

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 10-7053
)
M AND M COOP CONSTRUCTION CO.,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 13, 2010, by video teleconference with hearing sites located in Tallahassee, Florida, and Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Holly R. Werkema, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Jackie Shores
Corporate Representative
M and M Coop Construction Co., Inc.
1401 Minnesota Avenue
Lynn Haven, Florida 32444

STATEMENT OF THE ISSUES

The issues are as follows: (a) whether Respondent failed to secure the payment of workers' compensation for its employees; and if so, (b) whether Petitioner assessed an appropriate penalty.

PRELIMINARY STATEMENT

On March 16, 2010, Petitioner, Department of Financial Services, Division of Workers' Compensation (Petitioner), issued a Stop-Work Order and Order of Penalty Assessment against Respondent, M and M Coop Construction Co., Inc. (Respondent). The Stop-Work Order alleged that Respondent had failed to secure the payment of workers' compensation for its employees.

On March 16, 2010, Petitioner issued a Request for Business Records for Penalty Assessment Calculation.

On or about April 8, 2010, Petitioner provided Respondent with an Amended Order of Penalty Assessment. In a memorandum dated April 19, 2010, Respondent requested an administrative hearing to challenge the Stop-Work Order and Amended Order of Penalty Assessment. Petitioner subsequently amended the penalty assessment three additional times before referring the case to the Division of Administrative Hearings on August 4, 2010.

The parties filed a Joint Response to the Initial Order on August 11, 2010. On August 12, 2010, the undersigned issued a

Notice of Hearing by Video Teleconferencing, scheduling the hearing on October 13, 2010.

On October 5, 2010, Petitioner filed an Emergency Motion to Amend the Order of Penalty Assessment. The undersigned granted the motion on the record when the hearing commenced.

During the hearing, Petitioner presented the testimony of three witnesses. Petitioner offered 17 exhibits that were accepted as evidence.

Respondent presented the testimony of one witness. Respondent did not offer any exhibits as evidence.

The Transcript of the hearing was filed on November 5, 2010. Petitioner filed a Proposed Recommended Order on November 15, 2010. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

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 the requirements Chapter 440, Florida Statutes, requiring employers to secure the payment of workers' compensation for their employees.

2. At all times relevant here, Respondent has been an active Florida corporation. Respondent's business involves the

installation of acoustic ceiling tiles. Respondent's work in this regard constitutes construction.

3. On March 16, 2010, Carl Woodall, Petitioner's workers' compensation compliance investigator, conducted a random compliance check at a construction site. The site was located at 707 Jenks Avenue in Panama City, Florida.

4. Upon his arrival in the construction site, Mr. Woodall observed two individuals, Robin and Todd Calhoun, installing acoustic ceiling tiles in a commercial office building. The individuals informed Mr. Woodall that they were working for Jackie Shores. The individuals provided Mr. Woodall with contact information for Mr. Shores.

5. Mr. Woodall initially contacted Mr. Shores by phone. Later, Mr. Woodall and Mr. Shores spoke in person at the construction site. Mr. Shores informed Mr. Woodall that he was employed by Respondent as a job supervisor. Mr. Shores also identified Robin and Todd Calhoun as Respondent's employees.

6. Mr. Shores informed Mr. Woodall that Respondent used Southeast Employee Leasing for workers' compensation coverage, but that Robin and Todd Calhoun had not been signed up for coverage. Mr. Woodall then contacted George Kaspers from Southeast Employee Leasing to verify whether Respondent had secured workers' compensation for Robin and Todd Calhoun.

Mr. Kaspers confirmed that the Calhouns were not covered and that they did not have pending employee applications.

7. On March 16, 2010, Mr. Kaspers faxed Mr. Woodall a list of Respondent's employees that were covered by workers' compensation insurance. The list did not name the Calhouns.

8. Mr. Woodall next searched Petitioner's Coverage and Compliance Automated System (CCAS) for proof of a workers' compensation policy or officer exemptions. CCAS is a database that lists workers' compensation insurance policy information and all workers' compensation exemptions. The database did not list a current policy for Respondent or any valid exemptions.

9. Mr. Woodall also reviewed the website maintained by the Florida Department of State, Division of Corporations. The review showed that Respondent had been an active corporation since May 7, 2002.

10. Based on his investigation, Mr. Woodall determined that Respondent had not secured workers' compensation coverage for all of its employees as required by Chapter 440, Florida Statutes. On March 16, 2010, Petitioner issued, and served on Respondent, a Stop-Work Order and Order of Penalty Assessment, together with a Request for the Production of Business Records for Penalty Assessment Calculation.

11. The business records request applied to the period of March 17, 2007, through March 16, 2010. The request sought

production of payroll records, workers' compensation policy documents, employee leasing documents, temporary labor service documents, and workers' compensation exemption documents.

12. Mr. Woodall did not initially request subcontractor payroll and workers' compensation documentation from Respondent because he did not see any subcontractors on site. He did not want to burden Respondent with a request for more documents that were necessary to determine a proper penalty. However, after Respondent failed to produce the requested records within the required time-period, the case was assigned to Monica Moye, Respondent's penalty calculator, to prepare a penalty based on Respondent's imputed payroll.

13. On April 8, 2010, Mr. Woodall personally served an Amended Order of Penalty Assessment on Respondent. The Order assessed a total penalty in the amount of \$77,492.93 against Respondent for failure to secure workers' compensation coverage for its employees.

14. On April 5, 2010, and April 7, 2010, Respondent provided bank records with check images to Petitioner for the period of March 1, 2007, through March 31, 2010. Ms. Moye used these records to calculate a 2nd Amended Order of Penalty Assessment. The second order was based on payments to employees and subcontractors that were not covered by workers'

compensation insurance or an exemption there from. The second order assessed a penalty in the amount of \$13,018.63.

15. After service of the 2nd Amended Order of Penalty Assessment, Ms. Moye received additional information from Respondent regarding a subcontractor that was covered by its own workers' compensation policy. After confirming the subcontractor's coverage, Ms. Moye removed all payments to that subcontractor from Respondent's penalty. Mr. Woodall subsequently issued a 3rd Amended Order of Penalty Assessment to Respondent, assessing a penalty in the amount of \$7,105.35.

16. Later, Ms. Moye received information from Respondent, indicating that two additional subcontractors had workers' compensation coverage for their employees. This information resulted in the issuance of a 4th Amended Order of Penalty Assessment, assessing a penalty in the amount of \$6,675.91.

17. Classification codes are four digit codes assigned to occupation by the National Council on Compensation Insurance, Inc. (NCCI) to assist in the calculation of workers' compensation insurance premiums. The codes are listed in the Scopes® Manual, which Petitioner has adopted by rule.

18. After discovery was completed in this case, Petitioner determined that some of Respondent's employees had been assigned an improper construction classification code of 5348 on the 4th Amended Order of Penalty Assessment. Code 5348 encompasses

ceramic tile, indoor stone, and marble installation. The proper code for Respondent's employees was 5020, which encompasses the installation of suspended acoustical ceilings.

19. Based on information provided by Respondent during discovery, Petitioner also determined that one of Respondent's clerical employees should be assigned classification code 8810 rather than construction code 5348. Additionally, Petitioner discovered that payments to two entities were payments for material rather than labor. Based on information learned during discovery, Petitioner prepared a 5th Amended Order of Penalty Assessment, assessing a total penalty in the amount of \$8,621.46.

20. To calculate the penalty of the 5th Amended Order of Penalty Assessment, Petitioner totaled the gross payroll paid to Respondent's employees and subcontractors that were not covered by workers' compensation for each period of non-compliance. Respondent conceded that all of the individuals and entities listed on the penalty worksheet performed services for Respondent during the time periods listed. Respondent also conceded that the gross payroll amounts were correctly calculated, that none of the individuals listed had secured an exemption, and that none of the payments to employees or subcontractors included in the penalty calculation were covered by a workers' compensation policy.

21. Approved manual rates are established by NCCI and adopted by Petitioner. The approved manual rates are calculated upon the risk assigned to the type of employment reflected by each classification code.

22. Using the penalty calculation worksheet, Petitioner divided the gross payroll amount for each employee and subcontractor in each period of non-compliance by 100 and multiplied that figure by the approved manual rate for the classification code assigned to that employee or subcontractor. The product was the amount of workers' compensation premium Respondent should have paid for each employee and subcontractor if Respondent had been compliant.

23. The premium amounts were then multiplied by 1.5 to arrive at the penalty for each employee and subcontractor. The penalties for each employee and subcontractor for each period of non-compliance were then added together to come up with a total penalty of \$8,621.48.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010).

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

26. 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.

27. 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."

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

29. "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(17)(b)2., Fla. Stat.

30. 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. This definition includes "[a]ll persons who are being paid by a construction contractor as a

subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of workers' compensation coverage." See § 440.02(15)(c)2., Fla. Stat.

31. "Construction industry" is defined as "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land." See § 440.02(8), Fla. Stat. Section 440.02(8), Florida Statutes, further provides that "[t]he division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section." Pursuant to this statutory authority, Petitioner has adopted Florida Administrative Code Rule 69L-6.021, which adopts the definitions found in the Scopes® Manual.

32. Florida Administrative Code Rule 69L-6.021(1) lists workplace operations that fall within the statutory definition of "construction industry" and includes the Scopes® Manual's classification code 5020, acoustic ceiling installation. In this case, Respondent's business involved acoustic ceiling installation.

33. 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.

34. Clear and convincing evidence indicates that Respondent was required to secure the payment of workers' compensation coverage for its employees and subcontractors 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. See also § 440.38(1), Fla. Stat. Section 440.107(2), Florida Statutes, states that "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

35. Clear and convincing evidence shows that Respondent failed to secure the payment of workers' compensation for all of its employees and subcontractors as required by Chapter 440, Florida Statutes, and that Petitioner assessed an appropriate penalty for this violation. Petitioner is required by Section 440.107(7)(d)1., Florida Statutes, to

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 period 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.

There is no authority for Petitioner to reduce the amount of the penalty.

36. Here, Petitioner proved by clear and convincing evidence that Respondent was assessed a penalty only for payment to employees and statutory employees that were not covered by workers' compensation insurance. Respondent owes \$8,621.46 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, enter a final order, affirming, approving, and adopting the 5th Amended Order of Penalty Assessment.

DONE AND ENTERED this 10th day of December, 2010, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
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 10th day of December, 2010.

COPIES FURNISHED:

Jackie Shores
M & M Coop Construction Co., Inc.
1401 Minnesota Avenue
Lynn Haven, Florida 32444

Holly R. Werkema, 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

Benjamin Diamond, General Counsel
Department of Financial Services'
The Capitol, Plaza Level 11
Tallahassee, Florida 32399

Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

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.