

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 10-1100
)
PAT O'CONNELL PLASTERING, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on May 4, 2010, by video teleconference with sites in Daytona Beach and in Tallahassee, Florida.

APPEARANCES

For Petitioner: Justin H. Faulkner, Esquire
Holly R. Werkema, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4299

For Respondent: Patrick E. O'Connell, President
Pat O'Connell Plastering, Inc.
1319 Woodbine Street
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is obligated to pay the Department the amount of \$1,000 as set forth in the Department's Amended Order of Penalty Assessment.

PRELIMINARY STATEMENT

On January 14, 2010, the Department of Financial Services, Division of Workers' Compensation, issued a Stop-Work Order and Order of Penalty Assessment against Respondent Pat O'Connell Plastering, Inc., ordering that corporation to immediately cease all business operations for all worksites in the State of Florida. On January 19, 2010, the Department issued its Amended Order of Penalty Assessment, advising Respondent, among other things, of its right to request an administrative hearing regarding that Amended Order. Upon receipt of Respondent's request for a hearing, this matter was transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

The Department presented the testimony of Mark F. Mark, Carolyn V. Martin, and Essie Samantha Nixon. Respondent presented the testimony of Patrick E. O'Connell. Additionally, the Department's Exhibits numbered 1-7 and Respondent's Exhibit numbered 1 were admitted in evidence.

The Transcript of the final hearing was filed on May 25, 2010. The Department's proposed recommended order was filed on

June 4, 2010. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. Patrick E. O'Connell is the president of Respondent Pat O'Connell Plastering, Inc. As its name suggests, Respondent has been in the plastering business, and O'Connell has been its employee. Plastering is a construction activity, which has an approved manual rate for class code 5480.

2. As a corporate officer, O'Connell is entitled, upon application and approval, to an exemption from the requirement that his employer obtain workers' compensation coverage for him as an employee of the corporation.

3. For many years, Respondent has obtained an exemption from workers' compensation coverage for its president/employee O'Connell. The last exemption expired on December 6, 2009.

4. On January 14, 2010, a Department investigator was performing random compliance checks and discovered O'Connell at a home in Ormond Beach plastering a pool in back of that home. The investigator understood that type of activity was classified as construction. When she questioned O'Connell, he explained that he was the owner of the company and that the company had no other employees. He told her that he had an exemption from workers' compensation insurance coverage.

5. Upon verifying on the Department's database the information O'Connell had given her, the investigator discovered that his exemption had expired and that Respondent did not have workers' compensation insurance coverage. The investigator immediately issued a Stop-Work Order and handed it to O'Connell along with a request for the corporation's business records for the prior three years so that a penalty could be calculated.

6. The next day O'Connell gave the investigator the business records she had requested. He gave her Respondent's 2008 income tax return, O'Connell's 2008 income tax return, Respondent's check stubs from January 2007 through January 2010, and Respondent's bank statement for December 2009. Using Respondent's check stubs, the Department calculated a penalty amount and issued an Amended Order of Penalty Assessment.

7. The Department's employee who calculated the penalty assessment testified as to how she made the calculations. She used the class code 5480, which represents the construction industry trade of plastering. She ascertained that between the date when O'Connell's exemption expired and the date when the Department's investigator issued the Stop-Work Order against Respondent, the corporation had only issued one check representing the payment of wages, and she used that number to represent the gross payroll. She then ascertained the approved manual rate for that class code, computed the premium Respondent

would have paid for workers' compensation coverage, and multiplied that amount by 1.5. Since the penalty thus calculated was \$61.34, she assessed the minimum penalty against Respondent of \$1,000.

8. There is a three-fold problem with the penalty assessment sought by the Department in this proceeding. First, the penalty calculator misread Respondent's check stub regarding the only wages paid during the short time when Respondent was obligated to have workers' compensation coverage. The check stub reveals that the amount of the check was \$25, not \$325, and that the balance left in the account after the \$25 check was written was \$300. In other words, the person calculating the penalty read the beginning balance line rather than the line on which the amount of the check was written.

9. Second, no evidence was offered as to what the check for \$25 for labor written to O'Connell was for and whether it was for labor considered to be construction rather than non-construction labor, such as window-washing or janitorial services.

10. Third, no evidence was offered as to when the labor, if it involved a construction activity, was performed. There is no basis for assuming the labor was performed after O'Connell's exemption expired rather than assuming it was for labor

performed while O'Connell's exemption was in force but he was not paid until a month later.

11. At the commencement of the final hearing, the Department asked Respondent's representative to stipulate that Respondent was actively involved in business operations in the State of Florida between December 7, 2009, and January 14, 2010, and O'Connell so stipulated. The vagueness of that stipulation, which could mean many different things, renders that stipulation inadequate to cure the factual deficiencies in the penalty assessment, as described in Paragraphs numbered eight through ten of this Recommended Order. Accordingly, the proposed penalty assessment is devoid of a factual basis.

12. A few days before his exemption expired, O'Connell realized that he had not applied for a new exemption. He went on the Internet and found a business called All Florida Firm Inc., which advertised that it would prepare the exemption application form for \$60 per officer and would give 1-2 business day rush service for an extra \$50. He filled out the required information on the internet, authorized the company to charge him \$60 plus the \$50 charge for expedited service, and submitted the information to All Florida.

13. That company, however, did not actually file applications with the Department; it merely filled in the blanks and mailed the form to the customer. O'Connell did not receive

the form from All Florida until after the Department issued its Stop-Work Order against Respondent.

14. Respondent's bank statement reflects that on December 7, 2009, All Florida charged Respondent both \$150 and \$110, rather than just the \$110 it represented to be the charge for 1-2 business day rush service involving one exemption.

15. Although the record is clear that Respondent did not have workers' compensation coverage for its officer/employee and that O'Connell did not have a valid exemption from workers' compensation insurance coverage for the approximate six weeks after his exemption expired and until the issuance of the Department's Stop-Work Order, it is clear that O'Connell's failure to timely renew his exemption arose from neglect rather than from any willful intent to evade Florida's workers' compensation laws.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. See §§ 120.569 and 120.57(1), Fla. Stat.

17. Because administrative fines are penal in nature, the Department is required to prove by clear and convincing evidence Respondent's failure to secure the payment of workers' compensation coverage and the appropriate amount of the penalty Respondent should pay, if any. See Dep't of Banking & Fin. v.

Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The Department has failed in its burden to prove the appropriate amount of the penalty.

18. There is no dispute that pursuant to Sections 440.10, 440.107, and 440.38, Florida Statutes, employers must secure the payment of workers' compensation for their employees and that the Department is authorized to enforce compliance with that requirement. Further, the parties have stipulated as to the appropriate construction classification code used in this proceeding. Lastly, there is no dispute that Respondent was required to provide workers' compensation coverage for its one officer/employee unless that employee had a valid exemption. See §§ 440.02(8), (15), (16), and (17) and 440.05 (3), (5), and (12), Fla. Stat.

19. Since Respondent did not have workers' compensation coverage between the time O'Connell's exemption expired and the date the Department issued its Stop-Work Order, and since O'Connell did not have an exemption when the Stop-Work Order was issued, Respondent failed to comply with the requirements of Florida's workers' compensation laws. The Department's burden of proof on this issue was met.

20. However, as to the amount of any penalty assessment to be imposed or even whether a penalty assessment should be imposed, the Department has failed to offer any evidence, let

alone clear and convincing evidence, that would support a penalty assessment. The penalty calculator misread Respondent's check stub and computed a penalty based upon the beginning balance of Respondent's bank account, \$325, rather than the amount of the check, \$25.

21. Further, there is no evidence as to whether the \$25 represented wages paid to O'Connell for plastering during the time O'Connell's exemption was expired, for plastering during a time period when O'Connell's exemption was in effect, or for something else. Since the Department had the burden of proving by clear and convincing evidence what the \$25 check was for and offered no proof thereof, the Department has failed to meet its burden to prove the correctness of its penalty assessment. Without any evidence as to the time period for which wages were paid, the Department's Stop-Work Order and Order of Penalty Assessment issued January 14, 2010, and the Amended Order of Penalty Assessment issued January 19, 2010, cannot be enforced.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered dismissing the Stop-Work Order, Order of Penalty Assessment, and Amended Order of Penalty Assessment issued against Respondent.

DONE AND ENTERED this 15th day of June, 2010, in
Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
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 15th day of June, 2010.

COPIES FURNISHED:

Justin H. Faulkner, Esquire
Holly R. Werkema, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4299

Patrick E. O'Connell
Pat O'Connell Plastering, Inc.
1319 Woodbine Street
Daytona Beach, Florida 32114

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

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

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.