STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 12-1564
THAT'S RIGHT ENTERPRISES, LLC,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 27, 2012, by video teleconference at sites in Tallahassee, Florida, and Daytona Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael T. McGuckin, Esquire
Department of Financial Services
Division of Legal Services
Workers' Compensation Section
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Edward P. Kraher
That's Right Enterprises, LLC
302 Grant Street
Port Orange, Florida 32127

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 8, 2012, Petitioner, the Department of Financial Services, Division of Workers' Compensation, issued a Stop-Work Order and Order of Penalty Assessment, alleging that Respondent was not in compliance with the workers' compensation coverage requirements of chapter 440, Florida Statutes. The Stop-Work Order was hand-delivered to Respondent, and ordered Respondent to cease all business operations for all worksites in the state. The Order of Penalty Assessment established a general penalty of 1.5 times the amount that the employer would have paid in premiums had workers' compensation insurance been procured.

On March 27, 2012, Petitioner issued an Amended Order of Penalty Assessment (hereinafter "Amended Order") which was served by hand-delivery on Respondent on March 28, 2012. The Amended Order calculated a specific monetary penalty of $39,843.18. The Amended Order included a notice to Respondent of its right to challenge the agency's proposed action by filing a petition pursuant to sections 120.569 and 120.57.

On April 9, 2012, Respondent filed an election of proceeding by which it requested a formal administrative hearing.

On April 13, 2012, Petitioner filed a 2nd Amended Order of Penalty Assessment, by which it reduced the assessed penalty from $39,843.18 to $5,436.64. The 2nd Amended Order of Penalty Assessment forms the basis for this proceeding.

On April 30, 2012, the Stop-Work Order, 2nd 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 July 27, 2012.

The case was held by video hearing as scheduled at sites in Tallahassee, Florida, and Daytona Beach, Florida. Petitioner presented the testimony of Carolyn Martin, an Insurance Analyst II with the Division of Workers' Compensation Bureau of Compliance, and Lynne Murcia, a Penalty Auditor for the Division of Workers' Compensation. Petitioner introduced Exhibits 1 through 12, each of which was admitted into evidence. Respondent testified in his own behalf.

The one-volume Transcript was filed on August 14, 2012. Petitioner timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

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 require employers to secure and maintain payment of workers' compensation insurance for their employees who may suffer work-related injuries.

2. Respondent is an active Florida limited liability company, having been organized in 2006.

3. Howard's Famous Restaurant is a diner-style restaurant located at 488 South Yonge Street, Ormond Beach, Florida. It seats approximately 60 customers at a time, and is open for breakfast and lunch.

4. In 2006, Edward Kraher and Thomas Baldwin jointly purchased Howard's Famous Restaurant. They were equal partners. Mr. Baldwin generally handled the business aspects of the restaurant, while Mr. Kraher was responsible for the food.

5. At the time the restaurant was purchased, Mr. Baldwin organized That's Right Enterprises, LLC, to hold title to the restaurant and conduct the business of the restaurant. Mr. Baldwin and Mr. Kraher were both identified as managing members of the company.[1/]

6. On June 27, 2007, a 2007 Limited Liability Company Annual Report for That's Right Enterprises, LLC, was filed with the Secretary of State. The Annual Report bore the signature of Mr. Kraher, and contained a strike-through of the letter that caused the misspelling of Mr. Kraher's name. Mr. Kraher testified that the signature on the report appeared to be his, but he had no recollection of having seen the document, or of having signed it. He suggested that Mr. Baldwin may have forged his signature, but offered no explanation of why he might have done so. Although Mr. Kraher could not recall having signed the annual report, and may have had little understanding of its significance, the evidence supports a finding that Mr. Kraher did, in fact, sign the annual report for That's Right Enterprises, LLC, as a managing member of the business entity.

7. From March 9, 2009, through March of 2011, Mr. Kraher and Mr. Baldwin received salaries as officers, rather than employees, of That's Right Enterprises, LLC. Their pay was substantially equivalent during that period. The paychecks were issued by the company's accountant. Mr. Kraher denied having specific knowledge that he was receiving a salary as an officer of That's Right Enterprises, LLC.

8. Since Mr. Baldwin left the company, Mr. Kraher has continued to use the same accountant, and has continued to

receive his salary as an officer of That's Right Enterprises, LLC.

9. On March 24, 2011, after having bought out Mr. Baldwin's interest in the company by paying certain company-related debt owed by Mr. Baldwin, Mr. Kraher filed an annual report for That's Right Enterprises, LLC. In the annual report, which was prepared and filed at his request, Mr. Kraher assumed control as the sole member and registered agent of the company. Mr. Baldwin was removed as a managing member and registered agent, and other changes were made consistent therewith. Mr. Kraher denied any understanding of the significance of his operating as the same corporate entity, but rather thought he was "buying a new LLC."

10. On March 8, 2012, Petitioner's investigator, Carolyn Martin, conducted an inspection of Howard's Famous Restaurant. Ms. Martin introduced herself to one of the waitresses working at the restaurant. The waitress called Mr. Kraher from the kitchen to speak with Ms. Martin. Mr. Kraher identified himself as the owner of the restaurant for the past six years.

11. Ms. Martin asked Mr. Kraher for evidence that Respondent's employees were covered by workers' compensation insurance. Mr. Kraher retrieved a folder containing the restaurant's insurance policies and information. Ms. Martin

reviewed the folder, and determined that Respondent did not have workers' compensation insurance.

12. Mr. Kraher, who was very cooperative with Ms. Martin throughout the inspection, was genuinely surprised that the restaurant employees were not covered by workers' compensation insurance. He had taken out "a million-dollar insurance policy" that he thought covered everything he needed to have. While Ms. Martin was at the restaurant, Mr. Kraher called his insurance agent who, after reviewing his file, confirmed that Respondent did not have workers' compensation insurance. Mr. Kraher immediately asked his agent to bind a policy, and paid his first six-month premium using a business credit card. A copy of the policy was quickly faxed by the agent to Ms. Martin.

13. Ms. Martin took the names of Respondent's employees, which included two kitchen staff and four wait staff. Some of the employees worked in excess of 30 hours per week, while others worked part-time.

14. Ms. Martin went to her vehicle and completed a Field Interview Worksheet. Ms. Martin reviewed the Coverage and Compliance Automated System (CCAS), which is the statewide database for workers' compensation information, to confirm Respondent's status in the workers' compensation system. Using the CCAS, Ms. Martin confirmed that Respondent had no workers'

compensation coverage on file for any employee of the company. She also accessed the Florida Division of Corporations website to ascertain Respondent's corporate status.

15. After having gathered the information necessary to determine Respondent's status, Ms. Martin contacted her supervisor and received authorization to issue a consolidated Stop-Work Order and Order of Penalty Assessment. The Stop-Work Order required Respondent to cease all business operations statewide. The Order of Penalty Assessment assessed a penalty, pursuant to section 440.107(7)(d), 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. The consolidated order was hand-delivered to Mr. Kraher on behalf of Respondent at 11:00 a.m. on March 8, 2012.

16. At the time she delivered the consolidated Stop-Work Order and Order of Penalty Assessment, Ms. Martin also hand-delivered a Request for Production of Business Records for Penalty Assessment Calculation. The Request required that Respondent produce business records for the preceding three-year period, from March 9, 2009, through March 8, 2012. Respondent was given five days in which to provide the records.

17. On or about March 12, 2012, Mr. Kraher produced three boxes of business records to Ms. Martin. Those records were

forwarded by Ms. Martin, and placed in the queue for review by the penalty auditor.

18. The records were reviewed by Petitioner's penalty auditor, Lynne Murcia, and were found to be insufficient to establish the actual compensation paid to Respondent's employees for the preceding three year period. Therefore, pursuant to section 440.107(7)(e), salaries were imputed for each of the six employees based on the statewide average weekly wage.

19. Ms. Murcia used the "Scopes Manual" published by the National Council on Compensation Insurance to ascertain the classification of Respondent's business, based upon the nature of the goods and services it provided. Class code 9082, titled "Restaurant NOC," is described as "the 'traditional' restaurant that provides wait service." Ms. Murcia correctly determined that Howard's Famous Restaurant fell within class code 9082.

20. The salaries of Respondent's six employees, as employees of a class code 9082 restaurant, were imputed as though they worked full-time for the full three-year period from March 9, 2009, to March 8, 2012, pursuant to section 440.107(7)(e). The total imputed gross payroll amounted to $1,130,921.64.

21. The penalty for Respondent's failure to maintain workers' compensation insurance for its employees is calculated

as 1.5 times the amount Respondent would have paid in premium for the preceding three-year period.

22. The National Council on Compensation Insurance periodically issues a schedule of workers' compensation rates per $100 in salary, which varies based on the Scopes Manual classification of the business.

23. The workers' compensation insurance premium was calculated by multiplying one percent of the imputed gross payroll ($11,309.21) by the approved manual rate for each quarter (which varied from $2.20 to $2.65, depending on the quarterly rate), which resulted in a calculated premium of $26,562.06.

24. The penalty was determined by multiplying the calculated premium by 1.5, resulting in the final penalty of $39,843.18.

25. On March 28, 2012, Petitioner issued an Amended Order of Penalty Assessment assessing a monetary penalty amount of $39,843.18 against Respondent.

26. Respondent subsequently provided Petitioner with additional payroll records regarding the six employees. The records had been in the possession of Respondent's accountant. The records, which included Respondent's bank statements and payroll records for the six employees, were determined to be

adequate to calculate the actual employee salaries for the preceding three-year period.

27. Ms. Murcia revised her penalty worksheet to reflect that payroll was now based on records, rather than being imputed.[2/] Respondent's total payroll for the three-year period in question was determined to be $154,079.82. 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 $3,624.33, with a resulting penalty of $5,436.64.

28. On April 24, 2012, Petitioner issued a 2nd Amended Order of Penalty Assessment reducing Respondent's penalty from $39,843.18 to $5,436.64.

CONCLUSIONS OF LAW

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

30. 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.

31. Petitioner has the burden of proof in this case, and must show by clear and convincing evidence, that Respondent violated the Chapter 440 and the rules promulgated thereunder 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).

32. The workers' compensation law is a creation of statute, and was unknown to the common law. Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1184 (Fla. 4th DCA 2005); Shaw v. Cambridge Integrated Servs. Group, Inc., 888 So. 2d 58, 62 (Fla. 4th DCA 2004). As a statute in derogation of the common law, the workers' compensation statute requires strict compliance with its provisions by the person seeking its benefits. See Florida Steel Corp. v. Adaptable Dev., Inc., 503 So. 2d 1232 (Fla. 1986); Anderson Columbia, Inc. v. Brewer, 994 So.2d 419, 421 (Fla. 1st DCA 2008); Edwards v. C.A. Motors, Ltd., 985 So. 2d 1147 (Fla. 1st DCA 2008).

33. The evidence is clear and convincing that Respondent, That's Right Enterprises, LLC, has been in continuous, active existence since 2006. Respondent is the entity that was responsible for the operation of Howard's Famous Restaurant for the period from March 9, 2009, through March 8, 2012.[3/]

34. 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.

35. Section 440.02(16)(a), in pertinent part, defines an "employer" to be "every person carrying on any employment."

36. 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 "[a]ll private employments in which four or more employees are employed by the same employer . . ."

37. Section 440.02(15)(a) broadly defines "employee" to mean "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors."

38. Petitioner established by clear and convincing evidence that Respondent was an employer for workers' compensation purposes because it was conducting business, and engaged four or more employees to perform services on its behalf from March 9, 2009, to March 8, 2012. Therefore, Respondent was required to secure and maintain compensation for its employees pursuant to section 440.10.

39. Petitioner established 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.

40. 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.

41. The evidence demonstrates that upon being notified that Respondent did not have workers' compensation for its employees -- a fact that was a "revelation" to Mr. Kraher -- Mr. Kraher immediately secured workers' compensation for Respondent's employees, effective on the March 8, 2012, date of the inspection. Petitioner's representative was advised of that fact prior to her leaving Howard's Famous Restaurant.

42. 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.

43. Business records provided to Petitioner demonstrate that Respondent's total payroll for preceding three-year period, from March 9, 2009, through March 8, 2012, was $154,079.82.

Petitioner established by clear and convincing evidence that the total workers' compensation premium that Respondent should have paid for its employees for that period was $3,624.33. Multiplying that amount by the statutory factor of 1.5 results in a penalty assessment in the amount of $5,436.64.

44. Based on the foregoing, Respondent is liable for payment of a penalty in the amount of $5,436.64 for its failure to secure and maintain compensation for its employees as set forth in the Stop-Work Order and the 2nd Amended Penalty Assessment.

RECOMMENDATION

Based on the findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order assessing a penalty of $5,436.64 against Respondent, That's Right Enterprises, LLC, for its failure to secure and maintain required workers' compensation insurance for its employees.

DONE AND ENTERED this 31st day of August, 2012, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2012.

ENDNOTES

[1/] The corporate records identified one of the managing members as "Edward P. Kracher." The address, 302 Grant Street, Port Orange, Florida 32127, is that of Mr. Kraher. It is clear that the reference to Mr. "Kracher" is the result of a scrivener's error, and was not intended to refer to a person other than Edward P. Kraher.

[2/] The records provided by Respondent provided payroll information through March 7, 2012. Therefore, Ms. Murcia imputed the salary for March 8, 2012, as though each of the six employees worked on that day. The total imputed salary for that date was $1,031.88. Using the formula described herein, the total premium for that salary amount would have been $25.50, with a penalty derived for that date of $38.28. Although the evidence suggests that, as a rule, only three employees were on duty at any given time, the penalty difference attributable to that fact is *de minimis* and not material.

[3/] Mr. Kraher testified that he had no specific knowledge that Respondent had been formed in 2006 to be the legal entity responsible for the operation and control of Howard's Famous Restaurant. He further testified that he believed the current

iteration of That's Right Enterprises, LLC, which he admitted was the current legal entity responsible for the operation and control of Howard's Famous Restaurant, was a "new LLC." Even if that were true, Respondent would not be relieved of liability for the stop-work order and order of penalty assessment. Section 440.107(7)(b) provides that:

> Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

Consistent therewith, rule 69L-6.031 provides, in pertinent part, that:

> (1) Under section 440.107(7)(b), F.S., stop work orders or orders of penalty assessment issued against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the predecessor corporation or business entity against which the stop work order was issued and are engaged in the same or equivalent trade or activity.
>
> (b) For employers engaged in the non-construction industry, a corporation, partnership, or sole proprietorship and the successor corporation or business entity that has been issued a stop-work order or order of penalty assessment, are engaged in the same or equivalent trade or activity if they each perform or have performed business operations that include operations described in at least one classification code that is in the manufacturing, goods and services, or the office and clerical industry group listed in subsection (6) of this rule.

> (2) A stop-work order or order of penalty assessment issued against a corporation, partnership, or sole proprietorship becomes effective against a successor corporation or business entity that has one or more of the same principals, directors, officers, partners, or shareholders with a 10 percent or greater interest, including any "affiliated person" as defined in section 440.05(15), F.S., in common with the predecessor corporation or business entity against which the original stop work order or order of penalty assessment was issued and is engaged in the same or equivalent trade or activity, through service on the successor corporation or business entity of an order applying a stop work order or order of penalty assessment to successor corporation or business entity. The order applying a stop work order or order of penalty assessment to successor corporation or business entity remains in effect until withdrawn by the department.

Howard's Famous Restaurant is engaged in business described in the goods and services classification code for Restaurant NOC listed in Rule 69L-6(6)(d)111. Thus, even if Respondent had been reorganized by Mr. Kraher as a new LLC in 2011 -- which it was not -- Respondent would be the successor business entity engaged in the same or equivalent trade or activity responsible for the actions of the predecessor business entity.

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.