

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-4991
)
A AND M PAINTING SERVICES,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 9, 2009, an administrative hearing in this case was conducted by Carolyn S. Holifield, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Morgan R. Bentley, Esquire
Williams, Parker, Harrison,
Dietz & Getzen
200 South Orange Avenue
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue in the case is whether A and M Painting Services, Inc., (Respondent), should be assessed a penalty for an alleged

failure to comply with workers' compensation requirements as alleged in the Second Amended Order of Penalty Assessment.

PRELIMINARY STATEMENT

On June 24, 2009, the Department of Financial Services, Division of Workers' Compensation (Petitioner), issued an Order of Penalty Assessment against the Respondent, alleging that the Respondent failed to "obtain coverage that meets the requirements of Chapter 440, F.S. and the Insurance Code." The order assessed a total penalty of \$93,987.43. The Petitioner subsequently issued a Second Amended Order of Penalty Assessment against the Respondent, wherein the total penalty was identified as \$91,455.63.

The Respondent disputed the alleged violation and the proposed penalty assessment and requested a formal hearing. On September 11, 2009, the Petitioner forwarded the request to the Division of Administrative Hearings. The hearing was first scheduled to commence on October 29, 2009, and was rescheduled for November 9, 2009, at the request of the parties.

At the hearing, the Petitioner presented the testimony of three witnesses and had exhibits identified as A through L admitted into evidence. The Respondent presented the testimony of two witnesses.

The Transcript of the hearing was filed on November 20, 2009. After requesting an extension of the deadline for filing

proposed orders, the Respondent filed a Proposed Recommended Order on December 4, 2009, and the Petitioner filed a Proposed Recommended Order on December 7, 2009.

On May 20, 2010, the case was transferred to the undersigned Administrative Law Judge (ALJ) due to the unavailability of the ALJ who presided at the hearing. See § 120.57(1)(a), Fla. Stat. (2009). Upon review of the record, it appeared that a deposition admitted at the hearing as an exhibit was incomplete. Notice was provided to the parties, and the remainder of the exhibit was obtained.

This Recommended Order has been entered based upon a review of the hearing Transcript and exhibits and the Proposed Recommended Orders submitted by the parties.

FINDINGS OF FACT

1. On April 18, 2009, an investigator employed by the Petitioner visited the Respondent's business location to ascertain compliance with the pertinent workers' compensation requirements.

2. At the time of the visit, the investigator learned that the Respondent was owned by an individual identified as Samuel Rodriguez.

3. The investigator thereafter accessed the Petitioner's "Coverage and Compliance Automated System" (CCAS), which contains records related to workers' compensation coverage for

Florida employers. Based on a review of the information in the CCAS, the investigator determined that the Respondent did not have proper workers' compensation coverage.

4. Corporate officers in certain companies may exempt themselves from coverage requirements upon the filing of a proper notice of election for exemption.

5. The Respondent was authorized to exempt certain employees from workers' compensation coverage. The CCAS system reflected that notices of election for exemption had been filed by the Respondent on behalf of two persons identified as Maria Cardenas and Anselmo Rodriguez.

6. As of April 18, 2009, an employee leasing company identified as Southeast Employment Leasing provided one employee, Alfredo Palacios, to the Respondent.

7. Workers' compensation coverage for persons employed through employee leasing companies is provided by the leasing company and is based on the amount of compensation paid to the employee by the leasing company.

8. The Petitioner's investigator issued a request for business records, and the Respondent complied with the request.

9. Based on a review of the Respondent's business records by one of the Petitioner's "penalty calculator" employees, the Petitioner initially assessed a penalty of \$93,987.43.

10. The Petitioner subsequently revised the employment classification codes applied to the personnel identified in the Respondent's business records and reduced the assessment to \$91,455.63.

11. The calculation of the assessment was based on a determination by the Petitioner that the majority of the Respondent's personnel were employed as painters.

12. The National Council on Compensation Insurance (NCCI) assigns classification codes for various occupations to facilitate the process of obtaining proper workers' compensation coverage. Painters have a NCCI classification code of 5474.

13. The Respondent has asserted that the personnel identified by the Petitioner as painters were independent contractors, but there was no credible evidence offered to support the assertion.

14. The employment classification assigned to the Respondent's personnel was correct. The penalty assessment based on the classification was proper.

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, Fla. Stat. (2009).

16. The administrative fine at issue in this proceeding is penal in nature. In order to prevail, the Respondent must

demonstrate by clear and convincing evidence that the Petitioner was required to be in compliance with the applicable statutes on the referenced date, that the Petitioner failed to meet the requirements, and that the proposed penalty is appropriate.

Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

17. Every Florida employer is required to obtain workers' compensation coverage for employees unless a specific exemption or exclusion is provided by law. See §§ 440.10 and 440.38, Fla. Stat. (2008).

18. Section 440.02, Florida Statutes (2008), provides the following applicable definitions:

(8) "Construction industry" means for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land. However, "construction" does not mean a homeowner's act of construction or the result of a construction upon his or her own premises, provided such premises are not intended to be sold, resold, or leased by the owner within 1 year after the commencement of construction. The division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term "construction industry" as set forth in this section.

* * *

(15) (a) "Employee" means 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, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

* * *

(16) (a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

* * *

(17) (a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(b) "Employment" includes:

* * *

2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private

employment in which one or more employees are employed by the same employer.

19. As set forth in Florida Administrative Code Rule 69L-6.031(6)(b)35., painters (NCCI code 5474) are classified as being within the construction industry.

20. In this case, the evidence establishes by the requisite burden of proof that the Respondent was the employer of the personnel identified on the Respondent's business records, that such employees were properly classified as painters by the Petitioner, and that the Petitioner properly calculated the assessment against the Respondent.

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 assessing a penalty of \$91,455.63 against the Respondent.

DONE AND ENTERED this 16th day of September, 2010, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2010.

COPIES FURNISHED:

Morgan R. Bentley, Esquire
Williams, Parker, Harrison,
Dietz & Getzen
200 South Orange Avenue
Sarasota, Florida 34236

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

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307

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.