

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
) Case No. 09-4303
vs.)
)
CAROLINA REALTY AND DEVELOPMENT)
COMPANY, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was held before Robert S. Cohen,
Administrative Law Judge with the Division of Administrative
Hearings, on December 1, 2009, in Pensacola, Florida.

APPEARANCES

For Petitioner: Timothy L. Newhall, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: John Baehr, pro se
Carolina Realty and
Development Company, Inc.
608 Sheppard Drive
Pensacola, Florida 32507

STATEMENT OF THE ISSUE

The issue is whether the Stop-Work Order and Order of
Penalty Assessment entered by Petitioner on July 15, 2009, and
subsequently amended twice, should be upheld.

PRELIMINARY STATEMENT

On July 15, 2009, Petitioner issued and served a Stop-Work Order and Order of Penalty Assessment (hereinafter "Order") on Respondent, alleging that Respondent was not in compliance with the coverage requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. Respondent was ordered to cease all business operations. Petitioner issued and served an Amended Order of Penalty Assessment (hereinafter "Amended Order") on Respondent on August 6, 2009, assessing against Respondent a penalty in the amount of \$48,689.27 pursuant to Subsection 440.107(2), Florida Statutes. Petitioner thereafter filed a Motion to Amend the Order of Penalty Assessment on November 20, 2009, and, upon the granting of the Motion, issued and served its Second Amended Order of Penalty Assessment in the amount of \$10,492.94 on that date.

On July 16, 2009, Petitioner received a Petition from Respondent challenging the Order and requesting a hearing on the matter. Respondent's Petition has been applied to the subsequent Amended and Second Amended Orders of Penalty Assessment so that the final hearing would consider the most recently filed order of assessment. The Petition was transferred to the Division of Administrative Hearings on August 14, 2009. The matter was set for a hearing to be conducted on October 1, 2009, and after an agreed-upon Motion

for Continuance, the case proceeded to hearing on December 1, 2009, in Pensacola, Florida.

Petitioner presented the testimony of John Wheeler, Petitioner's investigator, and Larry Scapecchi, and introduced 12 exhibits, all of which were admitted into evidence. Respondent offered the testimony of its president, John G. Baehr, and offered no additional exhibits.

Petitioner ordered a transcript, but after a conference call hearing before the undersigned on December 7, 2009, both parties agreed that, in the interest of conserving time and resources, the matter would proceed to recommended order without a transcript or the filing of proposed recommended orders.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the requirement of the Workers' Compensation Law that employers secure the payment of compensation for their employees who suffer work-related injuries. Respondent, on July 15, 2009, was operating in the construction industry as a for-profit corporation, with an active status.

2. On July 15, 2009, Petitioner's investigator, John Wheeler, investigated Respondent for compliance with the Florida Workers' Compensation Law at 36 East Burgess Road, Pensacola,

Florida 32504 (hereinafter "worksite") during a random inspection.

3. On July 15, 2009, at the worksite, Petitioner's investigator interviewed and recorded the names of four individuals performing a roofing job as Benjamin H. Bell, Christopher T. Bell, Willie Lanier, and Curtis Jenkins.

4. Utilizing the Scopes Manual published by the National Council on Compensation Insurance and adopted by Florida Administrative Code Rule 69L-6.021 as guidance, Petitioner's investigator determined that roofing is within the construction industry and assigned the appropriate class code (5551) to the activities being performed at the worksite.

5. Petitioner's investigator determined that both Benjamin and Christopher Bell were officers of Respondent corporation, and had hired Mr. Lanier and Mr. Jenkins to work the roofing job with them.

6. Petitioner's investigator, using the Department of Financial Services' Coverage and Compliance Automated System (CCAS), determined that while both Benjamin and Christopher Bell had valid Certificates of Election to be exempt from Florida Workers' Compensation Law, neither Mr. Lanier nor Mr. Jenkins had similar certificates of exemption.

7. Using the CCAS, Petitioner's investigator was unable to locate proof of insurance securing the payment of workers'

compensation coverage by Respondent that would cover Mr. Lanier or Mr. Jenkins for the job at issue.

8. On July 15, 2009, Petitioner's investigator issued a Stop-Work Order and Order of Penalty Assessment to Petitioner for failure to meet the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. The Order required Respondent to cease all business operations and assessed a penalty equal to 1.5 times the amount the employer would have paid in premium when applying the approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation against Respondent for the preceding three-year period, pursuant to Subsection 440.107(7)(d), Florida Statutes.

9. On July 15, 2009, Petitioner's investigator issued to Respondent a Division of Workers' Compensation Request for Production of Business Records for Penalty Assessment Calculation (hereinafter "Request").

10. Respondent responded to the Request and provided Petitioner's investigator with the requested records on July 21, 2009.

11. On August 6, 2009, Petitioner issued an Amended Order of Penalty Assessment assessing a new penalty of \$48,689.27 against Respondent, based on Respondent's business records.

12. On November 20, 2009, Petitioner issued a Second Amended Order of Penalty Assessment reducing Respondent's penalty to \$10,492.94.

13. Petitioner's investigator issued the Second Amended Order of Penalty Assessment after having learned from Respondent that many of the amounts considered for the penalty in the Amended Penalty Assessment should not be deemed payroll for uncovered or non-exempt workers.

14. The roofing job at issue at 36 Burgess Road, resulted from a verbal contract entered into between Benjamin and Christopher Bell, on behalf of Respondent, and Larry Scapecchi, a Florida-certified roofing and general contractor.

15. Respondent's president, Mr. Baehr, was not aware of the verbal contract entered into by Respondent's vice presidents, Benjamin and Christopher Bell, to perform the roofing job that gave rise to this proceeding.

16. Mr. Baehr did not authorize the contract into which Benjamin and Christopher Bell entered.

17. In his 30 years in the construction business, Mr. Baehr had never entered into a verbal contract to perform construction work. All of contracts for construction jobs were written.

18. Benjamin and Christopher Bell, as officers of Respondent corporation, had real or apparent authority to enter

into the contract for the roofing job, and Mr. Larry Scapecchi entered into the contract with them based upon his good-faith belief in their authority to contract on behalf of the corporation.

19. Benjamin and Christopher Bell, on behalf of Respondent, allowed two workers, Willie Lanier and Curtis Jenkins, to be employed on the Burgess Road roofing job who were neither exempt from the requirements of Florida's Workers' Compensation Law nor covered by a policy of workers' compensation insurance for the work they were performing in Pensacola, Florida.

20. In response to Petitioner's Request for Production of Documents, since no payroll information was supplied by Respondent to Petitioner for the two workers, Willie Lanier and Curtis Jenkins, their salary had to be imputed based upon the two days they were found to be performing roofing work at the worksite. The remainder of the salary used in calculating the penalty to be assessed was based upon the payroll records for non-exempt and non-covered employees from January 2007 until the date of the inspection, July 15, 2009.

21. The premium due was calculated by multiplying one percent of the gross payroll times the approved manual rate which resulted in the amount of \$6,995.28. The penalty was then

determined by multiplying the amount of premium due by 1.5, resulting in the final penalty due of \$10,492.92.

22. Based upon the payroll records produced by Respondent in response to Petitioner's request, a penalty in the amount of \$10,492.92 is due to Petitioner. This amount is \$0.02 less than the amount calculated by Petitioner and may be the result of rounding errors.

CONCLUSIONS OF LAW

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

24. Petitioner is the state agency responsible for enforcing Respondent's violation of workers' compensation coverage requirements. Petitioner 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 v. Osborne Stern and Co., 670 So. 2d 932, 933 (Fla. 1996).

25. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is,

therefore, required by the employer. See, e.g., C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

26. Pursuant to Subsection 440.107(3)(g), Florida Statutes, "The department shall enforce workers' compensation coverage requirements . . . the department shall have the power to: Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section."

27. Pursuant to Subsection 440.02(16)(a), Florida Statutes, the law defines "employer" as ". . . every person carrying on any employment" If the employer is a corporation, such as in this case, the parties in actual control of the corporation, including the president, officers, directors and shareholders, are considered the employer. Id.

28. The workers' compensation law requires employers to secure the payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2006).

29. Pursuant to Section 440.05, Florida Statutes, the Department may grant applications for certificates of election of exemption from the Workers' Compensation Law.

30. Pursuant to Subsection 440.05(6), Florida Statutes, "a construction industry certificate of election to be exempt which is issued in accordance with this section shall be valid for 2 years after the effective date stated thereon."

31. Benjamin and Christopher Bell possessed valid exemption certificates at the time of the inspection at the worksite on July 15, 2009. Willie Lanier and Curtis Jenkins did not.

32. Pursuant to Subsection 440.02(17)(b)2., Florida Statutes, "employment" is defined as ". . . with respect to the construction industry, all private employment in which one or more employees are employed by the same employer."

33. Pursuant to Subsection 440.02(8), Florida Statutes, Petitioner "may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry'. . . ."

34. Petitioner has adopted construction industry classification codes contained in the Basic Manual (Scopes Manual) published by the National Council on Compensation Insurance by Florida Administrative Code Rule 69L-6.021 (2007), which references Subsection 440.02(8), Florida Statutes, as specific authority for implementation. Florida Administrative Code Rule 69L-6.021 includes roofing as an activity within the construction industry. Fla. Admin. Code R. 69L-6.021(1)(tt).

35. Pursuant to Subsection 440.107(2), Florida Statutes, "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

36. Respondent was an employer, engaged in employment in the construction industry as a corporation, that received remuneration and, in this case, was not in compliance with Chapter 440, Florida Statutes, and was correctly assessed a penalty.

37. Petitioner "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 \$1000, whichever is greater." Petitioner's investigator used this method of penalty calculation to arrive at Respondent's final penalty amount. § 440.107(7)(d)1., Fla. Stat.

38. The method of penalty calculation described in Subsection 440.107(7)(d), Florida Statutes, is mandatory.

39. Neither Chapter 440, Florida Statutes, nor the Florida Insurance Code contemplates any knowledge requirement as a factor which would excuse an employer's failure to secure the payment of workers' compensation.

40. Respondent did not provide any proof that it is not subject to the applicable laws and rules of Petitioner concerning the requirement that it secure workers' compensation

insurance for its employees. Moreover, Petitioner proved by clear and convincing evidence that the employees subject to the penalty were not covered by a valid workers' compensation insurance policy or holders of exemption certificates during the assessment period. Finally, the method of assessing the penalty imposed by Petitioner was performed correctly, and in accordance with the Florida Statutes and Petitioner's rules.

RECOMMENDATION

Based on the findings of fact and conclusions of law, it is RECOMMENDED that Petitioner enter a final order that adopts the Stop-Work Order and Second Amended Order of Penalty Assessment assessing a penalty of \$10,492.92.

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



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th 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.