STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM R. SIMS ROOFING, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3391F
	)	
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This cause came on for formal hearing before Daniel M. Kilbride, Administrative Law Judge with the Division of Administrative Hearings, on Petitioner's Application for an Award of Attorney's Fees and Costs, pursuant to Section 57.111, Florida Statutes (2009),[1] on November 16, 2009, by video teleconference between Orlando, Florida, and Tallahassee, Florida.

APPEARANCES

For Petitioner: Patrick John McGinley, Esquire
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For Respondent: Timothy L. Newhall, Esquire
Department of Financial Services
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to recover attorney's fees and costs from Respondent, pursuant to Section 57.111, Florida Statutes, as a result of the appeal being withdrawn in regard to DOAH Case No. 06-1169.

PRELIMINARY STATEMENT

On December 21, 2004, the Department of Financial Services, Division of Workers' Compensation (Respondent), issued and served Stop-Work Order(SWO) and Order of Penalty Assessment No. 04-340-D4 and a Request for Production of Business Records on Petitioner. Petitioner failed to produce business records, and Respondent imputed a penalty pursuant to Subsection 440.107(7)(e), Florida Statutes. On November 1, 2005, Respondent again investigated Petitioner at a worksite in Orlando and determined that the December 21, 2004, SWO was still in place. Respondent again requested business records from Petitioner, and based upon the records produced and Respondent's determination that Petitioner had worked 10 days in violation of the December 21, 2004, SWO, Respondent assessed a penalty of $49,413.18 against Petitioner for failure to secure the payment of workers' compensation for its employees.

Petitioner timely requested a formal administrative hearing, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes, and the matter was transferred to the Division

of Administrative Hearings (DOAH) and assigned Case No. 06-1169. A formal evidentiary hearing was held in Orlando on August 6, 2006, and on November 20, 2006, a Recommended Order was entered by Daniel M. Kilbride, Administrative Law Judge, upholding the full amount of the assessed penalty. Subsequently, Respondent entered a Final Order on February 15, 2007, which adopted the Recommended Order.

Petitioner appealed the Final Order to the Fifth District Court of Appeal, where the matter was assigned Case No. 5D07-891. On April 27, 2009, Respondent issued an Order Releasing SWO, and refunded the portion of the penalty that had been paid by Petitioner. Petitioner's appeal was subsequently dismissed.

On June 19, 2009, Petitioner filed its Petition and Application for Attorney's Fees pursuant to Section 57.111, Florida Statutes, and an evidentiary hearing was conducted on November 16, 2009. At the hearing, Petitioner presented the testimony of Robert Cerrone and William R. Sims, and offered Exhibits 1-6 and Exhibit A. Exhibits 1-6 were received into evidence, but Respondent's objection to Petitioner's Exhibit A was sustained. Respondent presented no live testimony and offered Exhibits 1-4, all of which were received into evidence.

A Transcript was filed on November 16, 2009, with proposed final orders due on January 9, 2010. On January 6, 2010,

Respondent filed a Motion for Extension of Time to Submit Proposed Final Orders. That motion was granted and both parties were given until January 15, 2010, to submit proposed final orders. Both parties filed their Proposed Final Orders on January 15, 2010, and the proposals have been given careful consideration in the preparation of this Final Order.

FINDINGS OF FACT

1. Respondent is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees, pursuant to Section 440.107, Florida Statutes.

2. Petitioner is in the business of constructing new and replacement roofs on residential and commercial structures, within the construction industry, as defined by Subsection 440.02(8), Florida Statutes, and is a Florida employer over whom Respondent has jurisdiction to enforce the payment of workers' compensation premiums for the benefit of Petitioner's employees.

3. Petitioner appealed Respondent's February 15, 2007, Final Order to the Fifth District Court of Appeal, where the matter was assigned Case No. 5D07-891.

4. After more than a year of appellate litigation, on April 27, 2009, Respondent issued an Order Releasing SWO, and refunded the portion of the assessed penalty that Petitioner had already paid pursuant to a payment agreement schedule. At

Respondent's request, Petitioner's appeal was subsequently dismissed. In its Motion, filed with the Appellate Court, Respondent stated in pertinent part:

> a. On or about December 21, 2004, Appellee issued and served a stop-work order to Appellant for failing to secure the payment of workers' compensation for the employees of D&L Trucking, a company it had hired to remove unused shingles from a roof. A penalty was subsequently calculated and assessed for this failure to secure.
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> b. Appellant challenged the stop-work order and the penalty, and the matter was heard before a duly appointed Administrative Law Judge (ALJ) from the Division of Administrative Hearings. Neither Appellant nor Appellee raised the issue that D&L Trucking's employees were materialmen and thus exempt from the definition of "statutory employee." The ALJ found that the employees of D&L Trucking were the statutory employees of Appellant and issued a Recommended Order recommending Appellee to adopt the findings of fact and conclusions of law contained therein.
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> c. On or about February 15, 2007, Appellee filed a Final Order in the underlying case addressing Appellant's exceptions to the ALJ's Recommended Order, and adopting the Recommended Order in its entirety.
>
> d. Appellant subsequently filed a timely Notice of Appeal, appealing Appellee's Final Order.
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> e. On or about April 3, 2009, this Court issued an opinion in Adams Homes of Northwest Florida, Inc. v. Cranfill, [7 So. 3d 611] (Fla. 5th DCA 2009) stating that materialmen were essentially vendees of a contractor and are excluded from the definition of "statutory employee," as

outlined in Section 440.10(1), Florida Statutes.

f. The ALJ in his Recommended Order for the underlying case stated, and Appellee adopted in its Final Order, that workers for whom Appellee calculated a penalty were being paid by Appellant to remove unused shingles from the roof of a worksite. In essence, these individuals were materialmen and would qualify as vendees of Appellant. Appellee designated these individuals as "statutory employees" and thus assigned a penalty to Appellant.

g. In light of this Court's ruling in Adam Homes, Appellee does not believe it can ethically or professionally maintain its defense to this appeal and has withdrawn the stop-work order issued to Appellant and rescinded the assessed penalty. All money paid by Appellant to Appellee up to this point will thus be refunded to Appellant. This appeal would thus be rendered moot as there would no longer be a case or controversy.

5. On June 19, 2009, Petitioner filed its Petition and Application for Attorney's Fees pursuant to Section 57.111, Florida Statutes with DOAH. The petition was timely filed.

6. The parties filed a Pre-Hearing Stipulation in which they agreed that the underlying dispute had been resolved in favor of Petitioner; that Petitioner's Petition and Application for Attorney's Fees had been timely filed, and that the amount of attorney's fees sought by Petitioner was reasonable.

7. At the November 16, 2009, evidentiary hearing, Respondent stipulated that Petitioner met the definition of a

small business party, as set forth in Section 57.111, Florida Statutes.

8. From the record, it appears that on December 20, 2004, Hector Vega, a Compliance Investigator with Respondent's Division of Workers' Compensation, received a referral that Petitioner was re-roofing the Apopka Assembly of God, a church, located in Apopka, Florida, while in violation of the workers' compensation coverage requirements of Chapter 440, Florida Statutes.

9. On December 21, 2004, Investigator Vega traveled to the Apopka Assembly of God, where he reported that he found five workers on the roof. His notes indicated that at least some of those workers appeared to be installing flashing and shingles on the roof. One of the workers present on the roof, Noel Maldonado, informed Investigator Vega that he was employed by Petitioner; that he was being paid by a David Lorenzo for installing shingles; and that William R. Sims and David Lorenzo were inspecting the ongoing work. Maldonado also provided Investigator Vega with the cell phone number for William R. Sims, Petitioner's president. After interviewing Maldonado, Investigator Vega met with Sims at the work site. Sims advised Investigator Vega that although he personally had an exemption, Petitioner did not have workers' compensation coverage for any of the workers found on the roof. When asked if he had

subcontracted the job of re-roofing the Apopka Assembly of God, Sims at first advised that he subcontracted it to “David.” When asked if David was a licensed roofing contractor, Sims then advised Investigator Vega that David was an employee, not a subcontractor.

10. Investigator Vega subsequently obtained information which confirmed Sims’ statement that Petitioner had not secured the payment of workers’ compensation for the men found on the roof of the church, and issued a SWO directed to Petitioner.

11. On December 27, 2004, Sims sent accountant Nick Petrone to speak with Investigator Vega on behalf of Petitioner. Vega’s report indicates that Petrone advised Investigator Vega that Sims had hired three workers, one being Noel Maldanado, and presented photocopied licenses and alien registrations for those three individuals. Petrone also advised that a fourth individual was present on the roof for the delivery of roofing materials. Petitioner did not raise the issue that all of the men on the roof were materialmen who were working for David Lorenzo; and did not claim that the workers were exempt from the requirement that an employer provide workers’ compensation coverage for its employees.

12. Sims never spoke with Petrone about what Petrone had discussed with Investigator Vega at their December 27, 2004,

meeting. Sims assumed that the SWO issued on December 21, 2004, was lifted.

13. On November 1, 2005, Compliance Investigator Robert Cerrone received a referral that Petitioner was conducting roofing work at 1905 Curryford Road in Orlando with workers who were not protected by workers' compensation insurance as required by Chapter 440, Florida Statutes.

14. Investigator Cerrone went to the work site at 1905 Curryford Road, where he found six workers repairing the roof of the home located at that address. Those workers identified themselves as Jose Lupe Rivas, Cesar Sandoval, Marcos Hernandez, Cesareo Maravilla, Oscar Mendez, and Gilbran Maravilla, and advised Investigator Cerrone that they were working for Petitioner. Investigator Cerrone contacted Sims, who acknowledged that all six men working on the roof of 1905 Curryford Road were his employees. Sims also advised Investigator Cerrone that he was providing workers' compensation coverage for those employees through Emerald Staffing Services.

15. Investigator Cerrone subsequently spoke with Robert Szika of Emerald Staffing Services. Szika advised that of the six employees working on the roof at 1905 Curryford Road, only Jose Rivas and Marcos Hernandez were laborers provided by Emerald Staffing Services, and therefore were the only workers covered by Emerald's workers' compensation coverage. The other

four workers had not been supplied by Emerald Staffing Services, and therefore were not covered by Emerald's workers' compensation coverage.

16. Because four of the six workers being utilized by Petitioner on November 1, 2005, were not covered for workers' compensation through Emerald Staffing Services' policy, it appeared that Petitioner was not in compliance with the coverage requirements of Chapter 440, Florida Statutes. Investigator Cerrone was prepared to issue a SWO to Petitioner for these violations. However, Cerrone checked Respondent's records and determined that the SWO issued on December 21, 2004, was still in effect and that Respondent's rules prevented Investigator Cerrone from issuing a second SWO so long as the December 21, 2004, SWO remained open. Therefore, for the purpose of continuing his investigation, Inspector Cerrone could rely on Respondent's records, including Vega's narrative, and continue his investigation.

17. Sims wrote and delivered a letter, dated November 10, 2005, to Inspector Cerrone in which he acknowledged that four workers found on the roof of the Apopka Assembly of God by Inspector Vega on December 21, 2004, were Petitioner's employees, and that Petitioner had not complied with the requirements of the workers' compensation law at that time.

18. Sims alleges that he was coerced or tricked into signing the November 10, 2005, letter. Sims' testimony in this regard is not credible.

19. Investigator Cerrone issued a Request for Production of Business Records for Penalty Assessment directed to Petitioner on November 16, 2005, requesting records for the period of December 22, 2001, through December 21, 2004. Petitioner subsequently produced records to Investigator Cerrone. Based upon those records, Respondent assessed a penalty against Petitioner in the amount of $39,413.18, for failure to secure the payment of workers' compensation for its employees. In addition, Respondent determined that Petitioner had worked ten days in violation of the December 21, 2004, SWO. Respondent therefore added an additional $10,000.00 to the penalty, pursuant to Subsection 440.107(7)(c), Florida Statutes, bringing the total penalty to $49,413.18.

20. Petitioner timely filed a petition requesting a formal administrative hearing to review the penalty assessed by Respondent. Petitioner's hearing request was forwarded to DOAH, and an evidentiary hearing was held on August 8, 2006. On November 30, 2009, a Recommended Order was issued by Daniel M. Kilbride, Administrative Law Judge, finding that Respondent had proven by clear and convincing evidence that Petitioner had failed to secure the payment of workers' compensation, and had

correctly calculated and assessed a penalty in the amount of $49,413.18. Respondent rendered a Final Order on February 15, 2007, which adopted the findings of fact and conclusions of law set forth in the Recommended Order.

21. Petitioner timely appealed the February 15, 2007, Final Order to the Fifth District Court of Appeal.

22. On April 27, 2009, Respondent issued an Order Releasing SWO, and refunded the portion of the assessed penalty that Petitioner had already paid pursuant to a payment agreement schedule. At Respondent's request, Petitioner's appeal was subsequently dismissed.

23. On June 19, 2009, Petitioner filed its Petition and Application for Attorney's Fees, with DOAH, pursuant to Section 57.111, Florida Statutes, and this proceeding followed.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.569, and Subsections 120.57(1), and 57.111(4), Florida Statutes.

25. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying proceeding and that it was a small business party at the time the disciplinary action was

initiated. Once the party requesting the award has met this burden, the burden of proof then shifts to the agency to establish that it was substantially justified in initiating the underlying action. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

26. Subsection 57.111(3)(c), Florida Statutes, reads as follows:

> (c) A small business party is a "prevailing small business party" when:
>
> 1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time seeking judicial review of the judgment or order has expired;
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> 2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or
>
> 3. The state agency has sought a voluntary dismissal of its complaint.

27. Respondent has vacated the December 21, 2004, SWO and has refunded all portions of the penalty paid by Petitioner, and has stipulated that Petitioner has prevailed within the meaning of Subsection 57.111(3)(c), Florida Statutes.

28. Subsection 57.111(3)(d), Florida Statutes, reads as follows:

> (d) The term "small business party" means:
>
> 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principle office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more that $2 million, including both personal and business investments;
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> b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more that 25 full-time employees or a net worth of not more that $2 million; or
>
> c. An individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or
>
> 2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

29. Respondent has stipulated that Petitioner meets the statutory definition of a small business party, so this element

of Petitioner's fee claim has been established as required by law.

30. Subsection 57.111(4)(a), Florida Statutes, reads as follows:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

31. A proceeding by a state agency is substantially justified if it had a reasonable basis in law and fact at the time it was initiated by a state agency. Fish v. Department of Health, Board of Dentistry, 825 So. 2d 421 (Fla. 4th DCA 2002).

32. In determining whether Respondent had substantial justification to issue the December 21, 2004, SWO and assess the $49,413.18 penalty, the analysis must be limited to the facts and circumstances known to Respondent at the time the SWO and the Amended Order of Penalty Assessment were issued. Department of Health v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004); Department of Health v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003).

33. At the November 16, 2009, evidentiary hearing on Petitioner's Petition and Application for Attorney's Fees

pursuant to Section 57.111, Florida Statutes, Petitioner introduced the narrative reports of Respondent's investigators Hector Vega and Robert Cerrone into evidence. The narrative reports of Investigator Vega set forth the facts and circumstances on which Respondent relied on in issuing the December 21, 2004, SWO.

34. Although the use of hearsay is limited in formal DOAH evidentiary hearings, see Subsection 120.57(1)(c), Florida Statutes, the analysis here is not whether or not Inspector Vega's Narrative Report is true or correct. The analysis is for purposes of determining whether Respondent's investigator was substantially justified in relying on the Narrative Report and other records in November of 2005, when he issued a Request for Production and subsequently issued an Amended Order of Penalty Assessment. Under the facts of this case, Respondent was substantially justified. See Department of Professional Regulation, Division of Real Estate v. Toleda Realty, Inc., supra at 717.

35. In any event, Petitioner's Exhibit 3 merely supplements other non-hearsay evidence demonstrating that Respondent had a substantial basis in law and fact for issuing the December 21, 2004, SWO. Sims' letter of November 10, 2005, supports the conclusion that the men found working by Investigator Vega on December 21, 2004, were Petitioner's

employees, and that Petitioner was not in compliance with the coverage requirements of Chapter 440, Florida Statutes.

36. At the time the SWO was issued, the following facts and circumstances were known to Respondent:

> a. Respondent had received a referral indicating that Petitioner was doing roofing work at the Apopka Assembly of God and did not have the workers' compensation coverage required by Chapter 440, Florida Statutes.
>
> b. Upon investigation, a number of men were found, what appeared to be, installing flashing and shingles at the Apopka Assembly of God. One of those workers, Noel Maldonado, advised Respondent's investigator that he was working for Petitioner, was being paid for installing shingles, and that Sims was supervising the work. Maldonado was able to provide Respondent's investigator with Sims' cell phone number.
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> c. Sims advised Respondent's investigator that Petitioner did not have workers' compensation insurance coverage, a fact that was independently confirmed by Respondent.
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> d. Sims advised Respondent's investigator that he had subcontracted the roofing work at the Apopka Assembly of God to "David." When asked if David was a licensed roofing contractor, Sims advised him that David was an employee.

37. Based upon the information uncovered by Respondent's investigation on December 21, 2004, including, but not limited to, the information provided by Petitioner's president, William R. Sims, Respondent was substantially justified in issuing and serving the SWO on Petitioner.

38. On December 27, 2004, six days after issuance of the SWO, Petitioner's authorized representative Nick Petrone met with Respondent's investigator. Petrone advised Respondent's investigator that Petitioner had hired three of the workers found working on the roof of the Apopka Assembly of God on December 21, 2004, including Noel Maldonado. Petrone also advised Respondent's investigator that a fourth individual on the roof, for whom Petrone did not produce documentation, was connected with the delivery of roofing materials.

39. None of the information provided to Respondent by Petrone on December 27, 2004, indicated to Respondent that it had not been substantially justified in issuing the SWO six days earlier. To the contrary, the information provided by Petrone reinforces the conclusion that Respondent had been substantially justified in issuing the SWO.

40. On November 10, 2005, Sims signed and delivered to Respondent a letter acknowledging that four of the individuals found working on the roof of the Apopka Assembly of God on December 21, 2004, were in fact employed by Petitioner, and that Petitioner had not been in compliance with the coverage requirements of Chapter 440, Florida Statutes. Sims' November 10, 2005, letter further reinforces the conclusion that Respondent was substantially justified in issuing the SWO, and

further provides substantial justification for Respondent's subsequent assessment of the $49,413.18 penalty.

41. Respondent had a substantial basis in law and fact for issuing the December 21, 2004, SWO and issuing the $49,413.18 penalty against Petitioner. Respondent's actions were, therefore, substantially justified, pursuant to Subsection 57.111(4)(a), Florida Statutes.

42. On April 27, 2009, Respondent concluded, out of an abundance of caution, that it should revoke the SWO and refund the portion of the penalty paid by Petitioner because of the possibility that at least some of the workers on the roof of the Apopka Assembly of God on December 21, 2004, were material suppliers, and therefore not Petitioner's employees. However, Respondent's subsequent decision to discharge the SWO is irrelevant to the determination that Respondent had a substantial basis in law and fact for issuing the SWO and assessing the penalty against Petitioner at the time those actions were taken. See Department of Health v. Cralle, 852 So. 2d at 932, supra.

43. Further, there is good reason to believe that Petitioner was not in compliance with the coverage requirements of Chapter 440, Florida Statutes, on November 1, 2005, and Respondent's investigator Robert Cerrone would have been justified in issuing a SWO to Petitioner on that date.

44. Because Petitioner was working on November 1, 2005, while in violation of the coverage requirements of Chapter 440, Florida Statutes, but did not receive a SWO for the sole reason that it was working in violation of the pending December 21, 2004, SWO, which was subsequently vacated, special circumstances exist which would make an award of attorney's fees to Petitioner pursuant to Section 57.111, Florida Statutes, unjust. Petitioner's good fortune in evading sanction for its serial violations of the coverage requirements of Chapter 440, Florida Statutes, does not entitle it to recover its attorney's fees.

45. Petitioner's Petition and Application for Attorney's Fees pursuant to Section 57.111, Florida Statutes, must therefore be denied.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby

ORDERED AND ADJUDGED that Petitioner's Application for an Award of Attorney's Fees and Costs, pursuant to Section 57.111, Florida Statutes, is hereby denied.

DONE AND ORDERED this 4th day of February, 2010 in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 2010.

ENDNOTE

[1/] All statutory references are to Florida Statutes (2009), unless otherwise noted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.