

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF)
WORKERS' COMPENSATION,)
)
Petitioner,) Case No. 12-0759
)
vs.)
)
HECTOR M. HICKMAN,)
d/b/a HICKMAN TILE, INC.,)
A DISSOLVED FLORIDA CORPORATION)
AND HICKMAN TILE, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On June 8, 2012, a duly-noticed hearing was held in Tallahassee and Jacksonville, Florida, via video teleconference, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondents: Hector Hickman, pro se
Number 3
10110 Arrowhead Drive
Jacksonville, Florida 32257

STATEMENT OF THE ISSUE

The issue in this case is whether Respondents violated the provisions of chapter 440, Florida Statutes, by failing to secure the payment of workers' compensation as alleged in the Stop-Work Order and Amended Order of Penalty Assessment, and if so, what penalty is appropriate.

PRELIMINARY STATEMENT

Following a site inspection, Petitioner issued a Stop-Work Order and Penalty Assessment to Respondents on January 11, 2012, by posting at the worksite. On January 17, 2012, a copy was hand-delivered to Mr. Hickman. On February 3, 2012, Petitioner requested an administrative hearing. An Amended Order of Penalty Assessment was issued on February 14, 2012. The matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge on February 24, 2012.

Pursuant to notice, the final hearing was conducted on June 8, 2012. Petitioner presented the testimony of three witnesses: Frank Odom; Victoria Parker; and Thomas R. Hash, Jr. Petitioner offered 11 exhibits, which were admitted without objection. Respondent Mr. Hickman testified on his own behalf and did not offer any exhibits.

The Transcript was filed with the Division on June 25, 2012. Petitioner filed a Proposed Recommended Order on July 5, 2012, which was considered.

FINDINGS OF FACT

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 for their employees.

2. Hickman Tile, Inc., was incorporated as a Florida domestic for-profit corporation on or about October 22, 2004, to engage in setting tile in the construction industry. Respondent Hector M. Hickman was a corporate officer of Hickman Tile, Inc., who filed a notice of election to be exempt from the provisions of chapter 440. The corporation had a checking account.

Mr. Hickman deposited cash and checks into the account and wrote checks from this account for both business expenses and personal expenses, including his rent, credit cards, and groceries.

3. On or about September 25, 2009, Hickman Tile, Inc., was dissolved by the Florida Department of State. After this date, no further Annual Reports or Requests for Exemption were filed by the corporation or its officers. Mr. Hickman stopped using the corporate checking account.

4. All violations of chapter 440 alleged in this case occurred after the dissolution date of Hickman, Tile, Inc.

5. During 2009, Mr. Hickman started attending college using student loans. He continued to do some tile work in the construction industry to meet expenses.

6. Beginning on or about April 18, 2011, Mr. Hickman began using the corporate checking account again. He deposited cash as well as checks made out to him personally into the account and again wrote checks from this account for both business expenses and personal expenses.

7. Beginning in or around June 2011, Mr. Hickman began setting tile for Ace Tile and Stone, LLC., a company which installs tile, stone, and wood flooring. This work was not carried out on his own home or premises. Mr. Hickman would work intermittently, as called by Mr. Hash, the owner of Ace Tile.

8. Mr. Hickman and Mr. Hash never discussed the exact nature of their relationship, but neither followed the requirements of the workers' compensation law, as discussed below. Mr. Hickman asked if Mr. Hash would pay him in cash, and Mr. Hash usually did so.

9. Mr. Hickman was paid a daily rate of \$110.00 per day. Although usually paid in cash, sometimes he was paid by check made out to Mr. Hickman, not the corporation. These checks were deposited into the corporate account: \$220.00 on or about June 15, 2011; \$550.00 on or about July 11, 2011; and \$440.00 on or about August 1, 2011.

10. Mr. Hash would call Mr. Hickman to work by the job when Mr. Hash needed him. Mr. Hickman did not do work for Mr. Hash unless Mr. Hickman had accepted work on a particular

job. Mr. Hickman was free to accept a job from Mr. Hash or not, and to accept jobs from other contractors.

11. Mr. Hash did not supervise Mr. Hickman in the daily performance of the job. Hickman supplied his own tools and was responsible for them.

12. Mr. Hickman's employment relationship with respect to Mr. Hash was that of an independent contractor.

13. On January, 11, 2012, Mr. Frank Odom, an investigator for Petitioner, visited a residential construction site in Jacksonville. He observed two individuals engaged in tile setting activities. Mr. Hickman was mixing thinset mortar, the other person, Mr. Mike Harrell, was cutting tile. These were construction activities. Mr. Odom identified himself as a workers' compensation investigator.

14. Mr. Hickman told Mr. Odom that both men were exempt employees through their own separate entities. Mr. Hickman indicated that he had an exemption under Hickman Tile, Inc. Mr. Harrell also indicated that he was exempt and provided Mr. Odom a copy of an exemption card under Mark Harrell, LLC. Both men indicated that they were working for Ace Tile.

15. Shortly thereafter, Mr. Hash arrived at the site. Mr. Hash stated that he was exempt through his entity, Ace Tile. He explained that Ace Tile was the contractor and had obtained the contract with the homeowner through a retail store where the

homeowner had purchased the tile. He stated that the individuals working at the site, Mr. Hickman and Mr. Harrell, each had exemptions under their respective entities.

16. Mr. Odom checked the workers' compensation information through the computer in his car by accessing the Coverage and Compliance Automated System (CCAS). It revealed that Mr. Hickman's exemption through Hickman Tile, Inc., had expired in 2009. He checked the Department of State's website for the Division of Corporations and determined that Hickman Tile, Inc. had been dissolved in 2009. Mr. Odom determined that both Mr. Hash and Mr. Harrell had active exemptions.

17. Mr. Odom prepared a stop-work order and posted it at the work site. He was unable to serve a copy on Mr. Hickman at that time, because Mr. Hickman and Mr. Harrell had left the job site. Mr. Odom left a copy of the stop-work order and a request to produce business records for a penalty assessment with Mr. Hash, asking him to tell Mr. Hickman to contact Mr. Odom at his office.

18. Mr. Hickman came to Mr. Odom's office on January 17, 2012. At that time, Mr. Odom was able to serve Mr. Hickman with copies of the stop-work order and request for business records. Mr. Hickman stated at this time that he was an employee of Ace Tile and that he had a Form 1099 showing he had been paid \$8,000.00 in 2011. Mr. Odom advised him that a Form 1099 was

commonly used to pay people who were self-employed and that an employee would have received a W-2 form.

19. Also on January 17, 2012, Mr. Hickman provided Petitioner with copies of check stubs from the Hickman Tile, Inc. checking account beginning on September 28, 2008, and going regularly through September 8, 2009, and then after a gap in dates, beginning again with a check stub dated April 18, 2011, and going regularly through January 13, 2012.

20. Mr. Hickman provided an affidavit on January 27, 2012, stating that he had received \$8,000.00 working as Tom Hash's helper in 2011 and that he had received \$330.00 from Mr. Hash in 2012 up until January 11, when the work was stopped by Petitioner.

21. Mr. Hickman was paid approximately \$8,000.00 for tile-setting work he performed for seven months in 2011 for Ace Tile and Stone. In 2012, he was paid \$330.00 for three days of tile-setting work performed until January 11. This was work within the construction industry.

22. Mr. Hickman was a sole proprietor working as an independent contractor for Mr. Hash. While Petitioner failed to prove that Mr. Hickman was paid by the job, and in fact there was credible evidence that he was paid by the day, failure to prove that payment was by the job is not alone determinative. The balance of the evidence clearly showed that Mr. Hickman's

relationship to Mr. Hash was one of independent contractor, rather than employee. Mr. Hickman was not supervised in the performance of his duties. He was an experienced tile setter with more years of experience than Mr. Hash. The other tile setter, Mr. Harrell, was hired by Mr. Hash as an independent contractor. Mr. Hickman provided his own tools, was responsible only for the end result of his work, and he was employed for one job only, until he was called again. He was free to decline any particular job and could work for other entities in addition to Mr. Hash, as he desired. Finally, no wage records or payroll deductions were kept by Mr. Hash; to the contrary, a Form 1099 was prepared for Mr. Hickman, though he later refused to accept it.

23. Mr. Hickman had no workers' compensation insurance for himself, and he had no valid exemption.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).^{1/}

25. Petitioner has the responsibility to enforce workers' compensation requirements, including the requirement that employers secure the payment of workers' compensation, pursuant to section 440.107(3).

26. In this proceeding, Petitioner seeks to penalize Respondents for failure to secure the payment of workers' compensation for the benefit of employees, as required by chapter 440, Florida Statutes.

27. Petitioner failed to prove that Hickman Tile, Inc., violated any provision of chapter 440. All violations of chapter 440 alleged in this case occurred after the dissolution date of Hickman, Tile, Inc., and the violations, if any, were committed by Mr. Hickman d/b/a Hickman Tile, Inc., hereafter referred to as Respondent.

28. Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the violation alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

29. The clear and convincing standard of proof has been described by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. Section 440.10(1)(a) provides in relevant part:

Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, 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.

31. Section 440.02(8) defines "construction industry" in pertinent part as "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."

Allied Trucking of Fla. v. Lanza, 826 So. 2d 1052, 1052-1053 (Fla. 1st DCA 2002). Respondent's activities in setting tile at the residential worksite for payment constituted construction.

32. The next question to be considered is whether or not Respondent meets the definition of an employer. Section 440.02(16)(a) defines "employer" to include "every person carrying on any employment."

33. Section 440.02(17) defines "employment" as "any service performed by an employee for the person employing him or her." The definition excludes certain types of labor and

services not applicable here, and includes, "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer."

34. Historically, it has been held that a sole proprietor could not be his own employee because there was no legal entity apart from the individual which could be considered to be the individual's employer. Stevens v. Int'l Builders of Fla., 207 So. 2d 287, 290 (Fla. 3d DCA 1968)(sole proprietor could not be a "statutory employee" of himself under the workers' compensation law because it is a logical anomaly to conceive of an individual as an entity apart from itself).

35. Particularly in the relatively dangerous construction industry, statutory changes were subsequently enacted to expand workers' compensation coverage. First, a sole proprietor was permitted to "opt in" by becoming an employee of his own business. § 440.02(2)(c), Fla. Stat. (1981); Boyd-Scarp Enters. v. Saunders, 453 So. 2d 161, 163 (Fla. 1st DCA 1984)(sole proprietor who failed to affirmatively elect to be an employee of his own business could not be considered a "statutory employee" of the general contractor either).

36. The statute was next changed to create an "opt out" structure. That is, a sole proprietor in the construction industry was considered to be an employee for purposes of workers' compensation unless the sole proprietor affirmatively

elected to be excluded from the definition of employee by filing written notice of such election with the Division of Workers' Compensation. § 440.02(13)(c), Fla. Stat. (1995); Armstrong v. Ormond in the Pines, 734 So. 2d 596, 597-598 (Fla. 1st DCA 1999)(without evidence of election to be exempt, sole proprietor was an employee of the general contractor).

37. In 2004, the statute was amended again. Section 440.02(15)(c) now defines "employee" to include:

1. A sole proprietor or a partner who is not engaged in the construction industry, devotes full time to the proprietorship or partnership, and elects to be included in the definition of employee by filing notice thereof as provided in s. 440.05.
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.
3. An independent contractor working or performing services in the construction industry.
4. A sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

This definition does away with all elections for sole proprietors engaged in construction, and simply declares as a matter of law that they are employees. Although not obvious

from the text alone, which does not refer to employers at all and confusingly blends forms of legal organization with types of business relationships, the court cases and legislative history summarized above make it clear that this language also makes a sole proprietor who engages in the construction industry his own employer.

38. The issue then, is whether Respondent was a sole proprietor working as an independent contractor for Mr. Hash, in which case he is his own employer and obligated to provide his own workers' compensation coverage, or if he instead is simply an employee of Mr. Hash's, in which case the employer's burden falls solely upon Mr. Hash.

39. While section 440.02(15)(d)1. delineates several factors relevant to the determination of whether a person is an independent contractor, the statute restricts their application to an "independent contractor who is not engaged in the construction industry." They reiterate the factors considered at common law, however.

40. Petitioner proved by clear and convincing evidence that Respondent was a sole proprietor working as an independent contractor for Mr. Hash. The question of whether a person is properly classified an employee or an independent contractor must be addressed on a case-by-case basis. La Grande v. B & L Srvs., Inc., 432 So. 2d 1364, 1366 (Fla. 1st DCA 1983). While

Petitioner failed to prove that Respondent was paid by the job, and in fact there was credible evidence that he was paid by the day, this failure alone is not determinative. The balance of the evidence clearly showed that Respondent's relationship to Mr. Hash was one of independent contractor, rather than employee. The lack of control exercised by Mr. Hash over Respondent's work is a primary factor. Strickland v. Progressive American Ins. Co., 468 So. 2d 525 (Fla. 1st DCA, 1985).

41. Section 440.38(1) provides several methods by which an employer may satisfy the requirement to secure the payment of compensation, including through insuring payment with any stock company or mutual company or association or exchange. It is undisputed that Respondent had not satisfied this requirement. Petitioner proved by clear and convincing evidence that Petitioner failed to secure the payment of compensation to himself as employee.

42. Section 440.107(7)(d)1. provides:

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.

43. Section 440.02(8) authorizes the Division to establish standard industrial classification codes and definitions for the construction industry by rule.

44. Florida Administrative Code Rule 69L-6.021 incorporates by reference classification codes and descriptions of the National Council on Compensation Insurance, Inc. (NCCI) Basic Manual, 2001 edition, with updates through January 1, 2011. Classification code number 5348 covers ceramic tile, indoor stone, marble, or mosaic work, and is applicable here. The Department applied the rule's approved manual rate of 4.43 for 2011 and 5.25 for 2012 in calculating the premiums that would have been paid for coverage during the period of noncompliance.

45. Petitioner demonstrated, by clear and convincing evidence, that under the applicable statutory and rule provisions, the premium for the 2011 payroll of \$8,000.00 was \$354.40, while the premium for the 2012 payroll of \$330.00 was \$17.33.

46. Under section 440.107(7)(d)1., Petitioner shall assess a penalty equal to 1.5 times the workers' compensation premium, or \$1,000, whichever is greater. The computed penalty was

correctly computed under this statute to be \$557.60., so the statutory minimum penalty is instead applicable.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Financial Services, Division of Workers' Compensation, enter a Final Order determining that Respondent Hector Hickman, d/b/a Hickman Tile, Inc., violated the requirement in chapter 440, Florida Statutes, to secure workers' compensation coverage and imposing upon him a total penalty assessment of \$1000.00.

DONE AND ENTERED this 24th day of July, 2012, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2012.

ENDNOTE

^{1/} All references to statutes and rules are to the versions in effect in 2011 and 2012, except as otherwise indicated. With the exception of the approved Manual Rates Tables incorporated by reference, no changes in statutes or administrative rules were identified during the time of the alleged violations.

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.