

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD MANAGEMENT, LLC,)
)
 Petitioner,)
)
vs.) Case No. 08-5349
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, via video teleconference from sites in Orlando and Tallahassee, Florida, on February 27, 2009.

APPEARANCES

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

For Respondent: Albert Segev, pro se
Brevard Management, LLC, d/b/a
River Palm Hotel
420 South Harbor City Boulevard
Melbourne, Florida 32901

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the Respondent, Brevard Management, LLC, (Brevard Management) failed to abide by the coverage requirements of the Workers' Compensation Law, Chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees; and whether Petitioner properly assessed a penalty against Respondent pursuant to Section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, Chapter 440, Florida Statutes, the Department of Financial Services, Division of Workers' Compensation (Department), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On August 25, 2008, the Department issued a "Stop Work and Penalty Assessment Order" (SWO) alleging that Brevard Management failed to abide by the coverage requirements of the Workers' Compensation Law on that date. The order directed Brevard Management immediately to cease business operations and pay a penalty equal to 1.5 times the amount Brevard Management would have paid in premium to secure workers' compensation during periods within the preceding three years when it failed to do so, or \$1,000, whichever is greater, pursuant to Subsection 440.107(7)(d), Florida Statutes.

The Department then requested business records from Brevard Management in order to determine the exact amount of the penalty. Brevard Management promptly provided the records. On August 26, 2008, the Department issued an "Amended Order of Penalty Assessment" (Amended Order) that ordered Brevard Management to pay a penalty of \$2,112.03, pursuant to Subsection 440.107(7)(d), Florida Statutes. The SWO requiring Brevard Management to cease all business operations remained in effect until Brevard Management secured workers' compensation coverage for its employees and paid the penalty assessment. Brevard Management promptly complied with those terms and an Order of Release from the SWO and the Amended Order was entered on August 26, 2008.

Brevard Management timely requested a formal administrative hearing to contest the penalty assessment, and on October 23, 2008, the Department forwarded Brevard Management's request to the Division of Administrative Hearings (DOAH). The hearing was originally scheduled for December 10, 2008. The case was continued twice, and the hearing was held on February 27, 2009.

At the hearing, the Department presented the testimony of its investigator, Eugene Wyatt. The Department's Exhibits 1 through 13 were admitted into evidence. Department Exhibit 10 was the deposition testimony of Clinton Stanley, a sales manager for Automatic Data Processing (ADP), a payroll and tax filing

company based in Orlando. Department Exhibit 11 was the deposition testimony of Elizabeth Hendricks Bowen, an agent for ADP. Department Exhibit 12 was the deposition testimony of Michael Cole, general manager of the River Palm Hotel. Brevard Management presented the testimony of its principal, Albert Segev. Brevard Management's Exhibits 1 through 4 were admitted into evidence.

A Transcript of the final hearing was filed at the DOAH on March 25, 2009. The Department timely filed a Proposed Recommended Order on April 6, 2009. Brevard Management did not file a proposed recommended order.

Unless otherwise stated, all statutory references are to the 2008 edition of the Florida Statutes.

FINDINGS OF FACT

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

1. The Department is the state agency responsible for enforcing the requirement of the Workers' Compensation Law that employers secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. On July 31, 2008, Eugene Wyatt, an insurance analyst working for the Department, visited the River Palm Motel in Melbourne to investigate the workers' compensation insurance

status of several contractors performing renovations on the property. The River Palm Motel is owned by Brevard Management, whose principal owner is Albert Segev.

3. During his visit, Mr. Wyatt spoke to Michael Cole, the hotel's manager, regarding the workers' compensation coverage of the hotel itself. Mr. Cole told Mr. Wyatt that the hotel used Automatic Data Processing, Inc. (ADP), a third-party payroll services provider, to provide workers' compensation insurance coverage.

4. Brevard Management began operating the River Palm Motel on June 18, 2008. On June 19, 2008, Brevard Management entered into an agreement with ADP for the provision of payroll services, including the filing of payroll taxes, using Easy Pay, ADP's proprietary payroll management service.

5. On August 25, 2008, Mr. Wyatt received an anonymous referral alleging that the River Palm Motel was not carrying workers' compensation insurance for its employees. Later that day, Mr. Wyatt returned to the River Palm Motel, this time to investigate the workers' compensation status of the motel itself.

6. Upon his arrival at the motel, Mr. Wyatt spoke with Mr. Cole, who disclosed that Brevard Management owned the motel. Mr. Wyatt conducted a search of the Division of Corporation's

website and learned that Mr. Segev was the principal owner of Brevard Management.

7. Mr. Cole provided Mr. Wyatt with invoices for the last payroll period for the River Palm Motel. The invoices indicated that the company had more than ten employees, which led Mr. Wyatt to conclude that the company was required to secure workers' compensation insurance. At his deposition, Mr. Cole confirmed that River Palm Motel had between ten and twelve employees on August 25, 2008.

8. Mr. Cole believed that Brevard Management had secured workers' compensation insurance coverage through ADP. However, the payroll invoices that Mr. Cole provided to Mr. Wyatt showed no deductions for any insurance.

9. Mr. Wyatt consulted the Department's Coverage and Compliance Automated System (CCAS) database, which lists the workers' compensation insurance policy information for each business as provided by the insurance companies, as well as any workers' compensation exemptions for corporate officers. CCAS indicated that Brevard Management had no workers' compensation insurance policy in place and no current, valid exemptions.

10. Mr. Cole provided Mr. Wyatt with a copy of the June 19, 2008, payroll agreement between Brevard Management and ADP, which gave no indication that workers' compensation insurance was included. The evidence at the hearing established

that ADP does not automatically provide workers' compensation insurance coverage to entities that enroll for its payroll services. ADP provides such insurance coverage, but only as part of a separate transaction.

11. After receiving authorization from the acting supervisor in the Department's Orlando office, Mr. Wyatt issued the SWO to Brevard Management on August 25, 2008, and personally served it on Mr. Segev on August 26, 2008.

12. On August 25, 2008, Mr. Wyatt gave Mr. Cole a request to produce business records, for the purpose of making a penalty assessment calculation. In response, Mr. Cole provided an employee roster from ADP showing the payroll entries for every Brevard Management employee from the opening of the motel in June 2008 through August 25, 2008.

13. After Mr. Wyatt's visit, Mr. Cole contacted ADP and spoke to Elizabeth Bowen, a workers' compensation sales agent with ADP Insurance Services. Ms. Bowen faxed forms to Mr. Cole to complete in order to obtain a workers' compensation insurance policy.

14. Mr. Cole completed the paperwork and obtained a workers' compensation insurance policy through NorGUARD Insurance Company, effective August 25, 2008.

15. Mr. Cole testified that he believed in good faith that he had obtained workers' compensation insurance at the time he

signed up for payroll services with ADP sales representative Clinton Stanley in June 2008. It was only Mr. Wyatt's investigation that alerted Mr. Cole to the fact that Brevard Management did not have the required coverage.

16. Mr. Stanley recalled that Mr. Cole had requested workers' compensation insurance, recalled telling Mr. Cole that his request had to be routed to ADP's separate insurance division, and recalled having forwarded the request to the insurance division. Mr. Stanley had no explanation for why the insurance division did not follow up with Mr. Cole in June 2008. Because he never heard from Mr. Cole again, he assumed that Brevard Management had obtained the requested workers' compensation coverage.

17. It is accepted that Mr. Cole believed that he had purchased the workers' compensation coverage as part of the ADP payroll services; however, the evidence established that Mr. Cole should reasonably have known that this was not the case. Nothing in the June 2008 contractual documentation with ADP indicated that Brevard Management had obtained workers' compensation insurance coverage, and the subsequent ADP payroll registers showed no deductions for workers' compensation insurance.

18. Using the proprietary Scopes Manual developed by the National Council on Compensation Insurance, Inc. (NCCI),

Mr. Wyatt assigned Brevard Management's employees the occupation classification code 9052, "Hotel: All Other Employees & Sales Persons, Drivers." This was the same code assigned by Ms. Bowen when she completed the policy paperwork for Brevard Management. Ms. Bowen described this classification as "all inclusive" with respect to hotel employees.

19. Mr. Wyatt calculated an amended penalty based on the payroll records provided by Mr. Cole, from the date Brevard Management became an active limited liability company, June 3, 2008, to the date the SWO was issued, August 25, 2008. Mr. Wyatt divided the total payroll by 100, then multiplied that figure by NCCI's approved manual rate for insurance coverage in 2008 for classification code 9052. That product was then multiplied by 1.5 to arrive at the penalty for the stated period. The total penalty for all employees was \$2,112.03.

20. The Amended Order was served on Brevard Management on August 26, 2008, along with the SWO.

21. On August 26, 2008, Mr. Wyatt met with Mr. Cole and Mr. Segev, who produced a copy of the application for workers' compensation insurance placed through NorGUARD Insurance Company and tendered a cashier's check for the full amount of the penalty. The SWO was released on the same day.

CONCLUSIONS OF LAW

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

23. Employers are required to secure payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

24. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her" and includes "[a]ll private employments in which four or more employees are employed by the same employer. . . ." §§ 440.02(17)(a) and (b)(2), Fla. Stat.

25. "Employee" is defined, in part, as "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. . . ." § 440.02(15)(a), Fla. Stat. "Employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state. . . ." § 440.02(15)(b), Fla. Stat. Certain corporate officers may elect to exempt themselves from the coverage requirements of Chapter 440, Florida Statutes. §§ 440.02(15)(b) and 440.05, Fla. Stat. In this case, none of

Brevard Management's employees had a workers' compensation exemption.

26. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the Workers' Compensation Law and that the penalty assessments were correct under the law. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

27. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

28. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an

intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

29. The Department established by clear and convincing evidence that Brevard Management was an "employer" for workers' compensation purposes because it was engaged in a non-construction industry and had four or more employees working for the company from June 2008 through August 2008. § 440.02(16)(a) and (17)(b)2., Fla. Stat. Brevard Management was therefore required to secure the payment of workers' compensation. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

30. Subsection 440.107(7)(a), Florida Statutes, provides in relevant part:

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 . . . 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.

31. Thus, the Department's SWO was mandated by statute. The Department applied the proper methodology in computing the penalty, pursuant to the Penalty Calculation Worksheet adopted by reference in Florida Administrative Code Rule 69L-6.027.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$2,112.03 against Brevard Management, LLC.

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



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
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this 17th day of April, 2009.

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.