STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 08-5348
JOHN H. WOODS, d/b/a WOODS CONSTRUCTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Daniel M. Kilbride, a duly-designated Administrative Law Judge of the Division of Administrative Hearings on April 15, 2009, in Fort Myers, Florida.

APPEARANCES

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

For Respondent: Michael F. Kayusa, Esquire
Post Office Box 2237
Fort Myers, Florida 33902

STATEMENT OF THE ISSUES

Whether Respondent, John H. Woods, d/b/a Woods Construction, conducted operations in the State of Florida without obtaining workers' compensation coverage which meets the requirements of Chapter 440, Florida Statutes (2008)[1], in violation of Subsection 440.107(2), Florida Statutes, as alleged in the Amended Stop-Work Order and Order of Penalty Assessment and Second Amended Order of Penalty Assessment.

If so, what penalty should be assessed by Petitioner, Department of Financial Services, Division of Workers' Compensation, pursuant to Section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

On August 14, 2008, Petitioner issued and served a Stop-Work Order and Order of Penalty Assessment (SWO) directing Respondent to immediately stop work and cease all business operations in Florida because it failed to secure the payment of workers' compensation insurance coverage meeting the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. The SWO was amended on August 18, 2008, and served via certified mail on August 22, 2008. Petitioner requested and received records during its investigation and calculated an Amended Order of Penalty Assessment (AOPA) which was served on Respondent on October 10, 2008. After Respondent filed a Petition for Hearing, Petitioner referred the matter to

the Division of Administrative Hearings (DOAH) to conduct the formal hearing.

On March 19, 2009, Petitioner filed a Motion to Amend Order of Penalty Assessment in which Petitioner decreased the penalty. The motion was granted on March 24, 2009. Following extensive discovery, motion practice and several continuances granted at the request of Respondent, the final hearing was held on April 15, 2009.

At the hearing, Petitioner presented the testimony of two witnesses: Maria Seidler and Lynne Murcia, an investigator and a penalty calculator, respectively, for Petitioner. Petitioner's Composite Exhibits 1b, 2, 3 (a, b, and c), 4a, 5, 6, 7 (a through m), 8, 9, and Joint Composite Exhibit 10 were offered and received into evidence. Respondent offered the testimony of two witnesses: Lynne Hendry and Brad Hendry, and Respondent testified in his own behalf.

The Transcript of the proceeding was filed with the DOAH on May 26, 2009. Petitioner requested and received a time extension for the filing of its proposed recommended order. Petitioner timely filed its Proposed Recommended Order on July 9, 2009. Respondent has not filed proposals as of the date of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility of enforcing the requirement of Section 440.107, Florida Statutes, that employers in Florida secure the payment of workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Workers' compensation coverage is required if a business entity is engaged in the construction industry in Florida. Securing the payment of workers' compensation coverage can be achieved via three different methods: purchase a workers' compensation insurance policy; ensure that workers are paid and workers' compensation coverage is provided by a third party entity called a Professional Employment Organization (PEO); or apply for a Certificate of Exemption from Workers' Compensation Coverage (Exemption Certificate) assuming certain statutorily mandated criteria are met. These methods are not mutually exclusive of each other.

3. On August 14, 2008, a workers' compensation compliance investigator employed by Petitioner, visited a construction site in Lee County, Florida. On the site, she observed several groups of men conducting various construction activities including the laying of a sidewalk along Lexington Street in Fort Myers.

4. The work performed involved construction activities as contemplated under the applicable agency rule. Fla. Admin. Code R. 69L-6.021.

5. By a preponderance of evidence, it is determined that among the entities on the worksite was a group of three laborers who worked for Woods Construction. There was no proof of coverage for workers' compensation for the Woods Construction Company, neither an insurance policy, nor any exemption certificate for the individuals encountered on the worksite.

6. Woods Construction assumed that the three laborers were covered by Able Body Labor, a PEO. The evidence confirmed that two of the three laborers were covered. However, the third laborer, Filberto Castro, was unable to be included on the work roster due to his lack of corresponding documentation necessary for employment in the United States. Therefore, Castro was working without coverage.

7. An SWO was issued and a Request for Production of Business Records for Penalty Calculation (BRR) was served on J. Woods Construction, Corp. [sic] on August 14, 2008. The SWO was later amended to conform to the correct name of the company, which is not a corporation. The amended SWO was served on John H. Woods on August 22, 2008, via certified mail.

8. Pursuant to the BRR, Respondent provided business records to Petitioner. Petitioner's Penalty Calculator's duties

are to receive records from the employer, and organize, identify, and audit those records which indicate payroll activities, while delineating other business activities, which may be related to the non-payroll activities of the business such as purchasing supplies, maintaining a place of business, etc.

9. The characterization of the voluminous records received from Respondent were categorized into three distinct categories: reliable, somewhat reliable, and unreliable records.

10. The records were characterized as “reliable” if they were records from an independent third party or the bank with whom Respondent conducted business, and were thus extremely difficult to alter without a high level of expertise. They are considered “source documentation.” The bank records capture the transactions as they occurred, to whom money was paid, and for what amount.

11. The next category of records deemed “somewhat reliable” were those records which, on their face appear to be legitimate records, such as copies of the checks with corresponding amounts and dates to those in the “reliable” category.

12. However, certain inconsistencies in these records demonstrated that they were less than reliable. These records were only used in select instances when there was corresponding

source documentation supporting their veracity. A prime example, among many, is check number 1078 for $100.00 indicating a payment for a credit card; the corresponding checkstub indicates that the payment went to “Whitney,” a grand-child of John H. Woods. In toto, the documents illustrated that Respondent failed to follow generally accepted accounting principles by mislabeling or mischaracterizing funds on a regular basis.

13. The third category of records were records which were considered “unreliable” as these records lacked any corresponding source documentation and they could not be considered in assessing the payroll activities of the firm.

14. In the construction industry, there are instruments called “draw requests.” The draw request is an item that a subcontractor or builder will utilize to show partial completion of a project and concurrently request more funds (the draw) to complete the remaining portion of the project. The draw requests are often utilized at pre-measured stages of the project, e.g.: 25 percent completion, 50 percent completion, etc. The draw requests would have attached source documentation such as receipts from suppliers, servicers, and other miscellanea to show that the project is worked upon as opposed to the funds being siphoned off elsewhere.

15. Nowhere, in the box full of records produced, was a proper draw request found with attached receipts. Therefore, none of the records produced could be considered as reliable documents.

16. Many irregularities in Respondent's methodology of accounting were also noted; as an example, there were numerous times that company checks from Respondent were deposited by an entity known as "Hendry Contracting," without explanation.

17. Respondent personally held the license as a General Contractor, and would utilize Hendry Contracting as a subcontractor. Hendry Contracting did not have any license whatsoever. It utilized Respondent's license while performing construction activities. Brad Hendry, the principal of Hendry Contracting, is married to Janice Hendry, the daughter of John H. Woods, the owner of Respondent, Woods Construction.

18. Janice Hendry administered Respondent's company account and the company account of Hendry Contracting. The evidence is clear that no separation of duties was attempted. Furthermore, Hendry admitted that she did not exercise any sense of separation between the two different accounts (Woods Construction and/or Hendry Contracting). The two businesses were "commingled," and the ability to retain any form of standard accounting requirement of checks and balances has been nullified.

19. Numerous irregularities that defied "generally accepted accounting principles" appeared, including personal loans to family members, wholesale transfers of monies from Respondent to Hendry Contracting without explanation, and checks drafted to Brad Hendry (personally). Further, Woods testified that he exercised little or no control over his company in the last ten years. Hendry also confirmed the haphazard method of managing the two firms' different accounts by writing checks from one firm to another, when the other firm's account was running low. Hendry's testimony regarding the financial cooperation of Respondent and Hendry Contracting is indicative of the commingling of accounts, as well. Hendry testified that each entity would draw on each other's accounts depending on the cash levels within each respective account. Hendry also testified that Hendry Contracting was utilized for obtaining bank loans and utilizing Hendry's name to purchase materials when the other accounts were depleted.

20. By utilizing only the bank records, a general ledger for Respondent was constructed which derived the amounts that came into the business and the amounts paid out for labor. The fact that Respondent had no general ledger meant that some items would never be accounted for, such as building supply costs. Based on that caveat, Florida Administrative Code Rule 69L-6.035(i) was applied to the total payroll derived from the bank

records. This had the effect of reducing total payroll by twenty percent to account for building supplies (which were never accounted for due to the non-existent business ledger of Respondent).

21. The amount of money flowing and commingling between the two firms (Respondent and Hendry Contracting) and among family members, numbered in the hundreds of thousands of dollars. The commingled money was utilized for all manners of payments: loans (not expected to be paid back) to family members, inflated wages to family members for de minimis services, or payment for services/goods for family members' personal residences.

22. A proposed penalty in the amount of $365,876.82 was originally assessed, as reflected in the AOPA, and served on Respondent on August 26, 2008.

23. Based on further records produced and the understanding that Respondent was a construction firm but was unable to show any receipts of building supplies, the proposed penalty, utilizing Florida Administrative Code Rule 69L-6.035(i), decreased the payroll by 20 percent to account for building supplies that were not documented. After consideration of the documents provided and application of the rule, a Second AOPA was prepared showing an assessment in the amount of $306,876.82.

24. With Hendry as the sole financial officer of Respondent, approximately $351,632.43 of payroll was allocated to various family members. There was unambiguous testimony from Woods and Hendry that family members were employed in various roles, most notably the grand-daughters who were earning wages while conducting secretarial duties. A further $472,292.94 was paid to Hendry Contracting during the three-year audit time-period. Hendry Contracting never had any discernible workers' compensation coverage for this amount of payroll, rendering Respondent liable for failure to secure workers' compensation coverage for the monies paid. The remainder of the unsecured payroll assessed to Respondent was for various non-family workers for whom no proof of workers' compensation coverage could be ascertained.

25. The Second AOPA was computed by calculating Respondent's payroll for the past three years using the business records Respondent provided. The payroll was then divided for each year by 100 and that figure was multiplied by an approved manual rate assigned to the classification codes (class codes) found in the National Council on Compensation Insurance's Scope of Trade Manual (Scopes Manual).

26. Class codes were assigned to the individuals listed on the penalty worksheet according to their historical duties. The grand-daughters and other female employees of Respondent were

listed as clerical employees (classification code 8810), while the remaining names were listed as general carpentry workers (classification code 5645). Next, the product of the approved manual rate and the payroll for each year divided by 100 was then multiplied by 1.5, pursuant to statute, to derive the penalty for each year or part of a year. The penalties for each employee and year or part of a year were then added together to come up with a total penalty of $306,213.78.

27. Based on the assessment of the financial records in conjunction with the documents admitted into evidence, the grand total of $306,213.78 is a true and correct penalty amount for Respondent.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

29. Because administrative fines are penal in nature, Petitioner is required to prove by clear and convincing evidence that Respondent failed to provide its employees with workers' compensation coverage from August 15, 2005, through August 14, 2008. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

30. Every employer is required to secure the payment of compensation for the benefit of its employees. §§ 440.10(1)(a), 440.38(1), Fla. Stat. Subsection 440.107(2), Florida Statutes, states that "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

31. Petitioner has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law, and is authorized to issue stop-work orders and penalty assessment orders in its enforcement of Florida's workers' compensation coverage requirements. § 440.107(3), Fla. Stat.

32. An "employer" is defined as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

33. "'Employment' . . . means any service performed by an employee for the person employing him or her." § 440.02(17)(a), Fla. Stat. Furthermore, employment in the construction industry includes "all private employment in which one or more employees are employed by the same employer." § 440.02(17)(b)2., Fla. Stat.

34. Additionally, "'[e]mployee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment. . . ." § 440.02(15)(a), Fla. Stat. The statutory definition of employee also includes "[a]n independent contractor working or

performing services in the construction industry." § 440.02(15)(c)3., Fla. Stat. Certain corporate officers can become exempt from the coverage requirements of Chapter 440, Florida Statutes, but must affirmatively make that election. §§ 440.02(15)(b), 440.05, Fla. Stat.

35. "Construction industry" is defined as, "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land." § 440.02(8), Fla. Stat. Subsection 440.02(8), Florida Statutes, further provides, "[t]he division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section." Pursuant to this statutory authority, the Division of Workers' Compensation has promulgated Florida Administrative Code Rule 69L-6.021, which adopts the definitions found in the Scopes Manual. Fla. Admin. Code R. 69L-6.021(2).

36. Florida Administrative Code Rule 69L-6.021(1), lists workplace operations that fall within the statutory definition of "construction industry" and includes "carpentry – detached one or two family dwellings," using the Scopes Manual's definition under classification code 5645.

37. As Respondent was in the construction industry, it was an employer if it had at least one employee. § 440.02(17)(b)2.,

Fla. Stat. Respondent's business records detail payments to multiple individuals for work performed for Respondent. The statutes and rules do not differentiate between employees who are family members and employees who are not family members, and likewise, do not contemplate the propriety of overcompensating family members for their services. Therefore, Respondent was required to secure the payment of workers' compensation for its employees for the amounts that it paid them, regardless of kinship and motive for compensation.

38. Since the failure to secure the payment of workers' compensation has been statutorily deemed "an immediate and serious danger to public health, safety, or welfare," Subsection 440.107(7)(a), Florida Statutes, authorizes Petitioner to issue a Stop-Work Order whenever it determines that an employer has failed to obtain worker's compensation insurance coverage, and the effect of the order is to require that employer to cease all business operations in the state. In fact, when Petitioner determines that an employer has failed to secure the payment of workers' compensation to his or her employees, it is required to issue a Stop-Work Order within 72 hours of making that determination. § 440.107(7)(a), Fla. Stat.

39. Petitioner is also required by Subsection 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.

40. Since Petitioner is obligated by statute to use an established formula to calculate a penalty, it was justified in penalizing Respondent in an amount equal to 1.5 times the workers' compensation premiums the employer evaded during the period extending from August 15, 2005, through August 14, 2008.

41. The methodology for calculating the penalty is mandated by rule and statute. Florida Administrative Code Rule 69L-6.027 adopts a penalty calculation worksheet for Petitioner's investigators to utilize. Analysis of the worksheet shows that an essential calculation is to establish the premium that should have been paid. Premium is equal to 1/100th of each employee's pay -– i.e., the gross payroll -– which is then multiplied by an established rate based on the risk of injury (the approved manual rate).

42. "Payments, including cash payments, made to employees by or on behalf of the employer," and "[p]ayments, including cash payments, made to a third person or party by or on behalf of the employer for services provided to the employer by the

employees" are included as remuneration paid to employees for the purposes of calculating a penalty. Fla. Admin. Code R. 69L-6.035(1)(b), (c).

43. Respondent's claims that workers' compensation coverage payments for wages paid to Woods are unnecessary and thus the penalty, as well, are not persuasive. A thorough review of the applicable agency rule, Florida Administrative Code Rule 69L-6.035, proves otherwise.

> (1) For purposes of determining payroll for calculating a penalty pursuant to Subsection 440.107(7)(d)1., F.S., the Department shall, when applicable, include any one or more of the following as remuneration to employees based upon evidence received in its investigation: . . .
>
> * * *
>
> (e) Payments made to employees by or on behalf of the employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distribution, or incentive plans; . . .

44. Likewise, Respondent's payments to its family members, whether overcompensated or not, are still considered remuneration for services as long as they worked for Respondent in any capacity, per Florida Administrative Code Rule 69L-6.035:

> (1) For purposes of determining payroll for calculating a penalty pursuant to Subsection 440.107(7)(d)1., F.S., the Department shall, when applicable, include any one or more of the following as remuneration to employees

> based upon evidence received in its investigation:
>
> (a) Wages or salaries paid to employees by or on behalf of the employer;
>
> (b) Payments, including cash payments, made to employees by or on behalf of the employer;
>
> (c) Payments, including cash payments, made to a third person or party by or on behalf of the employer for services provided to the employer by the employees;
>
> (d) Bonuses paid to employees by or on behalf of the employer. . . .

45. Based on the findings of fact herein, Petitioner has proven by clear and convincing evidence that the SWO and Amended SWO were justified, and it correctly calculated the payroll for Respondent's employees for the period at issue herein and was justified in assessing a penalty to Respondent for failing to comply with Section 440.107, Florida Statutes.

RECOMMENDATION

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

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

1. Finding that Respondent failed to secure the payment of workers' compensation insurance coverage for its employees in

violation of Subsections 440.10(1)(a) and 440.38(1), Florida Statutes; and

2. Assessing a penalty against Respondent in the amount of $306,213.78, which is equal to 1.5 times the evaded premium based on the payroll records provided by Respondent and on the applicable approved manual rates and classification codes for the period extending from August 15, 2005, through August 14, 2008, as provided in Subsection 440.107(7), Florida Statutes.

DONE AND ENTERED this 17th day of July, 2009, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 2009.

ENDNOTE

[1/] All references to Florida Statutes are to Florida Statutes (2008) unless otherwise indicated.

COPIES FURNISHED:

Tracy Beal, Agency Clerk
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

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

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

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

Michael F. Kayusa, Esquire
Post Office Box 2237
Fort Myers, Florida 33902

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.