

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 08-4630
)
GARY THE CARPENTER)
CONSTRUCTION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on January 28, 2009, in Key West, Florida.

APPEARANCES

For Petitioner: Kristian E. Dunn
Assistant General Counsel
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Jerry D. Sanders, Esquire
Vernis & Bowling, P.A.
604 Truman Avenue, Suite 3
Key West, Florida 33040

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Gary the Carpenter Construction, Inc., failed to comply with the requirements of Sections 440.10, 440.107, and 440.38, Florida Statutes, and, if so, the appropriate amount of penalty which should be assessed against Respondent.

PRELIMINARY STATEMENT

Petitioner, the Department of Financial Services, Division of Workers' Compensation, as a result of a March 25, 2008, on-site inspection of Respondent's, Gary the Carpenter Construction, Inc., worksite and business location and review of business records produced by Respondent, determined that Respondent had committed violations of Section 440.107(2), Florida Statutes, by "failing to obtain coverage that meets the requirements of chapter 440, F.S., and the Insurance Code"

On August 6, 2008, Petitioner served by certified mail Order of Penalty Assessment No. 08-258-D80PA, informing Respondent of its determination and the amount of the penalty to be assessed due to the alleged violation.

Through counsel, Respondent contested the Petitioner's proposed penalty assessment, by filing a Petition for Hearing on Order of Penalty Assessment, dated August 21, 2008.

A copy of the Order of Penalty Assessment and the Petition for Hearing on Penalty Assessment were filed with the Division of Administrative Hearings by letter dated September 19, 2008, requesting assignment of the matter to an administrative law judge. The request was designated DOAH Case No. 08-4630, and was assigned to the undersigned.

By Notice of Hearing entered October 2, 2008, the final hearing was initially scheduled for December 3, 2008. The hearing was subsequently continued and rescheduled for January 28, 2009, upon the granting of an Unopposed Motion to Continue Hearing filed by Petitioner.

On January 26, 2009, the parties filed a Joint Response to Order of Pre-Hearing Instructions. This pleading contains facts agreed to by the parties which have been included in this Recommended Order to the extent relevant.

At the final hearing, Petitioner presented the testimony of Russell Gray and had eight Exhibits admitted. The record was left open to give Petitioner an opportunity to present the testimony of one additional witness and for Respondent to present evidence in response to that testimony. Respondent presented the testimony of Gary Burchfield and had seven Exhibits admitted. Those Exhibits were to be filed at the time for filing of post-hearing argument. Respondent did not file

post-hearing argument. Nor did Respondent file Respondent's exhibits.

On February 6, 2009, Petitioner filed a Report of Status Conference in which it was represented that the parties had concluded that no additional testimony would be presented. It was also represented that an Unopposed Motion to Amend the Penalty Assessment would be filed. That Motion was filed on February 18, 2009, and was granted by Order entered February 20, 2009.

The one-volume Transcript of the final hearing was filed on February 17, 2009. On February 18, 2009, a Notice of Filing Transcript was entered informing the parties that the Transcript had been filed and that proposed recommended orders were, therefore, due on or before March 9, 2009. Petitioner filed Department of Financial Services' Proposed Recommended Order on March 9, 2009. Respondent has not filed any post-hearing argument. Petitioner's Proposed Order has been fully considered in issuing this Recommended Order.

All references to Florida Statutes in this Recommended Order are to the 2008 version.

FINDINGS OF FACT

1. The Department of Financial Services (hereinafter referred to as the "Department"), is the state agency charged with the responsibility of 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. Respondent, Gary the Carpenter Construction, Inc. (hereinafter referred to as "GTC"), is a Florida corporation, which at the times relevant employed subcontractors in the performance of its general contracting business located in Key West, Florida. GTC and its subcontractors, at the times relevant, were performing construction activities in the State of Florida.

3. On March 25, 2008, GTC was renovating a structure at 1300 Virginia Street, Key West, Florida. An investigator of the Department's Division of Workers' Compensation (hereinafter referred to as the "Division"), conducted a compliance check at the construction site, determining that GTC was the general contractor and that it was using an out-of-state business entity, Pryjomski Construction (hereinafter referred to as "Pryjomski"), as a subcontractor. A Stop-Work Order was issued to Pryjomski. Pryjomski is a Michigan corporation.

4. As a result of the Division investigator's findings with regard to Pryjomski, on or about April 22, 2008, a Business Records Request was made by the Division to GTC. In response to the records request, GTC provided documentation of its workers'

compensation coverage. Those records were reviewed by Russell Gray, the Department's "Penalty Calculator."

5. Based upon his review of GTC's records, it was found that GTC's employees were covered for workers' compensation insurance through an employee leasing service.

6. The records provided by GTC also indicated, however, that GTC utilized the services of numerous subcontractors. A review of Department records concerning the subcontractors revealed that four of the subcontractors utilized by GTC did not meet coverage requirements: Christian Construction, Perez Painting, Pryjomski, and Tiles Etcetera.

7. The accuracy of the penalty assessment proposed by the Department attributable to Christian Construction and Perez Painting was stipulated to by the parties, and GTC did not contest that amount of the penalty assessment attributable to those two subcontractors.

Pryjomski

8. As to Pryjomski, it was discovered that it had two Certificates of Liability Insurance (hereinafter referred to as "Certificates"), both with issuance dates after March 25, 2008, the date the Division's investigator conducted the compliance check at GTC's construction site. A 2007-2008 workers' compensation policy was issued two days after March 25, 2008, and a 2006-2007 workers' compensation policy was issued

September 29, 2009. Obviously, these policies were obtained by Pryjomski because it had no coverage for 2006-2007 and 2007-2008, as of March 25, 2008.

9. Even if the policies obtained by Pryjomski had been effective prior to March 25, 2008, the policies were written by an out-of-state insurance company not licensed to write policies in Florida, and the policies did not have a Florida Endorsement under "Item 3A" of the declaration page of the policies. Any policy issued to an out-of-state business like Pryjomski must have an endorsement indicating that the foreign entity is paying Florida rates for Florida classification codes. This endorsement is found under "Item 3A" of the declaration page of a policy. The Pryjomski policies did not have the appropriate endorsement.

10. At the times relevant to this matter, Pryjomski was not listed by the Department as a business with appropriate workers' compensation coverage in Florida. GTC could not, therefore, have exercised due diligence in an effort to ensure that Pryjomski had the required insurance coverage when it utilized Pryjomski's construction services. If due diligence had been exercised, GTC would have been aware of Pryjomski's lack of appropriate coverage.

11. Based upon documentation provided by GTC, the Division calculated the total amount of Pryjomski's "payroll" for which

GTC was responsible. Absent any receipts for materials for which the payments were made by GTC to Pryjomski, the Division treated 20 percent of the payments as non-payroll pursuant to Florida Administrative Code Rule 69L-6.035(1)(i).

12. Payroll for 2007, less materials, was determined to be \$22,106.00. For 2008, payroll, less materials, was determined to be \$10,811.93. Utilizing the "finish carpentry" classification code (number 5437) and the approved manual rate therefore of the National Council on Compensation Insurance of 13.01, the penalty for 2007 was determined to be \$4,313.99. The rate for 2008 was determined to be 10.47, and the penalty was determined to be \$1,698.02.

Tiles Etcetera

13. Tiles Etcetera had previously been issued a Certificate of Exemption from coverage for Gregory Veliz, the president of Tiles Etcetera. That Certificate, however, expired on August 23, 2007. Any contract amounts paid to Tiles Etcetera by GTC while the Certificate was in effect are not subject to assessment and have not been included in the penalty assessment in this matter. Amounts paid by GTC to Tiles Etcetera while the Certificate of Exemption had expired are subject to penalty.

14. Based upon documentation provided by GTC, the Division calculated the total amount of "payroll" paid to Tiles Etcetera for which GTC was responsible. Absent any receipts for

materials for which the payments were made by GTC to Tiles Etcetera, the Division treated 20 percent of the payments as non-payroll pursuant to Florida Administrative Code Rule 69L-6.035(1)(i).

15. Payroll for the period from August 24, 2007, to October 19, 2007, less materials, was determined to be \$22,269.17. Utilizing the tile installation classification code (number 5438) and the approved manual rate therefore of the National Council on Compensation Insurance of 8.34, the penalty for 2007 was determined to be \$2,786.88.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

17. Because the administrative fines sought by the Department are penal in nature, it must prove by clear and convincing evidence that GTC failed to comply with the requirements of Chapter 440, Florida Statutes, and that the Department's proposed civil and administrative penalties assessed are correct. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996).

18. Every "employer" is required to secure the payment of compensation for the benefit of its "employees."

§§ 440.10(1)(a) and 440.38(1), Fla. Stat. The Department has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. § 440.107(3), Fla. Stat.

19. 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.

20. Relevant to this matter, an "employee" is defined in Section 440.02(15)(c)2., Florida Statutes, to include:

All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.

21. Based on the findings of fact herein, the Department carried its burden of proving by a clear and convincing evidence that GTC was an "employer" as defined in Section 440.02(16)(a), Florida Statutes, and that it engaged in activities of employment as that term is defined in Section 440.02(15)(c)2., Florida Statutes.

22. The Department also proved that GTC utilized subcontractors who did not have any exemption permitted by Chapter 440, Florida Statutes, and had not otherwise secured the payment of compensation coverage as a subcontractor, consistent with Section 440.10, Florida Statutes.

23. As to Tiles Etcetera, the Department proved that, while it had obtained an appropriate exemption for part of the relevant time period, it did not have an exemption for the period from August 24, 2007, to October 19, 2007.

24. As to Pryjomski, the Department proved that Pryjomski did not have coverage from March 9, 2007, to December 21, 2007, and from January 11, 2008, to March 21, 2008. The coverage ultimately obtained by Pryjomski were acquired too late and did not have the endorsement required by Florida Administrative Code Rule 69L-6.019.

25. The Department is required by Section 440.107(7)(d)1., Florida Statutes, to:

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.

26. The Department is authorized by Section 440.107(9), Florida Statutes, to enact rules to implement Section 440.107, and it has done so in Florida Administrative Chapter 69L-6. Rule 69L-6.015 requires employers in Florida to "maintain employment records pertaining to every person to whom the employer paid or owes remuneration for the performance of any work or service in connection with any employment" for "the current calendar year to date and for the preceding three calendar years" and to "produce the records when requested by the division pursuant to Section 440.107." Fla. Admin. Code R. 69L-6.015(1), (3), and (11).

27. Florida Administrative Code Rule 69L-6.015 also requires that "[e]very employer shall maintain all invoices received from a subcontractor for work or service performed by the subcontractor for the employer" and that "[e]very contractor shall maintain evidence of workers' compensation insurance of every subcontractor and for every subcontractor that is a corporation or limited liability company that has an officer or a member who elects to be exempt from the coverage requirements of the workers' compensation law the contractor shall maintain a valid certificate of election to be exempt issued to the officer or member under Section 440.05, F.S."

28. Section 440.107, Florida Statutes, authorizes the Department to impose upon any employer who has failed to

maintain workers' compensation insurance "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"

29. The Department has established procedures to be used in imputing payroll in its rules. Where an employer is unable to prove the amount of a payment to a subcontractor attributable to the costs of materials, as opposed to salary, Florida Administrative Code Rule 69L-6.035(i) specifies that "eighty percent of the total contract price shall be the employer's payroll."

30. The Department has proven by clear and convincing evidence that it correctly calculated the imputed payroll for subcontractor of GTC for the period at issue herein. The total penalty is \$11,122.74.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order:

1. Finding that Respondent, Gary the Carpenter Construction, Inc., failed to secure the payment of workers'

compensation for its employees, in violation of Section 440.107,
Florida Statutes; and

2. Assessing a penalty against Gary the Carpenter
Construction, Inc., in the amount of \$11,122.74.

DONE AND ENTERED this 31st day of March, 2009, in
Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2009.

COPIES FURNISHED:

Kristian E. Dunn, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

Jerry D. Sanders, Esquire
Vernis & Bowling of Key West, P.A.
604 Truman Avenue, Suite 3
Key West, Florida 33040

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Daniel Sumner, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

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 these cases.