

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,) Case No. 09-1778
)
vs.)
)
MAJESTIC CUSTOM HOMES AND)
REALTY, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 7, 2009, by video teleconference with connecting sites in West Palm Beach and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paige B. Shoemaker, Esquire
Department of Financial Services
Division of Legal Services
Workers' Compensation Section
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: John P. George, pro se
Majestic Custom Homes and Realty, Inc.
4121 Royal Palm Beach Boulevard
Royal Palm Beach, Florida 33411

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent failed to secure workers' compensation coverage in violation of the requirements of the Workers' Compensation Law, Chapter 440, Florida Statutes, as set forth in the Stop-Work Order issued on February 11, 2009, and, if so, whether Respondent should be assessed the penalty set forth in the 3rd Amended Order of Penalty Assessment issued on April 7, 2009.

PRELIMINARY STATEMENT

On February 11, 2009, the Department of Financial Services, Division of Workers' Compensation (Department) issued a Stop-Work Order (SWO) and an Order of Penalty Assessment (OPA) against Majestic Custom Homes and Realty, Inc. (Majestic). The SWO and OPA were contained in a one-page document. By the SWO, the Department charged Majestic with violating Sections 440.10(1), 440.38(1), and 440.107(2), Florida Statutes, by failing to obtain workers' compensation coverage that meets the requirements of Chapter 440, Florida Statutes, and the Insurance Code. The SWO identified Majestic as a construction employer. The posting of the SWO and OPA was at the worksite, a Port Charlotte address. By the OPA, the Department assessed a penalty against Majestic, but no dollar amount was provided, only the calculation method or process being used by the Department. The SWO and OPA indicated that they were hand-delivered to Majestic. By an Amended OPA,

issued on March 4, 2009, which indicated that it was hand-delivered on March 5, 2009, to Majestic's address, to which was attached a penalty worksheet, the Department assessed an amended penalty against Majestic in the amount of \$4,298.20. Eventually, the Department issued a 3rd Amended OPA, issued on March 7, 2009, to which was attached a penalty worksheet, assessing a penalty against Majestic in the amount of \$29,173.08. By letter dated March 24, 2009, Majestic requested a hearing and submitted to the Department a list of all of its employees, gross payroll, class codes for the employees, and payroll summary reports. This matter was referred to the Division of Administrative Hearings on April 7, 2009.

At the hearing, the Department presented the testimony of two witnesses and entered five exhibits (Petitioner's Exhibits numbered 2 through 6) into evidence.¹ Majestic presented the testimony of two witnesses and entered no exhibits into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on July 28, 2009. The Department timely filed its post-hearing submission. Majestic chose not to file a post-hearing submission. The Department's post-hearing submission has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Majestic was an employer in the State of Florida, engaged in the construction industry.

2. At all times material hereto, John George was the president of Majestic.

3. On February 11, 2009, the Department's investigator, Ira Bender (Investigator Bender), visited Majestic's model home site at 16874 Toledo Blade Boulevard, Port Charlotte, Florida.

Investigator Bender spoke with two individuals, Linda Meldrum and Matt Brown, who were working at the worksite. Ms. Meldrum was a sales representative and Mr. Brown was a superintendent.

Majestic does not dispute that, even though it had employees working at the model home site, it (Majestic) did not have workers' compensation coverage for its employees.

4. On February 11, 2009, a SWO and an OPA were issued by the Department to Majestic and were posted, by Investigator Bender, at the model home site, Majestic's worksite.

Investigator Bender testified that he posted the SWO and OPA at the worksite. His testimony is found to be credible.

5. The SWO indicates, among other things, that Majestic failed to obtain workers' compensation coverage that meets the requirements of Chapter 440, Florida Statutes, and the Insurance Code. The SWO further provides that the SWO "SHALL REMAIN IN

EFFECT UNTIL THE [Department] ISSUES AN ORDER RELEASING THE [SWO] FOR ALL WORKSITES."

6. The OPA also indicates, among other things, that the penalty assessed against the employer (Majestic) would be in an amount equal to 1.5 times the amount the employer would have paid in premium within the preceding 3-year period, or \$1,000.00, whichever was greater. The OPA further provides that the "penalty may be amended until a Final Order or an Order of Conditional Release from [SWO] is issued."

7. Majestic stipulates and does not dispute that it was without workers' compensation coverage for all of its employees.

8. The SWO and OPA indicate that they were hand-delivered to Majestic at its place of business on February 13, 2009. Investigator Bender did not hand-deliver the SWO and OPA; however, he testified at hearing regarding the SWO and OPA and the usual or standard practice of the Department in hand-delivering a SWO and OPA. His testimony is found to be credible. An inference is drawn and a finding of fact is made that the standard operating procedure of the Department is to hand-deliver the SWO and OPA to the employer's address, i.e., at its place of business. The SWO and OPA indicate the employer's (Majestic's) address for its place of business as 4061 Royal Palm Beach Boulevard, Royal Palm Beach, Florida. The Department's investigator, who is indicated on the SWO and OPA as the one who

hand-delivered the SWO and OPA, did not testify at hearing. Further, Majestic denies receiving the SWO and OPA at its place of business and was unaware of the SWO and OPA. The Department failed to show by clear and convincing evidence² that the SWO and OPA were hand-delivered to Majestic on February 13, 2009, at its place of business.

9. Also, on February 13, 2009, the Department issued to Majestic a request for business records (Request) in order to calculate the penalty to be assessed. The Request indicates, among other things, that the business records being requested were to be submitted by Majestic within five business days of the service of the Request; that the business records were to be submitted to Investigator Bender, providing his contact information; and that the failure of Majestic to do so would result in imputed weekly payroll, which was the statewide average weekly wage multiplied by 1.5. Further, the Request indicates that it was personally served on Majestic on February 13, 2009, at Majestic's address for its place of business by the same investigator who was indicated as having hand-delivered the SWO and OPA. The Department failed to show by clear and convincing evidence³ that the Request was personally served on Majestic at its place of business on February 13, 2009.

10. Majestic did not comply with the Request.

11. An Amended OPA was issued by the Department on March 4, 2009. The Amended OPA provided, among other things, that the total assessed penalty was \$4,298.20; and that the SWO would remain in effect until either the Department issued a release from the SWO, indicating the terms or conditions upon which the SWO would be released, or the Department issued a conditional release from the SWO, indicating the terms or conditions upon which the SWO would be conditionally released.

12. A penalty worksheet was attached to the Amended OPA. The penalty worksheet reflected, among other things, the name of Majestic's employees who were covered by the SWO; the imputed class code for each of the employees—each employee had the same class code; the period of non-compliance; the imputed gross payroll for each employee; the insurance premium for each employee; and the penalty times 1.5 for each employee, totaling \$4,298.20. Because Majestic did not provide the requested business records, the penalty assessment was based upon imputed payroll and employee class codes.

13. The Amended OPA indicates that it was hand-delivered to Majestic at the address of its place of business on March 6, 2009, by the same investigator who was indicated as having hand-delivered the SWO and OPA and the Request. Majestic maintains that the Amended OPA was not hand-delivered to it (Majestic) at its place of business. The Department failed to show by clear

and convincing evidence⁴ that the Amended OPA was hand-delivered to Majestic on March 6, 2009, at its place of business.

14. On March 23, 2009, Investigator Bender returned to the model home site, i.e., the worksite. At that time, he found Ms. Meldrum and Mr. Brown working. Ms. Meldrum, the sales representative, had continued working her normal work schedule of Monday, Tuesday, Wednesday, Saturday, and Sunday, since the posting of the SWO; she had never ceased working as usual. Mr. Brown, the superintendent, had continued working part-time and being paid his normal salary, since the posting of the SWO; he too had never ceased working as usual. Terry Hearn, assistant to Mr. George, also worked for Majestic and was paid a salary from February 12 through March 23, 2009.

15. The SWO had not been lifted. The SWO was still in effect on March 23, 2009.

16. Mr. George testified that Majestic had no knowledge of a SWO until sometime in March 2009. He did not testify that Majestic was ever served with the SWO at its place of business. His testimony is found to be credible.

17. The evidence is not clear and convincing⁵ that Majestic was served with the SWO.

18. A 2nd Amended OPA was issued by the Department on March 25, 2009. The 2nd Amended OPA amended the total penalty to an amount of \$32,298.20, based upon "additional penalty of

\$28,000.00 added to original penalty for working thru the SWO." The additional penalty represented 28 days that the employees were working during the time that the SWO was in effect, at \$1,000.00 per day. The 2nd Amended OPA indicates that it was personally served on Majestic at the address of its place of business on March 27, 2009, by the same Department's investigator who was indicated as having hand-delivered the SWO and OPA. The Department failed to show by clear and convincing evidence⁶ that the Amended OPA was hand-delivered to Majestic on March 6, 2009, at its place of business. However, Majestic admits that it received notification regarding an assessed penalty in mid-March 2009. Hence, an inference is drawn and a finding of fact is made that Majestic received notification of the 2nd Amended OPA.

19. Mr. George testified that Majestic's person who handled its workers' compensation coverage was no longer with Majestic at the pertinent time and did not inform Majestic about its workers' compensation coverage; and that Majestic was, therefore, not aware that it did not have workers' compensation coverage until it received notification in mid-March of the SWO. However, Mr. George further testified that Majestic was responsible for maintaining workers' compensation coverage; and that he was not making any excuses for Majestic's failure to maintain such coverage. His testimony is found to be credible.

20. Furthermore, Mr. George testified that, if Majestic had been notified of the SWO at its place of business, it would have immediately ceased all work and obtained the workers' compensation coverage. His testimony is found to be credible. However, Mr. George's testimony fails to demonstrate that the SWO and OPA were not posted at the worksite: Investigator Bender testified that he posted the SWO and the OPA at the worksite on February 11, 2009, and Investigator Bender's testimony was found credible. Therefore, the evidence is insufficient to disturb the finding of fact that the SWO and OPA were posted at the worksite on February 11, 2009.

21. Subsequently, on May 20, 2009, Majestic provided the Department with the business records requested in the Request. Majestic provided the Department its (Majestic's) Quickbook records, which contained, among other things, Majestic's actual payroll and proper class codes.

22. Majestic requests compensation for the time expended by its employees, who were very limited in number, in obtaining the information needed by the Department in order to obtain the correct codes. Majestic did not present any evidence demonstrating a cost associated with providing the information to the Department.

23. Having received Majestic's Quickbook records, the Department issued a 3rd Amended OPA on April 7, 2009. The 3rd

Amended OPA amended the total penalty to an amount of \$29,173.08, based upon "Employees added to the penalty, class codes changed and business records used (no imputing)."

24. A penalty worksheet was attached to the 3rd Amended OPA. The penalty worksheet reflected, among other things, the name of Majestic's employees who were covered by the SWO; the class code for each of the employees; the period of non-compliance; gross payroll for each employee; the insurance premium for each employee; and the penalty times 1.5 for each employee, totaling \$1,173.08. Further, the penalty worksheet reflected, among other things, the time period of the violation of the SWO, i.e., February 12 through March 23, 2009; the number of days of the violation, i.e., 28 days; the statutory penalty, i.e., \$1,000.00, times the number of days in violation; the total penalty for violating the SWO in the amount of \$28,000.00; and a total penalty in the amount of \$29,173.08.

25. Majestic entered into a payment agreement with the Department, and the SWO was conditionally released.

26. Majestic does not dispute that the persons listed on the 3rd Amended OPA were employed by it during the time period that the SWO was in effect and that the class codes for the employees are correct.

27. However, Majestic does dispute the assessed penalty in the amount of \$28,000.00.

28. At the time of hearing, the number of persons employed by Majestic's had been considerably reduced to only three employees.

CONCLUSIONS OF LAW

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

30. The Department is charged with implementing and enforcing the Workers' Compensation Law, Chapter 440, Florida Statutes.

31. The ultimate burden of proof is on the Department to establish by clear and convincing evidence that Majestic violated Chapter 440, Florida Statutes, as alleged in the SWO and that the penalty assessed is correct as alleged in the 3rd Amended OPA. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat. See Department of Financial Services, Division of Workers' Compensation vs. U and M Contractors, Inc., DOAH Case No. 04-3041 (Recommended Order, April 7, 2005; Final Order, adopting Recommended Order in toto, April 27, 2005).

32. Strict compliance with the Workers' Compensation Law is required and is, therefore, required of the employer. See C & L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

33. Section 440.107, Florida Statutes (2008) and (2009), provide 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.

* * *

(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.

* * *

(4) The department shall designate representatives who may serve subpoenas and other process of the department issued under this section.

(5) The department shall specify by rule the business records that employers must maintain and produce to comply with this section.

* * *

(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 may be served

with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The 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. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due. . . .

* * *

(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.

* * *

(e) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5. . . .

34. No dispute exists that Majestic was an employer as defined by Chapter 440, Florida Statutes, during the pertinent time periods of the instant case.

35. No dispute exists that the persons listed on the Penalty Worksheet attached to the 3rd Amended OPA were employees of Majestic as defined by Chapter 440, Florida Statutes, during the pertinent time periods of the instant case.

36. Florida Administrative Code Rule 69L-6.021, Construction Industry Classification Codes, Descriptions, and Operations Scope of Exemption, provides in pertinent part:

(1) The Division adopts the classification codes and descriptions that are specified in the Florida Contracting Classification Premium Adjustment Program, and published in the Florida exception pages of the National Council on Compensation Insurance, Inc. (NCCI), Basic Manual (October 2005 ed.). For convenience, the Division lists here the classification codes and descriptions that are published in the Florida exception pages of the Basic Manual and adopted in this rule.

* * *

(2) The Division adopts the definitions published by NCCI, SCOPES[R] of Basic Manual Classifications (October 2005) that correspond to the classification codes and descriptions adopted in subsection (1) above. The definitions identify the workplace operations that satisfy the criteria of the term "construction industry" as used in the workers' compensation law. The definitions are hereby incorporated by reference

37. No dispute exists that the class codes for Majestic's employees reflected on the Penalty Worksheet attached to the 3rd Amended OPA are correct.

38. However, Majestic contends that it should be reimbursed for the time expended by its employees, who were very limited in number, in obtaining the information needed by the Department in order to obtain the correct class codes. Majestic failed to present evidence demonstrating a cost associated with producing the information. Moreover, the Department demonstrated that an employer was required to provide the information when requested; that, without information provided by an employer, the Department imputes information, which includes class codes and salaries; and that, when information is provided by an employer, the Department uses that information provided to properly and correctly reflect the information regarding employees and to calculate any penalty. Further, the evidence demonstrates that, in the instant case, Majestic benefited from providing the information on its employees—the penalty decreased from an assessed penalty of

\$4,298.20 to \$1,173.08. Hence, the undersigned is not persuaded that Majestic should be reimbursed for the time expended by its employees in providing the information that it (Majestic) was required to provide and that was needed by the Department in order to obtain the correct salaries and class codes of Majestic's employees.

39. No dispute exists that Majestic failed to have workers' compensation coverage for its employees during the pertinent time period in the instant case. Hence, Majestic violated Chapter 440, Florida Statutes, by failing to secure the payment of workers' compensation coverage for its employees.

40. As to the 3rd Amended OPA in the amount of \$29,173.08, Majestic does not dispute the penalty in the amount of \$1,173.08, but does dispute the penalty for violating the SWO in the amount of \$28,000.00. The evidence demonstrates that the SWO was posted and, therefore, served at the worksite by the Department. § 440.107(7)(a), Fla. Stat. (2008) and (2009). However, the evidence fails to demonstrate that the SWO was personally served on Majestic at its place of business. Further, the evidence demonstrates that Majestic failed to cease all business operations and its employees continued to work during the period of time that the SWO was in effect, i.e., February 12, 2009 through March 23, 2009, for a total of 28 days. The SWO served at the worksite took effect immediately upon being served.

§ 440.107(7)(a), Fla. Stat. (2008) and (2009). The evidence fails to demonstrate that Majestic was served with the SWO at its place of business, and, therefore, the SWO failed to take effect upon all of Majestic's business operations. § 440.107(7)(a), Fla. Stat. (2008) and (2009).

41. The evidence demonstrates that Majestic's employees continued to work at the worksite where the SWO was served. Consequently, only the worksite should be considered in the penalty for working during the effect of the SWO.

42. Majestic argued at hearing that the amount of the penalty for violating the SWO, i.e., \$28,000.00, was unfair in that the penalty was disproportionate to the violation committed. The undersigned is not persuaded by Majestic's argument. See Riopelle v. Department of Financial Services, Division of Workers' Compensation, 907 So. 2d 1220 (Fla. 1st DCA 2005). The Department is mandated to impose a penalty of \$1,000.00 per day for violation of a properly served SWO. § 440.107(7)(c), Fla. Stat. (2008) and (2009). The evidence demonstrates that the SWO was violated at the worksite for 28 days and that the penalty for such a violation is \$28,000.00.

43. The evidence demonstrates that the issuance of a SWO and OPA by the Department were warranted and that the Department correctly assessed the penalty in the 3rd Amended OPA.

RECOMMENDATION

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

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

1. Finding that Majestic Custom Homes and Realty, Inc. violated Sections 440.10 and 440.107, Florida Statutes, by failing to secure the payment of workers' compensation coverage for its employees and by failing to cease all business operations at the worksite after service of the Stop-Work Order at the worksite.

2. Affirming and upholding the Stop-Work Order and 3rd Amended Order of Penalty Assessment in the total amount of \$29,173.08.

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

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2009.

ENDNOTES

- 1/ Petitioner's Exhibit numbered 1 was withdrawn.
- 2/ See Conclusion of Law numbered 31.
- 3/ Id.
- 4/ Id.
- 5/ Id.
- 6/ Id.

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.