, including bath sinks, bathtubs and showers, drain pipes, faucets, floor drains, gas meters, gas vents, kitchen sinks, pipe repair, sewer lines, and water softeners.³

4. Mr. McMillan is a Florida-certified plumbing contractor, and he is the qualifier for Mr. Rooter. Mr. and Mrs. McMillan and Mr. Rolle, have elected, as officers of a corporation engaged in the construction industry, to be exempt from Florida's workers' compensation law, in accordance with the

provisions of Sections 440.02(15)(b)2. and 440.05(3), Florida Statutes.

5. Valou Enterprises hires plumbing technicians to provide plumbing services to Mr. Rooter's customers. These plumbing technicians are not licensed; rather, they work under Mr. McMillan's plumbing contractor's license. They do not receive a salary and do not have regular hours during which they must be at the Mr. Rooter office or at a jobsite. The plumbing technicians are paid commissions based on the work they perform, and they are required to supply their own tools. The plumbing technicians are on-call with Mr. Rooter at all times, but they only perform services for Mr. Rooter when actually dispatched to a job. When a plumbing technician is called and notified of a job, he is free either to accept or to reject the job. Mr. Rooter also dispatches plumbing helpers when a plumbing technician needs assistance.

6. Valou Enterprises employs Catia Duque, who takes calls and dispatches plumbing technicians to Mr. Rooter jobs. Kenneth Mecure runs errands for Valou Enterprises part-time when needed, on a part-time basis.

7. Late in the afternoon on Friday, June 27, 2008, a compliance investigator working for the Division of Workers' Compensation stopped at the Mr. Rooter office, which was located in a warehouse district. The visit was random, initiated when

the investigator saw white vans parked in front of the office, with the name "Mr. Rooter Plumbing" and logo on the sides of the vans. When the investigator entered the office, she observed four men wearing shirts with the "Mr. Rooter Plumbing" logo.

8. When the investigator requested information about Valou Enterprises's workers' compensation insurance coverage, Mr. Rolle referred her to Ms. Duque. Ms. Duque told the investigator that she would send whatever information she had regarding workers' compensation insurance coverage by facsimile transmittal, but the investigator did not receive any information from Ms. Duque.

9. After her visit on June 27, 2008, the compliance investigator conducted research through the Coverage and Compliance Automated System database, which provides information on workers' compensation insurance coverage and exemptions. The investigator's research revealed that Mr. McMillan, Mrs. McMillan, and Mr. Rolle had exemptions from the workers' compensation law as officers of a corporation engaged in the construction industry and that none of the persons she observed in the Mr. Rooter office on June 27, 2008, were covered by a workers' compensation insurance policy. The investigator confirmed the lack of workers' compensation insurance coverage by consulting the website for the National Council on Compensation Insurance, Inc. ("NCCI").

10. The compliance investigator returned to the Mr. Rooter office on Monday, July 1, 2008, and spoke with Mr. McMillan. Mr. McMillan was unable to provide her with proof that Valou Enterprises had workers' compensation insurance coverage. The investigator then prepared a Stop-Work Order and an Order of Penalty Assessment, which she hand-delivered to Mr. McMillan on July 2, 2008, and posted at the Mr. Rooter office. At the same time, the investigator served Mr. McMillan with a Request for Production of Business Records for Penalty Assessment Calculations.

11. The Stop-Work Order required Valou Enterprises to "cease all business operations for all worksites in the state." An Order of Penalty Assessment was included in the Stop-Work Order, in which Valou Enterprises was advised that a penalty would be assessed in an amount

[e]qual 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. Section 440.107(7)(d), F.S.

In addition, the Order of Penalty Assessment also advised Valou Enterprises that a penalty of "[u]p to \$5,000 for each employee who the Employer misclassified as an independent contractor"

would be imposed pursuant to Sections 440.10(1)(f) and 440.107(7)(f), Florida Statutes.

12. On July 3, 2008, the compliance investigator returned to the Mr. Rooter office. The office was closed, but she observed a white van turning out of the office parking lot. The van had the "Mr. Rooter Plumbing" name and logo on the side, and it was driven by Michael Dassell, a plumbing technician the investigator had met during her visit to the Mr. Rooter office on July 27, 2008. The investigator questioned Mr. Dassell, who told her that he was on-call that day. Mr. Dassell had not been dispatched on a job or called into the office but had gone to the office to pick up a commission check. Mr. Dassell had not been told that the Mr. Rooter office was closed on July 3, 2008.

13. Mr. McMillan provided the compliance investigator the payroll and other records requested in the business records request. Based on these records, the compliance investigator calculated the penalty to be imposed on Valou Enterprises for its failure to have workers' compensation insurance coverage in the amount of \$59,652.93. The investigator also imposed a penalty of \$1,000.00 for a one-day violation of the Stop-Work Order and a penalty of \$35,000.00 for "misrepresenting the status of the employee(s) as an independent contractor(s)." The total penalty of \$95,652.93 was set forth in an Amended Order of

Penalty Assessment that the investigator hand-delivered the order to Mr. McMillan on July 9, 2008.

14. Valou Enterprises obtained workers' compensation insurance coverage effective July 4, 2008, and, on July 9, 2008, Mr. McMillan entered into a Payment Agreement Schedule for Periodic Payment of Penalty, remitting at the time a down payment of 10 percent of the penalty, or \$9,566.00. As a result, an Order of Conditional Release from Stop-Work Order was entered on July 9, 2008.

15. The compliance investigator subsequently recalculated the penalty assessment and prepared a 2nd Amended Order of Penalty Assessment dated October 17, 2008. The \$35,000.00 penalty assessed for misclassifying employees as independent contractors was deleted for lack of evidence, and the final penalty assessment was in the amount of \$60,652.93, which consisted of a \$59,652.93 penalty for failure to secure workers' compensation insurance coverage for Valou Enterprises employees and a \$1,000.00 penalty for violating the Stop-Work Order.⁴

16. The compliance investigator looked to the NCCI SCOPES Basic Manual of Classifications ("SCOPES Manual") for classification codes attributable to the various workplace operations of the persons working for Valou Enterprises. The classification code assigned by the compliance investigator to the plumbing technicians and plumbing helpers performing work

for Valou Enterprises was Code 5183.⁵ According to the SCOPES Manual and to Florida Administrative Code Rule 69L-6.021(1)(r), Code 5183 is a code applicable to the construction industry and covers "Plumbing NOC and Drivers." The description of the scope of Code 5183 is stated in the SCOPES Manual in pertinent part as follows:

Applicable to gas, steam, hot water or other types of pipe fitting. Includes house connections and shop operations.

* * *

Code 5183 is applicable to plumbing operations provided that the work performed is "not otherwise classified" (NOC). Insureds contemplated by Code 5183 may install, remove, or repair equipment that is used to direct gas or water supplies to a destination. This equipment includes but is not limited to piping and related fixtures, appliances, and accessories. No limits have been established as to the size of the pipe being repaired or installed.

The operations contemplated by Code 5183 also include "the cleaning of building sewer connections using portable equipment" and "the installation or service of domestic water softener systems."

17. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 5183 was \$10.04 per \$100.00 of payroll; the approved NCCI Manual rate in Florida effective January 1, 2007, for Code 5183 was \$8.13 per \$100.00 of payroll;

and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 5183 was \$6.75 per \$100.00 of payroll.⁶

18. The classification code found in the SCOPES Manual assigned to Ms. Duque and to Paul Anderson, who was a clerical worker in the Valou Enterprises office in 2006, was Code 8810. According to the SCOPES Manual, Code 8810 covers "Clerical Office Employees."⁷ The description of the scope of Code 8810 is stated in the SCOPES Manual in pertinent part as follows: "The duties of a clerical office employee include . . . telephone duties."

19. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 8810 was \$.58 per \$100.00 of payroll; the approved NCCI Manual rate in Florida effective January 1, 2007, for Code 8810 was \$.48 per \$100.00 of payroll; and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 8810 was \$.37 per \$100.00 of payroll.⁸

20. The classification code assigned by the compliance investigator to Kevin Mecure, a part-time employee who ran errands for Valou Enterprises, was Code 7380.⁹ According to the SCOPES Manual, Code 7380 covers "Drivers, Chauffeurs & Their Helpers NOC - Commercial." The description of the scope of Code 7380 is stated in the SCOPES Manual in pertinent part as follows: "The term "drivers" refers to employees who engage in duties on or in connection with vehicles"

21. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 7380 was \$12.20 per \$100.00 of payroll; the approved NCCI Manual rate in Florida effective January 1, 2007, for Code 7380 was \$10.18 per \$100.00 of payroll; and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 7380 was \$8.74 per \$100.00 of payroll.¹⁰

22. The compliance investigator calculated the total penalty attributable to Valou Enterprises's failure to provide workers' compensation insurance coverage for the plumbing technicians, clerical workers, and drivers using the Department's Penalty Worksheet. She obtained the names of each of the individuals included in her calculations and the amount of the gross payroll for each individual from the payroll information provided by Mr. McMillan in response to the business records request.

23. The compliance investigator calculated the penalty as follows: She listed Valou Enterprises's employees on the Penalty Worksheet; assigned each employee a classification code based on the definitions of workplace operations that most closely described the work they performed for Valou Enterprises; set out the dates during which Valou Enterprises did not provide workers' compensation insurance coverage¹¹; entered the annual or pro-rated gross payroll for each employee during the period of

non-compliance; divided the gross payroll for each employee by 100; set out the approved manual rate for each employee during the period of non-compliance in accordance with his or her classification code; determined the premium that Valou Enterprises would have paid for workers' compensation insurance coverage for each employee during the period of non-compliance by multiplying the approved manual rate and one one-hundredth of the gross payroll for each employee; calculated the penalty attributable to each employee during the period of non-compliance by multiplying the premium for each employee by 1.5; and, finally, calculated the total penalty owed by Valou Enterprises attributable to its failure to secure workers' compensation insurance coverage for its employees.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 440.107(13), Florida Statutes.

25. The Department seeks to impose an administrative penalty on Valou Enterprises for its failure to secure workers' compensation insurance coverage for its employees. Accordingly, the Department must prove the charges in the Stop-Work Order and 2nd Amended Order of Penalty Assessment by clear and convincing evidence. See Department of Banking & Finance, Division of

So. 2d 932 (Fla. 1996).

26. Section 440.38(1), Florida Statutes, provides in pertinent part that "[e]very employer shall secure the payment of compensation under this chapter: (a) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange authorized to do business in the state." The compensation and benefits required by Chapter 440, Florida Statutes, must be paid as follows: "The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. § 440.09(1), Fla. Stat.

27. The definitions pertinent to this matter are found in Section 440.02, Florida Statutes, as follows:

(9) "Corporate officer" or "officer of a corporation" means any person who fills an office provided for in the corporate charter or articles of incorporation filed with the Division of Corporations of the Department of State or as permitted or required by chapter 607. . . .

* * *

(15)(a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully

employed, and includes, but is not limited to, aliens and minors.

(b) "Employee" includes any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous.

1. Any officer of a corporation may elect to be exempt from this chapter by filing written notice of the election with the department as provided in s. 440.05

2. As to officers of a corporation who are engaged in the construction industry, no more than three officers of a corporation or of any group of affiliated corporations may elect to be exempt from this chapter by filing written notice of the election with the department as provided in s. 440.05.

* * *

(16)(a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

* * *

(17)(a) "Employment," subject to the other provisions of this chapter, means any

service performed by an employee for the person employing him or her.

(b) "Employment" includes:

* * *

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

28. Based on the findings of fact herein and the definitions set out above, Valou Enterprises is an employer and the plumbing technicians, clerical employees, and part-time driver receiving payment for services performed for Valou Enterprises are employees in the employment of Valou Enterprises. Valou Enterprises is, therefore, required to provide workers' compensation insurance coverage for its employees.¹²

29. Section 440.107, Florida Statutes, provides in pertinent part:

(1) The Legislature finds that the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare.

(2) For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. . . .

(3) The department shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

(a) Conduct investigations for the purpose of ensuring employer compliance.

(b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.

(c) Examine and copy business records.

(d) Administer oaths and affirmations.

(e) Certify to official acts.

(f) Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.

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

(h) Enforce the terms of a stop-work order.

(i) Levy and pursue actions to recover penalties.

(j) Seek injunctions and other appropriate relief.

* * *

(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 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 order shall take effect when served upon the employer or, for a particular employer worksite, when served at that worksite. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance. A stop-work order . . . shall remain in effect until the department issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this chapter and has paid any penalty assessed under this section. 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. . . .

(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.

(c) The department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

(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.

30. Based on the findings of fact herein, the penalty for Valou Enterprises's failure to secure workers' compensation insurance coverage for its employees, as set out on the Penalty Worksheet attached to the 2nd Amended Order of Penalty Assessment, was calculated in conformance with the requirements of Section 440.107(7)(d)1., Florida Statutes, on the form required by Florida Administrative Code Rule 69L-6.027. The Department has, therefore, proven by clear and convincing evidence that Valou Enterprises was properly assessed \$59,652.93 as the penalty for its failure to secure workers' compensation insurance coverage for its employees.

31. The Department has failed, however, to prove by clear and convincing evidence that Valou Enterprises violated the Stop-Work Order. Mr. Dassell was not working on July 3, 2008. Under the procedures in place at Mr. Rooter, a plumbing technician was only paid for work done on a job assigned by Mr. Rooter and was on call whenever he was not working on an assigned job. Mr. Dassell had not been dispatched on a job for Mr. Rooter on July 3, 2008, because the office was closed. The fact that Mr. Dassell had not been advised that the business was closed on July 3, 2008, and that he considered himself on-call is not sufficient to establish that he was performing services for Mr. Rooter in violation of the Stop-Work Order. The Department has, therefore, failed to prove that a penalty should be imposed against Valou Enterprises for a violation of the Stop-Work Order. The total penalty assessed against Valou Enterprises in the 2nd Amended Order of Penalty Assessment should be reduced from \$60,652.93 to \$59,652.93.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order finding that Valou Enterprises, Inc., d/b/a/ Mr. Rooter Plumbing, failed to secure workers' compensation insurance coverage for its employees in violation of Section 440.38(1), Florida Statutes, and imposing a penalty in

the amount of \$59,652.93 for the failure to provide the required workers' compensation insurance coverage.

DONE AND ENTERED this 28th day of April, 2009, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 2009.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2008 edition unless indicated otherwise.

^{2/} Respondent's Exhibit 3.

^{3/} Petitioner's Exhibit 5 at page 93.

^{4/} Petitioner's Exhibit 9.

^{5/} Petitioner's Exhibit 10.

^{6/} Petitioner's Exhibit 11.

^{7/} Petitioner's Exhibit 10.

^{8/} Petitioner's Exhibit 11.

⁹/ Petitioner's Exhibit 10.

¹⁰/ Petitioner's Exhibit 11.

¹¹/ It is noted that, although Mr. Rooter was found to be non-compliant with Florida's Workers' Compensation Law on July 2, 2005, the penalty calculations in both the Amended Order of Penalty Assessment and the 2nd Amended Order of Penalty Assessment began effective January 1, 2006, and extended through July 2, 2008.

¹²/ Mr. McMillan and Mr. Rolle are not considered employees of Mr. Rooter because they are corporate officers who have chosen to be exempt from the requirements of Chapter 440, Florida Statutes, as permitted by Section 440.05(3), Florida Statutes ("Each officer of a corporation who is engaged in the construction industry and who elects an exemption from this chapter . . . must mail a written notice to such effect to the department on a form prescribed by the department.")

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.