STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 10-2332
CALDWELL TANKS, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on September 29, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamila Georgette Gooden, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Claude M. Harden, Esquire
Carr Allison
305 South Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues are whether Respondent conducted business operations in Florida without obtaining workers' compensation

coverage that met the requirements of Chapter 440, Florida Statutes (2009), for its employees, and if so, what penalty should be assessed.

PRELIMINARY STATEMENT

On March 5, 2010, Petitioner, Department of Financial Services, Division of Workers' Compensation (Petitioner), issued a Stop-Work Order and Order of Penalty Assessment to Respondent Caldwell Tanks, Inc. (Respondent). That same day, Petitioner issued a Request for Production of Business Records for Penalty Assessment Calculation.

On March 23, 2010, Petitioner issued an Amended Order of Penalty Assessment. The amended order assessed a total penalty of $122,242.23. On March 24, 2010, Petitioner and Respondent executed a Payment Agreement Schedule for Periodic Payment of Penalty. Petitioner also entered an Order of Conditional Release from Stop-Work Order.

On April 9, 2010, Respondent filed a Petition for Hearing. Respondent referred the case to the Division of Administrative Hearings on April 27, 2010.

The parties filed a Joint Response to Initial Order on May 5, 2010. A Notice of Hearing dated May 6, 2010, scheduled the hearing for July 1, 2010.

On June 18, 2010, Petitioner filed an opposed Motion for Continuance of Administrative Hearing. On June 21, 2010, the

undersigned issued an Order Denying Continuance of Final Hearing.

On June 25, 2010, the parties filed a Joint Motion for Continuance of Administrative Hearing. An Order Granting Continuance was issued on June 29, 2010.

The parties filed a Joint Status Report on July 9, 2010. The parties requested a hearing date at the end of August 2010.

The parties filed an Amended Joint Status Report on August 6, 2010. An Order Re-scheduling Hearing was issued that same day. The Order scheduled the hearing for September 9, 2010.

On September 1, 2010, the parties filed a Joint Motion for Continuance. An Order Re-scheduling Hearing, dated September 2, 2010, rescheduled the hearing for September 29, 2010.

During the hearing, Petitioner presented the testimony of three witnesses. Petitioner introduced 11 exhibits into evidence.

Respondent presented the testimony of two witnesses. Respondent introduced three exhibits into evidence.
The Transcript of the hearing was filed on October 13, 2010. On October 21, 2010, Respondent filed an unopposed Motion for Extension of Time to File Proposed Recommended Order. An Order Granting Extension of Time was issued on October 25, 2010. The parties filed Proposed Recommended Orders on November 3, 2010.

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

FINDINGS OF FACT

1. Petitioner is the state agency that is responsible for enforcing Chapter 440, Florida Statutes, which requires employers to secure the payment of workers' compensation for the benefit of their employees.

2. Respondent is a Louisville, Kentucky-based corporation that is engaged in the construction, maintenance, and painting of elevated water tanks. Respondent has a second fabrication facility located in Newnan, Georgia. Respondent's work constitutes construction.

3. On March 4, 2010, Petitioner's investigator, Lawrence F. Eaton, observed Respondent's employees working on a water tower in Pace, Florida. While visiting the worksite, one of Respondent's employees stated that he did not have any information regarding if and how the men were covered by workers' compensation. The employee gave Mr. Eaton a telephone number for Respondent.

4. Next, Mr. Eaton consulted the Kentucky Secretary of State website to find information concerning the corporate status of Respondent. The website indicated that Respondent was incorporated in 1892 and that it had three corporate officers.

5. Mr. Eaton then consulted Petitioner's Coverage and Compliance Automated System (CCAS) database. CCAS contains workers' compensation policy information for each employer that has a Florida policy and information relative to workers' compensation exemptions that have been applied for and issued to individuals by Petitioner.

6. Mr. Eaton was unable to find any indication on CCAS that Respondent had secured workers' compensation coverage by purchasing a Florida policy. CCAS also provided no evidence that Respondent had entered into an arrangement with an employee leasing company to provide workers' compensation coverage to its employees. Additionally, CCAS did not show that Respondent had obtained exemptions for its corporate officers.

7. Mr. Eaton subsequently spoke with one of Respondent's representatives. Mr. Eaton was informed that Respondent was self-insured for workers' compensation in Kentucky. Mr. Eaton also learned that Respondent had another workers' compensation policy. Respondent's representative indicated that she would send Mr. Eaton the policy paperwork.

8. When he received the paperwork from Petitioner, Mr. Eaton determined that the insurance coverage did not comply with the requirements of Florida's workers' compensation law. The paperwork included an excess policy of workers' compensation and a Georgia workers' compensation policy.

9. On March 5, 2010, Mr. Eaton issued a Stop-Work Order and Order of Penalty Assessment against Respondent. Specifically, the Stop-Work Order states that Respondent was not in compliance with Chapter 440, Florida Statutes, because Respondent failed to obtain workers' compensation coverage for its employees.

10. On March 5, 2010, Mr. Eaton issued a Request for Production of Business Records for Penalty Assessment Calculation to Respondent.

11. On March 8, 2010, Respondent provided Mr. Eaton with additional workers' compensation policy information. The information included the declarations page for Chartis Company Policy No. WC 005-73-7942.

12. The Chartis policy is a Workers' Compensation and Employers Liability Policy. In Item 3A, the policy lists the states that are covered, in Part One of the policy, pursuant to each state's workers' compensation law. Georgia is named as a covered state in Item 3A.

13. In Item 3C, the Chartis policy lists the states that are covered, in Part Three of the policy, as "other states insurance." Florida is listed only in Item 3C.

14. Item 4 of the Chartis policy states that "[t]he premium of this policy will be determined by our Manuals of

Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit."

15. In response to the request for business records, Respondent provided Petitioner with payroll information for work it had performed in Florida between September 2007 and February 2010. After receiving this information, Respondent's Penalty Calculator, Robert McAullife, calculated a penalty. Because Respondent had not provided all of the requested business records, Mr. McAullife imputed Respondent's payroll for a portion of the relevant time period.

16. In calculating the penalty, Mr. McAullife first sought to determine the amount of premium that Respondent would have paid had it been properly insured for the relevant three-year period. Mr. McAullife assigned a class code for each of Respondent's employees, reflecting the work they performed. Mr. McAullife then took 1/100th of the payroll and multiplied that figure by the approved manual rate applicable to each class code.

17. Mr. McAullife then took the previously obtained product and multiplied it by 1.5 to find a penalty in the amount of $122,242.23. This penalty is based on Respondent having $382,146.90 in Florida payroll that would have required $81,494.66 in workers' compensation premium. There are no errors in Mr. McAullife's penalty calculation.

18. Mr. Eaton issued an Amended Order of Penalty Assessment on March 23, 2010. On March 24, 2010, Respondent and Petitioner entered into a Payment Agreement Schedule for Periodic Payment of Penalty that required ten percent of the penalty to be paid in advance and the remainder to be paid in 60 interest-free monthly payments. Respondent also produced a policy that provided coverage in compliance with Florida law with an effective date of March 12, 2010. As a result, Petitioner issued an Order of Conditional Release, permitting Respondent to return to work.

19. During the hearing, Respondent presented evidence that it is a registered self-insured company in Kentucky for the first $500,000.00 of workers' compensation. Additionally, Respondent has excess insurance for any workers' compensation claims that exceed the $500,000.00 threshold.

20. Because it is self-insured in Kentucky, Respondent must purchase letters of credit on an annual basis. Respondent paid the following for its recent letters of credit: (a) 2007, $26,755.54; (b) 2008, $32,438.48; (c) 2009, $33,626.38; and (d) 2010 to date, $8,931.39.

21. The State of Kentucky assesses qualified self-insureds a six and one half percent tax based on an annual simulated premium. The amount of the simulated premium represents what a qualified self-insured would pay for a "first dollar" policy of

workers' compensation insurance. Respondent's recent simulated premiums are as follows: (a) 2007, $453.440.00; (b) 2008, $480,637.00; (c) 2009, $623,940.00; and (d) 2010, $1,006,243.00.

22. Respondent also maintains a "high dollar" deductible policy of insurance that provides workers' compensation coverage for its Georgia employees. Respondent's Georgia policy, Chartis Company Policy No. WC 005-73-7942, which includes Florida as part of "all other states" in Item 3C of the declarations page, also requires the payment of premiums. Respondent recently paid the following premiums for this insurance: (a) 2007, $124,736.78; (b) 2008, $125,950.08; and (c) 2009, $64,465.28.

23. The premiums paid by Respondent for the Chartis Company Policy No. WC 005-73-7942 are not based on Florida rates.

24. From 2007 to 2010, Respondent provided workers' compensation benefits for at least four different workers that were injured while performing work for Respondent in Florida. The workers' compensation benefits paid by Respondent on these claims totaled $147,958.25.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2010).

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

27. Because administrative fines are penal in nature, Petitioner has the burden of proving its case by clear and convincing evidence. See Dep't. of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996). To meet this burden, Petitioner must prove that Respondent was required to comply with the Workers' Compensation Law, that Respondent failed to comply with that law, and that the penalty assessed by Petitioner is appropriate. Petitioner has met its burden.

28. Section 440.03, Florida Statutes, states that "every employer and employee as defined in s. 440.02 shall be bound by the provisions of this chapter."

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

30. "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." See §§ 440.02(17)(a), and 440.02(b)2., Fla. Stat. Employee is defined, in pertinent 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.

31. Respondent did not contest the following: (a) Respondent was an "employer"; (b) Respondent conducted construction-industry business operations in Florida; and (c) Respondent paid remuneration to individuals to perform work in Florida. Because Respondent is an "employer," it is required to comply with the Workers' Compensation Law.

32. Respondent did not secure the payment of workers' compensation coverage for its employees that met the requirements of Chapter 440, Florida Statutes, and the Florida Insurance Code. Section 440.10(1)(a), Florida Statutes, requires that every employer coming within the provisions of Chapter 440, Florida Statutes, is liable for and shall secure workers' compensation insurance for its employees.

33. Section 440.10(1)(g), Florida Statutes, states as follows in relevant part:

> (g) Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code.
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> * * *
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> 1. For employees of non-construction-industry employers who have their

> headquarters outside of Florida and also operate in Florida and who are routinely crossing state lines, but usually return to their homes each night, the employee shall be assigned to the headquarters' state. However, the construction industry employees performing new construction or alteration in Florida shall be assigned to Florida even if the employees return to their home state each night.
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> * * *
>
> 3. For construction contractors who maintain a permanent staff of employees and superintendents, if any of these employees or superintendents are assigned to a job that is located in Florida, either for the duration of the job or any portion thereof, their payroll shall be assigned to Florida rather than the headquarters' state.
>
> 4. Employees who are hired for a specific project in Florida shall be assigned to Florida.

34. Similarly, Section 440.38, Florida Statutes, states as follows in relevant part:

> (7) Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in the state by such employee.

35. Respondent promulgated Florida Administrative Code Rule 69L-6.019, which states as follows:

> (1) Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state

shall obtain a Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the provision of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Section 440.10(1)(g) and 440.38(7), F.S.

(2) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., any policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state must be issued by an insurer that holds a valid Certificate of Authority in the State of Florida.

(3) In order to comply with Section 440.10(1)(g) and 440.38(7), F.S., for any workers' compensation policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state:

(a) The policy information page (NCCI form number WC 00 00 01 A) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(b) The policy information page endorsement (NCCI form number WC 89 06 00 B) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(4) A workers' compensation policy that lists "Florida" in Item 3.C. of the policy information page (NCCI form number WC 00 00 01 A) does not meet the requirements of Sections 440.10(a)(g) and 440.38(7), F.S., and is not valid proof of workers' compensation coverage for employees engaged in work in this state.

5. Workers' Compensation and Employers Liability Insurance Policy - Information Page, NCCI form numbers WC 00 00 01 A (rev. May 1, 1988) and Workers' Compensation and Employers Liability Insurance Policy - Policy Information Page Endorsement, WC 89 06 00B (rev. July, 2001) are hereby adopted and incorporated herein by reference. These

> forms can be obtained from the Florida Department of Financial Services, Division of Workers' Compensation, 200 East Gaines Street, Tallahassee, FL 32399-4228.
> (6) An employee of a construction industry employer headquartered outside the state of Florida is "engaged in work" in Florida if he or she participates in any one of the following activities in the state of Florida:
> (a) The employee engaged in new construction, alterations, or any job or any construction activities involving any form of the building, clearing, filling, excavation or improvement in the size of use of any structure or the appearance of any land as defined in Section 440.02(8), F.S., or performs any job duties or activities which would be subject to those contracting classifications identified in the Contracting Classification Premium Adjustment Program contained in the Florida State Special pages of the Basic Manual (as incorporated in Rule 69L-6.021, F.A.C.) within the borders of the state of Florida, regardless of whether an employee returns to his or her home state each night, or
> (b) If the employer maintains a permanent staff of employees or superintendents and the staff employee or superintendent is assigned to construction activities in Florida for the duration of the job or any portion thereof, or
> (c) If the employer hires employees in Florida for the specific purpose of completing all or any portion of construction contract work and related construction activities in the state of Florida.

36. Respondent admits that neither its "all other states" policy nor its Kentucky excess policy contained a Florida endorsement in Item 3.A. of the information page or had premiums based on Florida rates. Respondent also admits that it was not

"self-insured" in Florida. Respondent contends, however, that the workers' compensation benefits bestowed upon its workers as a result of its self-insured status under the laws of Kentucky, its excess workers' compensation insurance policy, and its "all other states" policy are equivalent to the benefits that would flow from a policy purchased in Florida. Therefore, Respondent asserts that it should not be penalized for non-compliance.

37. Respondent's argument misapprehends the fact that there is a recognized difference between coverage - i.e., what an insurer may ultimately cover under a policy - and compliance with Florida law. See U.S. Builders, L.P. v. Department of Financial Services, Division of Workers' Compensation, Case No. 07-4428 (Fla. DOAH Jan. 14, 2009; DFS Feb. 23, 2009); Department of Financial Services v. Raylin Steel Erectors, Inc., Case No. 05-2289 (Fla. DOAH Oct. 19, 2005; DFS Jan. 2006). Even if Respondent's contentions about its out-of-state coverage are taken as true, there is no provision in Chapter 440, Florida Statutes, that would allow for such a consideration. As a matter of law, Respondent did not have a workers' compensation policy with a proper Florida endorsement, and therefore, Respondent was not in compliance with Florida's Workers' Compensation Law.

38. The penalty assessed against Respondent is appropriate because the penalty was assessed pursuant to Petitioner's

statutory authority and calculated in conformity with statutory requirements.

39. Pursuant to Section 440.107, Florida Statutes, Petitioner has the duty of enforcing an employer's compliance with the requirements of the Workers' Compensation Law. To that end, Petitioner is empowered to examine and copy the business records of any employer conducting business in Florida to determine whether the employer is in compliance with the law. See § 440.107(3), Fla. Stat.

40. Petitioner is further required to assess a penalty as set forth in Section 440.107(7)(d)1., Florida Statutes, which states as follows:

> (d)1. 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.

41. Moreover, Petitioner is required to impute the payroll of any employer that is out of compliance and fails to provide business records sufficient to allow Petitioner to determine the employer's payroll. See § 440.107(e), Fla. Stat. The imputed

payroll is equal to 1.5 times the statewide average weekly wage. See § 440.107(e), Fla. Stat.

42. The statewide average weekly wage is the wage determined by the Agency for Workforce Innovation to be "the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law as reported to the Agency for Workforce Innovation for the four calendar quarters ending each June 30 . . .". See § 440.12(2), Fla. Stat.

43. Respondent contends that Petitioner should offset the penalty assessed by the costs incurred by Respondent for securing its self-insured status and its excess workers' compensation insurance policy. Alternatively, Respondent contends that Petitioner should offset the penalty by using the simulated premium payments calculated by Kentucky. However, the law is explicit and gives no room for compromise or adjustment. There is no statutory authority for Petitioner to reduce the penalty by giving credit for coverage that does not comply with Florida law.

RECOMMENDATION

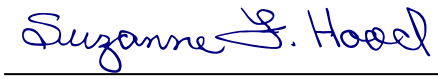
Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Department of Financial Services, Division of Workers' Compensation, enter a final order, finding that

Caldwell Tanks, Inc., failed to comply with Chapter 440, Florida Statutes, and imposing a penalty in the amount of $122,224.22.

DONE AND ENTERED this 8th day of December, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 8th day of December, 2010.

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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.