

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-6215
)
RIVERA CONSTRUCTION OF NORTH)
FLORIDA, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on February 22, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Salvador Rivera, pro se
Rivera Construction
of North Florida, LLC
931 Rosemary Terrace
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

The issues are whether Respondent failed to secure the payment of workers' compensation insurance, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about September 25, 2009, Petitioner Department of Financial Services, Division of Workers' Compensation (Petitioner), issued a Stop-work Order and an Order of Penalty Assessment against Respondent Rivera Construction of North Florida, LLC (Respondent). The order alleged that Respondent had failed to secure workers' compensation insurance as required by Chapter 440, Florida Statutes (2009).

On October 6, 2009, Petitioner issued an Amended Order of Penalty Assessment. The order alleged that Respondent owed a penalty in the amount of \$3,566.37 for failing to obtain workers' compensation insurance.

On or about October 20, 2009, Respondent filed a Request for Administrative Review of Agency Action. Petitioner referred the request to the Division of Administrative Hearings on November 12, 2009.

On November 25, 2009, the undersigned issued a Notice of Hearing. The notice scheduled the hearing for February 5, 2010.

When the hearing commenced as scheduled, Respondent did not make an appearance. In a telephone conference call during the

hearing, the parties agreed to reschedule the hearing for February 22, 2010.

On February 8, 2010, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing for February 22, 2010.

When the hearing reconvened, Petitioner presented the testimony of one witness. Petitioner offered nine exhibits that were accepted as evidence.

Respondent testified on his own behalf and presented the testimony of one additional witness. Respondent offered one exhibit that was accepted as evidence.

The Transcript of the proceeding was filed on March 8, 2010.

Petitioner filed a Proposed Recommended Order on March 17, 2010. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

All references hereinafter shall be to Florida Statutes (2009), unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the agency charged with enforcing the provisions of Chapter 440, Florida Statutes.

2. Respondent is a Florida limited-liability company, organized in 2004. Salvador Rivera is one of the company's managers/officers.

3. On or about February 27, 2009, Respondent secured workers' compensation insurance for its employees. The carrier was Guarantee Insurance Co.

4. In a Notice of Termination of Workers' Compensation Insurance dated August 10, 2009, Guarantee Insurance Co. advised Petitioner and Respondent that Respondent's workers' compensation insurance would be cancelled on August 25, 2009. Guarantee Insurance Co. issued the notice because Respondent had not paid its insurance premium.

5. Some time after receiving the notice from its insurer, Respondent received a check from Brantley Custom Homes. Mr. Rivera deposited the check into Respondent's bank account. Mr. Rivera then wrote a check to Guarantee Insurance Co. for the workers' compensation insurance premium.

6. Mark Piazza is one of Petitioner's compliance investigators. On September 25, 2009, Mr. Piazza conducted a routine compliance check in the Southwood subdivision of Tallahassee, Florida.

7. During the compliance check, Mr. Piazza noticed a new home under construction. He saw two men, Gilberto Torres and Saturino Gonzalez, doing carpentry work at the building site.

Under the Scopes Manual, carpentry is identified as construction work under the class code 5645.

8. During an interview with the two men, Mr. Piazza learned that they were employed by Respondent. Mr. Rivera confirmed by telephone that Respondent employed the two men.

9. Mr. Rivera believed that Respondent had workers' compensation coverage on September 25, 2009. Mr. Rivera was not aware that the check from Brantley Custom Homes had bounced, resulting in insufficient funds for Respondent's bank to pay Respondent's check to Guarantee Insurance Co.

10. Mr. Piazza then contacted Respondent's local insurance agent and checked Petitioner's Coverage and Compliance Automated System (CCAS) database to verify Mr. Rivera's claim that Respondent had workers' compensation insurance. Mr. Piazza subsequently correctly concluded that Respondent's insurance policy had been cancelled on August 25, 2009, due to the failure to pay the premium.

11. On September 25, 2009, Mr. Piazza served Respondent with a Stop-work Order and Order of Penalty Assessment. The penalty assessment was 1.5 times the amount of the insurance premium that Respondent should have paid from August 25, 2009, to September 24, 2009.

12. After receiving the Stop-work Order on September 25, 2009, Brantley Custom Homes gave Respondent another check.

Mr. Rivera then sent Guarantee Insurance Co. a second check to cover the premium with the understanding that there would be no lapse in coverage.

13. On September 28, 2009, Guarantee Insurance Co. provided Respondent with a notice of Reinstatement or Withdrawal of Policy Termination. The notice states as follows:

Our Notice of Termination, filed with the insured and the Department of Labor and Employment Security effective 8/25/2009 and or dated 8/10/2009, is hereby voided and coverage remains in effect for the employer identified below.

14. There is no evidence to show whether Respondent had to sign a no-loss affidavit and submit it to Guarantee Insurance Co. before the insurer would reinstate the policy with no lapse. Such an affidavit usually states that the insured had no claims during the uninsured period,

15. On September 29, 2009, Mr. Piazza served a second copy of the Stop-work Order and Order of Penalty Assessment on Respondent. At that time, Mr. Piazza also served Respondent with a Request for Production of Business Records for Penalty Assessment Calculation. Respondent subsequently provided Petitioner with the records.

16. On October 6, 2009, Mr. Piazza served Respondent with an Amended Order of Penalty Assessment. The assessed penalty was \$3,566.27.

17. The assessed penalty was based on Respondent's business records showing the following: (a) Respondent's total payroll from August 25, 2009, through September 24, 2009, was \$15,280.00; (b) the total workers' compensation premium that Respondent should have paid for its employees during the relevant time period was \$2,377.56; and (c) multiplying \$2,377.56 by the statutory factor of 1.5 results in a penalty assessment in the amount of \$3,566.37.

18. On October 6, 2009, Petitioner and Respondent entered into a Payment Agreement Schedule for Periodic Payment of Penalty. Respondent gave Petitioner \$1,000 as a down payment on the assessed penalty. The balance of the penalty is to be paid in 60 monthly payments in the amount of \$42.77 per month, with the exception of the last payment in the amount of \$42.64 on November 1, 2014.

19. On October 6, 2009, Petitioner issued an Order of Conditional Release from Stop-work Order. The conditional release states that it will be in place until Respondent pays the assessed penalty in full.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. Chapter 440, Florida Statutes, is known as the "Workers' Compensation Law." See § 440.01, Fla. Stat.

22. Petitioner has the burden of proving by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

23. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation insurance for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. In this case, there were no applicable exemptions or exclusions.

24. Under Section 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."

25. Section 440.107(7)(d), Florida Statutes, states as follows:

(d)1. In addition to any penalty, stop-work order, or injunction, the department 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 the 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 of \$1,000, whichever is greater.

26. Florida law does not provide for mitigating circumstances in cases where an employer fails to secure workers' compensation insurance. If an "employer comes into compliance with the workers' compensation coverage requirements prior to the issuance of a stop work order, such employer shall be assessed a penalty pursuant to Section 440.107(7)(d)1., F.S., and a stop work order will not be issued for such violation." See Fla. Admin. Code R. 69L-6.030.

27. Based on Respondent's business records, Respondent's total payroll from August 25, 2009, through September 24, 2009, was \$15,280.00. The total workers' compensation premium that Respondent should have paid for its employees during the relevant time period was \$2,377.56. Multiplying that amount by the statutory factor of 1.5 results in a penalty assessment in the amount of \$3,566.37.

28. Petitioner correctly issued the Stop-work Order and Amended Penalty Assessment prescribed in Section 440.107(7)(d), Florida Statutes. The evidence here clearly indicates that Respondent owes \$3,566.37 as a penalty for not "securing the payment of workers' compensation."

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, issue a final order affirming the Stop-work Order and Amended Order of Penalty Assessment in the amount of \$3,566.37.

DONE AND ENTERED this 19th day of March, 2010, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 2010.

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.