

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL	)	
SERVICES, DIVISION OF WORKERS'	)	
COMPENSATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6370
	)	
PIERSON COMMUNITY PHARMACY,	)	
INC.,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

A formal hearing was conducted in this case on March 24, 2010, by video teleconference with hearing sites located in Tallahassee, Florida, and Daytona Beach, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Justin Faulkner, Esquire  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399

For Respondent: John C. Eidt  
Qualified Representative  
112 East First Avenue  
Pierson, Florida 32180

## STATEMENT OF THE ISSUES

The issues are whether Respondent violated Chapter 440, Florida Statutes (2009), by failing to secure the payment of workers' compensation, and if so, what penalty should be imposed.

## PRELIMINARY STATEMENT

On October 28, 2009, Petitioner Department of Financial Services, Division of Workers' Compensation (Petitioner) issued a Stop-Work Order and Order of Penalty Assessment to Respondent Pierson Community Pharmacy, Inc. (Respondent). The Stop-Work Order alleged that Respondent had failed to secure workers' compensation insurance as required by Chapter 440, Florida Statutes (2009). That same day, Petitioner also issued a Request for Production of Business Records for Penalty Assessment Calculation.

Based on records received, Petitioner issued an Amended Order of Penalty Assessment on October 30, 2009. The amended Order assessed a penalty in the amount of \$14,058.90 pursuant to Section 440.197(7)(d), Florida Statutes (2009).

In a letter dated November 2, 2009, Respondent requested an administrative hearing to contest the Amended Order of Penalty Assessment. On November 18, 2009, Petitioner referred Respondent's request to the Division of Administrative Hearings.

On November 25, 2009, the undersigned issued a Notice of Hearing by Video Teleconference. The notice scheduled the hearing for March 24, 2010.

On March 15, 2010, Petitioner filed a Motion to Amend Order of Penalty Assessment. The Second Amended Order of Penalty Assessment lowered the assessed penalty to \$13,996.60. By Order dated March 16, 2010, the undersigned granted the motion.

At the hearing, Petitioner presented the testimony of three witnesses. Petitioner offered 15 exhibits that were accepted as evidence. Respondent did not present any testimony or offer any exhibits for admission as evidence.

The Transcript was filed on April 9, 2010. Petitioner filed its Proposed Recommended Order on April 19, 2010. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

Except as otherwise noted, reference hereinafter shall be to Florida Statutes (2009).

#### FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that Florida employers secure the payment of workers' compensation for the benefit of their employees. See § 440.107(3), Fla. Stat.

2. Respondent is a Florida for-profit corporation providing pharmacy services. Respondent has business locations

at 842 West Plymouth Avenue, Deland, Florida, and 112 East First Avenue, Pierson, Florida.

3. Respondent's Pierson business site sells a small amount of food like bubble gum and other sundries. Activities at the Pierson location include filling prescriptions, compounding and blending drugs, and dispensing drugs or medicine to walk-in customers and patients. The patients are referred from a health care clinic known as Northeast Florida Health Services (NEFHS). The patients are federally qualified as indigent pursuant to a federal poverty calculation.

4. Respondent's Deland location deals solely with prescription drug transactions to indigent patients who are referred by NEFHS. The Deland business site is very small and has no walk-in customers or food or other sundries for sale.

5. At the end of the month, Respondent sends a bill to NEFHS for the prescriptions dispensed by Respondent at both locations. NEFHS than reimburses Respondent for its services.

6. Respondent pays its employees at both locations out of a single checking account. Only one tax identification number is used for both business locations.

7. On October 27, 2009, Hector Beauchamp, one of Petitioner's workers' compensation compliance investigators, received a referral, indicating that Respondent was operating without workers' compensation insurance coverage for its

employees. After receiving the referral, Mr. Beauchamp used the website of the Department of State, Division of Corporations, to obtain Respondent's federal employer identification number.

8. The Department of State website showed that Respondent became Pierson Community Pharmacy, Inc., on March 3, 2005. The website also indicated that Respondent had two corporate officers, John Eidt and Hanan Francis.

9. Next, Mr. Beauchamp contacted Samantha Nixon, one of Petitioner's penalty calculators, to research Respondent's unemployment compensation tax information on the Department of Revenue's website. Ms. Nixon's research revealed that Respondent employed in excess of four employees for each quarter in the past three years.

10. Mr. Beauchamp also consulted Petitioner's Coverage and Compliance Automated System (CCAS) database. The CCAS database lists the workers' compensation insurance policy information for Florida employers together with any workers' compensation exemptions for corporate officers.

11. The CCAS database accurately revealed that Respondent had no workers' compensation insurance policy in place for its employees and no workers' compensation exemptions for either Mr. Eidt or Ms. Francis as corporate officers. This was true from October 29, 2006, through October 28, 2009. Additionally,

the CCAS database did not reveal any utilization of employee leasing by Respondent.

12. Mr. Beauchamp also researched the National Council on Compensation Insurance, Inc. (NCCI) on-line database. Using Respondent's name and federal employer identification number, the database showed no record of a Florida workers' compensation insurance policy for Respondent.

13. On October 28, 2009, Mr. Beauchamp visited both of Respondent's business locations. At the Pierson location, Mr. Beauchamp observed five individuals working behind a Plexiglas partition filling prescriptions.

14. Mr. Beauchamp spoke with Mr. and Mrs. Francis. They confirmed that Respondent did not have workers' compensation insurance in place.

15. Mr. Beauchamp then issued and served a Stop-Work Order. He also issued and served a records request.

16. On October 29, 2010, Respondent provided Petitioner with the following records: (a) corporate tax records for 2007 and 2008; (b) a workers' compensation insurance application submitted after the issuance of the Stop-Work Order; and (c) payroll summaries for October 2006 through October 2009. The records confirmed that Respondent had employed more than four employees for the prior three years.

17. On October 30, 2009, Petitioner issued and served the Amended Order of Penalty Assessment. That order was followed by the Second Amended Order of Penalty Assessment on March 15, 2010.

18. Ms. Nixon calculated the gross payroll for Respondent's employees for the relevant time period. The gross payroll amounts for Ms. Francis from January 1, 2008, through December 31, 2008, and April 1, 2009, through June 30, 2009, were limited to the average weekly wage in effect at the time the Stop-Work Order was issued, multiplied by 1.5 for those periods pursuant to Florida Administrative Code Rule 69L-6.035(2).

19. As a corporate officer, Ms. Francis' actual earnings were in excess of these amounts. However, Florida Administrative Code Rule 69L-6.035(2) limits the amount of a corporate officer's income upon which workers' compensation penalties may be assessed to 1.5 times the average weekly wage in effect at the time a Stop-Work Order is issued or actual earnings, whichever is less.

20. Using the classification codes in the NCCI Scopes<sup>®</sup> Manual, Petitioner accurately assigned the occupation classification code 8045, which corresponds to "Store: Drug Retail." Classification code 8045 is "applicable to store locations where the employer's books of accounts reflect at

least 40 percent gross receipts in prescription sales and less than 50 percent gross receipts in the service of food."

Prescription sales intended for the patients of health care facilities are included even though the facility is billed instead of the individual patient.

21. Ms. Nixon then divided the payroll for each year by 100 and multiplied that figure by the approved manual rates adopted by the Florida Office of Insurance Regulation for 2006, 2007, 2008, and 2009 for classification code 8045. That product was then multiplied by 1.5 to find the penalty for the period for the three-year period. The total penalty is \$13,996.60.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

23. Petitioner has the burden of proving by clear and convincing evidence that Respondent violated Chapter 440, Florida Statutes, the "Workers' Compensation Law," during the relevant period and that the penalty assessment is correct. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

24. Every employer is required to secure the payment of compensation for the benefit of its employees. See

§§ 440.10(1)(a) and 440.38(1), Fla. Stat. Section 440.107(2), Florida Statutes, states that "'securing the payment of workers' compensation means obtaining coverage that meets the requirement of this chapter and the Florida Insurance Code."

25. Petitioner has the duty of enforcing compliance with the Workers' Compensation Law and is authorized to issue stop-work orders and penalty assessment orders. See § 440.107(3), Fla. Stat.

26. An "employer" is defined, in part, as "every person carrying on any employment." See § 440.02(16)(a), Fla. Stat.

27. "'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." See §§ 440.02(17)(a) and 440.02(17)(b)2., Fla. Stat.

28. "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 . . . ." See § 440.02(15)(a), Fla. Stat. This definition includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous." See § 440.02(15)(b), Fla. Stat.

29. "Corporate officer" or "officer of a corporation" is defined as "any person who fills an office provided for in the corporate charter or articles of incorporation filed with the Division of Corporations of the Department of State or as permitted or required by chapter 607." See § 440.02(9), Fla. Stat. Here, only Ms. Francis and Mr. Eidt are the only corporate officers.

30. Certain corporate officers can become exempt from the coverage requirements of Chapter 440, Florida Statutes. However, they must affirmatively make that election. See §§ 440.02(15)(b) and 440.05, Fla. Stat.; Fla. Admin. Code R. 69L-6.012(2). In this case, neither of Respondent's corporate officers had a workers' compensation exemption.

31. An exemption for an officer of a corporation under Section 440.05, Florida Statutes, is not automatic. A corporate officer must provide Petitioner with a written notice of the election to be exempt. See §§ 440.02(15)(b)1. and 440.05(1), Fla. Stat.; Fla. Admin. Code R. 69L-6.012(1)(a), 69L-6.012(2), and 69L-6.12(6).

32. The person filing the notice has to personally sign it and "attest that he or she has reviewed, understands, and acknowledges" the notice. See § 440.05(4), Fla. Stat. Even then, the notice of election is not effective until "issued by the department or 30 days after an application for an exemption

is received by the department, whichever occurs first." See § 440.05(5), Fla. Stat.

33. In this case, Petitioner has established by clear and convincing evidence that Respondent was an "employer" for purposes of the Workers' Compensation Law. Petitioner also has proven that Respondent failed to secure the payment of workers' compensation.

34. Petitioner properly issued the Stop-Work Order that was mandated by statute. See § 440.107(7)(a), Fla. Stat. Petitioner then accurately determined the penalty as set forth in the Second Amended Order of Penalty Assessment. See § 440.107(7)(d)1., Fla. Stat.; Fla. Admin. Code R. 69L-6.027(1), 69L-6.035(1)(a), 69L-6.035(1)(b), 69L-6.035(1)(c), and 69L-6.035(2). Respondent owes \$13,996.60 as a penalty for not providing its employees workers' compensation insurance coverage.

#### RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusion 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 Second Amended order of Penalty Assessment in the amount of \$13,996.60.

DONE AND ENTERED this 26th day of April, 2010, in  
Tallahassee, Leon County, Florida.

*Suzanne F. Hood*

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SUZANNE F. HOOD  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of April, 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.