

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-2275
)
ABASH ENTERPRISES, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 10, 2011, by video teleconference with sites in Tallahassee and Fort Myers, Florida, before Susan B. Harrell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Timothy L. Newhall, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: James McCarthy, pro se
Abash Enterprises, Inc.
Post Office Box 51246
Fort Myers, Florida 33994

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to provide workers' compensation coverage, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 10, 2010, Petitioner, Department of Financial Services, Division of Workers' Compensation (Department), issued a Stop-Work Order against Respondent, Abash Enterprises, Inc. (Abash), and on September 15, 2010, the Department hand-delivered an Amended Order of Penalty Assessment to Abash, assessing a penalty of \$1,000.00. Both the Stop-Work Order and the Amended Order of Penalty Assessment were based on the alleged failure of Abash to secure the payment of workers' compensation within the meaning of section 440.107(2), Florida Statutes (2010).^{1/}

Abash paid the penalty and requested an administrative hearing. The case was forwarded to the Division of Administrative Hearings on May 5, 2011, for assignment to an Administrative Law Judge.

At the final hearing, the Department called the following witnesses: Jack Gumph, Carol Porter, and Lynne Murcia. Petitioner's Exhibits 1 through 15 were admitted in evidence. James McCarthy, the president of Abash, testified on behalf of Abash. Abash submitted no exhibits for admission in evidence.

The one-volume Transcript was filed on June 23, 2011. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. On June 30, 2011, the Department filed the Department's Motion for Extension of Time to Submit Proposed Recommended Order. The motion was granted by Order dated July 5, 2011, and the parties were given until July 15, 2011, to file their proposed recommended orders. The parties timely filed their proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Abash is a Florida corporation engaged in the business of demolition. James McCarthy (Mr. McCarthy) is the president and only officer of Abash.

2. The Department received a call from the City of Fort Myers that Abash was doing demolition work at the location of a former Publix on Cleveland Avenue in Fort Myers, Florida, and that it was believed that Abash did not have workers' compensation coverage. Carol Porter, the supervisor for District 7 of the Department, assigned Jack Gumph (Mr. Gumph), a compliance investigator for the Department, to investigate the matter.

3. On September 10, 2010, Mr. Gumph went to 3255 South Cleveland Avenue, where the former Publix was located. On

arriving at 9:55 a.m., he saw a large truck at the site with the name Abash on its side. He went inside the structure and observed two Abash employees at work with a lift truck. One employee, Vincent Canzone (Mr. Canzone), was taking down light fixtures, and another employee, Dan Myers (Mr. Myers), was operating the truck.

4. Mr. Gumph consulted the Coverage and Compliance Automated System (CCAS) to determine if Abash had workers' compensation coverage. The database showed that Abash had had workers' compensation coverage effective June 2, 2010, but that coverage had been cancelled September 7, 2010. Mr. Gumph checked the Department of State records and learned that Mr. McCarthy was the sole officer and director of Abash. Mr. Gumph again checked CCAS and learned that there was no exemption from coverage for Mr. McCarthy.^{2/}

5. Mr. Gumph checked the database for the National Council of Compensation Coverage and learned that Abash had had workers' compensation coverage with National Union Fire Insurance Company of Pittsburg, Pa. (National Union Fire), but that the coverage had been cancelled September 7, 2010.

6. Mr. McCarthy had received a notice of cancellation from National Union Fire, but he thought that they would give Abash a grace period and allow Abash to pay for back-coverage as long as Abash did not have any claims for the period in which there was

no coverage in place. He was looking into alternative methods of coverage, including using a payroll service. Mr. McCarthy conceded at the final hearing that if an employee had been injured during the non-covered period that National Union Fire would not have honored the claim.

7. Abash did enter into an employee leasing contract with Southeast Personnel Leasing on September 10, 2010; however, no evidence was presented establishing the time of day that Abash entered into the employee leasing contract, and the contract with the employee leasing company does not specify the time of day when Abash entered into the contract. The list of employees covered by the employee leasing contract does not include Mr. Myers, who was working for Abash when Mr. Gumph visited the work site.

8. Mr. Gumph issued a Stop-Work Order and posted it on the job site the day that he visited the site. He called Abash and spoke with a secretary who advised that Mr. McCarthy was not in the office.

9. Mr. Gumph mailed a copy of the Stop-Work Order and a Request for Production of Business Records for Penalty Assessment Calculation to Abash on September 10, 2010. Abash received the documents on September 14, 2010.

10. Abash produced copies of its businesses records to the Department. Lynne Murcia (Ms. Murcia), a penalty calculator for

the Department, calculated the penalty assessment based on Abash's business records. She reviewed Abash's records for the past three years and determined that the period in which there was no workers' compensation coverage was September 7 to September 10, 2010. Abash's financial records did not reveal that Mr. Canzone and Mr. Myers had been employees for Abash other than the day that Mr. Gumph visited the job site. The financial records identified seven other employees during the period of non-coverage, but there were no transactions listed for these employees for September 10, 2010.

11. Ms. Murcia assigned a class code to each employee based on the type of work they did. The class codes are specified in the Florida Contracting Classification Premium Adjustment Program, which is published in the Florida exception pages of the National Council on Compensation Insurance, Inc. (NCCI), Basic Manual (October 2005 ed.).

12. For seven employees, Ms. Murcia assigned a class code of 5445, which is for the installation of wallboard within buildings. Although the work was demolition of wallboards, the same class code applies. For two employees, a class code of 8742 was assigned. This class code deals with outside sales. One employee was assigned class code 5221, which deals with concrete work. Mr. McCarthy agreed at the final hearing that the class codes assigned were appropriate.

13. The gross payroll is determined for each employee and divided by 100.^{3/} The resulting quotient is multiplied by the approved minimum rate for the class code to determine the premium that should have been paid for coverage. Ms. Murcia listed the premium that should have been paid for the non-covered period for all Abash employees, which was \$170.48. The premium was multiplied by 1.5 to determine the penalty assessment for each employee, which Ms. Murcia determined was \$255.75; however, section 440.107(7)(d)1. provides that the minimum penalty that can be assessed is \$1,000.00.

14. Because the employee leasing contract provided coverage for Mr. Canzone on September 10, 2010, the penalty calculation should exclude Mr. Canzone. There was no coverage for Mr. Myers on September 10, 2010. The penalty assessment for Mr. Myers and Mr. Canzone was \$16.88 each. The penalty assessments based on the remaining employees were for days other than September 10, 2010. Excluding Mr. Canzone from the penalty assessment results in a penalty assessment of \$238.87. However, the statutory minimum assessment is \$1,000.00.

15. On September 15, 2010, Mr. McCarthy went to District 7's office, where he was personally served with the Stop-Work Order, and an Amended Order of Penalty Assessment, assessing the penalty at \$1,000.00 Mr. McCarthy paid the penalty.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat.

17. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

18. The Department has alleged that Abash failed to secure workers' compensation coverage for its employees. Section 440.10 provides that "[a]ny contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38."

19. The Department has established by clear and convincing evidence that Abash did not have workers' compensation coverage from September 7 through September 9, 2010, for some of its employees and did not have coverage on September 10, 2010, for its employee, Mr. Myers.

20. The Department calculated the premium that should have been paid during the period from September 7, 2010, to September 9, 2010, and for Mr. Myers on September 10, 2010, using the correct class codes and the premiums associated with those codes. The Department incorrectly included Mr. Canzone in

its assessment calculation for September 10, 2010. The premiums that would have been due had there been coverage was \$159.23.

21. The Department may enforce the requirement that the employer secure workers' compensation payments for its employees by issuing stop-work orders and penalty assessment orders.

§ 440.107(3), Fla. Stat. Section 440.107(7)(d)1. provides:

(d)1. In addition to any penalty, stop-work order, or injunction, the department 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.

22. When the premium is multiplied by 1.5, the penalty is \$238.87. This amount is less than the minimum penalty provided in section 440.107(7)(d)1. Therefore, the penalty which must be assessed is \$1,000.00.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Abash failed to secure workers' compensation coverage and assessing a penalty of \$1,000.00, which has been paid by Abash.

DONE AND ENTERED this 22nd day of July, 2011, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2011.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

^{2/} Section 440.05(3) provides that each corporate officer of a construction business may elect to be exempt from workers' compensation coverage by filing an appropriate notice with the Department.

^{3/} The gross payroll is divided by 100 because the monetary risk assigned to the NCCI classification codes is expressed as per \$100.00 of payroll.

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.