

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-2409
)
COCONUT COVE RESORT AND MARINA,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on September 22, 2009, in Marathon, Florida.

APPEARANCES

For Petitioner: Timothy L. Newhall
Assistant General Counsel
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Paul E. Bates, pro se
8401 Overseas Highway
Islamorada, Florida 33036

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Coconut Cove Resort and Marina, Inc., failed to comply with the requirements of Sections 440.10, 440.107, and 440.38, Florida Statutes, and, if so, the appropriate amount of penalty which should be assessed against Respondent.

PRELIMINARY STATEMENT

Petitioner, the Department of Financial Services, Division of Workers' Compensation, as a result of a November 6, 2008, on-site inspection of Respondent's worksite and business location and review of business records produced by Respondent, determined that Respondent had committed violations of Section 440.107(2), Florida Statutes, by "failing to obtain coverage that meets the requirements of chapter 440, F.S., and the Insurance Code. . . ." A Stop-Work Order and Order of Penalty Assessment, directing that Respondent immediately cease all business operations in Florida was issued.

On December 3, 2008, Petitioner issued an Amended Order of Penalty Assessment in Petitioner's Case No. 08-326-D5. The Order informed Respondent of Petitioner's determination that Respondent had violated Chapter 440, Florida Statutes, and the amount of the penalty to be assessed due to the alleged violation. The Amended Order of Penalty Assessment was served on Respondent by certified mail.

On or about December 23, 2008, Respondent filed a letter requesting an administrative hearing with Petitioner. That Request was dismissed by an Order Dismissing Petition for Section 120.57(1), Florida Statutes, Proceeding Without Prejudice entered by Petitioner on April 20, 2009.

Respondent filed a Reply, Dispute of Order Dated April 20 09 and Supplement to Appeal Dated December 22 09, dated May 1, 2009, with Petitioner.

A copy of the Amended Order of Penalty Assessment, Respondent's original request for hearing, the Order dismissing Respondent's first request for hearing, and the April 20, 2009, request for hearing from Respondent were filed with the Division of Administrative Hearings by letter on May 6, 2009, requesting assignment of the matter to an administrative law judge. The request was designated DOAH Case No. 09-2409, and was assigned to the undersigned.

By Notice of Hearing entered May 19, 2009, the final hearing was initially scheduled for July 28, 2009. The hearing was subsequently continued and rescheduled for September 22, 2009.

On September 18, 2009, Petitioner filed a Motion to Amend Order of Penalty Assessment, which slightly reduced the amount of the penalty assessment Petitioner sought to impose on Respondent. The Motion was opposed by Respondent at the

commencement of the hearing. After hearing evidence concerning why Petitioner proposed to modify the proposed penalty assessment, the Motion to amend was granted.

At the final hearing, Petitioner presented the testimony of Xotchilth Valdivia, an investigator for Petitioner, and Russell Gray, penalty calculator for Petitioner. Petitioner also had Exhibits 1 through 3, 4B, 4E, 4F, 4G, 5 through 10, 12, and 13 admitted. Respondent presented the testimony of Paul E. Bates, President and CEO of Respondent, and Magda Bates. Respondent offered no exhibits.

The two-volume Transcript of the final hearing was filed on October 8, 2009. On October 9, 2009, a Notice of Filing Transcript was entered informing the parties that the Transcript had been filed and that proposed recommended orders were, therefore, due on or before November 2, 2009. Petitioner filed a Proposed Recommended Order on November 2, 2009. Respondent has not filed any post-hearing argument. Petitioner's Proposed Recommended Order has been fully considered in issuing this Recommended Order.

All references to Florida Statutes in this Recommended Order are to the 2008 version, unless otherwise indicated.

FINDINGS OF FACT

1. The Department of Financial Services (hereinafter referred to as the "Department"), is the state agency charged

with the responsibility of 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. Respondent, Coconut Cove Resort and Marina, Inc. (hereinafter referred to as "Coconut Cove"), is a Florida corporation, which at the times relevant operated a small hotel/resort located in Islamorada, Florida.

3. On November 4, 2008, a complaint was received by the Bureau of Compliance Office of the Division of Workers' Compensation located in Miami, Florida, requesting a determination of whether Coconut Cove was in compliance with Florida's workers' compensation coverage requirements. The complaint was referred to Xotchilth Valdivia, a Department investigator, for investigation.

4. After performing an in-office audit of the Department's databases and finding no evidence that Coconut Cove had secured workers' compensation coverage or had obtained exemptions from Florida workers' compensation laws, Ms. Valdivia traveled to Coconut Cove's location on November 6, 2008.

5. Upon arriving at Coconut Cove's location, Ms. Valdivia spoke with a woman by the named Comeau, who was manning the front desk of the resort. Ms. Valdivia asked to speak with Mr. Bates, but was informed that Mr. Bates, a commercial airline

pilot, was away. Ms. Comeau, however, told Ms. Valdivia that Mr. Bates' wife, Magda was available.

6. While waiting for Ms. Bates to arrive, Ms. Valdivia observed four individuals who appeared to be performing work for the resort, in addition to Ms. Comeau, who was manning the front desk: a male who was working around the swimming pool, and two women who appeared to be maids with cleaning mops.

7. When Ms. Bates arrived, Ms. Valdivia identified herself and the purpose of her visit. During the course of her discussion with Ms. Bates, Ms. Bates identified 18 individuals as employees of Coconut Cove by name and occupation. The 18 individuals included Mr. and Ms. Bates, both officers of Coconut Cove.

8. While indicating that she knew nothing about Florida workers' compensation requirements, Ms. Bates also stated that Coconut Cove did not have workers' compensation coverage.

9. Finding that Coconut Cove had four employees as of November 6, 2008, and no workers' compensation coverage, conclusions not disputed by Ms. Bates, Ms. Valdivia issued Stop-Work Order No. 08-326-D5 and served it on Ms. Bates. A Request for Production of Business Records for Penalty Assessment Calculation (hereinafter referred to as the "Request for Records"), was also served on Ms. Bates. The Request for

Records sought payroll records for the three-year period preceding the date of the issuance of the Stop-Work Order.

10. Ms. Valdivia explained the reason why the Stop-Work Order was being issued and the purpose of the Request for Records. She also explained that the business records would be utilized in calculating any penalty owed by Coconut Cove for failing to carry workers' compensation coverage.

11. Although Coconut Cove attempted to prove that Ms. Valdivia acted arbitrary in her actions to this point, the evidence proved the contrary. Ms. Valdivia acted reasonably, appropriately, and had good cause for the actions taken.

12. In response to the Request for Records, Ms. Bates telephoned the accountant for Coconut Cove and requested that he provide the payroll information being sought by the Department. Almost all that information was immediately faxed to Ms. Bates, who then provided a copy to Ms. Valdivia. The documentation consisted of a payroll report for Coconut Cove for the period January 1, 2008, to November 6, 2008, UCT-6 reports filed by Coconut Cove with the Florida Department of Revenue for the fourth quarter of 2005 through the third quarter of 2008. (Petitioner's Exhibits 4B, 4E, 4F, and 4G.)

13. Based upon the information contained in the UCT-6 reports provided by Coconut Cove to the Department, the names of employees and the gross income paid to them by Coconut Cove was

reported by Coconut Cove to the Department of Revenue. Those reports indicate that Coconut Cove employed four or more individuals each month from October 2005 through September 2008.

14. Subsequently, Coconut Cove provided additional payroll information to the Department concerning payroll for the periods of November 7, 2005, through December 31, 2005, and November 1, 2008, through November 6, 2008. Again, the documents, which were provided by Coconut Cove, indicate that it had employed four or more individuals during the periods of time covered by these documents.

15. The Request for Records included a request for time sheets, check stubs, and check ledgers for the period of time at issue, November 7, 2005, to November 6, 2008 (hereinafter referred to as the "Audit Period"). None of these documents were provided to the Department or at hearing. While Coconut Cove had a stack of documents at hearing which Mr. Bates referred to generally as time cards, those documents were not offered into evidence and no specific testimony concerning the vast majority of the documents was provided.

16. Based upon the documentation provided by Coconut Cove to the Department, documentation which was offered and admitted at hearing, the Department proved clearly and convincingly that Coconut Cove employed four or more individuals during each month of the Audit Period. This finding excludes Mr. and Ms. Bates,

who, although employees of Coconut Cove who had not obtained exemptions from coverage during the audit period, received no remuneration from Coconut Cove during the Audit Period.

17. The documentation provided by Coconut Cove was provided to Russell Gray, an employee of the Department since 1986. Mr. Gray reviewed all the payroll information provided by Coconut Cove to Ms. Valdivia, transferred the payroll information to spread sheets, and proceeded to calculate the penalty imposed pursuant to statutes and rules for Coconut Cove's failure to comply with the insurance coverage requirements of Chapter 440, Florida Statutes. The manner in which Mr. Gray calculated the penalty is more specifically and accurately described in the Department's proposed findings of fact numbered 21 through 25 and 27, which are hereby incorporated into this Recommended Order by reference.

18. Mr. Gray determined that the penalty to be assessed against Coconut Cove was \$27,897.58. An Amended Order of Penalty Assessment for the penalty was issued December 3, 2008, and served on Coconut Cove by certified mail on December 4, 2008.

19. Subsequently, Mr. Gray concluded that his penalty calculation was incorrect to the extent that he had included gross income in the amount of \$1,316.65 to an employee named Gerald Elmore. This figure was the income of another employee

and not income attributable to Mr. Elmore. In order to correct his error, the Department filed a Motion to Amend Order of Penalty Assessment on September 18, 2009, seeking to file a 2nd Amended Order of Penalty Assessment, lowering the penalty assessment to \$27,821.74. Despite objections to this amendment raised at hearing by Coconut Cove, the Motion to Amend was granted after hearing the impact of the change and the reason it was required.

20. On December 15, 2008, Coconut Cove entered into a Payment Agreement Schedule for Periodic Payment of Penalty. The Department, therefore, issued a Conditional Release from Stop-Work Order, also dated December 15, 2008.

21. Coconut Cove's relevant defense to the foregoing consisted of the assertion by Mr. and Ms. Bates that they simply did not have more than three employees at anytime. It was asserted that employees listed on the documentation provided by Coconut Cove's accountant to Ms. Bates and given by Ms. Bates to Ms. Valdivia, were actually employees of another entity owned by the Bates, Paul's Beach Bar and Grill, Inc., which runs an on-site restaurant and catering service. The testimony of Mr. and Ms. Bates on this issue was not convincing and is rejected as unworthy. The testimony was uncertain as to time, short on specifics, and was contrary to the information reported on the payroll records and UCT-6s provided by Coconut Cove's

accountant. That testimony is also rejected because no explanation as to why the individuals had been listed as employees of Coconut Cove on the payroll records and UCT-6s if they were indeed employees of Paul's Beach Bar and Grill, Inc.

22. The Department proved clearly and convincingly, based upon documentation produced to it by Coconut Cove, that the individuals named on the penalty worksheet attached to the Amended Order of Penalty Assessment were employees of Coconut Cove during the Audit Period, that Coconut Cove paid those individuals the gross income included in the penalty worksheet, and that the calculation of the penalty assessment, as amended at hearing, was accurate.

CONCLUSIONS OF LAW

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

24. Because the administrative fines sought by the Department are penal in nature, it must prove by clear and convincing evidence that GTC failed to comply with the requirements of Chapter 440, Florida Statutes, and that the Department's proposed civil and administrative penalties assessed are correct. See Department of Banking and Finance,

Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996).

25. Every "employer" is required to secure the payment of compensation for the benefit of its "employees."

§§ 440.10(1)(a) and 440.38(1), Fla. Stat. The Department has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. § 440.107(3), Fla. Stat.

26. An "employer" is defined as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat. An "Employee" means "any person who received remuneration from an employer for the performance of any work or service while engaged in any employment. . . . § 440.02(15)(a), Fla. Stat. "Employment" is defined in Section 440.02(17)(b)2., Florida Statutes, as "[a]ll private employments in which four or more employees are employed by the same employer. . . ."

27. Based on the findings of fact herein, the Department carried its burden of proving by clear and convincing evidence that, based upon documentation produced to it by Coconut Cove, the individuals named on the penalty worksheet attached to the Amended Order of Penalty Assessment were "employees" who were "employed by" Coconut Cove, the "employer," during the Audit Period, that Coconut Cove paid those individuals the gross income included in the penalty worksheet, and that Coconut Cove

did not have insurance coverage for those employees during the Audit Period.

28. The Department is required by Section 440.107(7)(d)1., Florida Statutes, where it is determined that an employer has failed to have required insurance coverage as required by Section 440.38(1), Florida Statutes, to:

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.

29. The Department is authorized by Section 440.107(9), Florida Statutes, to enact rules to implement Section 440.107, and it has done so in Florida Administrative Code Chapter 69L-6. Florida Administrative Code Rule 69L-6.027 establishes the procedures for calculating the penalty authorized by Section 440.107(7)(d)1., Florida Statutes. The Department has proven by clear and convincing evidence that it correctly followed its rules in calculating the imputed payroll in this matter.

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 Respondent, Coconut Cove Resort and Marina, Inc., failed to secure the payment of workers' compensation for its employees during the Audit Period, in violation of Section 440.107, Florida Statutes; and

2. Assessing a penalty against Coconut Cove Resort and Marina, Inc., in the amount of \$27,821.74.

DONE AND ENTERED this 30th day of November, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2009.

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.