

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,) Case No. 09-4057
)
vs.)
)
THE GARDNER GROUP, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, in Jacksonville, Florida, on October 27, 2009.

APPEARANCES

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

For Respondent: Beverly Carter, Qualified Representative
The Gardner Group, Inc.
810 Third Street
Neptune Beach, Florida 32266

STATEMENT OF THE ISSUE

At issue in this proceeding is whether the Respondent, The Gardner Group, Inc. (Gardner Group) failed to abide by the

coverage requirements of the Workers' Compensation Law, Chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees; and whether the Petitioner properly assessed a penalty against the Respondent pursuant to Section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, Chapter 440, Florida Statutes, the Department of Financial Services, Division of Workers' Compensation (Department), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On June 26, 2009, the Department issued a Stop Work Order (SWO) that included an Order of Penalty Assessment. The SWO alleged that Gardner Group failed to abide by the coverage requirements of the workers' compensation law on that date. The order directed Gardner Group immediately to cease business operations and pay a penalty equal to 1.5 times the amount Gardner Group would have paid in premium to secure workers' compensation during periods within the preceding three years when it failed to do so, or \$1,000.00, whichever is greater, pursuant to Subsection 440.107(7)(d), Florida Statutes.

Also on June 26, 2009, the Department requested business records from Gardner Group in order to determine the exact amount of the penalty. Gardner Group promptly provided the

records. On July 13, 2009, the Department issued an "Amended Order of Penalty Assessment" (Amended Order) that ordered Gardner Group to pay a penalty of \$15,595.93, pursuant to Subsection 440.107(7)(d), Florida Statutes. A "Second Amended Order of Penalty Assessment" (Second Amended Order) was issued on July 17, 2009, ordering Gardner Group to pay a penalty in the amount of \$15,264.24.

Gardner Group timely requested a formal administrative hearing to contest the penalty assessment, and on July 30, 2009, the Department forwarded Gardner Group's request to the Division of Administrative Hearings (DOAH). The hearing was held as originally scheduled on October 27, 2009.

At the hearing, the Department presented the testimony of its investigator, Lucio Luis Cabrera, Jr., and of its penalty calculator, Gloria Ieanez Catalan. The Department's Exhibits 1 through 8 were admitted into evidence. Gardner Group presented the testimony of its Vice President of Administration, Beverly Carter. Gardner Group's composite Exhibit 1 was admitted into evidence.

A Transcript of the final hearing was filed at the DOAH on November 12, 2009. The Department timely filed a Proposed Recommended Order on November 23, 2009. Gardner Group did not file a proposed recommended order.

Unless otherwise stated, all statutory references are to the 2009 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of the workers' compensation law that employers secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. Gardner Group is an insurance broker located in Neptune Beach, Florida. The company has a total of six employees. Gardner Group stipulated that all persons listed in the Second Amended Order were its employees, and to the correctness of the calculation of payroll for which the penalty was assessed.

3. On June 25, 2009, Lou Cabrera, the Department's investigator, visited Gardner Group's place of business at 810 Third Street in Neptune Beach, where he spoke with Gardner Group employee Corinne Carter.

4. Mr. Cabrera later spoke with Beverly Carter, Gardner Group's Vice President for Administration. Ms. Gardner told Mr. Cabrera that Gardner Group had four employees in addition to her and Corrine Carter. The company's business records later

verified that these persons, Kayla Hauk, Sandra Moore, Brian Cook, and Howard Dunlap, were employees of Gardner Group.

5. Because Gardner Group had four or more employees, it appeared to meet the threshold for "employment" requiring workers' compensation coverage. § 440.02(17)(b)2., Fla. Stat.

6. A corporate officer may elect to be exempt from the requirements and benefits of Chapter 440, Florida Statutes, by filing a notice and receiving a certificate of election to be exempt from the Department. See Florida Administrative Code Rule 69L-6.012 for details of the process employed to obtain an exemption.

7. As of June 25, 2009, Howard Dunlap and Trace Milam were the only corporate officers of Gardner Group holding valid workers' compensation exemptions. Trace Milam was no longer working for Gardner Group on June 25, 2009.

8. As of June 25, 2009, Gardner Group did not have workers' compensation insurance. Mr. Cabrera issued and personally served the SWO on Gardner Group. Mr. Cabrera also issued and personally served a request for production of business records for the purpose of accurately calculating a penalty assessment for Gardner Group.

9. Gardner Group promptly complied with the Department's request for business records. Based on those records, the Department issued the Amended Order on July 13, 2009, ordering

Gardner Group to pay a penalty of \$15,595.93, pursuant to Subsection 440.107(7)(d), Florida Statutes. On July 17, 2009, the Department issued the Second Amended Order, ordering Gardner Group to pay a penalty in the amount of \$15,264.24. The Second Amended Order is the basis of this proceeding.

10. The SWO was conditionally released when Gardner Group entered into a periodic payment agreement and came into compliance with Section 440, Florida Statutes, by obtaining exemptions for three corporate officers (Mr. Dunlap, Mr. Cook, and Beverly Carter) and maintaining three employees.

11. Sole proprietors and partners not engaged in the construction industry are not considered employees for purposes of workers' compensation coverage unless they affirmatively elect to be covered. § 440.02(15)(c)1., Fla. Stat.

12. At the hearing, Beverly Carter testified that she is a partner in Gardner Group. She produced documents demonstrating that she owns 5 percent of the outstanding shares in Gardner Group. Mr. Dunlap owns 85 percent of the outstanding shares, and Mr. Milam owns 10 percent of the outstanding shares. The shares are not publicly traded, and a cross purchase agreement places restrictions on the manner in which the shareholders may dispose of their holdings.

13. Section 440.02(21), Florida Statutes, defines "partner" to mean:

any person who is a member of a partnership that is formed by two or more persons to carry on as co-owners of a business with the understanding that there will be a proportional sharing of the profits and losses between them. For the purposes of this chapter, a partner is a person who participates fully in the management of the partnership and who is personally liable for its debts.

14. As Vice President for Administration, Ms. Carter does participate in the management of the business. However, Gardner Group is a C corporation, formed pursuant to Chapter 607, Florida Statutes, meaning that the shareholders are not personally liable for the debts of the business. Ms. Carter testified that she is paid a salary that constitutes her main compensation from Gardner Group. She testified that she may receive a dividend if the corporation shows a profit.

15. Gardner Group is a corporation, not a partnership, and Ms. Carter therefore cannot meet the definition of "partner" set forth in Section 440.02(21), Florida Statutes.

16. Ms. Carter credibly testified that Gardner Group was unaware that its corporate officers were required to file a notice of election in order to be exempt from workers' compensation coverage. She noted that it was a simple matter for the company to obtain those exemptions, and stated that it

was unfair to penalize Gardner Group more than \$15,000.00 for the "minor technicality" of failing to file exemption notices for its three corporate officers.

17. The Department lacks discretion to overlook the requirements of Section 440.05, Florida Statutes, regarding the method by which a corporate officer must elect exemption from workers' compensation coverage, or the requirements of Section 440.107, Florida Statutes, regarding enforcement of workers' compensation coverage requirements. Therefore, Gardner Group's unawareness of the filing requirement does not excuse the payment of the amount set forth in the Second Amended Order.

CONCLUSIONS OF LAW

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

19. Employers are required to secure payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

20. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her" and includes "[a]ll private employments in which four or more employees are employed by the same employer. . . ." § 440.02(17)(a) and (b)(2), Fla. Stat.

21. "Employee" is defined, in part, as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written. . . ." § 440.02(15)(a), Fla. Stat. "Employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state. . . ." § 440.02(15)(b), Fla. Stat. Certain corporate officers may elect to exempt themselves from the coverage requirements of Chapter 440, Florida Statutes. §§ 440.02(15)(b) and 440.05, Fla. Stat. In this case, one of Gardner Group's employees had a workers' compensation exemption, but five employees were subject to the coverage requirement.

22. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the Workers' Compensation Law and that the penalty assessments were correct under the law. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

23. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

24. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

. . . Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re: Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

25. The Department established by clear and convincing evidence that Gardner Group was an "employer" for workers' compensation purposes because it was engaged in a non-

construction industry and had four or more employees working for the company from July 2006 through June 2009. § 440.02(16)(a) and (17)(b)2., Fla. Stat. Gardner Group was therefore required to secure the payment of workers' compensation. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

26. Section 440.107(7)(a), Florida Statutes, provides in relevant part:

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. . . 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.

27. Thus, the Department's SWO was mandated by statute. The Department applied the proper methodology in computing the penalty, pursuant to the Penalty Calculation Worksheet adopted by reference in Florida Administrative Code Rule 69L-6.027.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$15,264.24 against The Gardner Group, Inc.

DONE AND ENTERED this 24th day of December, 2009, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of December, 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.