

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-3018
)
ROBERT MIRANDA CONSTRUCTION,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case was heard on November 14, 2011, by video teleconference at sites in Tallahassee, Florida, and Jacksonville, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamila G. Gooden, Esquire
Department of Financial Services
Division of Legal Services
Workers' Compensation Section
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether Petitioner properly issued a Stop Work Order and Penalty Assessment against Respondent for failing to obtain

workers' compensation insurance that meets the requirements of chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On March 28, 2011, Petitioner, the Department of Financial Services, Division of Workers' Compensation issued and served a Stop-Work Order and Order of Penalty Assessment on Respondent, alleging that Respondent was not in compliance with the workers' compensation coverage requirements of chapter 440, Florida Statutes. The Stop-Work Order was posted on the construction site, and ordered Respondent to cease all business operations for all worksites in the state. The Order of Penalty Assessment set the penalty amount at 1.5 times the amount that the employer would have paid in premiums had workers' compensation insurance been procured. On April 5, 2011, Respondent filed an Election of Proceeding by which it disputed the allegations that it failed to obtain workers' compensation coverage that met the requirements of chapter 440, Florida Statutes.

On April 8, 2011, Petitioner issued an Amended Order of Penalty Assessment (hereinafter "Amended Order") which was served on Respondent on April 18, 2011. The Amended Order established a monetary penalty of \$21,623.46. The Order, Amended Order, and Election of Proceeding were transmitted to the Division of Administrative Hearings for a formal

administrative hearing, and assigned to the undersigned. The case was set for Hearing to convene on August 19, 2011.

On August 4, 2011, Petitioner moved to continue the hearing in order to allow it to review additional records provided by Respondent and, if appropriate, recalculate the penalty. The motion was granted and the case was placed in abeyance.

On September 19, 2011, Petitioner filed a Status Report requesting that the hearing be rescheduled. Petitioner also filed a Motion to Amend Penalty Assessment, along with its 2nd Amended Order of Penalty Assessment, by which it reduced the penalty from \$21,623.46 to \$2,523.27. The Motion was granted, and the hearing was rescheduled for November 14, 2011.

On November 7, 2011, Petitioner filed a 2nd Motion to Amend Penalty Assessment, along with its 3rd Amended Order of Penalty Assessment, by which it further reduced the penalty from \$2,523.27 to \$2,469.90. The 2nd Motion was granted. Accordingly, the 3rd Amended Order of Penalty Assessment forms the basis for this proceeding.

The case proceeded to hearing on November 14, 2011, by video hearing at sites in Tallahassee, Florida, and Jacksonville, Florida. Petitioner presented the testimony of Allen DiMaria, an Investigator with the Division of Workers' Compensation, and Cathe Ferguson, an Insurance Specialist III and penalty calculator for the Division of Workers'

Compensation. Petitioner introduced Exhibits 1 through 11, each of which was admitted into evidence. Respondent did not appear at the final hearing.

The one-volume Transcript was filed on December 12, 2011. Petitioner timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2011) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the Florida Workers' Compensation Law, chapter 440, Florida Statutes, including those provisions that employers shall be liable for, and shall secure and maintain payment of compensation for their employees who suffer work-related injuries.

2. Respondent is an active Florida for-profit corporation, having been first incorporated on November 18, 2004. Respondent has been certified as a Building Contractor by the Department of Business and Professional Regulation, Construction Industry Licensing Board, and holds license No. CBC1253639.

3. On March 28, 2011, Petitioner's investigator, Allen DiMaria, conducted a random inspection of a worksite at 3434 Atlantic Boulevard, Jacksonville, Florida 32207. Mr. DiMaria noticed an individual at the site cutting wood with

a circular saw. He introduced himself to the individual and produced identification. Mr. DiMaria then asked the individual what he was doing and for whom he worked. The individual identified himself as Mickey Larry Griffis, Jr., stated that he was cutting wood to replace rotted wood on a privacy fence, and indicated that he was employed by Respondent. He stated that it was his first day working for Respondent, but that he had worked for Respondent in the past.

4. Mr. DiMaria proceeded to call Respondent, as the contractor on the project, and spoke with Robert Miranda. Mr. Miranda indicated that he hired Mr. Griffis to watch work at the site, but not to do the work. Despite Mr. Miranda's explanation, Mr. DiMaria correctly determined that Mr. Griffis was engaged in "construction" activity for which workers' compensation insurance coverage was required.

5. Mr. DiMaria returned to his office, and consulted the Coverage and Compliance Automated System (CCAS), the statewide database for workers' compensation information, to determine Respondent's status in the workers' compensation system. Using the CCAS, Mr. DiMaria determined that Respondent had no workers' compensation coverage on file for any employee of the company. Rather, Respondent had an exemption, which is issued by Petitioner to officers of companies, and which serves to exempt said officers from the requirement to obtain workers'

compensation insurance for themselves. Pursuant to section 440.05(3), exemptions apply only to the officers of a company, not to employees.

6. Mr. DiMaria conferred with his supervisor, who authorized him to issue a Stop-Work Order and Penalty Assessment. The consolidated Stop-Work Order and Penalty Assessment was issued on March 28, 2011, and posted on the construction site. The Order required Respondent to cease all business operations statewide. The Order also assessed a penalty equal to 1.5 times the amount the employer would have paid in premium when applying the approved manual rates to the employer's payroll for the preceding three-year period, pursuant to section 440.107(7)(d).

7. On March 29, 2011, Mr. DiMaria issued a Request for Production of Business Records for Penalty Assessment Calculation (hereinafter the "Request") to Respondent, requiring Respondent to produce business records for the period of March 29, 2008, through March 28, 2011. The records requested included, but were not limited to business licenses, banking and account records for payroll and disbursements, and records regarding subcontractors and other leased or temporary workers.

8. In response to the Request, Respondent provided Petitioner with certain licenses, proposals, and contracts for work performed. Respondent also sent Certificates of Election

to be Exempt from Florida Workers' Compensation Law that had been issued to Respondent by Petitioner. The certificates identified the scope of Respondent's business as demolition, painting, framing, drywall, and "certified building contractor." All records received by Mr. DiMaria were sent by him to Cathe Ferguson, who was responsible for performing penalty calculations.

9. Ms. Ferguson reviewed the records in order to determine the appropriate penalty based on the information provided. The penalty worksheet prepared by Ms. Ferguson indicates that no payroll information was supplied to Petitioner by Respondent regarding Mr. Griffis, the employer on-site at the time of the inspection. Therefore, Mr. Griffis' payroll was imputed pursuant to section 440.107(7)(e).

10. Ms. Ferguson used the "Scopes Manual" published by the National Council on Compensation Insurance, and adopted by Petitioner in Florida Administrative Code Rule 69L-6.021, to determine the appropriate level of imputed compensation to Mr. Griffis. She determined that the work being performed on the site fell within class code 6400. Class code 6400 is described in rule 69L-6.021(2)(yyy) as "Fence Installation and Repair - Metal, Vinyl, Wood or Prefabricated Concrete Panel Fence Installed By Hand." Based on the evidence related to the inspection, which indicated that Mr. Griffis was engaged in the

repair of a wooden privacy fence, the work being performed by Mr. Griffis falls within class code 6400.

11. Mr. Griffis' salary was imputed for the full three-year period from March 30, 2008, to March 28, 2011, with a total imputed payroll of \$183,327.82. The workers' compensation insurance premium was calculated by multiplying one percent of the gross payroll for that period by the approved manual rate for each quarter, which resulted in a calculated premium of \$14,415.62. The penalty was determined by multiplying the calculated premium by 1.5, resulting in the final penalty of \$21,623.46.^{1/}

12. On April 8, 2011, Petitioner issued an Amended Order of Penalty Assessment assessing a monetary penalty amount of \$21,623.46 against Respondent.

13. Respondent subsequently provided Petitioner with additional records regarding Respondent's employees, including a number of bank records. Ms. Ferguson revised her penalty worksheet to reflect that payroll was now based on records, rather than being imputed, included a number of additional employees for fixed periods of employment, and applied different class codes. Ms. Ferguson testified that her application of the class codes was based upon her review of employee records and check ledgers provided by Respondent. Petitioner did not appear at the hearing to offer evidence to the contrary.

Ms. Ferguson's determinations were supported by competent, substantial evidence, and it is found that her determination of the appropriate class code for each employee was accurate.

14. Total payroll for the three-year period in question was determined to be \$14,676.25. Applying the same formula as that applied to determine the penalty amount reflected in the Amended Penalty Assessment, the premium was calculated to have been \$1,682.15, with a resulting penalty of \$2,523.27.

15. On August 11, 2011, Petitioner issued a 2nd Amended Order of Penalty Assessment reducing Respondent's penalty from \$21,623.46 to \$2,523.27.

16. Petitioner subsequently removed Al Baukecht, Mack Plumbing, and "No Name" from the list of Respondent's employees. With that change, total payroll for the three-year period in question was reduced to \$14,092.00. The premium was calculated to have been \$1,646.57, and the penalty reduced from \$2,523.27 to \$2,469.90.

17. On September 21, 2011, Petitioner issued a 3rd Amended Order of Penalty Assessment reducing Respondent's penalty to \$2,469.90.

CONCLUSIONS OF LAW

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

19. Petitioner is the agency of the State of Florida charged, pursuant to section 440.107(3), with the duty to:

. . . enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation In addition to any other powers under this chapter, the department shall have the power to:

- (a) Conduct investigations for the purpose of ensuring employer compliance.
- (b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.
- (c) Examine and copy business records.

* * *

- (g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.
- (h) Enforce the terms of a stop-work order.
- (i) Levy and pursue actions to recover penalties.
- (j) Seek injunctions and other appropriate relief.

20. Petitioner has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct.

§120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins., 707 So. 2d 941 (Fla. 3d DCA

1998). Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

21. Pursuant to sections 440.10 and 440.38, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. Strict compliance with the Workers' Compensation Law is, therefore, required by the employer. See, e.g., Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1185 (Fla. 4th DCA 2005); C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

22. Section 440.02(17)(b)2. defines "employment" to mean "any service performed by an employee for the person employing him or her," and includes "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer."

23. Section 440.02(8) defines "construction industry" to include "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land."

24. Section 440.02(8) further provides that Petitioner "may, by rule, establish standard industrial classification

codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section."

25. Petitioner has adopted the construction industry classification codes contained in the National Council on Compensation Insurance Basic Manual (2001 ed.) by rule 69L-6.021. That rule includes activities within the scope of Respondent's licensed business as a certified building contractor.

26. Petitioner established by clear and convincing evidence that Respondent was an "employer" for workers' compensation purposes because it was doing business in the construction industry as a building contractor, and engaged one or more employees to perform services on its behalf from March 30, 2008, to March 28, 2011. Therefore, Respondent was required to secure and maintain compensation for its employees pursuant to section 440.10.

27. Petitioner proved by clear and convincing evidence that the employees identified in the penalty worksheets were not covered by a valid workers' compensation insurance policy during the assessment period.

28. Section 440.107(7)(a) provides in pertinent part that:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers'

compensation . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations

As a result of the foregoing, Petitioner's Stop-Work Order was authorized and appropriate.

29. Section 440.107(7)(d)1. provides that:

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 \$1,000.00, whichever is greater.

30. Business records provided to Petitioner demonstrate that Respondent's total payroll from March 30, 2008, through March 28, 2011, was \$14,092.00. The total workers' compensation premium that Respondent should have paid for its employees for that period was \$1,646.57. Multiplying that amount by the statutory factor of 1.5 results in a penalty assessment in the amount of \$2,469.90.

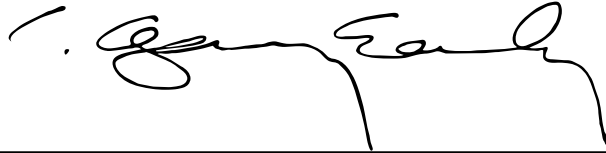
31. Based on the foregoing, Petitioner proved, by clear and convincing evidence, that Respondent is liable for payment of a penalty in the amount of \$2,469.90 for its failure to

secure and maintain compensation for its employees as set forth in the Stop Work Order and the 3rd Amended Penalty Assessment.

RECOMMENDATION

Based on the findings of fact and conclusions of law, it is RECOMMENDED that Petitioner enter a final order assessing a penalty of \$2,469.90 against Respondent, Robert Miranda Construction, Inc., for its failure to secure and maintain required workers' compensation insurance for its employees.

DONE AND ENTERED this 28th day of December, 2011, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2011.

ENDNOTE

^{1/} The calculated premium times 1.5 differed from the penalty assessed in each penalty iteration by an amount not exceeding five cents. The differences are presumed to be the result of rounding errors, but in any event are not material deviations.

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.