

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

P.A.T. AUTO TRANSPORT, INC.,)
)
 Petitioner,)
)
vs.) Case Nos. 10-3106F
) 10-3107F
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
 Respondent.)

)

FINAL ORDER

A formal hearing was conducted in this case on September 21, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Douglas F. Miller, Esquire
Clark, Partington, Hart, Larry,
Bond & Stackhouse
125 West Romana Street, Suite 800
Pensacola, Florida 32591-3010

For Respondent: Kristian E. Dunn, Esquire
Department of Financial Services
Division of Workers' Compensation
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STATEMENT OF THE ISSUES

The issues are whether Respondent was substantially justified in issuing an initial Stop Work Order and Order of Penalty Assessment against Petitioner for failing to comply with a Business Records Request, followed by an Amended Stop-Work Order and an Amended Order of Penalty Assessment to Petitioner for alleged noncompliance with workers' compensation coverage requirements, and if so, is an award of attorneys' fees and costs appropriate.

PRELIMINARY STATEMENT

On June 4, 2010, Petitioner P.A.T. Auto Transport, Inc. (Petitioner), filed Motions for Entitlement to an Award of Attorneys' Fees and Cost Pursuant to Section 57.111, Florida Statutes, in the underlying consolidated cases, Department of Financial Services, Division of Workers' Compensation v. DTS, LLC., Division of Administrative Hearings (DOAH) Case No. 09-3484, and Department of Financial Services, Division of Workers' Compensation v. P.A.T. Auto Transport, Inc., DOAH 09-3486 (Recommended Order entered January 29, 2010). Affidavits with respect to fees and costs, together with time logs, were attached to the motions.

On June 7, 2010, DOAH assigned Case No. 10-3106F to the motion filed in DOAH Case No. 09-3484 and Case No. 10-3107F to

the motion filed in DOAH Case No. 09-3486. DOAH then issued Initial Orders in both cases.

On June 28, 2010, Respondent Department of Financial Services, Division of Workers' Compensation (Respondent) filed its Response to Initial Order and Request for Evidentiary Hearing in DOAH Case Nos. 10-3106F and 10-3107F. In the response, Respondent acknowledged the following: (a) Respondent does not dispute the amount of fees and costs claimed by Petitioner; (b) Petitioner is the prevailing party; and (c) Petitioner is a small business based on the number of full-time employees.

On July 1, 2010, Administrative Law Judge W. David Watkins issued an Order of Consolidation for DOAH Case Nos. 10-3106F and 10-3107F. That same day, Judge Watkins issued a Notice of Hearing, scheduling the hearing for July 22, 2010.

On July 6, 2010, Petitioner filed its Response to Initial Order of June 7, 2010.

On July 7, 2010, Respondent filed an Unopposed Motion to Continue Hearing. The next day, Judge Watkins issued an Order Granting Continuance and Re-scheduling Hearing for September 21, 2010.

On September 17, 2010, the consolidated cases were transferred from Judge Watkins to the undersigned.

During the hearing, Petitioner presented the testimony of one witness. Petitioner offered two exhibits that were admitted as evidence.

Respondent presented the testimony of two witnesses. Respondent offered seven exhibits that were accepted as evidence.

The Transcript was filed on October 5, 2010. Petitioner filed a Proposed Final Order on October 18, 2010. Respondent filed a Proposed Final Order on October 25, 2010.

Hereinafter, all references shall be to Florida Statutes (2010), except as otherwise noted.

FINDINGS OF FACT

1. Respondent is the state agency charged with enforcing the requirements of Section 440.107, Florida Statutes, requiring that employers in Florida secure the payment of workers' compensation insurance coverage for their employees.

2. Petitioner is a Florida corporation that conducts business in Florida, with headquarters in Pensacola, Florida. Petitioner's business involves the transportation of vehicles, utilizing a fleet of approximately 61 tractor-trailers and accompanying auto transport trailers.

3. Michelle Newcomer is a compliance investigator for Respondent. Her duties focus on conducting inspections/investigations of Florida businesses to ensure

compliance with Florida's workers' compensation coverage requirements. She also issues Stop Work Orders (SWOs) and Orders of Penalty Assessment (OPAs) when Respondent believes a business is non-compliant with Florida's workers' compensation law.

4. Ms. Newcomer and her supervisors are familiar with the definition of "independent contractor" set forth in Sections 440.02(15)(d)1a and 440.02(15)(d)1b, Florida Statutes. However, they never tested Petitioner's claim that its truck drivers were independent contractors and not employees against the criteria in that definition.

5. On March 16, 2009, Ms. Newcomer received information from an anonymous source that Petitioner was not in compliance with the workers' compensation laws in Florida. The anonymous source asserted that Petitioner's drivers were being misclassified as independent contractors.

6. Ms. Newcomer performed a search of Respondent's database. She learned that Tracie Hedges and George Hedges, as corporate officers, were exempt from having workers' compensation insurance. She found that Petitioner had no workers' compensation coverage for any employees.

7. On March 18, 2009, Ms. Newcomer visited Petitioner's office. Upon arrival, she met Ms. Hedges. During the meeting, Ms. Newcomer inquired about the company, its operations, and its

truck drivers. Ms. Hedges told Ms. Newcomer that Petitioner had about 50 to 60 truck drivers who were independent contractors. Seeing only one other employee, Ms. Newcomer left and terminated her investigation.

8. On April 8, 2009, Ms. Newcomer received a referral from Respondent's Employee Assistance Office. The referral indicated that one of Petitioner's former drivers, Mike Borders, had suffered an injury while working for Petitioner, but was not receiving workers' compensation benefits. The referral included a copy of one of Mr. Borders' pay stubs.

9. Upon reviewing Mr. Borders' pay stub, Ms. Newcomer noticed that federal income tax withholding was deducted along with various deductions for Social Security and Medicare. The federal payroll deductions were identical to those any employer would deduct from an employee's wages.

10. Ms. Newcomer performed another search of Respondent's database, finding that Petitioner had workers' compensation insurance through Allstates Employer Services, effective March 17, 2009. Ms. Newcomer then contacted Allstates Employer Services and requested a copy of Petitioner's employee roster. When she received the roster, Mr. Borders' name was not on the roster.

11. Ms. Newcomer next interviewed Mr. Borders, inquiring about Mr. Borders' relationship with Petitioner. She wanted to

know the following: (a) whether he drove Petitioner's vehicle; (b) whether he signed any employment contracts; and (b) whether he considered himself Petitioner's employee.

12. Mr. Borders responded as follows: (a) he considered himself an employee of Petitioner; (b) he had signed an employment application; (c) he drove Petitioner's truck; and (d) he took orders from Petitioner as to when and where to pick up the cars that needed to be transported.

13. After speaking with Mr. Borders, Ms. Newcomer conducted further review via various state databases. She researched the database maintained by the Florida Department of State, Division of Corporations, to determine the relationship of Petitioner to Transport TK 131, LLC, another company listed on Mr. Borders' pay stub. This search revealed 21 limited-liability companies using the Transport TK name.

14. Ms. Newcomer learned that Transport TK 131's managing member was Gary Hedge. Ms. Newcomer believed that Mr. Hedge also was a principal of Petitioner.

15. Ms. Newcomer also reviewed the database maintained by the Florida Department of Revenue to determine who was paying the unemployment compensation tax for Petitioner's drivers. She learned that Transport TK 131, LLC, listed two to three employees for purposes of unemployment withholdings. The same was true for all of the other Transport TK companies.

16. Ms. Newcomer believed her investigation presented numerous inconsistencies with statements made by Ms. Hedge. Ms. Newcomer presented her findings to her supervisors. They gave her approval to investigate Petitioner.

17. Ms. Newcomer prepared a Business Records Request Form 1 (BRR#1) for Petitioner and Transport TK 131, LLC. Both BRRs requested the companies to provide payroll information for employees and any forms of workers' compensation coverage for its employees for the period January 21, 2009, through April 21, 2009. The BRRs also made the following request:

Record Category #12--For each independent contractor who performs any service with regard to the completion of a contractual obligation of the employer listed above, at any time during the period specified above: all contracts for work, licenses, invoices, ledgers, payments made pursuant to that contract, and any other documents that support the status of an independent contractor under section 440.02(15)(d), F.S.

The request for records did not give the companies the option of creating and providing affidavits or other documents to support the status of independent contractors if no written contracts for work existed. The BRRs were sent to Petitioner and Transport TK 131, LLC, by certified mail on April 22, 2009.

18. Petitioner failed to provide all of the requested records within the required five-day time period. Accordingly,

Respondent issued a SWO and an OPA to Petitioner. Ms. Newcomer posted the SWO and OPA at the worksite on May 5, 2009.

19. While Ms. Newcomer was at Petitioner's headquarters, Ms. Hedges provided her with some records, including Petitioner's QuickBooks registry, showing all checks written for a three-month period. Ms. Hedges also answered Ms. Newcomer's questions about the records, including questions about DTS, LLC, a company described by Ms. Hedges as a payroll account.

20. Ms. Hedges explained that before August 2008, Petitioner paid DTS, LLC, for work performed by "employees" of the Transport TK companies. DTS, LLC, would then pay the truck drivers. However, when DTS, LLC, ran out of checks in August 2008, Petitioner began paying the Transport TK employees directly.

21. The documentation and information provided by Ms. Hedges, resulted in the SWO being revoked for Transport TK 131, LLC. The revocation was based on a showing that Transport TK 131, LLC, and other Transport TK companies did not have bank accounts.

22. The SWO against Petitioner, for failing to produce sufficient records, remained in place, pending further review. Ms. Newcomer continued to have discussions with Ms. Hedges relative to Petitioner's business.

23. Ms. Newcomer discussed the case again with one of her supervisors. She explained that Petitioner was paying individuals that were reported as employees of the Transport TK companies. She also stated that Petitioner pays its corporate officers, Bradley Hedges, Gregory Hedges and Teri Forret, who did not have workers' compensation exemptions and were not covered by Allstates Employer Services workers' compensation coverage. Ms. Newcomer and her supervisor decided to amend the SWO to add the charge of failure to provide workers' compensation coverage for employees.

24. On May 6, 2009, Respondent sent the SWO, the Amended Stop Work Order (ASWO,) and a Business Records Request Form 2 (BBR#2) to Petitioner by certified mail. Petitioner received the documents the next day.

25. Ms. Newcomer had a meeting with Ms. Hedges on May 8, 2009. During the meeting, Ms. Hedges explained that DTS, LLC, is just a bank account, used to pay the employees of the Transport TK companies. Ms. Hedges also stated that Petitioner has full control of its customer contracts and directs the drivers where to go for work.

26. On May 11, 2009, Ms. Newcomer received Petitioner's Quickbook report for the period of the BBR#2 records request.

27. On May 13, 2009, Ms. Newcomer staffed the case with Respondent's legal counsel.

28. On May 14, 2009, Ms. Newcomer received some contracts between Petitioner and truck drivers who owned and operated their own trucks.

29. Respondent calculated Petitioner's penalty using the Quickbooks report, in conjunction with W-2 documents provided for tax years 2007 and 2008. As of May 18, 2009, Petitioner's penalty was \$1,496,680.40. Ms. Newcomer requested and received approval to issue an Amended Order of Penalty Assessment (AOPA) for that amount. The AOPA was served on Petitioner by hand delivery on May 19, 2009.

30. Ms. Newcomer did not include Petitioner's office staff/dispatchers, including Ms. Hedges, in calculating Petitioner's penalty. Ms. Newcomer was able to confirm that those individuals had workers' compensation coverage through the employee leasing company.

31. Ms. Newcomer did not include the owner/operator truck drivers in calculating Petitioner's penalty. Ms. Newcomer had copies of contracts indicating that they were independent contractors.

32. Ms. Newcomer did include the 50 to 60 truck drivers who drove Petitioner's trucks in calculating the penalty. Ms. Newcomer knew that Petitioner was paying those individuals by check and that their pay-stubs showed various deductions, including withholdings for federal income taxes, Social

Security, Medicare, and even deduction options for various forms of Individual Retirement Accounts, both standard and "Roth" versions. For some of the drivers, Petitioner deducted child support payments.

33. If Ms. Newcomer had asked more questions or talked to more drivers, she would have learned that Petitioner made the deductions from the checks of drivers who drove Petitioner's trucks at their request and in exchange for a smaller commission. Petitioner did not make the deductions as an employer.

34. Ms. Newcomer also learned that all individuals driving Petitioner's trucks signed employment applications. Apparently, Ms. Newcomer did not believe Ms. Hedges when she explained that the employment applications were used as forms to comply with the Federal Motor Vehicle Carrier Safety Act for drivers of trucks with Petitioner's name.

35. Ms. Newcomer never attempted to find out whether the drivers of Petitioner's trucks were independent contractors pursuant to oral contracts. She did not ask Ms. Hedges questions that track the definition of "independent contractor" status in Sections 440.02(15)(d)1a and 440.02(15)(d)1b, Florida Statutes. In other words, Ms. Newcomer did not try to ascertain whether and/or to what extent Petitioner or the truck drivers controlled or directed the manner in which the work was done.

36. Ms. Hedges told Ms. Newcomer that Petitioner's corporate officers had filed for workers' compensation exempt status by delivering exemption application forms to one of Respondent's offices in 2005. Ms. Hedges did not have a receipt showing delivery of the forms.

37. Ms. Newcomer could not find the names of two of these officers in the state's database of corporate officers electing exempt status. Therefore, Ms. Newcomer included the two corporate officers in the penalty calculation. Apparently, Ms. Newcomer never considered that Ms. Hedges was telling the truth about the exemption forms and that, pursuant to statute, the exemptions became effective 30 days after Ms. Hedges delivered them to Respondent even though Respondent never processed them.

38. Ms. Newcomer also did not go back to Mr. Borders to question him about his claim of being Petitioner's employee as opposed to an independent contractor, using the definition of independent contractor set forth in Sections 440.02(15)(d)1a and 440.02(15)(d)1b, Florida Statutes. Additionally, Ms. Newcomer did not attempt to interview any other individuals that drove Petitioner's vehicles to determine whether they considered themselves employees or independent contractors.

39. On or about June 5, 2009, Petitioner requested an administrative hearing to challenge the ASWO and AOPA. The

hearing was held on November 3, 2009. On January 29, 2010, Administrative Law Judge P. Michael Ruff issued a Recommended Order, finding that Petitioner was compliant with Florida's workers' compensation coverage and recommending that a final order be entered dismissing the ASWO and AOPA. On April 28, 2010, Respondent entered a Final Order adopting Judge Ruff's legal and factual findings.

40. The parties stipulate as follows: (a) Petitioner is the prevailing party in the underlying case; (b) Petitioner was a small business at the time the ASWO and AOPA were served; and (c) The reasonableness of the amount of attorney's fees and costs claimed by Petitioner, namely \$50,000, is not in dispute.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

42. This action for attorney's fees and costs is brought pursuant to Section 57.111, Florida Statutes, which states as follows in relevant part:

(1) This section may be cited as the "Florida Equal Access to Justice Act."

* * *

(3) As used in this section:

* * *

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

* * *

(4) (a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

(d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order, in the case of an administrative law judge. . . .

* * *

2. No award of attorney's fees and costs for an action initiated by a state agency shall exceed \$50,000.

43. The only issue is whether Respondent had a substantial basis in law and fact to issue the initial SWO and OPA, followed by the ASWO and AOPA. Respondent has the burden of proving, by a preponderance of the evidence, that it was "substantially justified" in taking the underlying action against Petitioner. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998)

44. In Helmy v. Department of Business and Professional Regulation, 707 So. 2d at 368, the court stated as follows:

Accordingly, in terms of Florida law, the "substantially justified" standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party.

45. In this case, Respondent was substantially justified in issuing the initial SWO and OPA because Petitioner was untimely in providing all of the records requested in BBR#1. After taking that action, and receiving Petitioner's payroll records, Respondent was justified in leaving the SWO in place pending further review of Petitioner's compliance with workers' compensation coverage requirements.

Independent Contractors

46. During the on-going investigation, Ms. Newcomer focused almost entirely on Mr. Border's statement that he believed he was Petitioner's employee, on a review of Mr. Borders' pay stub, on a review of Petitioner's payroll records, and a review of some contracts between Petitioner and independent operators. She did not question Mr. Borders or Ms. Hedges regarding the work being performed against the statutory definition of independent contractors. The first time that Ms. Hedges was asked to explain the relationship between

Petitioner and the drivers using the statutory definition of independent contractor status was at the compliance hearing.

47. Respondent was not substantially justified in issuing the ASWO and AOPA because Ms. Newcomer did almost nothing to resolve the conflicting stories of Mr. Borders and Ms. Hedges. A reasonable person faced with such a conflict, and knowing the statutory definition of an independent contractor, would or should have inquired about the criteria that define an individual as an independent contractor. If she had done so, Ms. Newcomer would have known that the drivers of Petitioner's trucks were independent contractors.

Corporate Officers

48. Respondent was not substantially justified in penalizing Petitioner for failing to have workers' compensation coverage for all of the corporate officers. According to Ms. Hedges, she personally delivered the exemption application forms to Respondent's office in 2005. Ms. Hedges did not know why Respondent had not processed all of them.

49. Ms. Newcomer did nothing more than check Respondent's database to confirm or deny Petitioner's claim that all corporate officers had applied for an exemption. A reasonable person with knowledge of Section 440.05(5), Florida Statutes, would have tried to determine whether the forms were delivered

but never processed, and therefore, effective in 30 days after delivery.

ORDER

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

ORDERED:

That the Department of Financial Services, Division of Workers' Compensation shall pay P.A.T. Auto Transport, Inc., an award of attorney's fees and costs in the amount of \$50,000.

DONE AND ORDERED this 16th day of November, 2010, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.