

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-2321
)
DAVID BUMGARNER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On July 21, 2009, an administrative hearing in this case was conducted by William F. Quattlebaum, Administrative Law Judge, for the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Justin H. Faulkner, Esquire
Paige B. Shoemaker, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: (No appearance)

STATEMENT OF THE ISSUE

The issue in the case is whether David Bumgarner (Respondent) should be assessed a penalty for an alleged failure to obtain workers' compensation coverage for his employees.

PRELIMINARY STATEMENT

On February 25, 2009, the Department of Financial Services, Division of Workers' Compensation (Petitioner), issued a Stop Work Order and Order of Penalty Assessment against the Respondent, asserting that the Respondent failed to "secure the payment of workers' compensation in violation of sections 440.10(1), 440.38(1), and 440.107(2), Florida Statutes," specifically by his "failure to obtain coverage that meets the requirements of Chapter 440 F.S. and the Insurance Code." The Petitioner issued an Amended Order of Penalty Assessment on March 31, 2009, identifying the amount of the proposed penalty as \$1,764,643.98.

The Respondent disputed the alleged violations and requested a formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 9 admitted into evidence. The Respondent did not appear at the hearing and had no witnesses or exhibits presented on his behalf.

A Transcript of the hearing was filed on August 6, 2009. The Petitioner filed a Proposed Recommended Order on August 17, 2009.

FINDINGS OF FACT

1. The Petitioner is the state agency designated to enforce the provisions of Chapter 440, Florida Statutes (2008),¹ which requires that employers in Florida obtain workers' compensation coverage for their employees.

2. The Respondent is a sole proprietor based in North Carolina and doing business as "Builders and Assemblers."

3. On February 25, 2009, Ira Bender, an investigator employed by the Petitioner, observed ten men assembling the iron-and-steel frame for a single story storage building being constructed at 7253 Gasparilla Road, Port Charlotte, Florida.

4. The Respondent was present at the time Mr. Bender observed the workers, and Mr. Bender asked the Respondent about the project. The Respondent advised Mr. Bender that he was the owner of the company constructing the building, that the ten men erecting the building frame were his employees, and that they were being paid \$10.00 per hour.

5. Mr. Bender, accompanied by the Respondent, then spoke to each of the ten men at the work site and obtained their names and other relevant information.

6. The Respondent provided to Mr. Bender a copy of a certificate of insurance from "Acord" bearing policy number BNUWC0108275.

7. Mr. Bender reviewed the Petitioner's "Coverage and Compliance Automated System" (CCAS) database and information contained on the National Council on Compensation Insurance ("NCCI") website. Both sources are routinely used to monitor and review workers' compensation coverage.

8. Neither the CCAS database nor the NCCI website indicated that the Respondent had workers' compensation coverage valid within Florida for any of the ten employees at the work site or that the Respondent had a valid exemption from coverage for any employee.

9. After discussing the collected information with his supervisor, Mr. Bender issued a Stop Work Order and Order of Penalty Assessment dated February 25, 2009.

10. The Respondent subsequently provided a copy of his workers' compensation policy to the Petitioner. The policy information page attached to the policy is an NCCI-issued form identified as "WC 00 00 01 A."

11. The Respondent's policy's information page provides, in relevant part, as follows:

3.A. Workers Compensation Insurance: Part
One of the policy applied to the Workers
Compensation Law of the states listed here:
NC

* * *

C. Other States Insurance: Part Three of
the policy applies to the states, if any

listed here: All states and U.S. territories except North Dakota, Ohio, Washington, Wyoming, Puerto Rico, and the U.S. Virgin islands, and states designated in Item 3.A. of the Information Page.

12. Administrative rules adopted by the Petitioner and referenced elsewhere herein explicitly state that the coverage identified in the Respondent's policy information page is not valid within the State of Florida.

13. Mr. Bender also issued a Request for Production of Business Records on February 25, 2009. Other than the previously referenced insurance certificate and policy, no further business records were provided to the Petitioner by the Respondent.

14. Mr. Bender subsequently forwarded the case to Lynn Murcia, the Petitioner's penalty calculator.

15. Because the Respondent failed to provide business records sufficient to enable computation of a penalty, Ms. Murcia computed the penalty based on an imputed payroll as provided by Florida law.

16. The NCCI publishes the "SCOPES Manual," which contains a commonly-used system of occupational classifications used to determine workers' compensation requirements. In Florida, the SCOPES Manual has been adopted by incorporation into the Florida Administrative Code.

17. The SCOPES Manual identifies the erection of steel or iron frames for buildings not in excess of two stories under classification code 5059. The Respondent's employees were engaged in such activities, and Ms. Murcia therefore properly classified the Respondent's employees under code 5059.

18. Ms. Murcia utilized the SCOPES classification in determining the imputed payroll applicable to this case and, thereafter, computed the penalty according to a worksheet that has been adopted as an administrative rule by the Petitioner. The worksheet is routinely used to calculate penalties applicable to employers who fail to obtain workers' compensation coverage for employees.

19. Based on Ms. Murcia's calculations, the penalty was identified as \$1,764,643.98, as was set forth in an Amended Order of Penalty Assessment issued on March 31, 2009.

20. Ms. Murcia's calculation of the applicable penalty, including her reliance on the applicable SCOPES classification codes and the imputation of the Respondent's payroll, was not disputed at the hearing. Her testimony has been fully credited.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

22. The administrative fine at issue in this proceeding is penal in nature. In order to prevail, the Respondent must demonstrate by clear and convincing evidence that the Petitioner was required to be in compliance with the applicable statutes on the referenced date, that he failed to meet the requirements, and that the proposed penalty is appropriate. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

23. In this case, the burden has been met.

24. The Respondent is an "employer" as defined at Subsection 440.02(16)(a), Florida Statutes. The men working at the site identified herein were the Respondent's "employees" as defined at Subsection 440.02(15)(a), Florida Statutes. The Respondent and his employees were engaged in the construction industry as defined at Subsection 440.02(9), Florida Statutes.

25. Every employer is required to obtain workers' compensation coverage for employees unless a specific exemption or exclusion is provided by law. See §§ 440.10 and 440.38, Fla. Stat.

26. Such coverage must meet the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. § 440.107(2), Fla. Stat.

27. Subsection 440.10(1)(g), Florida Statutes, provides as follows:

Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code. . . .

28. Subsection 440.38(7), Florida Statutes, provides as follows:

Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in this state by such employees.

29. Florida Administrative Code Rule 69L-6.019 provides, in relevant part, as follows:

69L-6.019 Policies and Endorsements
Covering Employees Engaged in Work in
Florida.

(1) Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)(g) and 440.38(7), F.S.

(2) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., any policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state must be issued by an insurer that holds a valid Certificate of Authority in the State of Florida.

(3) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., for any workers' compensation policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state:

(a) The policy information page (NCCI form number WC 00 00 01 A) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(b) The policy information page endorsement (NCCI form number WC 89 06 00 B) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(4) A workers' compensation policy that lists "Florida" in Item 3.C. of the policy information page (NCCI form number WC 00 00 01 A) does not meet the requirements of

Sections 440.10(1)(g) and 440.38(7), F.S., and is not valid proof of workers' compensation coverage for employees engaged in work in this state. (Emphasis supplied)

30. The Respondent's policy information page does not list "Florida" within Item 3.A. of the referenced form as required by the rule.

31. Although Item 3.C. of the policy information page presumably includes Florida within its reference to "all states," the rule explicitly states that such a reference does not meet Florida requirements and "is not valid proof of workers' compensation coverage for employees engaged in work in this state."

32. The evidence establishes that the Respondent was an employer who employed workers engaged in construction activities within Florida, that the Respondent was required to obtain workers' compensation for his employees, and that the Respondent failed to obtain proper workers' compensation coverage valid within Florida for the workers observed by Mr. Bender. There is no evidence that the Respondent's employees were exempt from coverage.

33. When an employer who is required to obtain workers' compensation coverage has failed to do so, the Petitioner is directed by statute to calculate a penalty.

Subsection 440.107(7)(d)1., Florida Statutes, provides in relevant part as follows:

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.

34. The Petitioner has adopted rules that specify the records an employer is required to maintain and to produce upon the Petitioner's request. See § 440.107(5), Fla. Stat., and Fla. Admin. Code R. 69L-6.015. In calculating the penalty, the Petitioner may rely on the employer's business records to determine the payroll (and the applicable unpaid premium) which underlies the calculation of the penalty.

35. When an employer fails to provide business records, as occurred here, the Petitioner is required to impute the payroll pursuant to Subsection 440.107(7)(e), Florida Statutes, which provides as follows:

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.

36. Subsection 400.12(2), Florida Statutes, provides in relevant part, as follows:

For the purpose of this subsection, the "statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law as reported to the Agency for Workforce Innovation for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Agency for Workforce Innovation on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. The statewide average weekly wage determined by the Agency for Workforce Innovation shall be reported annually to the Legislature.

37. The Petitioner has adopted Florida Administrative Code Rule 69L-6.028, which identifies the manner in which the imputed payroll is calculated with respect to various employees, including corporate officers, sole proprietors, and partners involved in a business, and which Ms. Murcia relied upon in determining the imputed payroll in this case. In calculating the penalty, Ms. Murcia utilized a worksheet that has been adopted by incorporation through Florida Administrative Code Rule 69L-6.027. Ms. Murcia's determination of the penalty applicable to this case has been credited.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner enter a final order assessing a penalty of \$1,764,643.98 against the Respondent.

DONE AND ENTERED this 9th day of September, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 9th day of September, 2009.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2008 version.

COPIES FURNISHED:

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

David Bumgarner
21007 Pine Street
Cornelius, North Carolina 28031

Tracey Beal, 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.