

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 11-5070
)
DOOR DEPOT OF PALM BEACH,)
INC.)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,^{1/} before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted on December 13, 2011, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Paige Billings Shoemaker, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Nancy Morris
Door Depot of Palm Beach, Inc.
18330 Jupiter Landings Drive
Jupiter, Florida 33458

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated chapter 440, Florida Statutes, and Florida Administrative Code Chapter 69L-6, by failing to maintain workers' compensation coverage for its employees, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

Pursuant to a Request for Production of Business Records issued by Petitioner to Respondent on May 11, 2011, Petitioner determined that Respondent had violated section 440.107(2) by failing to comply with the workers' compensation coverage requirements under chapter 440. On June 27, 2011, Petitioner issued an Order of Penalty Assessment, seeking to penalize Respondent for these alleged violations. Petitioner timely requested an administrative hearing to contest the penalty. The matter was referred to the Division of Administrative Hearings ("Division") on September 29, 2011, for assignment of an Administrative Law Judge and the conduct of a hearing pursuant to sections 120.569 and 120.57(1).

Pursuant to Petitioner's Stipulated Motion to Modify Charging Document, the undersigned issued an Order Modifying Charging Documents on December 2, 2011, accepting the "2nd Amended Order of Penalty Assessment (Penalty Only)" as the correct charging document in this proceeding.

Pursuant to notice, the final hearing was conducted on December 13, 2011. Petitioner presented the testimony of Michelle Jimerson and Teo Morel, and offered Petitioner's Exhibits 1 through 16, all of which were admitted into evidence without objection. Respondent presented the testimony of its owner, Nancy Morris, and did not offer any exhibits for admission into evidence.

The one-volume Transcript of the final hearing was filed with the Division on December 30, 2011. By Notice of Filing Transcript issued January 4, 2012, the parties were given until January 9, 2012, to file their Proposed Recommended Orders. Petitioner timely filed its Proposed Recommended Order on January 9, 2012. On January 24, 2012, Respondent filed a letter directed to the undersigned, disputing Petitioner's Proposed Recommended Order; this document has been treated as Respondent's late-filed Proposed Recommended Order. Both proposed recommended orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Department of Financial Services, Division of Workers' Compensation, is the state agency responsible for enforcing the requirement that employers in the State of Florida

secure the payment of workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Respondent, Door Depot of Palm Beach, Inc., is a Florida for-profit corporation engaged in the sale and installation of doors, which is encompassed within the construction industry.^{2/} Ms. Morris is Respondent's owner and sole corporate officer.

Failure to Secure Workers' Compensation Coverage

3. As a result of a public referral, Petitioner initiated an investigation to determine whether Respondent had the required workers' compensation coverage for its employees. Michelle Jimerson, a Compliance Investigator employed by Petitioner, researched Petitioner's Coverage and Compliance Automated System ("CCAS") internal database regarding workers' compensation coverage and compliance, and determined that Respondent did not have current workers' compensation coverage and had not previously secured coverage. Ms. Jimerson's research further revealed that Ms. Morris, as Respondent's sole corporate officer, had a current workers' compensation exemption covering herself, and that she had maintained such exemptions since August 2002.

4. On May 11, 2011, Ms. Jimerson conducted an on-site visit to Respondent's place of business. At that time, Petitioner issued a Request for Business Records to Respondent,

seeking copies of payroll documents; bank statements; business tax receipts; check stubs and check ledgers; names of subcontractors; records of payments or disbursements to subcontractors; contracts; and proof of workers' compensation coverage for, or exemptions held by, the subcontractors. Respondent produced the requested records.

5. From a review of the records, Ms. Jimerson determined that Respondent had contracted with three subcontractors, Breeze Image, Inc.,^{3/} Mike Jacobs, and Ross Whitehouse, to provide construction industry services (specifically, door repair and installation work), between April 22, 2011, and May 10, 2011.

6. Ms. Jimerson's review of Petitioner's CCAS database revealed that none of these subcontractors was exempt from the workers' compensation coverage requirement during the period in which they contracted with Respondent to provide construction industry services, that none had secured workers' compensation coverage for themselves, and that Respondent had not secured workers' compensation coverage for them during this period.

7. Because Respondent came into compliance with chapter 440 during Petitioner's investigation and before initiation of this enforcement action, Petitioner did not issue a Stop-Work Order.^{4/}

8. Nancy Morris testified on Respondent's behalf. She admitted that Respondent had not secured workers' compensation

coverage for these subcontractors. She credibly testified that she had asked if they were exempt from the workers' compensation coverage requirement, that they had told her they were, and that she had believed them.

Penalty Assessment

9. On May 24, 2011, Petitioner issued to Respondent a Request for Production of Business Records for Penalty Assessment Calculation, seeking copies of payroll documents; bank statements; business tax receipts; check stubs and check ledgers; names of subcontractors; records of payments or disbursements to subcontractors; contracts; and proof of workers' compensation coverage for, or exemptions held by, the subcontractors. Respondent produced the requested documents.

10. Using these documents, Petitioner's Penalty Calculator, Teo Morel, calculated the penalty assessment for Respondent.

11. Section 440.107(7)(d)1., establishes a formula for determining the penalty to be assessed against an employer who fails to secure workers' compensation as required by chapter 440. Specifically, the penalty is one and a half (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 within the preceding three-year period, or \$1000, whichever is greater.

12. Petitioner has adopted a penalty worksheet for calculating the penalty prescribed by section 440.107(7)(d)1. See Fla. Admin. Code R. 69L-6.027. Ms. Morel used the worksheet in calculating the penalty to be assessed against Respondent.

13. Specifically, Ms. Morel identified the subcontractors for which Respondent had not secured workers' compensation and identified the applicable construction industry classification NCCI Manual code for each (here, classification code 5102). For each subcontractor, she identified the periods of noncompliance for the preceding three-year period as required by section 440.107(7)(d)1., determined the subcontractor's gross payroll amount and divided that amount by 100, then multiplied this amount by the NCCI Manual rate applicable to the 5102 classification code. This calculation yielded the workers' compensation premium Respondent should have paid for each subcontractor, had Respondent complied with chapter 440. The premium amount was then multiplied by 1.5 to determine the total penalty amount to be assessed.

14. Pursuant to the information Respondent provided, and performing the statutorily prescribed calculation, Petitioner initially calculated the total penalty to be assessed as \$20,266.59.

15. Respondent subsequently provided additional business records consisting of raw job worksite notes. These documents showed that the subcontractors were paid a total contract amount for each job. However, the notes did not indicate the cost of materials per contract, and Respondent was unable to provide records containing this information.

16. Because the cost of materials for each contract was indeterminable, pursuant to Florida Administrative Code Rule 69L-6.035(1)(i), Petitioner assumed that the materials cost constituted 20 percent of each contract, deducted this amount from each subcontractor's gross payroll, and recalculated the premium amount. As a result, the total penalty assessment was reduced by 20 percent, to \$16,213.30.

17. Respondent disputes the amount of the amended penalty assessment on the basis that materials costs for each contract constituted more than 20 percent of each contract's amount. However, Ms. Morris was unable to provide any evidence substantiating the cost of materials for each contract.

18. Ms. Morris credibly testified that if Respondent is required to pay the assessed penalty of \$16,213.30, it likely will be forced to go out of business.

19. Ms. Morris fully cooperated with Petitioner throughout its compliance investigation leading to this enforcement action against Respondent.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to section 120.57(1), Florida Statutes.

21. In this proceeding, Petitioner seeks to penalize Respondent for failure to secure the payment of workers' compensation coverage for the benefit of its employees, as required by chapter 440. Accordingly, Petitioner must prove the alleged violations and the factual basis for the penalty sought by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).^{5/}

22. Section 440.10(1) provides in pertinent part:

(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees . . . of the compensation payable under ss. 440.13, 440.15, and 440.16. Any 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.

(b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be

liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

23. Section 440.02(16)(a) defines "employer" to include "every person carrying on any employment." This section further provides in pertinent part:

If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

24. Section 440.02(15)(c) defines "employee" in pertinent part to include:

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.

25. Section 440.02(17)(b) defines "employment" to include, "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer."

26. Florida Administrative Code Rule 69L-6.032 addresses contractor requirements for obtaining evidence that its subcontractors possess workers' compensation coverage or

otherwise comply with chapter 440. Specifically, this rule requires contractors to obtain evidence of its subcontractors' workers' compensation coverage or certificates of election to be exempt. If the contractor fails to obtain evidence of a subcontractor's coverage or exemption, and has not provided coverage for the subcontractor, the contractor is subject to penalty for failing to comply with chapter 440. See Fla. Admin. Code R. 69L-6.032(1), (6).

27. Pursuant to these provisions, Respondent, as a contractor in the construction industry, was required to secure workers' compensation coverage for the subcontractors with which it contracted to provide construction industry services, unless the subcontractors secured coverage for themselves or held a valid exemption from the coverage requirement. Here, the subcontractors were neither covered nor exempt. Accordingly, Respondent was required to secure coverage.

28. Petitioner demonstrated, by clear and convincing evidence, that Respondent failed to secure workers' compensation coverage for these subcontractors, in violation of these statute and rule provisions.

29. With respect to determining the total penalty to be assessed for such violation, section 440.107(7)(d)1., provides in pertinent part:

[T]he 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.

30. Rule 69L-6.035(1)(i) further provides:

[T]he Department shall when applicable include any one or more of the following as remuneration to employees based upon evidence received in its investigation:

* * *

(i) Total contract price of a service provided by the employer, excluding the cost for materials as evidenced in the employer's business records or contract. In the event the costs for materials is included in the total contract price and cannot be separately identified in the total contract price, eighty percent of the total contract price shall be the employer's payroll;

* * *

31. Petitioner demonstrated, by clear and convincing evidence, that pursuant to these statutory and rule provisions, the correct total penalty assessment for Respondent's failure to comply with the requirement to secure workers' compensation coverage in violation of chapter 440 is \$16,213.30.

32. Unfortunately, neither chapter 440 nor Petitioner's rules authorize a reduction of the penalty assessment due to

mitigating circumstances—in this case, Respondent's full cooperation in Petitioner's investigation, and its lack of culpability due to its owner having trusted the representations of the subcontractors with which it was doing business.

33. However, Florida Administrative Code Rule 69L-6.025 authorizes Petitioner to enter into a Payment Agreement Schedule for Periodic Payment of Penalty with employers. Indeed, this rule allows Petitioner to enter into a Payment Agreement Schedule for Periodic Payment of Penalty even where Petitioner previously has entered a Stop-Work Order—circumstances much more egregious than are present in this case, where the undisputed evidence establishes that Respondent was in compliance with chapter 440 before Petitioner initiated its enforcement action.

34. Under these circumstances, and given that in the absence of such relief, it is likely Respondent will be forced out of business, the undersigned strongly urges Petitioner to enter into a Payment Agreement Schedule for Periodic Payment of Penalty with Respondent, pursuant to rule 69L-6.025, to enable Respondent to make a down payment of ten percent of the total assessed penalty and repay the remaining penalty in 60 consecutive monthly installments.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of law, it is hereby RECOMMENDED that Petitioner enter a Final Order determining that Respondent violated the requirement in chapter 440, Florida Statutes, to secure workers' compensation coverage; imposing a total penalty assessment of \$16,213.30; and providing that Petitioner will execute with Respondent a Payment Agreement Schedule for Periodic Payment of Penalty, pursuant to Florida Administrative Code Rule 69L-6.025, under which Respondent shall make a down payment to Petitioner of ten percent of the total assessed penalty amount, which is \$1,621.33, and shall repay the remaining penalty in 60 consecutive monthly installments.

DONE AND ENTERED this 30th day of January, 2012, in Tallahassee, Leon County, Florida.



Cathy M. Sellers
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 26th day of January, 2012.

ENDNOTES

^{1/} Unless otherwise stated, all references are to Florida Statutes (2011).

^{2/} Florida Administrative Code Rule 69L-6.021(1)(o) (2007) and the National Council on Compensation Insurance, Inc., SCOPES Manual (Oct. 2005) (hereafter "NCCI Manual") assign construction industry classification code 5102 to door, door frame, or sash erection.

^{3/} Ronald Coursol is the sole officer and employee of Breeze Image, Inc. Respondent paid Mr. Coursol for the services rendered.

^{4/} In fact, Respondent's actions to come into compliance may ultimately have precipitated this enforcement proceeding. Ms. Morris testified that when she discovered that Mr. Whitehouse did not have a current exemption from workers' compensation coverage, she immediately terminated Respondent's relationship with him. She claimed that he then contacted Petitioner to report that Respondent was not in compliance with state licensing law.

^{5/} Clear and convincing evidence requires that:

[t]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

COPIES FURNISHED:

Paige Billings Shoemaker, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

Nancy Morris
Door Depot of Palm Beach, Inc.
1033 Wynndale Way
Lantana, Florida 33462

Julie Jones, Agency Clerk
Department of Financial 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.