

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF )  
WORKERS' COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5911  
 )  
L AND I CONSOLIDATED )  
SERVICES, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to appropriate notice this matter came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Pensacola, Florida, on March 23, 2009. The appearances were as follows:

APPEARANCES

For Department of Financial Services, Division of Workers' Compensation:

Justin H. Faulkner, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399

For L and I Consolidated Services, Inc.:

Samuel W. Bearman, Esquire  
Law Office of Samuel W. Bearman, L.C.  
820 North 12th Avenue  
Pensacola, Florida 32501

### STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent was an employer in the State of Florida, required to secure the payment of workers' compensation insurance coverage pursuant to the appropriate provisions of Chapter 440, Florida Statutes (2007); whether the Respondent secured such coverage, if required; and whether the proposed penalty, if any, is warranted.

### PRELIMINARY STATEMENT

This proceeding had its origin in an observation made by an investigator for the Department of Financial Services, Division of Workers' Compensation (Petitioner, Department), wherein the Respondent's principal, Richard Longoria, was observed performing construction work at a job site in or around Pensacola, Florida. It was determined by the investigator that the Respondent Corporation did not have workers' compensation coverage nor an effective exemption therefrom. Consequently, the investigator issued a Stop Work Order based upon the alleged failure to obtain workers' compensation insurance coverage meeting the relevant requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. In due course, an Amended Order of Penalty Assessment was issued and served on the Respondent on October 31, 2008. The Respondent filed a timely petition for formal proceeding, and hearing based upon the

Amended Order of Penalty Assessment. The minimum fine of \$1,000 had been assessed and, during the free form stage of this proceeding, the Respondent paid the \$1,000 fine in full. After the filing of the Petition for Hearing, the Petitioner referred the dispute to the Division of Administrative Hearings, after which it was assigned to the undersigned Administrative Law Judge for conduct of a formal proceeding.

The cause came on for final hearing, as noticed, on March 23, 2009. The Petitioner presented the testimony of Michelle Newcomer, an investigator for the Department, as well as Mark Mark, a Senior Management Analyst II for the Department. Exhibits 1 through 13 were presented by the Petitioner and were received into evidence without objection.

The Respondent offered the testimony of its principal and president, Richard Longoria. The Respondent did not offer any exhibits into evidence.

Upon conclusion of the proceeding, a transcript of the proceeding was ordered and was filed on April 8, 2009. Proposed Recommended orders were thereafter timely filed and have been considered in the rendition of this Recommended Order.

#### FINDINGS OF FACT

1. The Department is an agency of the State of Florida charged with enforcing the various requirements of Chapter 440 Florida Statutes. This includes the requirement, in Section

440.107(3) Florida Statutes, that employers in the State of Florida, as defined by statute, secure the payment of workers' compensation coverage for all employees, as provided in Sections 440.10(1)(a), 440.38(1), and 440.107(2), Florida Statutes (2007).

2. The Respondent is a closely held Florida corporation with a principal business address of record at 1815 West Detroit Boulevard, Pensacola, Florida 32534. The president of the Respondent Corporation is Richard Longoria.

3. On October 29, 2008, an investigator for the Department, Michelle Newcomer, observed construction work being conducted at a site at 4111 Baisden Road in Pensacola, Florida. Ms. Newcomer stopped at that address and encountered Richard Longoria, the Respondent's president. In the course of their conversation, Mr. Longoria told Investigator Newcomer that he was sanding and caulking window frames in preparation for painting them. He also was engaged in painting shutters at that address.

4. The so-called "Scopes Manual" is a manual published by the National Counsel on Compensation Insurance, Inc. (NCCI). In that manual are certain codes, related to the construction industry and trades considered to be within that industry. Painting is considered to be "construction" under the relevant codes in this manual. The manual, with its codes and

classifications is relied upon in the insurance industry and has been adopted by the State of Florida, and the Department, in Florida Administrative Code Rule 69L-6.021. The preparation of surfaces for painting is contemplated as being included in the construction trade or industry in that manual, under the painting classification code.

5. Mr. Longoria performs a significant amount of painting, but also does general construction, wallpapering, general maintenance and carpentry work. He has three different occupational licenses: maintenance, carpentry and painting/wallpapering. The trades or types of work Mr. Longoria had disclosed in the course of obtaining his construction industry exemption, which was effective April 13, 2006, through April 12, 2008, included paperhanging, wallpapering and carpentry.

6. During his conversation with Investigator Newcomer, Mr. Longoria disclosed that he did not have workers' compensation coverage because he had an exemption from such coverage. He provided her with a workers' compensation Exemption card for the construction industry. Ms. Newcomer observed that the workers' compensation exemption held by Mr. Longoria, as an officer of the Respondent, had actually expired some months previously, on April 12, 2008. Ms. Newcomer consulted the Department's automated database, called the

Coverage and Compliance Automated System (CCAS). That system is routinely used and lists workers' compensation insurance policy information for each corporation, which insurance companies are required to provide to the Department, as well as the workers' compensation exemptions for corporate officers, if any. The database confirmed that Mr. Longoria's most recent exemption had expired on April 12, 2008. He thus did not have a current workers' compensation exemption on October 29, 2008, when he encountered Investigator Newcomer. That database also revealed that there was no record of a workers' compensation insurance policy in effect for the Respondent, and this was confirmed by Mr. Longoria's testimony during his deposition (in evidence).

7. Corporate officers who qualify for a workers' compensation coverage exemption are not automatically exempt, but must submit a Notice of Election to Be Exempt. They submit a form, along with a \$50 fee, to apply for an exemption. Upon receipt of a Notice of Election to Be Exempt, the Department makes a determination as to whether the applicant for the exemption meets the relevant eligibility requirements. The exemption request is then processed by the Department and a Notice of Granting the Exemption, or denial, or a Notice of Incompletion, and the necessity for more information, is sent to the applicant.

8. A workers' compensation exemption has a duration of two years from its effective date. Its effective date is the date that is entered into the CCAS system. The only Notice of Election to Be Exempt the Department received from Mr. Longoria, as of the October 29, 2008, inspection date, was the application received on April 10, 2006. It became effective on April 13, 2006, and thus was effective until April 13, 2008.

9. Before October 29, 2008, Mr. Longoria had three construction industry exemptions which were renewed. One exemption was as a sole proprietor and was effective from July 4, 1993, through July 4, 1995. He had another exemption extending from April 13, 2004, through April 13, 2006, and then an exemption from April 13, 2006, through April 12, 2008.

10. Mr. Longoria stated to Ms. Newcomer, in their conversation on October 29, 2008, that he had not received notice of his April 13, 2006 exemption's expiration prior to the expiration date of April 13, 2008. Ms. Newcomer thereupon consulted the CCAS system to determine when the notification of expiration of the exemption had been sent to Mr. Longoria or the Respondent. That database revealed that a letter notifying him of the expiration of his exemption had been sent on January 29, 2008. The CCAS entry shows that the expiration notice had been mailed out to Mr. Longoria to his address of record,

1815 West Detroit Boulevard, Pensacola, Florida 32354. That is the same address which had been shown on Mr. Longoria's exemption certificate, effective on April 13, 2006.

11. Mr. Longoria's wife was stricken with cancer. She is a veteran and sought treatment and therapy for her cancer at a Veteran's Administration facility in Tennessee. Consequently, Mr. and Mrs. Longoria moved to Tennessee in May 2006, soon after the effective date of his exemption. Mr. Longoria filed a mail-forwarding form with the United States Postal Service in Pensacola so that his mail would be forwarded to his residence and address in Tennessee. Mail was forwarded for approximately one year, but no mail originally sent to his Pensacola address was forwarded to his address in Tennessee after sometime in August 2007. Mr. Longoria did not notice this fact until April 2008.

12. None of the later mail addressed to the Pensacola address was forwarded to Tennessee, even after he renewed his forwarding application with the postal service in April of 2008. In fact, he testified that "99 percent of whatever mail was sent to the Florida address between 2007 and April 2008 was never forwarded to [Mr. Longoria] in Tennessee." Mr. Longoria, however, did not file a change of address notification with the Department prior to submitting his new Notice of Election to be Exempt, which he filed on October 31, 2008. The Respondent did



not change his mailing address with the Florida Department of State, Division of Corporations until April 9, 2008.

13. On October 29, 2008, after the discussion between Mr. Longoria and Investigator Newcomer, concerning the matter of workers' compensation coverage, Ms. Newcomer issued a Stop Work Order and Order of Penalty Assessment, and served it on Mr. Longoria and the Respondent. These were issued because of the Respondent's failure to secure payment of workers' compensation in purported violation of Sections 440.10(1), 440.38(1) and 440.107(2), Florida Statutes.

14. Upon issuance of the Stop Work Order, Mr. Longoria promptly complied. Investigator Newcomer also requested production of certain business records in order to perform the relevant penalty assessment calculations. Mr. Longoria promptly provided the necessary business records to the Department.

15. The parties stipulated that work was being performed by the Respondent between the dates of April 12, 2008, and October 29, 2008. This was the period of time when the exemption was in an expired state.

16. Based upon the Respondent's records, Investigator Newcomer calculated an amended penalty, for the period of noncompliance with the workers' compensation law (the period of expiration of the exemption) using the penalty calculation worksheet adopted in Florida Administrative Code Rule 69L-6.027.

The total penalty based upon that formula resulted in an assessment of less than \$1,000. The penalty assessed was therefore \$1,000, pursuant to Section 440.107(7)(d), Florida Statutes, which provides that the penalty to be assessed will be based on the formula provided in the referenced provision of Section 440.107, Florida Statutes, and the above-cited rule, or a minimum of \$1,000, whichever is greater. The parties stipulated that the penalty assessed is accurate, if it is ultimately determined that the penalty was properly and lawfully assessed.

17. After being served with the Amended Order of Penalty Assessment on October 31, 2008, Mr. Longoria promptly paid the penalty in full, in the form of a cashier's check. He submitted a new Notice of Election to Be Exempt for himself, as a corporate officer of the Respondent, which exemption became effective on that same date. The Respondent was subsequently issued an Order of Release from the Stop Work Order and an Amended Order of Penalty Assessment, which allowed the Respondent to resume working. The expiration of the exemption, for the number of months referenced above, occurred because the Respondent, through Mr. Longoria, inadvertently failed to renew the exemption. Mr. Longoria had not been reminded of his expiration because he had not received the Notice of Impending Expiration from the Department. There is no dispute that

Mr. Longoria and the Respondent corporation qualified for the exemption and were thus not required to secure the payment of workers' compensation, if the exemption had been effective at times pertinent hereto. This is because of the corporate business entity under which the Respondent and Mr. Longoria operated, with Mr. Longoria as the sole employee and sole corporate officer and owner.

#### CONCLUSIONS OF LAW

18. 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. (2008).

19. Cases involving the proposed assessment of administrative fines have been held to be penal in nature. Therefore, the Department is required to prove its case by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996); James T. Quinn d/b/a James Quinn v. Department of Financial Services, Division of Workers' Compensation, Case No. 08-2745 (DOAH; November 7, 2008). See also § 120.57(1)(j), Fla. Stat. (2008) ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure discipline proceedings or except as otherwise provided by statute.").

20. Florida employers are required to secure the payment of workers' compensation for employees. §§ 440.10(1)(a), 440.38(1), Fla. Stat. (2007). Section 440.107(2), Florida Statutes (2007), states that "'Securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

21. Section 440.107(3), Florida Statutes, charges the Department with the responsibility for enforcing compliance with the workers' compensation Law and requires issuance of Stop Work Orders and Penalty Assessment Orders in carrying out enforcement of workers' compensation coverage requirements. "Employer" is defined as "Every person carrying on any employment." §§ 440.02(16)(a), Fla. Stat. (227). "'Employment' . . . means any service performed by an employee for the person employing him or her." §§ 440.02(17)(a), Fla. Stat. Employment in the construction industry in Florida includes "all private employment in which one or more employees are employed by the same employer." §§ 440.02(17)(b)2. Fla. Stat.

22. 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. . . ." §§ 40.02(15)(a), Fla. Stat. This definition 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."

§ 440.02(15)(b), Fla. Stat. Pursuant to Sections 440.02(15)(b), and 440.05, Florida Statutes, and Florida Administrative Code Rule 69L-6.012(2), corporate officers can become exempt from the coverage requirements of Chapter 440, Florida Statutes, by appropriately and affirmatively making an election and applying for such an exemption.

23. "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. That section further provides that the Division of Workers' Compensation may establish by rules certain industrial classification codes and definitions which meet the criteria for the term "construction industry." Pursuant to that authority the Division promulgated Florida Administrative Code Rule 69L-6.021, which adopts the definitions found in the Scopes Manual, as referenced in the above findings of fact.

24. There is no dispute that Mr. Longoria and the Respondent engaged in various activities which come within the construction industry classification codes, such as painting and carpentry.

25. Because the Respondent was involved in the construction industry in his work activities, the Respondent was

an employer if it had at least one employee. See § 440.02(17)(b)2., Fla. Stat. Because Mr. Longoria is an officer of the Respondent Corporation he is an employee of that Respondent and therefore the Respondent was required to secure the payment of workers' compensation for that employee. § 440.02(15)(a),(b), Fla. Stat.

26. Corporate officers may elect to be exempt from the requirement for securing payment of workers' compensation (i.e. coverage). Such a person electing to be exempt must meet certain requirements. 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." § 440.02(15)(b)2., Fla. Stat. There is no dispute that Mr. Longoria meets the requirement of being an officer of the Respondent corporation, with the required level of ownership of the stock of the corporation in order to qualify for an exemption under the above last-cited statutory provision.

27. In order to obtain the exemption, a Notice of Election to be Exempt must be filed. It must be completed, notarized, attested to and then submitted to the Department with a \$50 fee. See § 440.05(3)(8), Fla. Stat. (2007), and Fla. Admin. Code R. 69L-6.012(2)(4). Various items of information are required to be included in the Notice of Election, such as copies of

occupational licenses, evidence from the records of the Department of State, Division of Corporations, identifying the corporation and its status and any corporations with which the person seeking the exemption is employed. See § 440.05(3), Florida Statutes, and Fla. Admin. Code R. 69L-6.012(3). There is no question that, as a corporate officer, Mr. Longoria meets these requirements. There is no dispute that the Respondent and Mr. Longoria meet all of the relevant requirements for obtaining an exemption. The dispute in this case really focuses on the fact that the exemption was allowed to expire and some months elapsed during which the Respondent had not secured the payment of workers' compensation in accordance with the statutory authority referenced herein. Because Mr. Longoria met all the relevant requirements, his new exemption was immediately granted upon being applied for on October 31, 2008.

28. Section 440.05(6), Florida Statutes, provides that "A construction industry certificate of election to be exempt which is issued in accordance with this section shall be valid for two years after the effective date stated thereon." The exemption for Mr. Longoria first became effective on April 13, 2006. It therefore expired on April 12, 2008, as listed on the CCAS data in Department's Exhibits 2, 3b, and 3d, in evidence. Mr. Longoria had to renew his exemption before that expiration date in order to remain exempt from the Florida workers'

compensation laws. Mr. Longoria inadvertently failed to renew that exemption for the reasons referenced in the above findings of fact.

29. If a renewal Notice of Election to be Exempt is received by the Department after the Certificate of Election to be Exempt has expired, the renewal Certificate of Election to be Exempt issuance date is the date the renewal Certificate of Election to be Exempt is approved and entered in the CCAS database or 30 days after the date the renewal Notice of Election is received by the Department, whichever is earlier. See Fla. Admin. Code R. 69L-6.012(7)(e). Mr. Longoria's most recent exemption election was thus received by the Department on October 31, 2008, which was its effective date. Thus, the Respondent brought itself back into compliance with the referenced workers' compensation laws effective that date, as explained in the above findings of fact.

30. The workers' compensation exemption holder has a duty to notify the Department of any change in that person's address of record, as listed on the Certificate of Election to be Exempt. See Fla. Admin. Code R. 69L-6.012(14). Mr. Longoria thus had a duty to notify the Department of any change of address, which he failed to do due to inadvertence, prior to the issuance of the Stop Work Order referenced herein.



31. Because Mr. Longoria did not have an effective exemption between the dates of April 12, 2008, and October 31, 2008, he reverted during that time to the status of an employee of a Florida corporation for purposes of the referenced provisions of Chapter 440, Florida Statutes. Because the Respondent Corporation did not have workers' compensation insurance coverage, the Respondent failed to secure the payment of workers' compensation for its employee, Mr. Longoria.

32. The evidence in this de novo proceeding clearly showed that during that time period the Respondent factually met the requirements for not having workers' compensation insurance coverage, its employee qualified for the corporate officer exemption, (sole employee). That exemption, however, must be affirmatively requested and the seeker of the exemption, the corporate officer and the corporation he represents, have an affirmative duty to apply for the exemption and furnish the necessary information showing that it is justifiable. While the Department, by practice, notifies holders of the exemptions when an exemption is about to expire, it is still the responsibility and duty of the person seeking to hold an exemption to timely effect its renewal.

33. While the failure to timely renew the exemption is understandable given the circumstances Mr. Longoria was confronting, concerning his wife's illness, during the time his

prior exemption was expiring and should have been renewed, it is still the responsibility of the applicant for the exemption to apply for any renewal when expiration is pending. It may appear harsh to impose a penalty for failure to timely renew the exemption, especially when that failure was due to inadvertence and not due to any effort to circumvent the legal requirements. The fact remains, however, that the Department has no discretion under the controlling statutory authority when workers' compensation coverage has not been legally effected and an exemption from the requirement to secure workers' compensation has likewise not been effected, by the party with the duty to seek and renew an exemption.

34. Section 440.107(7)(a), Florida Statutes, authorizes the Department to issue Stop Work Orders when an employer has failed to obtain workers' compensation coverage and thus to require that employer to cease all business operations. Indeed, the Department is required to issue a Stop Work Order within 72 hours of making the determination that an employer is thus out of compliance. § 440.107(7)(a), Fla. Stat.

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

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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.

Thus, pursuant to this statute, the minimum penalty amount which can be assessed is \$1,000. The Respondent makes the argument that, in the de novo context of this proceeding, the evidence at hearing showed that the Respondent and Mr. Longoria were not required to have workers' compensation coverage and therefore the penalty should not be imposed for failing to have that which the law, as applied to the facts proven at hearing, shows was not required. That argument however loses sight of the fact that the Respondent is a corporation and that Mr. Longoria meets the criteria to be deemed an employee of that corporation. That being the case, the corporate Respondent is required to have workers' compensation coverage, unless an exemption is effectively in place. That was not the case for the period of time referenced in the above findings of fact; therefore, under the law, the Department is justified in determining that the workers' compensation coverage was not secured and that the corporate officer exemption for its officer/employee had not been put into effect for the time period in question. That is sufficient to trigger the above-referenced enforcement and penalty provisions.

36. In summary, the Department has established that the Respondent was required to either secure the payment of workers' compensation under the above provisions of Chapter 440, Florida Statutes, or that it have an exemption in place for its sole employee and corporate officer. Since that was not done, albeit inadvertently, for the period of time in question, the penalty was properly assessed for failure to secure the payment of workers' compensation, or demonstrate exemption, as required by the statute.

#### 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, finding that the Respondent failed to properly secure workers' compensation insurance coverage for its employee in violation of Sections 440.10(1)(a) and 440.38(1), Florida Statutes, and that a penalty in the amount of \$1,000 be assessed, as mandated by Section 440.107(7), Florida Statutes.

DONE AND ENTERED this 28th day of May, 2009, in  
Tallahassee, Leon County, Florida.



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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 28th day of May, 2009.

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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.