

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 10-3029
)
HARRY NORTON, d/b/a NORTON TREE)
SERVICE, LLC A DISSOLVED)
FLORIDA LIMITED LIABILITY)
COMPANY AND NORTON TREE)
SERVICE, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on July 26, 2010, in Tallahassee, Florida, before Administrative Law Judge W. David Watkins 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: Jamila G. Gooden, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Harry Norton, pro se
Norton Tree Service, LLC
12566 Rachel Cooper Lane
Tallahassee, Florida 322317

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On March 1, 2010, the Division of Workers' Compensation ("Division" or "Petitioner") issued and served a SWO and Order of Penalty Assessment ("Order") on Harry Norton, d/b/a Norton Tree Service ("Norton" 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. Also on March 1, 2010, the Division served a request for production of business records on Norton.

On March 19, April 29, and May 27, 2010, the Division served: an Amended Order of Penalty Assessment; a Second Amended Order of Penalty Assessment; and, an Amended Stop Work Order and (Third) Amended Order of Penalty Assessment, respectively, on Norton.

On May 20, 2010, the Division received a Petition from Respondent challenging the Orders of Penalty Assessment and requesting a hearing on the matter. Attached to the Petition were an Amended Stop Work Order and Fourth Amended Order of

Penalty Assessment reflecting service on Respondent by certified mail on May 27, 2010. The Petition was referred to the Division of Administrative Hearings on June 2, 2010, for assignment of an Administrative Law Judge to conduct the hearing.

At the outset of the hearing, Petitioner moved ore tenus to amend its charging documents, and, upon the granting of the motion, issued and served its Fifth Amended Order of Penalty Assessment in the amount of \$61,003.11. Respondent's Petition has been applied to the subsequent Fifth Amended Order of Penalty Assessment so that the final hearing would consider the most recently filed order of assessment.

At hearing, Respondent testified on his own behalf. Respondent did not offer any exhibits into evidence. The Division presented the testimony of Jonas Hall and Monica Moye. The Division's Exhibits 1 through 14 were received into evidence.

The proceedings were transcribed and the parties were advised 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 August 9, 2010. On August 13, 2010, counsel for Petitioner filed a Motion for Extension of Time for the submittal of Proposed Recommended Orders, which was granted. Petitioner timely filed a Proposed Recommended Order, which has been

considered in the preparation of this Recommended Order. No Proposed Recommended Order was filed by Respondent.

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

FINDINGS OF FACT

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

2. Norton is a limited liability company operating as a tree trimming and removal business in Tallahassee, Florida. Harry Norton, Jr. is the sole owner and manager of Norton.

3. On March 1, 2010, Petitioner's investigator, Jonas Hall, visited 1144 Mary's Drive, Tallahassee, Florida ("work site"), after being referred to the location to investigate Respondent for compliance with the Florida Workers' Compensation Law.

4. At the work site, Petitioner's investigator spoke to Harry Norton, Jr., and asked him whether the other five individuals observed working at the work site were his employees. He confirmed they were.

5. While at the work site, Mr. Hall 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 no exemptions from workers' compensation had been issued for Norton Tree Service or for any of the five employees identified at the work site.

6. Upon confirmation that Respondent lacked workers' compensation coverage and that no exemptions were in effect, Petitioner's investigator contacted his supervisor and requested authorization to issue a SWO and business records request. Approval was given, and Mr. Hall personally served Mr. Norton with the SWO and Request for Production of Business Records ("Request") at the work site that same day. The SWO ordered Respondent to immediately cease all business operations.

7. Soon thereafter, Norton responded to the Request and provided Petitioner's investigator with some of the requested records. These included UTC-6s, some federal quarterly tax returns, and handwritten timesheets for 2007. Petitioner's investigator forwarded the documents to Monica Moye, Petitioner's penalty calculator, for review.

8. On or about March 16, 2010, Petitioner issued an Amended Order of Penalty Assessment assessing a penalty of \$214,643.15 against Respondent.

9. Subsequent to the issuance of the Amended Order Norton provided additional financial documents to Petitioner. These

included additional federal tax returns and Forms 1099, as well as paycheck stubs and banking records. These documents were also forwarded to Ms. Moye, resulting in the issuance on April 28, 2010, of the Second Amended Order of Penalty Assessment. The new penalty assessment was \$76,712.02.

10. Subsequent to the issuance of the Second Amended Order of Penalty Assessment, Investigator Hall researched the corporate status of Respondent on the Department of State, Division of Corporations website. The website showed that Respondent had become inactive on September 14, 2007. Accordingly, on May 27, 2010, Investigator Hall issued and served an Amended SWO and a Third Amended Order of Penalty Assessment to reflect the inactive status of Respondent. However, a typographical error in the issuance date necessitated the issuance of a Fourth Amended Order of Penalty Assessment, served on June 2, 2010. As with the Second Amended Order, both the Third and Fourth Amended Orders reflected a penalty of \$76,712.02.

11. On July 23, 2010, a Fifth Amended Order of Penalty Assessment was issued by Petitioner, this time reducing the total penalty assessment to \$61,003.11. The reduction was the product of additional financial information being provided by Mr. Norton and analyzed by Ms. Moye, resulting in the removal of some individuals from the penalty worksheet.

12. In calculating the penalty owed by Respondent, Ms. Moyer first determined the amount of premium that Respondent would have paid had workers' compensation insurance been in place during the period March 2, 2007, through March 1, 2010. To do so, Ms. Moyer identified the Norton employees and their gross wages using the UCT-6s and check copies provided by Respondent. Ms. Moyer then used this information to ascertain the time periods for which Respondent had four or more employees but did not have workers' compensation insurance. Ms. Moyer used weekly pay periods as the interval over which to make this determination. Only the weeks during which Respondent was found to have four or more employees were included by Ms. Moyer in the penalty calculation. By assigning the appropriate occupational class codes to each employee, and then multiplying by the applicable manual rates as determined by the National Council on Compensation Insurance, Ms. Moyer calculated the premium that would have been paid by Norton had coverage been provided. This amount was then multiplied by 1.5, to arrive at the total penalty of \$61,003.11.

13. During the hearing, Respondent admitted not having workers' compensation coverage for his employees. Mr. Norton testified he was told many years earlier by his CPA that his company was exempted from the coverage requirements because the company had only two employees. Mr. Norton was apparently under

the mistaken belief that the exemption continued in effect, even after the addition of several more employees over the years.

CONCLUSIONS OF LAW

14. 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 (2010).

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

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

17. "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.

18. "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.

19. 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).

20. 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."

21. Petitioner established by clear and convincing evidence that Norton was an "employer" for workers' compensation purposes because it was engaged in a tree trimming and removal business and frequently had four or more employees working for the corporation during the period March 2, 2007, through March 1, 2010. Norton was therefore required to secure the payment of workers' compensation.

22. 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.

23. 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 \$1,000.00, whichever is greater.

24. Florida law does not provide for consideration of mitigating circumstances in cases where an employer fails to secure workers' compensation insurance because the employer is not aware that it is required, or mistakenly believes his company is exempted.^{1/}

25. Based on Respondent's business records, Respondent's total payroll from March 2, 2007, through March 1, 2010, was \$238,767.31. The total workers' compensation premium that Respondent should have paid for its employees during the relevant time period was \$40,668.64. Multiplying that amount by

the statutory factor of 1.5 results in a penalty assessment in the amount of \$61,003.11.

26. Petitioner correctly issued the SWO and Fifth Amended Penalty Assessment prescribed in Section 440.107(7)(d), Florida Statutes. The evidence here clearly indicates that Respondent owes \$61,003.11 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 Fifth Amended Order of Penalty Assessment in the amount of \$61,003.11.

DONE AND ENTERED this 25th day of August, 2010, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2010.

ENDNOTE

^{1/} Certain corporate officers can become exempt from the coverage requirements of Chapter 440, Florida Statutes, but must affirmatively make that election. §§ 440.02(15)(b), 440.05, Fla. Stat.; Fla. Admin. Code R. 69L-6.012(2). An exemption for an officer of a corporation is not automatic, but rather requires the filing of a written notice of the election to be exempt with the Department. §§ 440.02(15)(b)1., 440.05(1), Fla. Stat.; Fla. Admin. Code R. 69L-6.012(1)(a)(2),(6).

COPIES FURNISHED:

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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.