

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-2463
)
JORGE L. GARCIA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 14, 2011, by video teleconference with sites in Tallahassee and Orlando, Florida, before Lynne A. Quimby-Pennock, an Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Keith A. Graham, Esquire
Marchena and Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814

STATEMENT OF THE ISSUE

The issue in this case is whether Jorge L. Garcia (Respondent) is entitled to elect to be exempt from the workers'

compensation insurance coverage requirements of chapter 440, Florida Statutes (2010).^{1/}

PRELIMINARY STATEMENT

On February 5, 2007, Petitioner, Department of Financial Services, Division of Workers' Compensation (Department or Petitioner), issued a Stop-Work Order to Tempmaster Heating and Cooling, Inc. (Tempmaster), a construction-based employer. The total penalty assessed against Tempmaster, as reflected in the Amended Order of Penalty Assessment (Amended Penalty Order) issued on February 19, 2007, was \$6,332.42. On February 20, 2007, Tempmaster entered into a payment agreement schedule with the Department that called for Tempmaster to make 60 monthly payments, each due on the first day of the month.

On February 20, 2008, Tempmaster was notified that it had failed to make its periodic payments, and the Department entered an Order Reinstating Stop-Work Order (February 2008 Stop-Work Order), effective immediately. Thereafter, Tempmaster submitted the requisite payments, and the Department rescinded its February 2008 Stop-Work Order. On September 4, 2008, the Department sent Tempmaster another notification that it had failed to make its periodic payments, and the Department entered another Order Reinstating Stop-Work Order (September 2008 Stop-Work Order), effective immediately. Tempmaster submitted the requisite payments, and, on October 3, 2008, the Department

rescinded its September 2008 Stop-Work Order. With this October 2008 notification, Tempmaster was advised that the Department did not rescind a stop-work order more than two times.

On June 3, 2009, the Department issued an Order Reinstating Stop-Work Order (June 2009 Stop-Work Order) to Tempmaster, detailing that the unpaid balance of \$3,732.76 was due immediately. To date, this amount remains unpaid.

On April 13, 2011, the Department received a "Notice of Election to Be Exempt" (Election of Exemption) from Florida's workers' compensation law in the name of "Jorge L. Garcia" as a corporate officer and ten percent owner of All Construction Services of Central Florida, Inc. (ACSOFC). The Election of Exemption indicated that ACSOFC was engaged in the construction industry and listed "Residential Contractor" and "HVAC Contractor" as the scope of business or trade.

Upon review of the Election of Exemption, the Department determined that Respondent was also a corporate officer and owner of Tempmaster and that the February 5, 2007, Stop-Work Order and Amended Penalty Order were still in effect against Tempmaster. On April 20, 2011, the Department notified Respondent that it was denying his Election of Exemption based on several factors.

On May 11, 2011, Respondent filed a "Jorge L. Garcia and All Construction Services of Central Florida, Inc., Petition for Hearing Pursuant to Sections 120.569 and 120.57 Fla. Stat." (Petition), wherein he disputed several statements in the Department's denial notification. The Petition alleged that Respondent was entitled to an exemption, because Respondent was not affiliated with Tempmaster because it was involuntarily dissolved on September 14, 2007, by the Florida Department of State, Division of Corporations.

On May 16, 2011, the Department referred the Petition to the Division for assignment of an Administrative Law Judge to conduct a hearing. Following one continuance, this case was set to be heard and was heard on September 14, 2011. A Joint Pre-hearing Stipulation was timely filed, and those stipulated findings of fact contained therein are listed below at paragraphs 1 through 21.

At the final hearing, the Department called the following witnesses: Mark Frances Mark and Kevin Sterling. Petitioner's Exhibits 1 through 15 were offered and admitted into evidence over Respondent's objection. Respondent was present with his counsel and did not testify. Respondent's Exhibits 1 through 6 were offered and admitted in evidence without objection.

At the conclusion of the hearing, the parties agreed to file their proposed recommended orders (PROs) within ten days of

the filing of the transcript. The Transcript of the final hearing was filed on November 3, 2011. The parties timely filed their PROs, and each has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees and corporate officers.

2. An exemption is a method by which a corporate officer becomes exempt from the workers' compensation insurance coverage requirement of chapter 440. See § 440.05, Fla. Stat.

3. The Department shall certify a corporate officer's election to be exempt from the workers' compensation insurance coverage requirement of chapter 440, if the election to be exempt meets the statutory criteria of section 440.05. See § 440.05, Fla. Stat.

4. A corporate officer or director 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 s. 440.107, [Florida Statutes]." § 440.05(15), Fla. Stat.

5. Respondent has been listed as a corporate officer of ACSOCF with the Division of Corporations in the annual reports filed on October 1, 2007, and thereafter.

6. Tempmaster was incorporated in Florida on March 30, 1989.

7. Tempmaster's Articles of Incorporation contain provisions whereby shareholders may remove directors.

8. Respondent was listed as a director of Tempmaster in the Articles of Incorporation filed with the Division of Corporations on March 30, 1989, and on the annual corporation reports filed from February 5, 1990, through December 18, 2006.

9. Tempmaster filed its last annual report with the Division of Corporations on December 18, 2006.

10. No annual report or other documents identifying the company's directors were filed with the Division of Corporations after December 18, 2006.

11. On February 5, 2007, the Department issued a Stop-Work Order and Order of Penalty Assessment (Division of Workers' Compensation Case No. 07-054-D4) on Tempmaster.

12. On February 19, 2007, the Department issued the Amended Penalty Order on Tempmaster. The Amended Penalty Order assessed a total penalty of \$6,332.42 on Tempmaster in Case No. 07-054-D4.

13. The Stop-Work Order, penalty assessment, and reinstating orders were not served on Respondent and were not in effect against Respondent individually.

14. On February 20, 2007, Respondent, on behalf of Tempmaster, executed a Payment Agreement Schedule for Periodic Payment of Penalty with the Department in Case No. 07-054-D4.

15. On February 20, 2007, the Department served an Order of Conditional Release from Stop-Work Order to Respondent, as a director of Tempmaster in Case No. 07-054-D4.

16. Tempmaster became delinquent in paying the penalty assessment order against it on October 1, 2008, when it ceased making payments in accordance with the Payment Agreement Schedule for Periodic Payment of Penalty.

17. Tempmaster, whose principal address was located at 199 North Goldenrod Road, Suite B, Orlando, Florida, 32807, was administratively dissolved by the Division of Corporations on September 14, 2007, and had ceased doing business and winding up its corporate affairs by the first quarter of 2009.

18. In the first quarter of 2009, Respondent and John Saccone (Mr. Saccone), the only two shareholders of Tempmaster, agreed that the corporation would cease to exist; that they would cease being directors, officers, shareholders, and employees; and that their relationship to Tempmaster was ended.

19. On April 13, 2011, Respondent filed an Election of Exemption with the Department as a corporate officer of ACSOCF.

20. On April 20, 2011, the Department issued a Notice of Denial of Respondent's Election of Exemption, stating:

. . . JORGE L GARCIA is an affiliated person of TEMPMASTER HEATING & COOLING INC against which a Stop-Work Order and an Order of Penalty Assessment was served and is still in effect. Accordingly, JORGE L GARCIA is ineligible for an election of exemption and the Notice of Election to be Exempt application for JORGE L GARCIA is hereby **Denied.**

The Department provided no other basis for the denial of Respondent's exemption.

21. On July 11, 2011, Respondent filed his officer/director and registered agent resignations from Tempmaster with the Division of Corporations.

22. No credible evidence was presented that Respondent or anyone from Tempmaster disputed the Stop-Work Order when it was issued in 2007. In fact, Respondent, on behalf of Tempmaster, executed the payment plan to resolve the Stop-Work Order on February 20, 2007.

23. On February 20, 2008, the Department reinstated Tempmaster's Stop-Work Order for failure to make its periodic payments. This Stop-Work Order was rescinded on March 25, 2008, when Tempmaster brought current its payments.

24. On September 4, 2008, the Department again reinstated Tempmaster's Stop-Work Order for failure to make its periodic payments. This Stop-Work Order was rescinded on October 3, 2008, when Tempmaster brought current its payments.

25. Although Respondent's Election of Exemption indicated that Tempmaster had ceased to exist as of the first quarter in 2009, no credible evidence or testimony was presented that the Department was notified at that time (2009) of this development.

26. On June 3, 2009, the Department reinstated Tempmaster's Stop-Work Order for failure to make its periodic payments. However, following the June 2009 Stop-Work Order, no additional payments were received, and Tempmaster was in default of its obligation. At that time, Respondent remained an officer or director of Tempmaster, based on his own failure to take any steps to notify the Department of a change.

27. As of June 3, 2009, the unpaid balance of the penalty assessment against Tempmaster was \$3,732.76. This amount was due immediately when the June 2009 Stop-Work Order was issued. As of the date of this hearing, the balance remained unpaid.

28. 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. See § 440.05(3), Fla. Stat.

29. No credible testimony or evidence was submitted (or stipulated to) that Tempmaster ever provided documentation or notification to the Department that it had ceased operations in the first quarter of 2009. Additionally, neither its officers nor directors notified the Department until April 2011 that Tempmaster was dissolved, and, then, it was only when Respondent filed his Election of Exemption for another entity and inserted a statement regarding Tempmaster.

30. Respondent's April 2011 statement reads:

I, Jorge Garcia, am not affiliated with Tempmaster Heating and Cooling, Inc., as shown by the attached Secretary of State record. Tempmaster Heating and Cooling, Inc., was dissolved on September 14, 2007, and has not been in existence since then. My affiliation with Tempmaster Heating and Cooling, Inc., ceased on September 14, 2007 when the corporation was dissolved. Therefore, I request the processing of my Notice of Election to be Exempt.

Respondent apparently took the position that his affiliation with Tempmaster ended in September 2007. Yet he and the other shareholder, Mr. Saccone, met in early 2009 to dissolve the corporation.^{2/}

31. Three months later, on July 11, 2011, Respondent submitted two resignations to the Division of Corporations: one as the registered agent for Tempmaster and the second as a

director for Tempmaster. These actions ended Respondent's affiliation with Tempmaster. However, this actual cessation of Respondent's affiliation with Tempmaster was well after his April 13, 2011, Election of Exemption was filed with Department.

32. Although there was some discussion about Respondent being granted two prior exemptions by the Department, one in 2007 and another in 2009, there was no credible testimony or evidence presented to establish the dates on which Respondent applied for those exemptions. If Tempmaster had been in compliance (or without a stop-work order) in 2007 when Respondent applied, there would be no bar to the Department granting the exemption. The same is true for the 2009 exemption. There was a period of time between January 2009 and June 3, 2009, when Tempmaster was in compliance. Thus, Respondent's posturing that he should be granted this exemption because he had two prior exemptions granted is baseless.

33. The Department reviewed Respondent's Election of Exemption to determine his eligibility to elect the exemption. The Department's Coverage and Compliance Automated System (CCAS) reflected that Respondent was an officer of a corporation that remained delinquent in paying a stop-work order and order of penalty assessment, which made him ineligible for the exemption. Further, no credible evidence was presented that reflected Respondent notified the Department of his cessation from

Tempmaster, save for the documentation admitted at hearing, which was after the fact.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2011).

35. 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. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this proceeding, Respondent seeks to establish that he qualifies for an election of exemption from the workers' compensation insurance coverage requirements of chapter 440.

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

(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. . . .

* * *

(11) Any corporate officer permitted by this chapter to claim an exemption must be listed on the records of this state's Secretary of State, Division of Corporations, as a corporate officer. The department shall issue a stop-work order under s. 440.107(7) to any corporation who employs a person who claims to be exempt as a corporate officer but who fails or refuses to produce the documents required under this subsection to the department within 3 business days after the request is made.

(12) Certificates of election to be exempt issued under subsection (3) shall apply only to the corporate officer named on the notice of election to be exempt and apply only within the scope of the business or trade listed on the notice of election to be exempt.

* * *

(15) Any corporate officer who is an affiliated person of a person who is delinquent in paying a stop-work order and penalty assessment order issued pursuant to s. 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:

* * *

(b) Any person who directly or indirectly owns or controls, or holds with the power to vote, 10 percent or more of the outstanding voting securities of such other person;

(c) Any person who directly or indirectly owns 10 percent or more of the outstanding voting securities that are directly or indirectly owned, controlled, or held with the power to vote by such other person;

* * *

(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. . . .

37. Respondent's application failed to satisfy the exemption eligibility requirements as set forth in the statutory provisions. The evidence established: that Respondent, at the time Tempmaster was issued the February 5, 2007, Stop-Work Order and penalty assessment order, and the subsequent reinstatements of penalty orders (in March and October 2008), was an officer or director of Tempmaster; that Respondent was still an officer or director when Tempmaster defaulted on its scheduled payments in June 2009; that Respondent remained a Tempmaster officer or director until he notified the Department of his resignation from Tempmaster in July 2011 (after he filed his Election of Exemption with a different construction entity); and that Tempmaster's penalty remained outstanding or delinquent. Therefore, Respondent was an "affiliated person" of a person who

is delinquent in paying a stop-work order and penalty assessment order and is currently ineligible for an exemption.

38. Respondent failed to demonstrate that he is entitled to an election of exemption from the workers' compensation insurance coverage requirements of chapter 440.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, finding that Jorge L. Garcia is ineligible for an election of exemption under section 440.05.

DONE AND ENTERED this 30th day of November, 2011, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
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 30th day of November, 2011.

ENDNOTES

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

^{2/} According to the Division of Corporations, Tempmaster "was administratively dissolved on September 14, 2007, for failure to file its annual report, as required by law." However, it is well settled that any corporation, which is administratively dissolved, may apply for reinstatement at any time after the effective date of dissolution. As such, Respondent (or the other shareholder/director, Mr. Saccone) could have applied for reinstatement of Tempmaster at any time, before Respondent's resignations in July 2011.

COPIES FURNISHED:

Keith A. Graham, Esquire
Marchena and Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814

Alexander Brick, Esquire
Florida 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

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.