STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 09-3912
COUNTYWIDE SIDING AND WINDOWS, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings, on January 7, 2010, in Panama City, Florida.

APPEARANCES

For Petitioner: Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondents: India Creed, pro se
Countrywide Siding and Windows, Inc.
5314 Peppertree Court
Panama City, Florida 32404

STATEMENT OF THE ISSUES

The issues in this matter are whether Countrywide Siding and Windows, Inc., failed to secure workers compensation that meets the requirements of Chapter 440, Florida Statutes, and, if

so was correctly assessed a penalty for violating, the workers' compensation laws of Florida.

PRELIMINARY STATEMENT

On February 17, 2009, Petitioner issued and served a Stop-Work Order and Order of Penalty Assessment on Respondent, alleging that Respondent had failed to obtain workers' compensation coverage that met the requirements of Chapter 440, Florida Statutes, and ordering Respondent to cease all business operations. Petitioner also issued and served on Respondent a Division of Workers' Compensation Request for Production of Business Records for Penalty Assessment Calculation on the same day. After receiving Respondent's business records in response to the request, Petitioner issued and served an Amended Order of Penalty Assessment (Amended Order) on Respondent on March 13, 2009, assessing a penalty in the amount of $159,002.46 against Respondent pursuant to Section 440.107(7)(d), Florida Statutes. On June 9, 2009, in response to additional documents submitted by Respondent, Petitioner issued and served a 2nd Amended Order of Penalty Assessment (2nd Amended Order) on Respondent on June 9, 2009, reducing the assessed penalty to $130,914.99.

On June 29, 2009, Petitioner received a letter from Respondent challenging the 2nd Amended Order of Penalty Assessment and requesting a hearing on the matter. The matter was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner presented the testimony of Petitioner's investigator, Carl Woodall, and Petitioner's penalty calculator, Monica Moye, and introduced 11 exhibits into evidence. Respondent presented the testimony of its representative, India Creed, but did not introduce any exhibits into evidence. The record was held open to allow Respondent to submit additional exhibits. Apparently, some documents were submitted to Petitioner, but were never filed with the Division of Administrative Hearings. Therefore, these extra documents are not part of the record of this proceeding. However, in response to those additional documents, Petitioner issued and served a 3rd Amended Order of Penalty Assessment on Respondent on February 26, 2010, reducing the assessed penalty to $130,135.03. On March 1, 2010, Respondent filed a Motion to Amend Order of Penalty Assessment which was not opposed by Respondent. On March 16, 2010, the Motion to Amend was granted and this Recommended Order proceeds on the basis of the 3rd Amended Order of Penalty Assessment.

After the hearing, Petitioner submitted its Proposed Recommended Order on March 1, 2010. Respondent submitted its Proposed Recommended Order in letter form on February 26, 2010.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure

workers' compensation for the benefit of their employees. § 440.107, Fla. Stat. (2009).

2. Respondent is a corporation domiciled in Florida and engaged in the construction industry.

3. On February 13, 2009, Petitioner's investigator, Carl Woodall, stopped to spot check a house in the Cabrille Lane area of Panama City, Florida, where he saw workers installing siding. Petitioner's investigator is the only employee for Petitioner who investigated and developed the substantive evidence in this case. Other employees, who have no direct knowledge of the underlying facts, calculated the amounts of the proposed penalties.

4. Mr. Woodall inquired of the workers and ascertained that they worked for Respondent. The investigator then contacted the Respondent to determine whether Respondent had secured or obtained workers' compensation insurance under Florida's workers' compensation law. Respondent's representative indicated that it maintained workers' compensation insurance through Employee Leasing Service (ELS), an employee-leasing company. There is no dispute that in February 2009, Respondent leased its workers from ELS and that under the lease agreement, ELS provided workers' compensation coverage to Respondent and its leased workers. Other evidence suggested that in past years, Respondent had leased its workers

from other employee-leasing companies. The evidence was not specific as to who those companies were. The evidence, while not specific, also suggested that Respondent paid its leased employees bonuses and sometimes loaned them money.[1/]

5. In general, employee-leasing agreements provide clerical duties to client companies including tax deduction and workers' compensation, in exchange for a fee. Client companies' workers who are registered with the leasing company are employees of the leasing company, not the client company.

6. In this case, the specific contract between ELS and Respondent was not introduced into evidence. Likewise, neither the contract nor the proof of coverage between ELS and its workers' compensation insurer was introduced into evidence and it is unknown who the actual workers' compensation insurer was or is. Therefore, there is no credible evidence regarding the specific terms of the contract between ELS, Respondent or the workers' compensation insurer. Importantly, there is no evidence regarding any fee arrangement between ELS and Respondent showing that workers' compensation coverage was provided based on payroll or that direct payments to Respondent's workers constituted payroll under the terms of the lease contract for which workers' compensation had not been secured.

7. Petitioner's investigator telephoned ELS and learned from some person (purportedly Ellen Clark) that it did have an employee-leasing contract with Respondent and did maintain workers' compensation on Respondent's workers. The investigator was also told that ELS intended to or had cancelled its employee-leasing contract with Respondent effective either February 14 or 15, 2009. No one from ELS testified at the hearing and the substance of the above conversation, as with all the testimony about purported ELS statements, constitutes hearsay that was not corroborated by other credible evidence in the record. As such, the substance of these conversations is not found as facts, other than to establish that Petitioner's investigator had a conversation with a person purporting to Represent ELS. However, on February 14, 2010, the investigator did not take any action against Respondent since he felt Respondent was in compliance with Florida's workers' compensation law.

8. On February 17, 2009, Mr. Woodall again returned to the Cabrille Lane area and observed Respondent's workers installing siding on a house. One of the workers, Mike Moore, revealed to Mr. Woodall that he was a subcontractor of Respondent, but that the other worker, Ryan Grantham, was Respondent's employee. The subcontractor was in compliance with Florida's workers' compensation laws.

9. In order to find out if the other worker was covered by workers' compensation insurance, Mr. Woodall met with Ronnie Creed, Respondent's owner and officer, who was exempt under Florida's workers' compensation law. Mr. Creed was unaware of Respondent's workers' compensation status but put Mr. Woodall in contact with his wife, India Creed, who was also exempt from Florida's workers' compensation law. Ms. Creed told Mr. Woodall that Respondent had received a letter from ELS that day, purportedly notifying it that ELS intended to cancel or had cancelled its employee-leasing contract with Respondent. The letter was not introduced into evidence and it is unclear whether the letter discussed the workers' compensation insurance coverage ELS maintained on its employees that it leased to Respondent. Again, no one from ELS or its workers' compensation insurer testified at the hearing regarding its lease or which workers were covered under the lease. The record is devoid of any evidence that these employees were no longer employed by ELS and, more importantly, not covered by ELS's workers' compensation coverage on February 17, 2009.[2/]

10. Mr. Woodall also checked the Department's Coverage and Compliance Automated System (CCAS) database. CCAS is a database that maintains information on business entities in Florida and whether they have secured workers' compensation and /or whether exemptions from workers' compensation have been granted to

eligible company officers. CCAS did not reflect that Respondent had a workers' compensation insurance policy in place. However, the investigator did not check to see if ELS or another employee-leasing company had such a policy. Similarly, the investigator did not investigate the terms of those contracts and whether those contracts considered any bonuses or loans paid by Petitioner to its employees to be payroll, and if it was, whether any workers' compensation coverage was dependent on such payments being reported to these companies. As such, the information in that system is hearsay which may or may not indicate a need to investigate further. Moreover, CCAS is simply a database of information reported by others and maintained by the Petitioner. Its reliability is questionable in this case given the multiple contractual entities involved in the provision of workers' compensation to Respondent and the lack of any direct evidence from those contractual entities. Therefore, the fact that CCAS did not reflect that Respondent had workers' compensation insurance is not given weight in this Order and is neither clear nor convincing evidence demonstrating that Respondent failed to secure workers' compensation insurance on February 17, 2009, or for prior years.

11. Based on his belief that Respondent had not secured workers' compensation on its workers, Mr. Woodall issued a Stop-Work Order and Order of Penalty Assessment and a Request for

Production of Business Records for Penalty Assessment Calculation to Respondent (Request) asking for Respondent's business and financial records related to Respondent's business and employee leasing for the last 3 years. The records were requested to construct Respondent's alleged payroll and determine the employees of Respondent. There was no evidence that there was any inquiry into past employment leasing companies that Petitioner contracted with or the terms of those contracts. As with the contract with ELS, there was no inquiry into whether loans or bonuses or any other money paid by Respondent to its workers was considered payroll, required to be reported, or had any impact on workers' compensation coverage that the leasing companies provided on the employees they leased to Respondent.

12. Respondent complied with the Request and provided the requested business records to Petitioner. Mr. Woodall forwarded the financial records to Petitioner's penalty calculator, Monica Moye. Beyond checking CCAS, Ms. Moye was not responsible for factually determining whether Respondent had properly secured workers' compensation insurance during the period under review.

13. Using Respondent's financial records, Ms. Moye calculated a penalty to be assessed to Respondent based on class code 5645 for siding installation as established by the National Council on Compensation Insurance in the Scopes Manual. She

also separated Respondent's periods of alleged noncompliance based on periodically changing approved manual rates. Approved manual rates are set by the National Council on Compensation Insurance and represent the amounts employers would pay in workers' compensation premiums for tasks performed by their employees. On March 13, 2009, Petitioner issued an Amended Order of Penalty Assessment, assessing a penalty of $159,002.46 to Respondent. Based on additional records submitted by Respondent, Petitioner recalculated the previously-assessed penalty and issued a 2nd Amended Order of Penalty Assessment to Respondent on June 9, 2009, reducing the assessed penalty to $130,914.99.

14. Additionally, following the hearing, the Department revised the assessed penalty and issued a 3rd Amended Order of Penalty Assessment (3rd Amended Order) reducing the assessed penalty to $130,135.03.[3/] The list of employees attached to the 3rd Amended Order of Penalty Assessment contains several incidents of imputed employment listed as "cash," "unknown" or "Star H." There is nothing in the record that supports a finding that these amounts were paid for employment purposes. However, the evidence did not establish that Petitioner did not secure workers' compensation coverage and the issues regarding the correctness of the amount of penalty assessed against Respondent is not addressed in this Recommended Order. Since

the evidence did not establish that Respondent failed to secure workers' compensation, the Stop-work order should be cancelled and the 3rd Amended Order of Penalty Assessment dismissed.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

16. The law defines "employer" in part as ". . . every person carrying on any employment. . ." § 440.02(16)(a), Fla. Stat. (2009). The law also defines "employment" in respect to the construction industry as, ". . . all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a)2., Fla. Stat. There was no dispute that Respondent was engaged in employment as defined in Section 440.02(17)(b)2., Florida Statutes, as it employed more than one employee in the operation of a siding business and was an employer as defined in Section 440.02(16)(a), Florida Statutes.

17. The workers' compensation law requires employers to secure the payment of workers' compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2009).

18. Pursuant to Section 440.107(2), Florida Statutes (2009), "securing the payment of workers' compensation means obtaining coverage that meets the requirements of Chapter 440, Florida Statutes and the Florida Insurance Code."

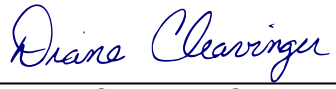
19. The Department has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. Department of Banking and Finance Division of Securities and Investor 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., DOAH Case No. 04-3041 (Final Order April 27, 2005); Triple M Enterprises, Inc. v. Department of Financial Services, Division of Workers' Compensation, DOAH Case No. 94-2524 (Recommended Order January 13, 2005).

20. In this case, the evidence was neither clear nor convincing that Respondent did not secure workers' compensation. No one from any employee-leasing company who leased its employees to Respondent testified at the hearing. The lease contracts were not introduced into evidence. Without this evidence and under the very vague facts of this case, no determination on the ultimate factual issue of whether Respondent failed to secure workers' compensation on February 17, 2010, or earlier can be made. Therefore, the Stop-work Order should be cancelled and the 3rd Amended Order of Penalty Assessment dismissed.

RECOMMENDATION

Based on the findings of fact and conclusions of law, it is RECOMMENDED that the Department of Financial Services enter a Final Order that Petitioner failed to establish by clear and convincing evidence that Petitioner failed to secure workers' compensation to its employees and canceling the Stop Work Order and dismissing the 3rd Amended Order of Penalty Assessment.

DONE AND ENTERED this 2nd day of April, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of April, 2010.

ENDNOTES

[1/] One long-time employee had a serious gambling problem and routinely got loans from Respondent to cover his gambling debts. The evidence was not clear what amounts in the list of employees attached to the 3rd Amended Order of Penalty Assessment were for loans or bonuses. Ms. Creed testified that most of the amounts in the penalty assessment were for bonuses and some loans.

[2/] It was clear that Ms. Creed was in over her head in representing Respondent and did not have a good grasp regarding the importance of the terms of the ELS contract, the exact cancellation date and the effect such a cancellation may or may not have on workers' compensation coverage. She seemed to assume that they did not have coverage because she was told that they did not. This assumption is not an admission or credible evidence of a fact which would relieve Petitioner from its burden to establish that Respondent had not secured workers' compensation in accordance with Florida law especially since there are two contracts at issue—Respondent's contract with ELS and the contract of insurance providing workers' compensation coverage. For similar reasons, assuming arguendo that Respondent's letter requesting a hearing is a pleading, Petitioner's argument regarding the pleadings forming the issues also fails.

[3/] Petitioner's penalty calculator reviewed several documents submitted by Respondent to Petitioner following the hearing. None of these documents were filed with the Division of Administrative Hearings. In its Proposed Recommended Order, Petitioner describes some of these documents as employee applications that state the applicant is an employee of the leasing company, and that should the employee be paid by another entity and be injured, the injured employee would not be covered by the leasing company's workers' compensation policy. However, this language does not establish that Respondent did not secure workers' compensation coverage through the employee-leasing company if it paid its, otherwise covered, leased employees extra money. Indeed, this clause relates more to a situation where a worker performs labor for multiple subcontractors only one of whom (in this case the Respondent) may have a contract to lease that worker as an employee. Understatement of payroll issues are not the subject of this proceeding.

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.