

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 08-4411
)
MIKE HILL CONSTRUCTION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on October 21, 2008, in Bronson, Florida.

APPEARANCES

For Petitioner: Douglas D. Dolan, Esquire
Justin H. Faulkner, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Michael C. Hill, pro se
Mike Hill Construction, Inc.
9650 Northeast 136th Court
Williston, Florida 32696

STATEMENT OF THE ISSUE

The issue is whether Petitioner's Stop-Work Order and Amended Order of Penalty Assessment are lawful.

PRELIMINARY STATEMENT

On July 10, 2008, the Department of Financial Services (Department) issued a Stop-Work Order (SWO) and Order of Penalty Assessment to Mike Hill Construction, Inc. (Hill, Inc.). Hill, Inc., asserted its right to a hearing, and the matter was forwarded to the Division of Administrative Hearings and filed on September 8, 2008. The hearing was scheduled for October 21, 2008, in Bronson, Florida, and was held at the time and place noticed.

At the hearing, Petitioner presented the testimony of two witnesses and offered nine exhibits into evidence. Respondent testified and offered two exhibits into evidence. All offered exhibits were accepted into evidence.

A Transcript was filed on November 12, 2008. After the hearing, both Petitioner and Respondent timely filed their Proposed Recommended Orders.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

FINDINGS OF FACT

1. The Division of Workers' Compensation (Division) is a component of the Department. The Department is a state agency charged with the administration of portions of the "Workers' Compensation Law." Among the Division's duties is enforcing the statutory requirement that employers secure the payment of

workers' compensation coverage for the benefit of their employees and corporate officers who are required to be covered.

2. William Pangrass is an investigator for the Division. Specifically, Mr. Pangrass works in the Bureau of Compliance in the Division's office in Ocala, Florida.

3. In that capacity, Mr. Pangrass was doing a routine compliance check on July 10, 2008, at the premises located at 2942 Northwest 144th Terrace in Gainesville, Florida. There was new construction on the site. Mr. Pangrass saw two men talking to one another and going about the site and concluded they were involved in the construction. He went inside and saw a third man on a ladder located in the interior of the house being built. The third man was finishing drywall.

4. The activities observed by Mr. Pangrass were construction industry activities as defined and classified by Florida Administrative Code Rule 69L-6.021. This Rule adopts the SCOPES Manual of the National Council on Compensation Insurance (NCCI).

5. One of the three men identified himself as Mike Hill, the principal of Hill, Inc. Mr. Pangrass inquired into Mr. Hill's workers' compensation status. Mr. Hill provided an expired exemption card. Inquiry as to the other two men revealed that one, Mr. Beauregard, had an expired exemption card and the other, Mr. Petrokowski, had no exemption at all.

6. Mr. Pangrass verified that Mr. Hill was not covered by a policy of workers' compensation insurance and did not have an exemption from coverage, by using the Coverage and Compliance Automated System (CCAS) website. He also reviewed the Florida Department of State, Division of Corporations' website to verify the status of Hill, Inc. Mr. Pangrass learned that Hill, Inc., had no workers' compensation coverage. Furthermore, it was verified that Mr. Hill, who was eligible for an exemption, had not obtained an exemption when his previous exemption expired on June 29, 2008.

7. After consulting with higher authority, Mr. Pangrass issued a Stop-Work Order and served it on July 10, 2008. He also served Mr. Hill with a Request for Business Records for Penalty Assessment Calculation. Mr. Hill responded with records as requested. The records consisted of bank statements and copies of checks signed by Mike Hill on behalf of Hill, Inc., and a statement by Mr. Hill that he had earned \$2,571.91 during the period June 30, 2008, through July 10, 2008.

8. It was Mr. Hill's duty to obtain an exemption from the Department, and he failed in that duty. Undoubtedly, the failure was due to an oversight on his part. Although one may be eligible for an exemption, as Mr. Hill was, the exemption does not occur absent an applicant satisfying the Department's documentary requirements, and Mr. Hill did not. Because he was

out of compliance from June 30, 2008, until July 10, 2008, Hill, Inc., employed a person without insuring that the person was covered or exempt.

9. The records provided were the sourced documents for an Amended Order of Penalty Assessment prepared by Mr. Pangrass and served on Mr. Hill on July 21, 2008. This document listed names of purported employees or subcontractors, as determined from the business records. They were Mike Beauregard; Daryl Miller, LLC; Fred Atkins; Ashley's Top Shop; and Mike Hill.

10. A Penalty Worksheet was used to calculate the penalties. On the Penalty Worksheet, the five people or entities were assigned NCCI class codes as discussed in paragraph 4, above. Thereafter, the periods of noncompliance were set forth, followed by the payroll for the period. The payroll for each person or entity was divided by 100, and the result was multiplied by the manual rate for the class to determine the premium that should have been paid. Thereafter, the premium was multiplied by 1.5, which is the statutory penalty. This resulted in a total penalty for Hill, Inc., of \$1,447.13

11. It was determined that Hill, Inc., made payments to Mr. Beauregard, who had no exemption, and that Mr. Beauregard paid Mr. Petrokowski, who had no workers' compensation coverage. They were properly included on the Penalty Worksheet.

12. With regard to Fred Atkins, none of the records provided to Mr. Pangrass indicate a \$250.00 payment to anyone named Fred Atkins. Mr. Pangrass could not explain from where he derived the name Fred Atkins and could not document any payment to him by Hill, Inc. The \$41.70 on the Penalty Worksheet attributable to the Fred Atkins entry should be deducted from the total penalty.

13. Daryl Miller, LLC, appeared twice on the Penalty Worksheet, because it was assumed that the entity was engaged in floor covering and the approved manual rate for floor covering increased. However, there is nothing in the business records introduced into evidence to support any payment to Daryl Miller, LLC, either on June 20, 2007, or between September 26, 2006, and November 16, 2006, as appears on the Penalty Worksheet.

14. There is a check in evidence with a payee of Daryl Floor Covering in the amount of \$2,140.00, and dated June 27, 2008. Mr. Hill's unrebutted testimony was that Daryl Miller, LLC, an entity without workers' compensation coverage, and Daryl Floor Covering, a company with workers' compensation coverage, are totally different entities. The lack of evidentiary support for payments to Daryl Miller, LLC, requires that the portion of the penalty attributable to that entity, in the amount of \$593.10, be deducted from the amount calculated by Mr. Pangrass.

15. With regard to Ashley's Top Shop, Mr. Hill's un rebutted testimony was that Ashley's Top Shop was a fabricator of counter tops. Mr. Hill stated that he would typically take a pattern to Ashley's Top Shop and that a countertop would be made from it. Thereafter, Mr. Hill testified that he obtained the countertop and installed it. This procedure is a retail sale as opposed to a contractor-subcontractor or employment relationship. The portion of the penalty attributable to Ashley's Top Shop in the amount of \$151.61, should be deducted from the amount calculated by Mr. Pangrass.

16. It is therefore demonstrated by the evidence of record that the correctly calculated penalty is \$660.72.

17. Mr. Hill paid the assessment of \$1,447.13, and properly applied for an exemption. The exemption was granted, and on July 21, 2008, Mr. Hill received an Order of Release from Stop-Work Order, and Amended Order of Penalty Assessment. On that date, he also signed a statement that he had terminated all subcontractors and employees who were not in compliance with the workers' compensation law and that he will not hire anyone unless in compliance with the workers' compensation law.

CONCLUSIONS OF LAW

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

19. Because administrative fines are penal in nature, the Department has the burden to prove by clear and convincing evidence that Hill, Inc., failed to be in compliance with the coverage requirements set forth, by not securing a certificate of exemption for Mr. Hill, who was entitled to a certificate of exemption for the period June 30, 2008, through the time he was designated exempt on July 10. The Department must further prove by clear and convincing evidence that Hill, Inc., failed to ensure that Mr. Beauregard and Mr. Petrokowski were covered by workers' compensation insurance when Mr. Hill employed them. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996) and L and W Plastering and Drywall Services, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 06-3261 (DOAH, March 16, 2007).

20. The Florida Legislature has determined that the failure of an employer to comply with the requirement to provide workers' compensation coverage to employees ". . . poses an immediate danger to public health, safety, and welfare." § 440.107(1), Fla. Stat.

21. Pursuant to Sections 440.10 and 440.338, Florida Statutes, employers must secure the payment of workers' compensation for their employees. Specifically, Subsection 440.10(1)(a), Florida Statutes, provides, "Every employer coming

within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s.440.38."

22. Subsections 440.107(2), (3), and (7), Florida Statutes, authorize the Department to issue stop-work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements, and read in pertinent part:

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

* * *

(2) For 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:

* * *

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

* * *

(7)(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.

23. The definition of employee and the status of corporate officers as employees for purposes of workers' compensation are outlined in Subsections 440.02(15)(a) and (b), Florida Statutes, which provide in part:

440.02. Definitions --When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

* * *

(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. Officers must be shareholders, each owning at least 10 percent of the stock of such corporation and listed as an officer of such corporation with the Division of Corporations of the Department of State, in order to elect exemptions under this chapter. For purposes of this subparagraph, the term "affiliated" means and includes one or more corporations or entities, any one of which is a corporation engaged in the construction industry, under the same or substantially the same control of a group of business entities which are connected or associated so that one entity controls or has the power to control each of the other business entities. The term "affiliated" includes, but is not limited to, the officers, directors, executives, shareholders active in management, employees, and agents of the affiliated corporation. The ownership by one business entity of a controlling interest in another business entity or a pooling of equipment or income among business entities shall be

prima facie evidence that one business is affiliated with the other.

3. An officer of a corporation who elects to be exempt from this chapter by filing a written notice of the election with the department as provided in s. 440.05 is not an employee.

Services are presumed to have been rendered to the corporation if the officer is compensated by other than dividends upon shares of stock of the corporation which the officer owns.

24. Section 440.05, Florida Statutes, provides the procedure for corporate officers to exempt themselves from workers' compensation coverage. It provides in relevant part, as follows:

440.05. Election of exemption; revocation of election; notice; certification

(1) Each corporate officer who elects not to accept the provisions of this chapter or who, after electing such exemption, revokes that exemption shall mail to the department in Tallahassee notice to such effect in accordance with a form to be prescribed by the department.

* * *

(3) Each officer of a corporation who is engaged in the construction industry and who elects an exemption from this chapter or who, after electing such exemption, revokes that exemption, must mail a written notice to such effect to the department on a form prescribed by the department. The notice of election to be exempt from the provisions of this chapter must be notarized and under oath. The notice of election to be exempt which is submitted to the department by the officer of a corporation who is allowed to

claim an exemption as provided by this chapter must list the name, federal tax identification number, social security number, all certified or registered licenses issued pursuant to chapter 489 held by the person seeking the exemption, a copy of relevant documentation as to employment status filed with the Internal Revenue Service as specified by the department, a copy of the relevant occupational license in the primary jurisdiction of the business, and the registration number of the corporation filed with the Division of Corporations of the Department of State along with a copy of the stock certificate evidencing the required ownership under this chapter. The notice of election to be exempt must identify each corporation that employs the person electing the exemption and must list the social security number or federal tax identification number of each such employer and the additional documentation required by this section. In addition, the notice of election to be exempt must provide that the officer electing an exemption is not entitled to benefits under this chapter, must provide that the election does not exceed exemption limits for officers provided in s. 440.02, and must certify that any employees of the corporation whose officer elects an exemption are covered by workers' compensation insurance. Upon receipt of the notice of the election to be exempt, receipt of all application fees, and a determination by the department that the notice meets the requirements of this subsection, the department shall issue a certification of the election to the officer, unless the department determines that the information contained in the notice is invalid. The department shall revoke a certificate of election to be exempt from coverage upon a determination by the department that the person does not meet the requirements for exemption or that the information contained in the notice of election to be exempt is

invalid. The certificate of election must list the name of the corporation listed in the request for exemption. A new certificate of election must be obtained each time the person is employed by a new or different corporation that is not listed on the certificate of election. A copy of the certificate of election must be sent to each workers' compensation carrier identified in the request for exemption. Upon filing a notice of revocation of election, an officer who is a subcontractor or an officer of a corporate subcontractor must notify her or his contractor. Upon revocation of a certificate of election of exemption by the department, the department shall notify the workers' compensation carriers identified in the request for exemption.

25. Even though a person meets all of the requirements for an exemption, that person does not become exempt until the process outlined by Subsection 440.05(3), Florida Statutes, has been accomplished. Accordingly, Mr. Hill was an employee during all times pertinent, and Hill, Inc., was required to obtain coverage and failed to do so.

26. Mr. Hill and his employees, Mr. Beauregard and Mr. Petrokowski, were not covered by workers' compensation insurance during the times indicated on the Penalty Worksheet, and the penalties calculated by the Department in the case of these three men are correct.

RECOMMENDATION

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

RECOMMENDED that the Department of Financial Services enter a final order requiring Hill, Inc., to pay a penalty of \$660.72, and to refund any amounts paid by Hill, Inc., in excess of that amount.

DONE AND ENTERED this 15th day of December, 2008, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of December, 2008.

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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.