

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-6594
)
NOBEL VAN LINES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on March 5, 2010, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes.

APPEARANCES

For Petitioner: Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Yaniv Dalei, pro se
18255 Northeast 4th Court, Section A
North Miami Beach, Florida 33162

STATEMENT OF THE ISSUE

The issue is whether Petitioner properly issued a Stop Work Order (SWO) and Second Amended Penalty Assessment against Respondent for failing to obtain workers' compensation insurance that meets the requirements of Chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On June 9, 2009, and June 12, 2009, the Division of Workers' Compensation ("Division" or "Petitioner") issued and served a SWO and Order of Penalty Assessment ("Order") on Nobel Van Lines, Inc. ("Nobel" or "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.

On August 3, 2009, Petitioner received a Petition from Respondent challenging the Amended Order of Penalty Assessment and requesting a hearing on the matter. The Petition was transferred to the Division of Administrative Hearings on December 1, 2009, for assignment of an Administrative Law Judge to conduct the hearing.

On March 3, 2010, Petitioner filed a Motion to Amend Order of Penalty Assessment, and, upon the granting of the Motion, issued and served its Second Amended Order of Penalty Assessment in the amount of \$68,224.81. Respondent's Petition has been applied to the subsequent Second Amended Order of Penalty

Assessment so that the final hearing would consider the most recently filed order of assessment.

At hearing, Petitioner testified on his own behalf. Petitioner's Exhibit A was received into evidence. The Division presented the testimony of Russell Gray and Cesar Tolentino. The Division's Exhibits A through Q and S were received into evidence.

At the request of the Division, the undersigned took official recognition of Chapter 440, Florida Statutes and 69L-6, Florida Administrative Code.

The proceedings were transcribed and the parties availed themselves of the right to submit proposed recommended orders after the filing of the Transcript. The Transcript of the final hearing was filed with the Division of Administrative Hearings on March 26, 2010. Petitioner and Respondent timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

All citations are to Florida Statutes (2009) unless otherwise indicated.

FINDINGS OF FACT

1. The Division is a component of the Department of Financial Services. It is responsible for enforcing the workers' compensation coverage requirements pursuant to Section 440.107, Florida Statutes.

2. Nobel is a corporation operating as a moving business in Florida. Nobel was incorporated in 2004 and has been operating with an active status since its inception. Yaniv Dalei is the sole owner and president of Nobel.

3. On June 9, 2009, Petitioner's investigator, Cesar Tolentino, visited 18255 Northeast 4th Court, North Miami, Florida ("business site"), after being referred to the location to investigate Respondent for compliance with the Florida Workers' Compensation Law.

4. At the business site, Petitioner's investigator spoke to the manager, and saw the bookkeeper and the receptionist during the visit.

5. Respondent was not at the business site, but was out of the country in Panama when Tolentino visited. Respondent spoke to Tolentino by telephone. Respondent informed Tolentino that he had five employees and that he "was in the process of obtaining workers' compensation insurance."

6. While at the business site, Tolentino, used the Department of Financial Services' Coverage and Compliance Automated System (CCAS), and confirmed Respondent lacked insurance for the payment of workers' compensation coverage. Additionally, Petitioner's investigator verified through the CCAS that Nobel had not secured an employee leasing company to secure workers' compensation insurance for its employees as well

as found that no exemptions from workers' compensation had been issued in connection with Nobel.

7. Petitioner's investigator also performed a National Council on Compensation Insurance search on Nobel while at the business site. The search revealed that Nobel's employees had not had workers' compensation insurance in the past.

8. On June 9, 2009, Petitioner's investigator issued a SWO and posted it at the business site. The SWO required Respondent to cease all business operations.

9. On June 10, 2009, Respondent obtained a certificate of insurance for workers' compensation coverage with the effective date being the same. The policy was issued by One-Stop Insurance Agency. Respondent provided the certificate to Tolentino upon receipt.

10. On June 12, 2009, Petitioner's investigator issued to Respondent a Division of Workers' Compensation Request for Production of Business Records for Penalty Assessment Calculation ("Request").

11. Soon thereafter, Respondent responded to the Request and provided Petitioner's investigator with the requested records. Petitioner's investigator forwarded the documents to Jorge Pinera, Petitioner's penalty calculator, for review.

12. On or about July 17, 2009, Petitioner issued an Amended Order of Penalty Assessment assessing a penalty of \$74,794.38 against Respondent.

13. On August 10, 2009, Respondent entered into a payment agreement with the Division. Respondent provided the Division a \$7,480.00 cashier's check and agreed to pay the remainder of the assessed penalty in monthly installments. As a result, Petitioner issued an Order of Conditional Release for Nobel to operate.

14. On March 3, 2010, Respondent supplied an employee list with position descriptions to Petitioner. After reviewing the document, Petitioner changed some employee class codes to indicate a lower rate for some occupations and recalculated the penalty amount owed with the new class codes.

15. For the recalculation, Petitioner's penalty calculator, Russell Gray, used the following calculation from the penalty worksheet: (a) Respondent's total gross payroll from June 10, 2006, through June 9, 2009, was \$1,010,001.32; (b) the total workers' compensation premium that Respondent should have paid for its employees during the relevant time period was \$45,483.96; and (c) the premium was multiplied by the statutory factor of 1.5 resulting in a penalty assessment in the amount of \$68,224.81.

16. The new calculation superseded the Amended Order and a Second Amended Order of Penalty Assessment was issued March 3, 2010, reducing Respondent's penalty to \$68,224.81.¹

17. During the hearing, Respondent admitted not having workers' compensation coverage for his employees. He said, "Yes, you're right I needed to have workers' compensation but as I said . . . I never knew that I needed to have workers' compensation . . . I'm here to ask for forgiveness."

CONCLUSIONS OF LAW

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

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

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

21. "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.

22. "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.

23. Because an administrative fine deprives the person fined of substantial rights in property, such fines are punitive in nature. Petitioner has the burden of proof and must establish through clear and convincing evidence that Respondent violated the workers' compensation law. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996).

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. Petitioner established by clear and convincing evidence that Nobel was an "employer" for workers' compensation purposes because it was engaged in a moving business and had four or more employees working for the corporation from June 2006 through June 2009. Nobel was therefore required to secure the payment of workers' compensation.

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 . . . 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.

Thus, the Division's SWO was mandated by statute.

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

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 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 \$1,000, whichever is greater.

28. Florida law does not provide for consideration of mitigating circumstances in cases where an employer fails to secure workers' compensation insurance because the employer isn't aware that it is required.

29. Based on Respondent's business records, Respondent's total payroll from June 10, 2006, through June 9, 2009, was \$1,010,001.32. The total workers' compensation premium that Respondent should have paid for its employees during the

relevant time period was \$45,483.96. Multiplying that amount by the statutory factor of 1.5 results in a penalty assessment in the amount of \$68,224.81.

30. Petitioner correctly issued the SWO and Second Amended Penalty Assessment prescribed in Section 440.107(7)(d), Florida Statutes. The evidence here clearly indicates that Respondent owes \$68,224.81 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 Second Amended Order of Penalty Assessment in the amount of \$68,224.81.

DONE AND ENTERED this 20th day of April, 2010, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of April, 2010.

ENDNOTE

^{1/} Respondent testified and demonstrated to the undersigned that he contacted Tolentino numerous times to try to obtain the penalty amount so that Nobel could reopen but the Division took two months to calculate the first penalty. The two month time line is contrary to the Division recalculating the penalty amount all in one day, March 3, 2010.

COPIES FURNISHED:

Yaniv Dalei
Nobel Van Lines, Inc.
230 191 Street
Sunny Isles Beach, Florida 33160

Yaniv Dalei
Nobel Van Lines, Inc.
18255 Northeast 4th Court, Section A
North Miami Beach, Florida 33162

Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

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 32399-0300

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.