

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-0959
)
RON'S CUSTOM SCREEN, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) by video teleconference on September 18, 2009, in Tallahassee and Ft. Myers, Florida.

APPEARANCES

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

For Respondent: Ludwig J. Abruzzo, Esquire
Park Central Law Building
5425 Park Central Court
Naples, Florida 34109-5934

STATEMENT OF THE ISSUE

The issue is whether Respondent is liable for a penalty of \$265,604.81 based on payroll records for the period from

October 28, 2008, through October 27, 2008, pursuant to Subsection 440.107(7), Florida Statutes (2008).¹

PRELIMINARY STATEMENT

On October 27, 2008, Petitioner issued a stop-work order and proposed penalty assessment. The penalty assessment was reduced seven times to the amount at issue in this hearing.

At the hearing, Petitioner presented the testimony of one expert witness and submitted three exhibits for admission into evidence. Respondent presented the testimony of two witnesses and submitted 26 exhibits. The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing, which was filed with DOAH on October 5, 2009. The parties timely filed their respective proposed recommended orders on October 23, 2009.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation insurance for the benefit of their employees in accordance with Section 440.107. Respondent is a Florida corporation engaged in the construction business.

2. On October 27, 2008, a compensation compliance investigator and other investigators for Petitioner conducted a targeted investigation of Respondent's business based on reports from a confidential informant that Respondent was not in

compliance with Chapter 440 and the Insurance Code. The compliance investigator met two relatives of the sole shareholder of the company, who identified themselves as employees. The compliance investigator also identified construction work being conducted by two workers, who, it is undisputed, were not in compliance with Chapter 440.

3. The disputed issues of fact are comprised of two issues. The first issue is whether payments to relatives of the sole shareholder are compensation or loans. The second issue is whether cash payments to the sole shareholder are compensation or business expenses.

4. None of the loans to family members were repaid to the employer at the time of the hearing. Loans that have not been repaid to the employer are defined as payroll by Florida Administrative Code Rule 69L-6.035, and Respondent owes that portion of the penalty assessment allocable to the first issue.

5. Respondent provided ample evidence to demonstrate that the disputed transactions were loans rather than compensation for employment. One relative is disabled and unable to work at the level for which he is allegedly compensated. He will repay the loans out of the sale proceeds of his home upon his death. Other family members have less tragic but similarly sad stories. However, deviation from Florida Administrative Code Rule 69L-6.035 would merely invite remand pursuant to Section 120.69.

6. The remaining issue is whether cash payments by Respondent to its sole shareholder are properly characterized as compensation or business expenses. Florida Administrative Code Rule 69L-6.035(1)(f) defines payroll to include expense reimbursements to the extent the business records do not confirm the expense was incurred as a valid business expense. For the reasons stated hereinafter, it is less than clear and convincing that the disputed cash payments are payroll within the meaning of Florida Administrative Code Rule 69L-6.035(1)(f).

7. The sole shareholder explained under oath at the hearing that the cash payments at issue were for business expenses, including the payment of construction materials. He does not give workers charge cards to buy construction materials. He gives them cash. They do not always bring him receipts. The witness submitted detailed tabulations of approximately \$77,002.46 in such expenses during the audit period, and the trier of fact found the testimony and supporting documentation to be credible and persuasive.

8. The sole shareholder also testified that he incurred cash office expenses during the audit period of approximately \$22,500.00 and submitted documentation to support that testimony. He also purchased three trucks for the business and made cash down payments on each truck with documentation to support the cash payments. The trier of fact finds that

testimony and supporting documentation to be credible and persuasive.

9. Based on the evidence through the date of the hearing, it is less than clear and convincing that the disputed cash payments to the sole shareholder were not incurred as valid business expenses within the meaning of Florida Administrative Code Rule 69L-6.035(f). The testimony of the sole shareholder and the supporting documentary evidence also shows that the disputed amounts were not cash payments to the sole shareholder in his capacity as an employee within the meaning of Florida Administrative Code Rule 69L-6.035(1)(b).

CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

11. An administrative fine deprives Respondent of substantial rights in property and is punitive in nature. Petitioner has the burden of proof. Petitioner must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law and the reasonableness of the proposed penalty assessment. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Dept. of Financial Services,

Division of Workers' Compensation v. U&M Contractors, Inc., Case No. 04-3041 (DOAH April 27, 2005); Triple M Enterprises, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 94-2524 (DOAH January 13, 2005).

12. The requirement for clear and convincing evidence imposes an intermediate level of proof on Petitioner. Petitioner must prove material factual allegations by more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994); Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So. 2d 996, 1006 n. 13 (Fla. 2d DCA 1993).

13. The Florida Supreme Court has addressed the clear and convincing standard of proof with attention to detail. In relevant part, the court stated:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. . . . [T]he facts to which witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witness 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning a Judge, 645 So. 2d at 404 (quoting, in part, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

14. In order to satisfy the qualitative standard for clear and convincing evidence, incriminating evidence must be credible, precise, and explicit. This qualitative standard has been adopted by each District Court of Appeal in the state. E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004); K-Mart Corporation v. Collins, 707 So. 2d 753, 757 n.3 (Fla. 2d DCA 1998); McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998); Kingsley v. Kingsley, 623 So. 2d 780, 786-787 (Fla. 5th DCA 1993); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Petitioner satisfied its burden of proof concerning the issue of whether payments to relatives of the sole shareholder are compensation, for which workers' compensation payments are owed, or loans. By rule, unpaid loans are compensation, and the evidence is clear and convincing that Respondent owes the portion of penalty allocable to that issue.

16. For reasons stated in the Findings of Fact, the evidence is less than clear and convincing that the disputed cash payments to the sole shareholder of Respondent are compensation. Clear and convincing evidence does not support the penalty assessment allocable to that issue.

17. The fact-finder must resolve conflicts in the evidence and decide the question one way or the other. Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 473 (Fla. 1st DCA 1981).

18. As to the second factual issue, the trier of fact resolved the evidential conflict in favor of Respondent. The fact-finder is the sole arbiter of credibility. Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

19. This is a de novo, or new proceeding, conducted to formulate final agency action rather than to review final agency action previously taken. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). In a de novo proceeding, the ALJ correctly considers evidence as it exists at the time of the final hearing. The ALJ is not limited to the evidence that was available to Petitioner when Petitioner proposed the assessment.

The [ALJ's] decision to permit evidence of circumstances as they existed at the time of hearing [rather than limiting evidence to that available to the agency when it proposed agency action] was correct. . . . Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily.

See McDonald, 346 So. 2d at 584.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order imposing a fine consistent with the amount attributable to unpaid loans.

DONE AND ENTERED this 24th day of November, 2009, in Tallahassee, Leon County, Florida.



DANIEL MANRY
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 24th day of November, 2009.

ENDNOTE

^{1/} References to chapters, sections, and subsections are to Florida Statutes (2008), unless otherwise stated.

COPIES FURNISHED:

Ludwig J. Abruzzo, Esquire
Park Central Law Building
5425 Park Central Court
Naples, Florida 34109-5934

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

Julie Jones, CP, FRP, 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

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.