

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF WORKERS' )  
COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-6412  
 )  
C.S.E. PAVING OF SOUTH FLORIDA, )  
INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 10, 2009, by video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Second Amended Order of Penalty Assessment filed May 11, 2009,<sup>1</sup> and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On November 25, 2008, the Department of Financial Services, Division of Workers' Compensation ("Department"), issued a Stop Work Order directing C.S.E. Paving of South Florida, Inc. ("C.S.E Paving") to immediately stop work and cease all business operations in Florida because it had failed to obtain workers' compensation insurance meeting the requirements of Chapter 440, Florida Statutes (2008),<sup>2</sup> and the Florida Insurance Code. The Department did not initially receive any business records in response to a request to C.S.E Paving, and it calculated an Amended Order of Penalty Assessment, which was issued on December 22, 2008, and which included an imputed assessment of \$21,290.11 in penalties. C.S.E Paving timely filed its request for an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for the assignment of an administrative law judge. Pursuant to notice, the final hearing was held on August 10, 2009.

The Department subsequently received business records from C.S.E Paving, and, on May 11, 2009, the Department filed a Motion to Amend Order of Penalty Assessment, in which the

penalty assessment was decreased to \$13,487.64. No order was entered on the motion prior to the final hearing, but, in the absence of a response in opposition to the motion from the Respondent, the motion is granted, and the Second Amended Order of Penalty Assessment filed May 11, 2009, is substituted for the Amended Order of Penalty Assessment dated December 22, 2009.

At the final hearing, the Department presented the testimony of Germaine Green, and Petitioner's Exhibits 1 through 3, together with their subparts, were offered and received into evidence. C.S.E Paving did not make an appearance at the final hearing.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on December 5, 2008; this document was mislabeled as the Deposition of Germaine Green. The Department timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

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

1. The Department is the state agency responsible for 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. C.S.E Paving is a Florida corporation located in Delray Beach, Florida. Stephen Warden is the owner of C.S.E Paving, which engages in the business of paving.

3. On November 24, 2008, Germaine Greer, a compliance investigator employed by the Department, observed two workers repairing and reinstalling concrete brick pavers at a Best Western Hotel. She learned that these workers were employed by C.S.E Paving.

4. After her visit on November 24, 2008, the compliance investigator conducted research through the Coverage and Compliance Automated System database, which provides information on workers' compensation insurance coverage and exemptions. The investigator's research revealed that, during the three-year period from November 24, 2005, and November 24, 2008, C.S.E Paving had workers' compensation insurance coverage for its employees from July 25, 2006, through July 28, 2007; from July 16, 2007, through July 16, 2008; and from July 16, 2008, through August 6, 2008, when the policy was cancelled. Mr. Warden did not have an exemption from the requirement to have workers' compensation insurance coverage.

5. Mr. Warden provided the compliance investigator with the payroll and other records requested in the business records

request. Based on these records, the compliance investigator calculated the penalty to be imposed on C.S.E Paving for its failure to have workers' compensation insurance coverage during the approximately six-month period in 2005 and 2006 and the approximately four-month period in 2008. The penalty assessed in the Second Amended Order of Penalty Assessment was \$13,487.64, which assessment superseded the \$21,290.11 penalty assessed in the Amended Order of Penalty Assessment dated December 22, 2008.

6. The compliance investigator looked to the NCCI SCOPES Basic Manual of Classifications ("SCOPES Manual") for classification codes attributable to the workplace operations of the persons working for C.S.E Paving. The classification code assigned by the compliance investigator to the workmen employed by C.S.E Paving between November 24, 2005, and November 24, 2006, who engaged in paving activities was Code 5221. According to the SCOPES Manual and to Florida Administrative Code Rule 69L-6.021(1)(w), Code 5221 is a code applicable to the construction industry and covers "Concrete or Cement Work Floors, Driveways, Yards, and Sidewalks & Drivers."

7. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 5221 was \$10.37 per \$100.00 of payroll; and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 5221 was \$6.97 per \$100.00 of payroll.

8. The classification code found in the SCOPES Manual assigned by the compliance investigators to the clerical workers employed by C.S.E Paving between November 24, 2005, and November 24, 2006, was Code 8810. According to the SCOPES Manual, Code 8810 covers "Clerical Office Employees."

9. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 8810 was \$.58 per \$100.00 of payroll; and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 8810 was \$.37 per \$100.00 of payroll.

10. The classification code assigned by the compliance investigator to Stephen Warden, the owner of C.S.E Paving, was Code 5606. According to the SCOPES Manual, Code 5606 covers "Contractor - Project Manager, Construction Executive, Construction Manager or Construction Superintendent."

11. The approved NCCI Manual rate in Florida effective January 1, 2006, for Code 5606 was \$3.84 per \$100.00 of payroll; and the approved NCCI Manual rate in Florida effective January 1, 2008, for Code 5606 was \$2.74 per \$100.00 of payroll.

12. The compliance investigator calculated the total penalty attributable to C.S.E Paving's failure to provide workers' compensation insurance coverage for its employees during the covered time periods. She obtained the names of each of the individuals included in her calculations and the amount of the gross payroll for each individual from the payroll

information provided by Mr. Warden in response to the business records request.

13. The compliance investigator calculated the penalty as follows: She listed C.S.E Paving's employees on the Penalty Worksheet; assigned each employee a classification code based on the definitions of workplace operations that most closely described the work they performed for C.S.E Paving; set out the dates during which C.S.E Paving did not provide workers' compensation insurance coverage; entered the annual or pro-rated gross payroll for each employee during the period of non-compliance; divided the gross payroll for each employee by 100; set out the approved manual rate for each employee during the period of non-compliance in accordance with his or her classification code; determined the premium that C.S.E Paving would have paid for workers' compensation insurance coverage for each employee during the period of non-compliance by multiplying the approved manual rate and one one-hundredth of the gross payroll for each employee; calculated the penalty attributable to each employee during the period of non-compliance by multiplying the premium for each employee by 1.5; and, finally, calculated the total penalty owed by C.S.E Paving attributable to its failure to secure workers' compensation insurance coverage for its employees during the time periods at issue.

## CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 440.107(13), Florida Statutes (2009).

15. The Department seeks to impose an administrative penalty on C.S.E Paving for its failure to secure workers' compensation insurance coverage for its employees. Accordingly, the Department must prove the charges in the Stop-Work Order and Second Amended Order of Penalty Assessment by clear and convincing evidence. See Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

16. Section 440.38(1), Florida Statutes, provides in pertinent part that "[e]very employer shall secure the payment of compensation under this chapter: (a) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange authorized to do business in the state." The compensation and benefits required by Chapter 440, Florida Statutes, must be paid as follows: "The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. § 440.09(1), Fla. Stat.



17. The definitions pertinent to this matter are found in Section 440.02, Florida Statutes, as follows:

(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.

\* \* \*

(16)(a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

\* \* \*

(17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) "Employment" includes:

\* \* \*

2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

18. Based on the findings of fact herein and the definitions set out above, C.S.E Paving is an employer and the workmen, clerical employees, and project manager/owner receiving payment for services performed for C.S.E Paving are employees in the employment of C.S.E Paving. C.S.E Paving is, therefore, required to provide workers' compensation insurance coverage for its employees.

19. Section 440.107, Florida Statutes, provides in pertinent part:

(1) The Legislature finds that the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare.

(2) For the 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:

- (a) Conduct investigations for the purpose of ensuring employer compliance.
- (b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.
- (c) Examine and copy business records.
- (d) Administer oaths and affirmations.
- (e) Certify to official acts.
- (f) Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.
- (g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.
- (h) Enforce the terms of a stop-work order.
- (i) Levy and pursue actions to recover penalties.
- (j) Seek injunctions and other appropriate relief.

\* \* \*

(7)(a) 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 or to produce the required business records under

subsection (5) within 5 business days after receipt of the written request of the department, 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. The order shall take effect when served upon the employer or, for a particular employer worksite, when served at that worksite. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance. A stop-work order . . . shall remain in effect until the department issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this chapter and has paid any penalty assessed under this section. The department may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this chapter and has agreed to remit periodic payments of the penalty pursuant to a payment agreement schedule with the department. . . .

(b) Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

(c) The department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

(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.

20. Based on the findings of fact herein, the penalty for C.S.E Paving's failure to secure workers' compensation insurance coverage for its employees, as set out on the Penalty Worksheet attached to the Second Amended Order of Penalty Assessment, was calculated in conformance with the requirements of Section 440.107(7)(d)1., Florida Statutes, on the form required by Florida Administrative Code Rule 69L-6.027. The Department has, therefore, proven by clear and convincing evidence that C.S.E Paving was properly assessed \$13,487.64 as the penalty for its failure to secure workers' compensation insurance coverage for its employees during the time periods at issue.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order finding that C.S.E Paving of South Florida Inc., failed to secure workers' compensation insurance coverage for its employees in violation of Section 440.38(1), Florida Statutes, from January 1, 2006, through July 25, 2006, and from August 6, 2008, through November 24, 2008, and imposing a penalty in the amount of \$13,487.64 for the failure to provide the required workers' compensation insurance coverage.

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



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PATRICIA M. HART  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of September, 2009.

ENDNOTES

<sup>1/</sup> Please see discussion of Second Amended Order of Penalty Assessment in the Preliminary Statement below.

<sup>2/</sup> All references herein to the Florida Statutes are to the 2008 edition unless indicated otherwise.

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.