

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

|                                |   |                   |
|--------------------------------|---|-------------------|
| DEPARTMENT OF FINANCIAL        | ) |                   |
| SERVICES, DIVISION OF WORKERS' | ) |                   |
| COMPENSATION,                  | ) |                   |
|                                | ) |                   |
| Petitioner,                    | ) |                   |
|                                | ) |                   |
| vs.                            | ) | Case No. 10-10012 |
|                                | ) |                   |
| DEREK EYRE,                    | ) |                   |
|                                | ) |                   |
| Respondent.                    | ) |                   |
| _____                          | ) |                   |

RECOMMENDED ORDER

Administrative Law Judge Eleanor M. Hunter held a final hearing in this case on March 15, 2011, by video teleconference between sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Paige Shoemaker, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Derek Eyre, pro se  
18330 Jupiter Landings Drive  
Jupiter, Florida 33458

STATEMENT OF THE ISSUES

The issues are whether Respondent failed to provide workers' compensation insurance coverage and/or an exemption as required by law, as set forth in the second Amended Order of Penalty Assessment dated March 11, 2011, and, if so, what penalty, if any, should be assessed against him.

PRELIMINARY STATEMENT

In a Stop-Work Order issued September 16, 2010, Petitioner directed Respondent to stop work and cease all business operations in Florida for allegedly failing to obtain workers' compensation insurance as required in chapter 440, Florida Statutes (2010).<sup>1</sup> Respondent was advised, in the Stop-Work Order, that a penalty would be assessed against him "[e]qual 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."

§ 440.107(7) (d)1., Fla. Stat.

Respondent timely requested an administrative hearing, and on November 2, 2010, Petitioner transmitted the file to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the hearing. In an Amended Order of Penalty Assessment issued by Petitioner on October 29, 2010, Respondent was notified that the proposed assessed penalty against him was \$16,082.82. In a second Amended Order of Penalty Assessment, issued on March 11, 2011, Petitioner reduced the amount of the penalty to \$12,247.62. An Order granting the parties' stipulated motion to accept the modified charging document was entered on the same date, March 11, 2011.

Pursuant to notice, the final hearing in this case was held on March 15, 2011. At the hearing, Petitioner presented the testimony of Mark Marks, Kathleen Patracco,<sup>2</sup> and Lydia Ribacchi. Petitioner's Exhibits 2 through 6, and 8 through 13, were offered and received in evidence. Respondent testified in his own behalf and did not offer any exhibits.

The one-volume Transcript of the proceedings was filed with the DOAH on April 4, 2010. Petitioner filed its Proposed Findings of Fact and Conclusions of Law on April 13, 2011. Respondent did not file any post-hearing pleadings.

#### FINDINGS OF FACT

1. Petitioner, the Department of Financial Services, Division of Workers' Compensation ("DFS"), is the state agency responsible for enforcing section 440.107, Florida Statutes. That section mandates, in relevant part, that employers in Florida secure workers' compensation insurance coverage for their employees. § 440.107(3), Fla. Stat.

2. Respondent, Derek Eyre, is a sole proprietor who works as a handyman, making home repairs and improvements in the area of Jupiter, Florida, where he lives. Mr. Eyre always has maintained valid city and county licenses to operate his business. The parties agree that the type of work performed by Mr. Eyre is properly categorized as construction industry work.

3. In 1998, Petitioner's predecessor, the Department of Labor and Employment Security, Division of Worker's Compensation issued a "Construction Industry Certificate of Exemption from Workers' Compensation Law" to Mr. Eyre, a sole proprietor, as the "exempt individual" effective May 17, 1998.

4. The parties agree that at the time it was issued to Mr. Eyre, the certificate had no expiration date and was a so-called "lifetime" exemption that "[a]t the time of issuance, . . . did not expire unless revoked by the exemption holder." See Department of Financial Services' Proposed Recommended Order (PRO) in DOAH Case No. 10-10012; and § 440.05(3), Fla. Stat. (1997).<sup>3</sup>

5. Chapters 98-125 and 98-174, Laws of Florida, amending the provisions of the Workers' Compensation Law, became effective on May 22, 1998.

6. Chapter 98-125 authorized the predecessor agency to establish forms and procedures related to exemptions.

7. Chapter 98-174 provided an expiration date for exemptions by amending section 440.05(6), Florida Statutes (1997), as follows:

A construction industry certificate of election to be exempt which is issued in accordance with this section shall be valid for 2 years after the effective date stated thereon. Both the effective date and the expiration date must be listed on the face of the certificate by the division. The

construction industry certificate must expire at midnight, 2 years from its issue date, as noted on the face of the exemption certificate. Any person who has received from the division a construction industry certificate of election to be exempt which is in effect on December 31, 1998, shall file a new notice of election to be exempt by the last day in his or her birth month following December 1, 1998. A construction industry certificate of election to be exempt may be revoked before its expiration by the sole proprietor, partner, or officer for whom it was issued or by the division for the reasons stated in this section. At least 60 days prior to the expiration date of a construction industry certificate of exemption issued after December 1, 1998, the division shall send notice of the expiration date and an application for renewal to the certificateholder at the address on the certificate.

(Emphasis added)

8. Although not required to do so for exemptions issued before December 1, 1998, DFS's predecessor sent form letters dated October 9, 1998, to all holders of exemptions notifying them that their exemptions would expire, and that the exemption filing fee had been increased from \$25 to \$50.

9. The letter was sent to the address for Mr. Eyre maintained in the Workers' Compensation exemption database, but it was not sent by registered mail. Mr. Eyre did not receive the letter.

10. On September 16, 2010, Kathleen Patracco, an investigator for DFS was conducting a routine compliance "construction sweep" in Martin County, Florida, when she saw a

worker carrying paint and a paintbrush from a van. She found the worker on a ladder painting the fascia on the home.

11. Ms. Patraco took pictures of a worker, the work being done, and of the van. The van, as pictured, had the following words painted on its exterior, "The Repair Genie," "Licensed," and "Bonded."

12. Ms. Patraco interviewed the worker, Frank Weinsheimer, who told her that he worked for Mr. Eyre and gave her Mr. Eyre's telephone number. Ms. Patraco also spoke to the homeowner who produced the contract with Mr. Eyre for the work being performed at the home. Ms. Patraco photographed the contract.

13. When she telephoned Mr. Eyre, he told Ms. Patraco that he did not have workers' compensation insurance coverage for Mr. Weinsheimer, but claimed to have had an exemption for himself.

14. Mr. Eyre told Ms. Patraco that Mr. Weinsheimer worked for him "on and off" at a "part-time hourly rate." When she checked the state database, Ms. Patraco found that Mr. Eyre did not have workers' compensation coverage for a worker. During the final hearing, however, Mr. Eyre conceded that he now knows that he should have had workers' compensation insurance coverage for Mr. Weinsheimer, and is not contesting that portion of the assessed penalty.

15. Ms. Patraco also determined that Mr. Eyre's worker's compensation exemption for himself had expired on December 31, 1999. As a result, Ms. Patraco requested and received a Stop-Work Order that was issued on September 16, 2011. She posted it at the job site that day and hand delivered to Mr. Eyre at her office on the following day.

16. On September 17, 2010, in addition to delivering the Stop-Work Order, Ms. Patraco also issued a business records request to Mr. Eyre. Based on a review of those records, the initial assessed penalty was \$16,082.82.

17. DFS received additional business records from Mr. Eyre with his apparent explanation of records and expenditures, intended, in part, to determine his salary, but Mr. Eyre did not pay himself a salary.

18. DFS attempted to calculate the penalty by multiplying payroll by the manual rate of pay for the National Counsel for Insurance Compensation's classification code, in this case code number 5474 for construction work, including painting, for the three-year period without coverage to determine the premium that would have been paid. As authorized by section 440.107(7)(d)1., the penalty is determined by multiplying the premium that should have been paid for the three-year period of non-compliance by the 1.5 percent.

19. Using the statutory formula and Mr. Eyre's records, DFS reduced the penalty to \$12,247.62.

20. The portion of the premium and 1.5 percent penalty for failing to provide worker's compensation coverage for Mr. Weinsheimer for each day he worked is as follows: \$23.36, \$20.49, \$6.30, \$24.45, \$10.80, and \$17.84, or a total of \$103.24 for the period of non-compliance, or the greater penalty of \$1,000, pursuant to section 440.107(7)(d)1.

21. Although Mr. Eyre thought his Certificate of Exemption was valid at the time the Stop-Work Order was issued, it was not. It had, as noted, expired by operation of law on December 31, 1999, as a result of the 1998 amendment to section 440.05(6), Florida Statutes.

22. Mr. Eyre is also no longer eligible to receive an exemption as a sole proprietor. Currently, section 440.02(15)(c)4. defines "[a] sole proprietor who engages in the construction industry" as an employee.

23. Of the intended assessed penalty of \$12,247.62, after subtracting \$103.24 for the failure to cover Mr. Weinsheimer, a balance of \$12,144.38 is attributable to the unpaid premium and penalty for Mr. Eyre. Regarding how the penalty was calculated, the only explanation offered by the witness for DFS was "[y]ou review the records looking for remuneration to the employees" and "there were payments found in Mr. Eyre's records." DFS's



exhibits indicate that Mr. Eyre provided the sole explanation of payments, including the appropriate deductions for personal, supply, and material expenses that should not have been included in his payroll to himself.

24. Mr. Eyre disputed the accuracy of DFS's calculations because he used funds from his account for both business and personal expenses for his family and himself, sometimes making cash payments. The evidence is insufficient to establish that DFS' calculations, which depended solely on Mr. Eyre's explanations to DFS, are clearly correct.

25. DFS has clearly demonstrated that Mr. Eyre is ineligible to reapply for an exemption under chapter 440, Florida Statutes, unless or until he has established a corporation and become an employee of that corporation, or has paid workers' compensation coverage for himself.

26. DFS has, as conceded by Mr. Eyre, clearly established that the Stop-Work Order issued against Mr. Eyre should not be lifted until he has paid a penalty of \$1,000, for failing to provide coverage for his worker.

#### CONCLUSIONS OF LAW

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

28. Because an administrative fine deprives the person or corporation fined of substantial rights in property, such fines are penal in nature. Respondent has the burden to prove in this case, by clear and convincing evidence, that Petitioner violated the Workers' Compensation Law during the relevant period, by failing to be in compliance with the coverage requirements of the law, and that the penalty assessments are correct. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, provided a "workable definition of clear and convincing evidence" and held that

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 testimony must be precise and explicit and the witnesses must be lacking 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

30. According to section 440.02(14)(a), Mr. Weinsheimer clearly met the definition of an employee of Mr. Eyre, as follows:

"Employee" means 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, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

31. Pursuant to section 440.029(14)(c), a sole proprietor actively engaged in the construction industry is also defined as an employee unless he elects to be excluded from the definition of employee by filing a notice with the Division of Workers' Compensation. Allied Trucking of Fla., Inc. v. Lanza, 826 So. 2d 1052, (Fla. 1st DCA 2002), rev. denied, (Fla. 2003). It is, therefore, also clear that in the absence of a valid election to be exempt, the statute treats a sole proprietor, like Mr. Eyre, as an employee for workers' compensation purposes. Smith v. Larry Rice Constr., 730 So. 2d 336, (Fla. 1st DCA 1999).


32. There is no dispute in this case, that Mr. Weinsheimer and Mr. Eyre were employees for whom workers' compensation insurance coverage should have been provided. § 440.107, Fla. Stat.

#### 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 and adopting the Stop-Work Order, and affirming and assessing a penalty against Derek Eyre in the amount of one

thousand dollars (\$1,000.00), pursuant to section 440.107(7)(d)1., to be paid into the Workers' Compensation Administration Trust Fund.

DONE AND ENTERED this 13th day of May, 2011, in Tallahassee, Leon County, Florida.

  
ELEANOR M. HUNTER  
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 13th day of May, 2011.

ENDNOTES

<sup>1/</sup> All references in this Order to Florida Statutes are to the 2010 edition unless indicated otherwise.

<sup>2/</sup> "Patraco" is spelled as it is in the Official Transcript, filed April 4, 2011, not "Patrecco" as spelled in Petitioner DFS' PRO.

<sup>3/</sup> In 1997, subsection 440.05(3) provided that:  
(3) Each sole proprietor, partner, or officer of a corporation who is actively engaged in the construction industry and who elects an exemption from this chapter or who, after electing such exemption, revokes that exemption, must mail a written notice to such effect to the division on a form prescribed by the division. The notice of election to be exempt from the provisions of this chapter must be notarized and under

oath... Upon receipt of the notice of the election to be exempt and a determination that the notice meets the requirements of this subsection, the division shall issue a certification of the election to the sole proprietor, partner, or officer... The certification of the election is valid until the sole proprietor, partner, or officer revokes her or his election. Upon filing a notice of revocation of election, a sole proprietor, partner, or officer who is a subcontractor must notify her or his contractor.

COPIES FURNISHED:

Julie Jones, CP, FRP, Agency Clerk  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0390

Paige Billings Shoemaker, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

Derek Eyre  
18330 Jupiter Landings Drive  
Jupiter, Florida 33458

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.