

**FILED**

JAN 30 2012

Chief Financial Officer  
Docketed by: BAR



CHIEF FINANCIAL OFFICER  
JEFF ATWATER  
STATE OF FLORIDA

**FILED**

2012 JAN 31 A 11: 16

DIVISION OF  
ADMINISTRATIVE  
HEARINGS  
CASE NO. 10-176-1A-WC

IN THE MATTER OF  
  
MUBARAK TRADING CORPORATION, INC.

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Written Report and Recommendation entered on December 19, 2011, attached hereto as Exhibit A.

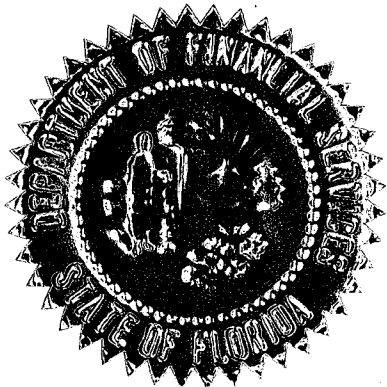
Pursuant to Section 120.57(2), Florida Statutes an informal hearing was held before Hearing Officer Alan J. Leifer, via telephonic conference call.

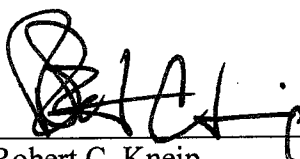
After review of the record, and admitted exhibits, and being otherwise fully apprised in all material premises:

IT IS HEREBY ORDERED that the Findings of Fact of the Hearing Officer are adopted in full as the Department's Findings of Fact, and the Conclusions of Law reached by the Hearing Officer are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Second Amended Order of Penalty Assessment is affirmed, and that Mubarak Trading Corporation, Inc. shall pay to the Department the assessed penalty of \$16, 429.44, within thirty (30) days from the date hereof.

DONE and ORDERED this 30<sup>th</sup> day of January, 2012.



  
Robert C. Kneip  
Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, at 612 Larson Building, Tallahassee, Florida 32399-0390, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

Christopher O. Marsh, Econotax, Representative for  
Mubarak Trading Corp., Inc.  
Jamila Georgette Gooden, Attorney for the Department  
Alan J. Leifer, Hearing Officer

IN THE MATTER OF:

FILED

MUBARAK TRADING CORPORATION, INC. 2012 JAN 31 A 11 CASE NO.: 10-176-1A

WRITTEN REPORT AND RECOMMENDATION

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

THIS CAUSE came to be considered via a telephonic informal hearing pursuant to the provisions of Section 120.57(2), Florida Statutes, and Rule 28-106.215, Florida Administrative Code. The purpose of the proceeding was to receive evidence and testimony as to whether the Florida Department of Financial Services, Division of Workers' Compensation (hereinafter referred to as the "Respondent" "Division" or the "Department") acted with authority and pursuant to Florida law when it imposed a Stop Work Order and Second Amended Order of Penalty Assessment upon Mubarak Trading Corporation, Inc. (hereinafter referred to as the "Petitioner"), for failing to maintain workers' compensation insurance on behalf of its' employees working in a neighborhood food store.

APPEARANCES

Christopher O. Marsh, Econotax  
139 Beal Parkway SE, Ste. 102  
Fort Walton Beach, Florida 32548

Representative for Mubarak Trading Corp, Inc.

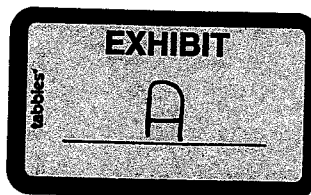
Jamila Georgette Gooden, Esq.  
Florida Department of Financial Services  
Division of Legal Services  
Tallahassee, Florida 32399-4429

Attorney for the Florida Department of Financial  
Services, Division of Workers' Compensation

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DIVISION OF LEGAL SERVICES  
TALLAHASSEE, FLORIDA

ISSUES

The Principal issues in this matter are whether the Department of Financial Services, Division of Workers' Compensation acted appropriately and within its' statutory authority when



it entered the Second Amended Order of Penalty Assessment and Stop-Work Order against the Petitioner for failing to secure workers' compensation insurance for their employees when required by Florida law, and whether any provisions of the Florida Workers' Compensation Law provide for the mitigation or rescission of penalties against the Petitioner.

### **PRELIMINARY STATEMENT**

This proceeding arose out of the requirement in Florida workers' compensation law that employers must secure the payment of workers' compensation insurance for the protection of their employees. The Petitioner in this matter is a Florida corporation currently doing business as a neighborhood food and convenience store in Fort Walton Beach, Florida. On April 26, 2011, Larry Eaton, a Compliance Investigator for the Florida Department of Financial Services, Division of Workers' Compensation conducted a random job site workers' compensation compliance investigation at the Petitioner's place of business. After concluding the Petitioner had four (4) employees and did not maintain workers' compensation insurance, the Department issued a Stop-Work Order and delivered a request for the production of business records. The Petitioner and their accountant cooperated with the Department's investigation and provided records that were used to determine the mandated statutory monetary penalty for failing to maintain workers' compensation insurance. The Petitioner then executed a penalty payment plan with the Department and also came into compliance with Florida's Workers' Compensation Law. The Petitioner has consistently objected to the Department's mandated statutory penalty as excessive, in violation of both the Florida and Federal Constitution, and contrary to the "principle of proportionality".

The Department originally referred this matter to this Hearing Officer for a F.S. 120.57(2) informal hearing, but that matter was closed when the Parties agreed a disputed issue

of fact existed. This matter was then forwarded to the Florida Division of Administrative Hearings to hold a formal hearing pursuant to F.S. 120.57(1), and after discovery, the Administrative Law Judge closed his file after a finding there were no disputed issues of material fact. This matter was again assigned to this Hearing Officer to hold a telephonic informal hearing pursuant to Section 120.57(2), Florida Statutes, which occurred on November 1, 2011. Both Parties timely submitted Proposed Recommended Orders.

### EXHIBITS AND WITNESSES

The Department submitted Eleven (11) Exhibits that are admitted into evidence without objection and include the following:

- Respondents Exhibit 1: A copy of the Petitioner's corporate status as contained within the Florida Secretary of State Records, dated April 26, 2010, the same day as the Departments random workers' compliance Investigation.
- Respondent's Exhibit 2: A two (2) page April 26, 2010, printout from the Department's Financial Services Coverage and Compliance Automated System ("CCAS") database for Mubarak Trading Corporation, Inc. reflecting no evidence of workers' compensation insurance coverage and no exemptions from coverage.
- Respondent's Exhibit 3: A copy of the Department's hand delivered April 26, 2010 Stop-Work Order.
- Respondents Exhibit 4: A copy of the Department's hand delivered April 26, 2011, Request for Production of Business Records for Penalty Assessment Calculation.
- Respondents Exhibit 5: A twenty six (26) page composite exhibit of the Petitioner's payroll and business records provided to the Department's workers' compensation compliance investigator.
- Respondent's Exhibit 6: A copy of the Department's May 12, 2010 Amended Order of Penalty Assessment hand delivered to the Petitioner on May 13, 2010.
- Respondent's Exhibit 7: A copy of the Department's Payment Agreement Schedule for Periodic Payment of Penalty executed by the Petitioner on May 13,

2010, wherein the Petitioner paid Eighteen Hundred (\$1,800.00) dollars as a ten percent (10%) down-payment on the Department's Administrative Penalty.

- Respondent's Exhibit 8: A copy of the Department's Order of Conditional Release From Stop-Work Order dated May 13, 2010, that was entered after the execution and payment reflected in Respondent's Exhibit 7.
- Respondent's Exhibit 9: A copy of the Department's Second Amended Order of Penalty Assessment dated February 2, 2011.
- Respondent's Exhibit 10: A five (5) page excerpt from the National Council on Compensation Insurance, Inc., ("NCCI") Scopes Manual description of Classification Code 8017 (Retail Store).
- Respondent's Exhibit 11: A forty-nine (49) page excerpt of NCCI approved Manual Rates for Classification Code 8017, used in the calculation of the Department's May 12, 2010, Amended Order for Penalty Assessment and February 2, 2011, Second Amended Order of Penalty Assessment.

The Petitioner submitted two (2) exhibits that were admitted into evidence and consist of the following:

- Petitioner's Exhibit 1: A two (2) page copy of the Petitioner's timely filed request for an informal proceeding to contest his administrative penalty, pursuant to Section 120.57(2), Florida Statutes.
- Petitioner's Exhibit 2. A four (4) page May 5, 2011, letter of tax representation from Mr. Chris Marsh and Mr. James Marsh, who provide accounting and tax services for and on behalf of Mubarak Trading Corporation, Inc.

The Department called two (2) witnesses to testify at the telephonic informal hearing, including Mr. Larry Eaton, a workers' compensation compliance investigator for the Department, and Mrs. Michelle Newcomer, a workers' compensation penalty calculator for the Department. The Petitioner offered the testimony of its' President Ziad ("Mike") Mubarak, as well as their tax advisors, Mr. Christopher Marsh, and Mr. James Marsh. Both Parties submitted Proposed Recommended Orders.

### FINDINGS OF FACT

1. Pursuant to Section 440.107, Florida Statutes, the Respondent is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees.
2. The Petitioner is a Florida corporation that first registered with the Florida Department of State on July 15, 1993, and was in good-standing on April 26, 2010, the date on which the Department conducted their random workers' compensation compliance investigation. (Respondent's Exhibit 1.)
3. On April 26, 2011, the Respondents Workers' Compensation Compliance Investigator, Mr. Larry Eaton, conducted a random compliance investigation at the Principal Business Address of Mubarak Trading Corporation, Inc., in Fort Walton Beach, Florida. (Respondent's Exhibit's 2, 3, and 4.)
4. Upon entering the Petitioner's work-place on April 26, 2011, the Department's compliance investigator conducted a field interview, as well as a database search to confirm the existence of four (4) employees of Mubarak Trading Corporation, Inc., and the lack of either workers' compensation insurance or exemptions from workers' compensation insurance coverage. (Respondent's Exhibits 2, 3, and 4.) Upon finding four (4) employees and no workers' compensation insurance coverage for those employees, the Department's compliance investigator hand delivered an April 26, 2010, Stop Work Order, as well as a Request for Production of Business Records for Penalty Assessment Calculation seeking payroll information for the past three (3) years. (Respondent's Exhibits 3 and 4.)

5. The Petitioner provided business records to the Department in response to their Request, and based on those records, an Amended Order of Penalty Assessment was hand delivered to the Petitioner on May 13, 2010, in the amount of Seventeen Thousand Seven Hundred Ninety One and 76/100 Dollars (\$17,791.76). (Respondent's Exhibits 5 and 6.) Under protest, and in the effort to remove the Department's April 26, 2010, Stop Work Order, the Petitioner executed a Payment Agreement Schedule for Periodic Payment of Penalty on May 13, 2010, paying Eighteen Hundred Dollars (\$1,800.00) to the Department as a ten percent (10%) down-payment of the administrative penalty. (Respondent's Exhibit 7.)
6. The Petitioner did not purchase a policy of workers' compensation insurance, but instead the Corporation's President obtained an exemption from the requirement of being covered by workers' compensation insurance. With only three (3) remaining non-exempt employees, Florida law does not require an underlying worker's compensation insurance policy, and Mubarak Trading Corporation, Inc., was no longer in violation of Florida Workers' Compensation Law.
7. Mrs. Michelle Newcomb, Penalty Calculator for the Florida Department of Financial Services, Division of Workers' Compensation, Bureau of Compliance, was assigned the task of calculating the statutory penalty to be assessed against Mubarak Trading Corporation, Inc., for failing to secure workers' compensation insurance. Utilizing NCCI Class Code 8017 for retail stores, the appropriate NCCI premium pages for Class Code 8017, and the documentation provided by the Petitioner, the Department calculated the mandated statutory penalty of Seventeen Thousand Seven Hundred Ninety One and 76/100 (\$17,791.76) in their May 12, 2010, Amended Order for Penalty Assessment



(Respondent's Exhibit 6, 10 and 11.) The Department's administrative penalty was ultimately adjusted downward to Sixteen Thousand, Four Hundred Twenty Nine and 44/100 Dollars (\$16,429.76), as reflected in the Department's February 2, 2011, Second Amended Order of Penalty Assessment. (Respondent's Exhibit 9.)

8. There are no disputed issues of material fact in this matter. The Petitioner's Proposed Recommended Order acknowledges "[t]he calculation of the Section 440.107(7)(d) penalty is not in question...." The Petitioner has consistently objected to the "excessive" amount of the Department's penalty, challenged the Department's authority to assess unconstitutional penalties, and argues the penalty assessed violates the "principle of proportionality."

#### CONCLUSIONS OF LAW

1. The Department of Financial Services has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(2), Florida Statutes.
2. There are no disputed issues of material fact in this proceeding and an informal proceeding pursuant to Section 120.57(2), Florida Statutes, is appropriate.
3. Pursuant to Sections 440.10, 440.107(2), and 440.38, Florida Statutes, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbitt, 546 So.2d 1185, 1187 (Fla. 5th DCA 1989). Consolidated Services, Inc., DOAH Case No. 08-5911 (2008).

4. "Securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code." Section 440.107(2), Florida Statutes (2008).
5. An employee is defined as "...any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment." Section 440.02(15)(a), Florida Statutes (2006). "Employee" includes any person who is an officer of a corporation and who performs services for remuneration...." Section 440.02(15)(b), Florida Statutes (2006).
6. Florida law defines "employment" as "any service performed by an employee for the person employing him or her," and the definition includes "[a]ll private employments in which four or more employees are employed by the same employer." Section 440.02(17)(a), (b)2., Florida Statutes (2006). However, the Florida Worker's Compensation Law provides that certain corporate officers in a non-construction industry can become exempt from the coverage requirements of Chapter 440, Florida Statutes, but must affirmatively make that election. Sections 440.02(15)(b), and 440.05, Florida Statutes, and Rule 69(L)-6.012(2), Florida Statutes. In this matter, the Petitioner's corporate President filed for and received an exemption from workers' compensation insurance coverage after the Department's April 26, 2010, site visit. When the corporate President became exempt from workers' compensation insurance, a total of three (3) nonexempt employees remained, which fell below the threshold of required employees for securing coverage. In a matter of minutes and without any cost, the Petitioner came into compliance with Florida's Workers' Compensation Law and that is central to their theory of "proportionality". More specifically, the Petitioner argues there is no logical

correlation or “proportionality” between the Seventeen plus Thousand Dollar administrative penalty and the costs associated with their coming into compliance with Florida’s Workers’ Compensation Law.

7. Mubarak Trading Corporation, Inc. is a corporation in the non-construction industry, and at the times relevant for the calculation of the monetary penalties in this matter, had four or more employees conducting business in Florida and is thus an “employer” for the purposes of Chapter 440, Florida Statutes.
8. The Division of Workers’ Compensation is the state agency authorized to enforce the statutory workers’ compensation coverage requirements. Pursuant to Section 440.107(3), Florida Statutes, “[t]he department shall enforce workers’ compensation coverage requirements,” and “the department shall have the power to: . . . (g) [i]ssue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.” Section 440.107(3), Florida Statutes (2008).
9. Section 440.107(7)(d)(1), Florida Statutes, provides that the Division:

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, whichever is greater.

Section 440.107(7)(d)(1), Florida Statutes (2008). This statutory provision mandates the Division assess a penalty in the amount indicated, and does not provide any authority for the Division to reduce the amount of the penalty.
10. Florida Administrative Code Rule 69L-6.030(1) (2006) provides that the Department must assess a penalty pursuant to Section 440.107(7)(d)(1), Florida Statutes, against an

employer who fails to secure the payment of workers' compensation on the date that the Department commences an investigation, but comes into compliance with the workers' compensation coverage requirements prior to the issuance of a stop-work order.<sup>1</sup>

11. Florida Administrative Code Rule 69L-6.027 adopts a penalty calculation worksheet for the Department's investigators to utilize "for purposes of calculating penalties to be assessed against employers pursuant to Section 440.107, F.S." Rule 69L-6.027(1), Florida Administrative Code (2007).
12. The Petitioner's penalty was correctly assessed by the Division at Sixteen Thousand Four Hundred Twenty Nine and 44/100 Dollars (\$16,429.44), pursuant to statute and rule. Petitioner concedes that the penalty has been correctly calculated. (*See Petitioner's Proposed Recommended Order.*)
13. By not providing for the payment of workers' compensation and securing workers' compensation insurance, Mubarak Trading Corporation, Inc., was in violation of Chapter 440 on April 26, 2010, and for the three (3) years preceding that date. The Department is thus justified in issuance of both the Stop Work Order and the Second Amended Order Penalty Assessment against Mubarak Trading Corporation, Inc. The fact that the Petitioner came into compliance with Florida Law **after** the Department's work-site visit, or would have obtained his exemption from coverage earlier had he known about it does nothing to change the fact Mubarak Trading Corporation, Inc., did not have workers' compensation insurance coverage on April 26, 2010, and for the three (3) years preceding that date, when such coverage was required by Florida Law.

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<sup>1</sup> The Petitioner questioned whether the Department's penalty calculator considered the fact the Petitioner's President worked part-time for other businesses as well as Mubarak Trading Corporation, Inc. The Department's Penalty Calculator testified the Petitioner's assessed penalty was based on payroll paid to the President, and his payroll from other businesses was not included.

14. The Department applied the proper methodology in computing the penalty, pursuant to the Penalty Calculation Worksheet adopted by reference in Rule 69L-6.027, Florida Administrative Code (2007). The Second Amended Order of Penalty Assessment in the amount of Sixteen Thousand Four Hundred Twenty Nine and 44/100 Dollars (\$16,429.44) is thus justified, within the Department's statutory authority, and appropriate. (See The Gardner Group, Inc., DOAH Case No. 09-004057 (2009); Rivera Construction of North Florida, LLC, DOAH Case No. 09-6215 (2010).
15. The imposition of administrative fines is penal in nature. Therefore, the Department must prove its case by clear and convincing evidence. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).
16. The Petitioner argues it was unaware the business was required to secure workers' compensation insurance or that if the corporate President obtained an exemption for workers' compensation insurance, the business did not have to purchase that insurance. The Petitioner testified it was simple and quick to obtain the exemption from coverage and that since the business no longer had to secure workers' compensation insurance to be in compliance with Florida law, the Sixteen Thousand Four Hundred Twenty Nine and 44/100 Dollars (\$16,429.44) penalty is abusively excessive. While it is unfortunate the Petitioner was unaware of the workers' compensation insurance requirements of Florida law and was not advised of such, the fact remains that on April 26, 2010, (the date of the Department's site visit) the Petitioner was not in compliance with Florida's Workers' Compensation Law. The fact that the Petitioner came into compliance **after** the

Department's investigation, is not relevant for the purposes of calculating a monetary penalty for non-compliance.

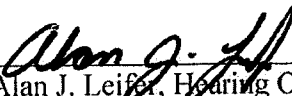
17. The Petitioner also consistently argued that the penalty provisions of Section 440.107(7)(d), Florida Statutes (2008), are contrary to both the Florida and Federal Constitutions. It is well established that Hearing Officers do not have the authority to make rulings on constitutional issues. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So2d 695, 699 (Fla. 1978). The Division has the duty of enforcing an employer's compliance with the requirements of Workers' Compensation Law. Section 440.107(3), Florida Statutes (2008). That duty arises from the Laws of Florida as created by the Florida Legislature, and is intended, in-part, to ensure all businesses participate in the workers' compensation system. The Legislature has provided neither the Department nor this Hearing Officer any discretion to waive, reduce, or mitigate any monetary penalties to be assessed for a business failing to secure workers' compensation insurance in violation of Florida law. Should the Petitioner remain committed to challenge the Department, their remedies remain with the Legislature to change the existing law, or file a lawsuit with a Florida Court that has authority to find laws unconstitutional. Regardless of either choice, the Petitioner would first need to exhaust their administrative remedies, making this proceeding necessary and not wasted effort.
18. The Department has satisfied its burden of proving clearly and convincingly, that Mubarak Trading Corporation, Inc., failed to secure the payment of workers' compensation as that term is defined in Section 440.107(7)(2), Florida Statutes (2004). Further, the Division of Workers' Compensation correctly issued its' Stop Work Order

and their Second Amended Order of Penalty Assessment in the amount of Sixteen Thousand Four Hundred Twenty Nine and 44/100 Dollars (\$16, 429.44), pursuant to Sections 440.107(7)(d) and (e), Florida Statutes (2008).

### RECOMMENDATION

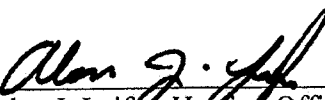
Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that a Final Order be entered affirming the Division of Workers' Compensation Second Amended Order of Penalty Assessment in the amount of Sixteen Thousand Four Hundred Twenty Nine and 44/100 Dollars (\$16, 429.44).

Respectfully submitted this 19<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
Alan J. Leifer, Hearing Officer  
Department of Financial Services  
3700 Lifford Circle  
Tallahassee, Florida 32309  
Phone: (850)668-9820  
Fax: (850)668-9825

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Recommended Order has been provided by US Mail to: Mr. Christopher Marsh, Econotax, on behalf of Mubarak Trading Corporation, Inc., 139 Deal Parkway, SE, Suite 102, Fort Walton Beach, Florida 32548 and via hand delivery in the interests of judicial economy to Alexander Brick, Esq. Department of Financial Services, Division of Legal Services, 200 East Gaines Street, Tallahassee, FL 32399-4429 this 19<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
Alan J. Leifer, Hearing Officer