STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 10-1565
MARK DUNLAP, d/b/a MARK DUNLAP MASONRY OF CENTRAL FL, INC., A DISSOLVED FLORIDA CORPORATION AND MARK DUNLAP MASONRY OF CENTRAL FLORIDA, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for a formal hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, via video teleconference from sites in Daytona Beach and Tallahassee, Florida, on August 25, 2010.

APPEARANCES

For Petitioner: Justin H. Faulkner, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues in this proceeding are whether Respondent, Mark Dunlap, d/b/a Mark Dunlap Masonry of Central Florida, Inc.,

a dissolved Florida corporation, and Mark Dunlap Masonry of Central Florida, Inc. ("Respondent") failed to abide by the coverage requirements of the Workers' Compensation Law, chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees; and whether the Petitioner properly assessed a penalty against the Respondent pursuant to section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, chapter 440, the Department of Financial Services, Division of Workers' Compensation (Department), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On January 8, 2010, the Department issued a Stop-Work Order ("SWO") that included an Order of Penalty Assessment. The SWO alleged that Respondent failed to abide by the coverage requirements of the workers' compensation law on that date. The order directed Respondent immediately to cease business operations and pay a penalty equal to 1.5 times the amount Respondent would have paid in premium to secure workers' compensation during periods within the preceding three years when it failed to do so, or $1,000, whichever is greater, pursuant to section 440.107(7)(d), as well as a penalty of up to $5,000 for each employee whom Respondent misclassified as an

independent contractor, pursuant to section 440.107(7)(f).

The Department also requested business records from Respondent in order to determine the exact amount of the penalty. Respondent provided records, but these were insufficient to allow the Department to calculate an appropriate penalty. Therefore, the Department calculated a penalty based upon an imputation of Respondent's payroll, pursuant to section 440.107(7)(e). The Department issued an "Amended Order of Penalty Assessment" ("Amended Order") on February 12, 2010, that assessed a penalty of $121,001.30 against Respondent. The Amended Order was served on Respondent on March 5, 2010.

Respondent timely requested a formal administrative hearing to contest the penalty assessment, and on March 23, 2010, the Department forwarded Respondent's request to the Division of Administrative Hearings ("DOAH"). The case was initially set for hearing on June 3, 2010. On May 24, 2010, the Department filed a Motion for Continuance and a Motion to Compel Discovery. The Department's discovery requests had been returned in blank by Respondent, and the Department stated that it could be prepared for the scheduled hearing without a continuance and an order requiring Respondent to substantively reply to the Department's discovery requests. An Order Granting Continuance and Rescheduling Hearing by Video Teleconference for August 25, 2010, was entered on May 26, 2010. On June 15, 2010, an Order

granting the Department's motion to compel was entered directing Respondent to serve his responses to the Department's discovery requests no later than June 29, 2010.

On August 19, 2010, the Department filed a motion to amend the Amended Order to lower the penalty assessment to $64,315.28. This motion was granted at the outset of the final hearing, and the hearing proceeded on the Department's Second Amended Order of Penalty Assessment ("Second Amended Order").

Respondent did not appear at the final hearing on August 23, 2010, the commencement of which was delayed by 20 minutes to allow Respondent every opportunity to be heard. The hearing proceeded in order to allow the Department to present its prima facie case. The hearing adjourned at approximately 10:30 a.m. Respondent had not arrived, nor had he contacted the Department or DOAH to explain his absence from the scheduled hearing.

On August 25, 2010, the undersigned entered an Order to Show Cause directing Respondent to provide, within 10 days, reasons why the record in the case should not be closed and the recommended order entered based on the current record. Respondent did not respond to the Order to Show Cause, and an Order closing the record was entered on September 17, 2010.

At the hearing, the Department presented the testimony of its investigator, Hector Beauchamp, and of its penalty

calculator, Samantha Nixon. The Department's Exhibits A through O were admitted into evidence.

A Transcript of the final hearing was filed at DOAH on September 15, 2010. On September 22, 2010, the Department filed a motion for an extension of the time within which to submit a proposed recommended order, which was granted by Order dated September 23, 2010. In accordance with the Order granting extension, the Department filed a Proposed Recommended Order on October 11, 2010. Respondent did not file a proposed recommended order.

On October 6, 2010, Mr. Dunlap filed a document titled "Declaration," in which he stated that he believed he was in compliance with the requirements of chapter 440, Florida Statutes, and that his failure to appear at the August 25, 2010, hearing was due to a "communication error" that resulted in his not receiving the Notice of Hearing. Because this declaration was filed more than one month after the Order to Show Cause was entered, it was not deemed sufficient cause to reopen the record in this case and was not considered in the writing of this Recommended Order.

Unless otherwise stated, all statutory references are to the 2009 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of the workers' compensation law that employers secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107(3), Fla. Stat.

2. Respondent operates a masonry business located in Paisley, and is therefore engaged in the construction industry.

3. On January 8, 2010, Hector Beauchamp, the Department's investigator, received a referral alleging that Respondent was working at 1601 Tillery Drive in Deltona, in violation of the Workers' Compensation Law. Mr. Beauchamp visited the plans examiner for the City of Deltona, who confirmed that a building permit had been issued for the cited address.

4. Mr. Beauchamp drove to 1601 Tillery Drive in Deltona, where he found four people behind the house building a block wall as part of an addition to the single-family house at that address. Mark Dunlap was on the site, and told Mr. Beauchamp that the four men worked for his business, Mark Dunlap Masonry of Central Florida, Inc. Mr. Dunlap subsequently identified the

four persons working on the site as Wayne Sochocki, Kevin Copeland, Annie Blackburn, and David Allen Baxley.

5. Mr. Beauchamp researched the database maintained by the Department of State, Division of Corporations (accessible at www.sunbiz.org) and learned that Mark Dunlap Masonry of Central Florida, Inc. had been administratively dissolved for failure to file an annual report on September 25, 2009. Mr. Beauchamp also learned that Mr. Dunlap had owned another Florida corporation, Mark Dunlap Masonry, Inc., that had been administratively dissolved for failure to file an annual report on September 16, 2005. According to the Division of Corporations' information, both Mark Dunlap Masonry of Central Florida, Inc., and Mark Dunlap Masonry, Inc., had the same Federal Employer Identification Number ("FEIN") of 030531755.

6. Mr. Dunlap claimed to Mr. Beauchamp that he was himself exempted from carrying workers' compensation coverage, but admitted that he had not secured coverage for the four employees building the block wall at 1601 Tillery Drive.

7. Mr. Beauchamp consulted the Department's Coverage and Compliance Automated System ("CCAS") database, which lists the workers' compensation insurance policy information for each business as provided by the insurance companies, as well as any workers' compensation exemptions for corporate officers. CCAS indicated that in previous years Respondent had secured workers'

compensation insurance through a leasing arrangement with Employee Leasing Solutions ("ELS").

8. In an employee leasing arrangement, the leasing company hires an employer's workers and leases them back to the employer. The leasing company provides payroll services and workers' compensation insurance coverage to the leased employees in exchange for a fee paid by the employer. However, only those employees specifically placed in the leasing arrangement by the employer and accepted as employees by the leasing company are covered by the leasing company's workers' compensation insurance.

9. Mr. Beauchamp's investigation confirmed that Respondent's workers' compensation coverage obtained through the leasing agreement with ELS had been terminated as of July 8, 2008.

10. The CCAS database confirmed that Mr. Dunlap had an active exemption from the requirement to obtain workers' compensation coverage. It also confirmed that none of the four employees whom Mr. Beauchamp found building the block wall at 1601 Tillery Drive were exempt.

11. Mr. Beauchamp concluded that Respondent had failed to secure workers' compensation insurance coverage that met the requirements of chapter 440. Mr. Beauchamp therefore issued an

SWO to Respondent on January 8, 2010, and personally served the SWO on Mr. Dunlap on the same date.

12. Also on January 8, 2010, Mr. Beauchamp served Respondent with the Request for Production of Business Records for Penalty Assessment Calculation. The purpose of this request was to obtain the business records necessary to determine the appropriate penalty to be assessed against Respondent for violating the coverage requirements of chapter 440. Because section 440.107(7)(d)1. provides that the Department's assessment of a penalty covers the preceding three-year period, the request for production asked for Respondent's business records from January 9, 2007, through January 8, 2010.

13. If an employer fails to produce business records sufficient to allow for the calculation of the appropriate penalty, the Department must calculate the applicable penalty by imputing the employer's payroll using the statewide average weekly wage for the type of work performed by the employee and multiplying that payroll by 1.5.

14. The statewide average wage is derived by use of the occupation classification codes established by the proprietary Scopes Manual developed by the National Council on Compensation Insurance, Inc. ("NCCI"). The Scopes Manual has been adopted by reference in Florida Administrative Code Rule 69L-6.031(6). For Respondent's employees, Mr. Beauchamp applied the occupation

classification code 5022, for masonry. Fla. Admin. Code R. 69L-6.031(6)(b)9.

15. The Department's Amended Order, assessing an imputed penalty in the amount of $121,001.30 against Respondent, was issued on February 12, 2010, and served on Mr. Dunlap by process server on March 5, 2010.

16. Following service of the Amended Order, Respondent supplied the Department with additional business records, including Respondent's payroll runs from ELS and W-2's for the year 2007. However, even these records were not sufficient to permit the Department to calculate a penalty based on Respondent's actual payroll.

17. The additional business records produced by Respondent did show that Mark Dunlap Masonry, Inc., had a policy of workers' compensation insurance in place with Business First Insurance Company from September 9, 2004, through February 22, 2008. Mr. Beauchamp had not previously found this coverage because the FEIN number listed by the Division of Corporations for Mark Dunlap Masonry, Inc., was incorrect.

18. The Department issued the Second Amended Order on August 18, 2010, lowering the penalty assessment to $64,315.28. Although the Business First Insurance Company policy had been issued to Mark Dunlap Masonry, Inc., and not to Respondent, the Department nonetheless concluded that the policy brought

Respondent into compliance with chapter 440 until February 22, 2008, and adjusted the penalty assessment accordingly.

19. Respondent's workers' compensation coverage through the leasing agreement with ELS became effective on March 20, 2008, and was terminated on July 7, 2008.

20. Of the four workers whom Mr. Beauchamp found at the work site on January 8, 2010, only Wayne Sochocki was listed on the ELS employee roster. Thus, Respondent was in compliance with respect to Mr. Sochocki for the period from March 20, 2008, through July 7, 2008. However, the records indicate that Respondent was not in compliance through the ELS leasing agreement with respect to its employees Kevin Copeland, Annie Blackburn, or David Allen Baxley because they had never been tendered to ELS as leased employees.

21. The Department correctly imputed the penalty against Respondent for the four employees found at the work site on January 8, 2010, for all periods of noncompliance. The Department correctly determined the period of noncompliance for Mr. Sochocki to run from July 8, 2008 to January 8, 2010, and for Mr. Copeland, Ms. Blackburn and Mr. Baxley to run from February 22, 2008, to January 8, 2010.

22. The Department utilized the correct occupation classification code for the four employees.

23. The Department correctly utilized the procedure set forth by section 440.107(7)(d) and (e), and the penalty calculation worksheet incorporated by reference into Florida Administrative Code Rule 69L-6.027(1), to calculate the penalty assessed against Respondent by the Second Amended Order.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

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

26. "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, "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) and (b)(2), Fla. Stat.

27. "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.

"Employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state. . . ." § 440.02(15)(b), Fla. Stat. Certain corporate officers may elect to exempt themselves from the coverage requirements of chapter 440. §§ 440.02(15)(b) and 440.05, Fla. Stat. In this case, Mr. Dunlap had a workers' compensation exemption, but none of Respondent's four employees had an exemption.

28. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the Workers' Compensation Law and that the penalty assessments were correct under the law. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

29. In Evans Packing Co. v. Dep't of Agric. and Consumer Servs., 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

30. Judge Sharp, in her dissenting opinion in Walker v. FL Dep't of Bus. and Prof'l Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

> [C]lear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the factfinder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

31. The Department established by clear and convincing evidence that Respondent was an "employer" for workers' compensation purposes because it was engaged in the construction industry and had one or more employees working for the company from February 22, 2008, through January 8, 2010. § 440.02(16)(a) and (17)(b)2., Fla. Stat. Respondent was therefore required to secure the payment of workers' compensation. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

32. Section 440.107(7)(a) 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 required by this chapter. . . 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.

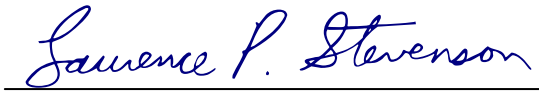
33. Thus, the Department's SWO was mandated by statute. As to both the Amended Order and the Second Amended Order, the Department applied the proper methodology in computing the penalty, pursuant to the Penalty Calculation Worksheet adopted by reference in Florida Administrative Code Rule 69L-6.027.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of $64,315.28 against Respondent.

DONE AND ENTERED this 22nd day of March, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.