

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 10-1245
)
J. D. TREE SERVICE, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On January 26, 2011, a formal administrative hearing was conducted by video teleconference in Tallahassee and Fort Myers, Florida, before William F. Quattlebaum, Administrative Law Judge (ALJ), Division of Administrative Hearings.

APPEARANCES

For Petitioner: Timothy L. Newhall, Esquire
Ryan C. Cox, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: James D. King, pro se
Sherri King
J. D. Tree Service, Inc.
16591 Gator Road
Fort Myers, Florida 33912

STATEMENT OF THE ISSUES

The issues in the case are whether J. D. Tree Service, Inc. (Respondent), conducted business in violation of a previously-

issued Stop-Work Order, and, if so, whether the Department of Financial Services, Division of Workers' Compensation (Petitioner), properly calculated the applicable penalty assessment.

PRELIMINARY STATEMENT

On December 14, 2009, a compliance investigator employed by the Petitioner observed trucks and workers bearing the Respondent's business information and engaged in tree trimming operations. The investigator also determined that a Stop-Work Order, originally issued against the Respondent in 2007 and lifted after the Respondent executed a penalty payment agreement, had been reinstated based on non-payment of the installment payments. On December 14, 2009, the Petitioner issued a second Stop-Work Order. The Petitioner subsequently issued an Order Assessing Penalty for Working in Violation of Reinstated Stop-Work Order, seeking to impose a penalty of \$555,000.00.

The Respondent disputed the Stop-Work Order and the penalty assessment and requested a formal hearing. On March 15, 2010, the Petitioner forwarded the request to the Division of Administrative Hearings. The hearing was first scheduled to commence on May 26, 2010, and was rescheduled three times at the request of the parties. The case was transferred to the

undersigned on January 21, 2011, and was heard on January 26, 2011.

At the hearing, the Petitioner presented the testimony of four witnesses and had Exhibits identified as 1, 3 through 10, 12, and 14 through 16 admitted into evidence. The Respondent presented the testimony of one witness.

The Transcript of the hearing was filed on February 22, 2011. The Transcript indicates that the Petitioner's Exhibits 2, 11, and 13 were admitted concurrently at the close of the Petitioner's case presentation, but the Transcript does not indicate that there was any discussion of the exhibits. Additionally, the Transcript indicates that, during the hearing and prior to the admission of each exhibit, the ALJ inquired as to whether the Respondent had any objection to each exhibit, but that no such inquiry occurred as to Petitioner's Exhibits 2, 11, and 13. There was no acknowledgement on the record that the referenced exhibits had been admitted, and, therefore, the exhibits have not been reviewed or considered.

On March 4, 2011, the Petitioner filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with the responsibility to enforce chapter 440, Florida Statutes (2010),^{1/}

which essentially requires that Florida employers secure workers' compensation coverage for their employees.

2. The Respondent is a Florida corporation providing various tree services, including trimming and related activities.

3. On June 11, 2007, the Petitioner issued a Stop-Work Order (07-172-D7) and an Order of Penalty Assessment based on the Respondent's failure to obtain proper workers' compensation insurance coverage for employees.

4. On June 14, 2007, the Petitioner issued an Amended Order of Penalty Assessment for \$147,419.52 against the Respondent. The amended order was personally served on the Respondent on the date of issuance.

5. The Respondent did not challenge either the Stop-Work Order or the Amended Order of Penalty Assessment.

6. On June 15, 2007, the Respondent executed a "Payment Agreement Schedule for Periodic Payment of Penalty" (hereinafter "Agreement"). The Agreement permitted the Respondent to satisfy the penalty through a ten percent down payment and 60 subsequent monthly payments.

7. Based on the execution of the Agreement, the Petitioner lifted the Stop-Work Order on the condition that the Respondent complied with the terms of the Agreement.

8. The Agreement specifically stated that failure to meet the terms set forth therein would "result in the immediate reinstatement of the Stop-Work Order, and the remaining unpaid balance of the penalty to be paid by the employer shall become immediately due."

9. The Respondent was provided a copy of the Agreement and acknowledged understanding the terms set forth therein.

10. The Respondent made the down payment required at the time the Agreement was executed, but thereafter made none of the monthly payments due under the Agreement.

11. On May 18, 2007, the Petitioner issued an Order Reinstating Stop-Work Order (the "Reinstatement Order") based on the Respondent's failure to comply with the payment terms of the Agreement.

12. The Reinstatement Order identified the unpaid balance as \$132,674.52 and directed the Respondent to "cease all business operations in the State of Florida" until certain conditions were met.

13. Such conditions included satisfaction of the existing unpaid penalty balance as well as any additional penalty related to business operations conducted in violation of the Stop-Work Order and a determination by the Petitioner that the Respondent was in compliance with workers' compensation coverage requirements.

14. The Respondent did not challenge the Reinstatement Order, and it became effective on June 6, 2008.

15. On December 14, 2009, a workers' compensation compliance investigator employed by the Petitioner observed tree service operations being conducted at a recreational vehicle park in Naples, Florida.

16. The investigator observed that there were persons wearing t-shirts bearing the Respondent's identification. Upon inquiry by the investigator, the workers stated that they were working for the Respondent.

17. The investigator observed that the vehicles from which the workers were operating bore the Respondent's insignia.

18. The investigator determined that there was an existing Stop-Work Order against the Respondent.

19. On January 8, 2010, the Petitioner issued a Request for Production of Business Records, seeking to identify the number of days during which the Respondent had operated in violation of the Stop-Work Order, and provided the request to the Respondent.

20. Also on January 8, 2010, the Petitioner issued an Order Assessing Penalty for Working in Violation of Reinstated Stop-Work Order, seeking to impose a penalty of \$555,000.00. The penalty calculation was based on the 555 calendar days from June 7, 2008, to December 14, 2009.

21. The Respondent challenged the penalty assessment and requested a formal administrative hearing.

22. On May 21, 2010, the Respondent submitted payroll records for the period of March 21, 2009, through December 11, 2009.

23. The records established that the Respondent had conducted business operations during the period that the Stop-Work Order was effective.

24. The records also indicated that the Respondent routinely conducted business operations from Monday through Friday of each week, but did not operate on Saturdays, Sundays, or usual legal holidays.

25. On January 21, 2011, the Department issued an Amended Order Assessing Penalty for Working in Violation of Reinstated Stop-Work Order in the amount of \$381,000.00, based on the Respondent's routine work schedule with the deletion of the Saturdays, Sundays, and legal holidays that had been included in the January 8, 2010, Assessment.

26. On January 25, 2011, the Petitioner filed a Motion to Amend Order of Penalty Assessment. The Motion was granted without objection at the commencement of the hearing.

27. All orders relevant to this dispute were hand-delivered or were mailed to the Respondent's corporate address,

which was also the residential address for the principals of the Respondent.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

29. The administrative fine at issue in this proceeding is penal in nature. In order to prevail, the Petitioner must demonstrate by clear and convincing evidence that the Respondent was required to be in compliance with the applicable statutes on the referenced date, that the Respondent failed to meet the requirements, and that the proposed penalty is appropriate. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

30. 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.

31. The Respondent is an employer. The workers observed by the investigator on December 9, 2007, and who were identified on payroll records submitted on May 21, 2010, were employees of the Respondent. Section 440.02 provides the following applicable definitions:

(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.

32. The evidence establishes that the Respondent was the subject of a 2007 Stop-Work Order, that the Respondent entered into an Agreement to pay the penalty related to the 2007 Stop-Work Order, and that, based on execution of the Agreement, the Stop-Work Order was conditionally lifted. Section 440.107(7)(a) provides as follows:

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 required by this chapter or to produce the required business records under subsection (5) within 5 business days after receipt of the written request of the department, 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. If the department makes such a determination, the department shall issue a stop-work order within 72 hours. The order shall take effect when served upon the employer or, for a particular employer worksite, when served at that worksite. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance. A stop-work order may be served with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The order shall remain in effect until the department issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this chapter and has paid any penalty assessed under this section. The department may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this chapter and has agreed to remit periodic payments of the penalty pursuant to a payment agreement schedule with the department. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become

immediately due. The department may require an employer who is found to have failed to comply with the coverage requirements of s. 440.38 to file with the department, as a condition of release from a stop-work order, periodic reports for a probationary period that shall not exceed 2 years that demonstrate the employer's continued compliance with this chapter. The department shall by rule specify the reports required and the time for filing under this subsection. (Emphasis supplied)

33. The evidence establishes that the Respondent failed to make any of the monthly payments required under the terms of the Agreement and that the Petitioner reinstated the Stop-Work Order based on the Respondent's non-payment. The evidence establishes that the Respondent operated in violation of the reinstated Stop-Work Order.

34. Section 440.107(7)(c) provides as follows:

The department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order. (Emphasis supplied)

35. The evidence establishes that the Respondent routinely conducted business operations from Monday through Friday of each week and did not operate on Saturdays, Sundays, or usual legal holidays. There are 381 days during the relevant period during which the Respondent conducted business operations in violation of the reinstated Stop-Work Order. The Petitioner is required to assess the penalty for each day of operation.

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 \$381,000.00 against the Respondent for conducting business operations in violation of the reinstated Stop-Work Order.

DONE AND ENTERED this 29th day of March, 2011, 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 29th day of March, 2011.

ENDNOTE

^{1/} References to Florida Statutes are to Florida Statutes (2010), Unless otherwise indicated.

COPIES FURNISHED:

James D. King
Sherri King
J. D. Tree Service, Inc.
16591 Gator Road
Fort Myers, Florida 33912

Timothy L. Newhall, Esquire
Ryan C. Cox, Esquire
Department of Financial 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 Jeff Atwater
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

P. K. Jameson, 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.