

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-0243
)
SERGIO A. BALSINDE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause came on for a formal hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, in Gainesville, Florida, on March 2, 2011.

APPEARANCES

For Petitioner: Timothy L. Newhall, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Sergio A. Balsinde, pro se
Olivia Balsinde^{1/}
3819 Pepper Tree Lane, Apt. No. 3101
Wildwood, Florida 34785

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent, Sergio A. Balsinde ("Respondent") is entitled to elect to be

exempt from the workers' compensation insurance coverage requirements of chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On February 8, 2007, a Stop-Work and Order of Penalty Assessment was issued and served on Balco Construction and Development, Inc. ("Balco") by the Department of Financial Services, Division of Workers' Compensation ("Department"). The total penalty assessed against Balco, as reflected in the Second Amended Order of Penalty Assessment issued on July 18, 2008, was \$32,452.08. On September 23, 2008, Balco entered into an Amended Payment Agreement Schedule with the Department that called for Balco to make 60 monthly payments, each due on the first day of the month. Balco ceased making payments in January 2009. On October 26, 2009, the Department issued an Order Reinstating Stop-Work Order on Balco, reinstating the February 8, 2007, Stop-Work Order. The Order Reinstating Stop-Work Order was served on Balco on October 30, 2009.

On November 29, 2010, the Department received a Notice of Election to be Exempt from Florida's Workers' Compensation Law, in the name of Sergio A. Balsinde as a corporate officer and 10 percent owner of LC Cable Corp. The election of exemption indicated that LC Cable Corp was engaged in the construction industry and listed "Certified Electrical Contractor" as the scope of business or trade.

Upon review of the election of exemption, the Department discovered that Mr. Balsinde is also a corporate officer and owner of Balco, and that the February 8, 2007, Stop-Work Order was still in effect against Balco. A corporate officer is ineligible for an election to be exempt if that officer is affiliated with a "person who is delinquent in paying a Stop-Work Order and Penalty Assessment Order issued pursuant to section 440.107, Florida Statutes, or owed pursuant to a court order." § 440.105(15), Fla. Stat. (2010). The Department accordingly denied Mr. Balsinde's election of exemption on December 6, 2010, and contemporaneously served a Notice of Denial on Mr. Balsinde.

On December 28, 2010, Mr. Balsinde filed a Petition for Administrative Hearing to contest the Department's decision. The petition alleged that Mr. Balsinde was entitled to an exemption because the Order Reinstating Stop-Work Order was discharged in a Chapter 7 bankruptcy proceeding filed by Mr. Balsinde as an individual. The petition also requested review of the Order Reinstating Stop-Work Order issued by the Department on October 26, 2009, and served on Mr. Balsinde on October 30, 2009.

On January 14, 2011, the Department referred the petition to the Division of Administrative Hearings for the assignment of an administrative law judge and the conduct of a formal hearing.

The hearing was scheduled for March 2, 2011, on which date the hearing was held.

At the hearing, the Department presented the testimony of Mark Francis Mark, the Department employee who managed the exemption program. The Department's Exhibits 1 through 9 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of his wife, Olivia Balsinde. Respondent offered no exhibits into evidence.

A Transcript of the final hearing was filed at the Division of Administrative Hearings on March 24, 2011. The Department timely filed a Proposed Recommended Order on April 4, 2011. Respondent did not file a proposed recommended order.

On April 19, 2011, well after the time for filing proposed recommended orders, Mr. Balsinde filed a letter requesting an extension of the period of time for filing proposed recommended orders. The request is hereby denied.

Unless otherwise stated, all statutory references are to the 2009 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of the workers' compensation law that

employers secure the payment of workers' compensation insurance coverage for their employees and corporate officers.

§ 440.107(3).

2. A corporate officer may elect to become exempt from the workers' compensation insurance coverage requirements of chapter 440 by complying with the election of exemption methodology set forth in section 440.05. If the election of exemption meets the criteria of section 440.05, then the Department is required to issue a certification of the election to be exempt to the officer. § 440.05(3).

3. A corporate officer is ineligible for an exemption if he is affiliated with "a person who is delinquent in paying a stop-work order and penalty assessment order issued pursuant to section 440.107, or owed pursuant to a court order."

§ 440.05(15).

4. Balco was originally incorporated in 1985. Mr. Balsinde has been a corporate officer of Balco since at least April 28, 2003, the date of the earliest Balco annual report entered into evidence.

5. Mr. Balsinde is also a corporate officer and 10 percent owner of LC Cable Corp.

6. The Department issued and served a Stop-Work Order and Order of Penalty Assessment on Balco on February 8, 2007. At the final hearing in the instant case, Mr. Balsinde testified

that the Stop-Work Order and Order of Penalty Assessment had been erroneously entered against his company. He testified that the uninsured workers in question did not even work for Balco. Mr. Balsinde testified that he had attempted to rectify the error with the Department, but was unable to make the Department acknowledge its mistake.

7. Whatever the merits of Mr. Balsinde's factual claim, neither he nor any other representative of Balco formally challenged the Stop-Work Order and Order of Penalty Assessment. Having long ago become final, the Stop-Work Order and Order of Penalty Assessment cannot be contested in this proceeding.

8. On September 23, 2008, Balco entered into an Amended Payment Agreement Schedule with the Department that called for Balco to make 60 monthly payments, each due on the first day of the month, and a suspension of the Stop-Work Order. After Balco ceased making payments according to the schedule, the Department issued an Order Reinstating Stop-Work Order on October 26, 2009. The reinstatement order was served on Mr. Balsinde on October 30, 2009.

7. As of October 26, 2009, the unpaid balance of the penalty assessment against Balco was \$22,236.38, which was ordered due immediately by the reinstatement order. As of the date of the hearing in this case, the balance remained unpaid.

8. Neither Mr. Balsinde nor any other representative of Balco filed a timely request for a review proceeding to challenge the reinstatement order. Balco did not appeal the reinstatement order.

9. On July 22, 2010, a final decree in Chapter 7 bankruptcy was entered on behalf of Mr. Balsinde by the United States Bankruptcy Court for the Southern District of Florida, in Case Number 10-18850-LMI.

10. The discharge in bankruptcy was received by Mr. Balsinde as an individual. Though the final decree listed the Department as an unsecured creditor and Balco as a business of the debtor, Balco did not receive a discharge in bankruptcy, nor did the company file a bankruptcy petition subsequent to the issuance of the reinstatement order by the Department.

11. Mr. Balsinde submitted a Notice of Election to be Exempt to the Department on November 29, 2010, as an officer of LC Cable Corp., a corporation operating in the construction industry.

12. The Department reviewed Mr. Balsinde's application to determine his eligibility to elect the exemption. The Department's Coverage and Compliance Automated System indicated that Mr. Balsinde is the officer of a corporation that is delinquent in paying a Stop-Work Order and Order of Penalty Assessment, which makes him ineligible for an exemption.

13. The Department issued a Notice of Denial of Mr. Balsinde's election of exemption on December 6, 2010.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

15. The uncontested Order Reinstating Stop-Work Order issued on October 26, 2009, constituted final agency action pursuant to section 440.107(7)(a). The order included a "Notice of Rights" informing Balco of its right to seek review of the final order pursuant to section 120.68. Neither Mr. Balsinde nor any other representative of Balco sought appellate review of the order. Therefore, this tribunal lacks jurisdiction to review any challenge to the Order Reinstating Stop-Work Order or the underlying Stop-Work Order and Order of Penalty Assessment issued on February 8, 2007.

16. As the party seeking affirmative relief, Respondent has the burden to demonstrate entitlement to the relief requested by a preponderance of the evidence. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 835 (Fla. 1993); Dep't of Transp. v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this proceeding, Mr. Balsinde seeks to establish that he qualifies for an election of exemption from the workers' compensation insurance coverage requirements of chapter 440.

Section 440.05 sets forth the requirements for an election of exemption as follows, in relevant part:

(3) Each officer of a corporation who is engaged in the construction industry and who elects an exemption from this chapter. . . must mail a written notice to such effect to the department on a form prescribed by the department. . . .Upon receipt of the notice of the election to be exempt, receipt of all application fees, and a determination by the department that the notice meets the requirements of this subsection, the department shall issue a certification of the election to the officer, unless the department determines that the information contained in the notice is invalid. The department shall revoke a certificate of election to be exempt from coverage upon a determination by the department that the person does not meet the requirements for exemption or that the information contained in the notice of election to be exempt is invalid. . .

* * *

(15) Any corporate officer who is an affiliated person of a person^[2/] who is delinquent in paying a stop-work order and penalty assessment order issued pursuant to section 440.107, or owed pursuant to a court order, is ineligible for an election of exemption. The Stop-Work Order and Penalty Assessment shall be in effect against any such affiliated person. As used in this subsection, the term "affiliated person" means:

* * *

(f) Any officer, director, trustee, partner, owner, manager, joint venturer, or employee of such other person or a person performing duties similar to persons in such positions. . .

17. Mr. Balsinde's application failed to satisfy the exemption eligibility requirements set forth in the quoted statutory provisions. The evidence established that Mr. Balsinde is a corporate officer of Balco and that Balco is delinquent in paying a Stop-Work Order and Penalty Assessment Order. Therefore, Mr. Balsinde is an "affiliated person" of a person who is delinquent in paying a Stop-Work Order and Penalty Assessment Order and is ineligible for an exemption.

18. Mr. Balsinde argued that the Order Reinstating Stop-Work Order against Balco was discharged by the final decree in his personal bankruptcy case. The evidence on this point was ambiguous at best. The final decree included the Department in the list of unsecured creditors and named Balco as a business of the debtor, but the final decree made no specific finding that the Stop-Work Order and Order of Penalty Assessment against Balco were discharged.

19. Even if Mr. Balsinde was discharged as to any personal liability for the Balco debt, the liability of Balco as a corporate entity would be unaffected unless and until Balco itself filed for bankruptcy. See Dep't of Prof'l Reg., Div. of Real Estate v. Stephen P. McCrady, Case No. 86-1145 (DOAH August 19, 1986). Mr. Balsinde would thus remain an affiliated person of a person who is delinquent in paying a Stop-Work Order and Penalty Assessment Order.

20. Further, it is questionable whether the Balco debt was dischargeable at all in Mr. Balsinde's personal bankruptcy proceeding. The Order Reinstating Stop-Work Order imposed an administrative fine and was punitive in nature. See Dep't of Banking & Fin. v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

21. 11 U.S.C. § 523(a) provides, in pertinent part:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

* * *

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss....

22. The nondischargeability of fines and penalties is self-executing under 11 U.S.C. § 523(c), meaning that such fines and penalties are "automatically nondischargeable and it is not necessary for either the state or the debtor to file a proceeding to request the determination of dischargeability." In re Honeycutt, 228 B.R. 428, 430 (Bankr. E.D. Ark. 1998). The Department had no duty to object in Mr. Balsinde's bankruptcy proceeding in order to preserve the debt imposed by the Order Reinstating Stop-Work Order.

23. In conclusion, it appears that even if Balco itself had received a discharge in bankruptcy, the Stop-Work Order and Order of Penalty Assessment, as reinstated, would have remained in effect as an exception to discharge pursuant to 11 U.S.C. § 523(a)(7).

24. The undersigned pretends to no great depth of expertise in the field of bankruptcy law. The above discussion is intended not as the final word on whether the debt owed to the Department could be discharged by either Mr. Balsinde or Balco, but as an explanation of the presumptions that Mr. Balsinde was required to overcome in order to establish entitlement to the election of exemption in this case.

25. Mr. Balsinde has failed to demonstrate that he is entitled to an election of exemption from the workers' compensation insurance coverage requirements of chapter 440, Florida Statutes.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, finding that Sergio A. Balsinde is ineligible for an election of exemption under section 440.05.

DONE AND ENTERED this 18th day of May, 2011, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2011.

ENDNOTES

^{1/} Olivia Balsinde is the wife of Sergio Balsinde, whose English proficiency is limited. Without objection from counsel for Respondent, Ms. Balsinde was allowed to assist her husband at the hearing.

^{2/} "'Person' means individual, partnership, association, or corporation, including any public service corporation."
§ 440.02(23).

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.