

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NU WAY DRYWALL, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 08-3779
)
 DEPARTMENT OF FINANCIAL)
 SERVICES, DIVISION OF WORKERS')
 COMPENSATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the final hearing in this case was held on September 4, 2008, in Bradenton, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alex Rivera, pro se
Nu Way Drywall, LLC
384 Snapdragon Loop
Bradenton, Florida 34212

For Respondent: Thomas H. Duffy, Esquire
Division of Legal Services
Department of Financial Services
200 East Gaines Street, Sixth Floor
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner, Nu Way Drywall, LLC, was in violation of the workers'

compensation requirements of Sections 440.107 and 440.38, Florida Statutes (2007),¹ by failing to secure workers' compensation coverage for its subcontractors and/or employees of its subcontractors; and (2) if yes, what penalty should be assessed against Petitioner.

PRELIMINARY STATEMENT

On April 16, 2008, Respondent, Department of Financial Services, Division of Workers' Compensation ("Department"), issued a Stop-Work Order for Specific Work Site to Petitioner, Nu Way Drywall, LLC, which alleged that Petitioner failed to secure workers' compensation for its subcontractors or employees of the subcontractors. On April 17, 2008, the Department issued an Amended Order of Penalty Assessment, which assessed a penalty of \$76,215.95, for the alleged violation. Petitioner timely requested an administrative hearing.

The Department referred the matter to the Division of Administrative Hearings on or about July 31, 2008.

Prior to the evidentiary part of the hearing, the Department indicated that due to a recently discovered computational error, it had determined that the penalty assessment for the alleged violation was \$72,963.77 and not \$76,215.95, as indicated in the Amended Order of Penalty Assessment.

At the final hearing, the Department presented the testimony of one witness, Germaine Green, and offered and had nine exhibits admitted into evidence. Petitioner cross-examined the Department's witness, but did not present any witnesses or offer any exhibits. The record was left open until September 18, 2008, to allow Petitioner additional time to obtain and late-file exhibits. However, no late-filed exhibits were filed by Petitioner.

The Transcript of the hearing was filed on September 23, 2008. The Department filed its Proposed Recommended Order on October 3, 2008. Petitioner did not file a post-hearing submittal.

FINDINGS OF FACT

1. On April 15, 2008, Germaine Green, a compliance investigator for the Department, conducted a random compliance check of a work site where an office building was under construction. The work site was located at 698 South Tamiami Trail in Osprey, Florida. During the compliance check, Ms. Green observed three men hanging metal framing for the interior walls.

2. One of the men at the work site identified himself as Ted Webb and told Ms. Green that he was in charge of the framing work being done and that the other two men working with him were his sons.

3. Mr. Webb told Ms. Green that his company, Ted Webb, Inc., had workers' compensation coverage through an employee leasing company, Howard Leasing. Ms. Green telephoned the leasing company and was told that the contract with Ted Webb, Inc., had been terminated or had lapsed in December 2007.

4. Ms. Green then checked the Department's computerized database known as Coverage and Compliance Automated System (CCAS). The information maintained in CCAS allowed Ms. Green to determine whether Mr. Webb or his sons had workers' compensation coverage or exemptions from such coverage.

5. After checking CCAS, Ms. Green determined that Mr. Webb and his company did not have workers' compensation coverage and that Mr. Webb and his employees had no exemption from such coverage. Upon making this determination, Ms. Green issued a Stop-Work Order.

6. Mr. Webb advised Ms. Green that Nu Way Drywall, LLC ("Nu Way"), had subcontracted with him or Ted Webb, Inc., to perform the framing services at the work site.

7. Under Florida law, a subcontractor that does not have workers' compensation coverage becomes the "statutory employee" of the contractor that hired the subcontractor.

8. Upon being told that Mr. Webb was working for Nu Way, Ms. Green checked CCAS to determine if that company had active workers' compensation exemptions for any of its employees.

Ms. Green's review of CCAS revealed that Nu Way had an exemption for only one person, Alex Rivera, the managing member of the company.

9. Ms. Green contacted Mr. Rivera to determine whether he had received documentation that Mr. Webb had workers' compensation coverage prior to Mr. Webb's beginning work on the Osprey project. Mr. Rivera reported that he had received information in the past that indicated that Mr. Webb had workers' compensation coverage. However, Mr. Rivera told Ms. Green that he had obtained information regarding Mr. Webb's workers' compensation coverage before Mr. Webb began work on the subject work site.

10. At all times relevant to this proceeding, Nu Way had workers' compensation coverage through an employee leasing company, Employee Leasing Solutions. However, when Ms. Green called the leasing company, she was advised by someone with the company that Mr. Webb and his two sons were not listed on the employee roster for Nu Way. Therefore, they were not covered by Nu Way's workers' compensation coverage.

11. Employee leasing companies provide workers' compensation coverage for their clients, but coverage is provided only to employees that the client company specifically identifies.

12. Because Mr. Rivera could not provide proof that Mr. Webb and his sons had workers' compensation coverage pursuant to Chapter 440, Ms. Green issued a Stop-Work Order for Specific Worksite Only ("Stop-Work Order") to Nu Way on April 15, 2008. The Stop-Work Order was posted at the work site and served on Mr. Rivera on April 16, 2008.

13. On the day that Ms. Green served the Stop-Work Order on Mr. Rivera, she also served on him a Request for Production of Business Records for Penalty Assessment Calculation ("Request for Business Records"). The Request for Business Records requested that Mr. Rivera provide the business records of Nu Way to the Department so that it could determine the employer's payroll for the period of April 17, 2005, through April 16, 2008, for the calculation of the penalty provided in Subsection 440.107(7).

14. In response to the Department's Request for Business Records Documents, Mr. Rivera provided Nu Way's business records, which included Nu Way's canceled checks. In auditing the business records, Ms. Green discovered that in addition to making payments made to Ted Webb, Inc., in 2006 and 2008, Nu Way had also made payments to two other companies that did not have valid workers' compensation coverage for their employees when they worked for Nu Way.

15. According to its business records, Nu Way paid Santis Drywall and Construction (Santis) \$36,890.00 between July 28 and August 11, 2006, and paid Hernandez Chico Drywall (Hernandez) \$260,972.50 between March 17 and April 28, 2006. During the time period Nu Way made those payments to Santis and Hernandez, neither of those companies had valid workers' compensation coverage.

16. After auditing Nu Way's business records, Ms. Green prepared a spreadsheet that included the payments made to uninsured subcontractors or companies during the relevant time period of April 17, 2005, through April 16, 2008. Ms. Green calculated the penalty by dividing the payroll for each uninsured subcontractor by 100 and then multiplied that number (the dividend) by the "approved manual rate" for drywall work for the year in question. Each product of 1/100 of the payroll and the approved manual yielded the "evaded premium" that Nu Way should have paid for each uninsured subcontractor in the years in question. The amount of the "evaded premiums" were then multiplied by 1.5 and then added together to determine the total penalty amount.

17. Applying the formula prescribed in Subsection 440.107(7)(d), Ms. Green determined that the total penalty assessment against Nu Way was \$76,215.95.

18. On April 17, 2008, Mr. Rivera was served with the Amended Order of Penalty Assessment, which showed that the total penalty assessment against Nu Way was \$76,215.95. That same day, Mr. Rivera, on behalf of Nu Way, entered into an agreement with the Department to pay ten percent of the penalty assessment in one lump sum payment and to make 60 interest-free payments for the balance. After Mr. Rivera signed the agreement, the Department issued an Order of Conditional Release from the Stop-Work Order ("Order of Conditional Release"). The Order of Conditional Release allowed Nu Way to resume work at the work site, subject to his complying with the terms of the agreement.

19. When Ms. Green served the Amended Order of Penalty Assessment on Mr. Rivera, she discussed the penalty assessment with him and also allowed him to review the spreadsheet for accuracy. Mr. Rivera reviewed the spreadsheet, but did not find any errors.

20. In preparing for this hearing, Ms. Green reviewed the spreadsheet and discovered that she had mistakenly included some payments made by Nu Way. By mistakenly including certain payments on the spreadsheet, the payroll amount used to calculate the penalty assessment was higher than it should have been.

21. After discovering the mistake discussed in paragraph 20, Ms. Green prepared a new spreadsheet, which did

not include the payments that had been mistakenly included in the initial spreadsheet. Ms. Green then recalculated the penalty assessment and properly determined the corrected penalty assessment to be \$72,963.77.

22. The Department prepared a Proposed Second Amended Order of Penalty Assessment showing that the correct penalty assessment for Nu Way is \$72,963.77. As of the date of this proceeding, the Department had not served the Proposed Second Amended Order of Penalty Assessment on Mr. Rivera. However, at hearing, Mr. Rivera indicated that he did not object to this amendment as it reduced the penalty assessment.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

24. The Department is the state agency responsible for enforcing the requirements of Section 440.107, Florida Statutes, which mandates that employers secure the payment of workers' compensation coverage for their employees.

25. In instances where an employer fails to comply with the requirement to have workers' compensation coverage, the Department is empowered to issue stop-work orders and penalty assessment orders, enforce the terms of a stop-work order, and

levy and pursue actions to recover penalties. § 440.107(3)(g), (h) and (i), Fla. Stat.

26. The penalty assessment sought in this case is penal in nature. Therefore, the Department has the burden of proving the allegations in this case by clear and convincing evidence.

Department of Banking and Finance v. Osborne, Stern, and Co., 670 So. 2d 932, 935 (Fla. 1996).

27. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its workers unless exempted or excluded under Chapter 400, Florida Statutes.

28. For purposes of Chapter 440, Florida Statutes, "employer" is defined as "every person carrying on employment" § 440.02(16)(a), Fla. Stat. "Employment" is "any service performed by an employee for the person employing him or her . . . [and] with respect to the construction industry, [includes] all private employment in which one or more of the employees are employed by the same employer." § 440.02(17)(a) and (b), Fla. Stat.

29. "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."

§ 440.02(15)(a), Fla. Stat.

30. An "employee" also includes a person being paid by a construction contractor as a subcontractor, unless the subcontractor has a validly elected exemption or has secured the payment of compensation as a subcontractor, consistent with Section 440.10, Florida Statutes, for work performed as a subcontractor. § 440.02(15)(c)2., Fla. Stat.

31. With respect to subcontractors, Subsection 440.10(1)(b) states:

(b) 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 subcontractors engaged on 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 [workers'] compensation to all such employees, except to employees of a subcontractor who has secured such payment.

32. The undisputed evidence established that Nu Way was an employer, within the meaning of Subsection 440.02(15), during the time specified in the Amended Order.

33. The undisputed evidence established that Ted Webb and the two men working with him at the Osprey work site on April 15 or 16, 2008, were Nu Way's "employees" as that term is defined in Subsection 440.02(15)(c)2., Florida Statutes.

34. As an employer of Ted Webb and the two men working with him, Nu Way was required to provide workers' compensation coverage pursuant to Sections 440.10 and 440.38, Florida Statutes.

35. In this case, Nu Way does not dispute that at the time relevant to this proceeding, it had not secured workers' compensation coverage for Mr. Webb and the two men working with him. Further, Nu Way offered no evidence to establish that Mr. Webb and his sons had valid workers' compensation exemptions or proof of workers' compensation coverage as required by law. § 440.02(15)(c)2., Fla. Stat.

36. Pursuant to Subsection 440.107(7)(d), Florida Statutes, an employer who fails to secure workers' compensation coverage for his employees is subject to:

[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.

37. The evidence established that during the three-year period covered by the penalty assessment, the entities listed on the penalty worksheet dated September 3, 2008, were paid directly by Nu Way, which did not have workers' compensation coverage or exemptions from such coverage.²

38. The Department properly applied the formula and correctly calculated the penalty assessment as prescribed in Subsection 440.107(7)(d), Florida Statutes.

39. Nu Way is liable for the penalty assessment of \$72,963.77, as indicated in the Proposed Second Amended Order of Penalty Assessment.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Financial Services, Division of Workers' Compensation, enter a final order:

1. Finding that Petitioner, Nu Way Drywall, LLC, failed to secure the payment of workers' compensation for its employees in violation of Subsections 440.10(1)(a) and 440.38(1), Florida Statutes; and

2. Assessing a penalty of \$72,963.77 against Nu Way Drywall, LLC.

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

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2008.

ENDNOTES

- 1/ All references to Florida Statutes are to the 2007 version, unless otherwise noted.
- 2/ The use of the penalty worksheet is required by Florida Administrative Code Rule 69L-6.027.

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.