

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 12-1582
)
ALL PHASE CONSTRUCTION AND)
DEVELOPMENT, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on September 6, 2012, via video teleconference with sites in Tallahassee and Tampa, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamila G. Gooden, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: David M. Robey, pro se
All Phase Construction and
Development, LLC
3118 Whitehead Lane
Land O Lakes, Florida 34638

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, All Phase Construction and Development, LLC ("All Phase"), failed to provide workers' compensation coverage for its employees and, if so, what amount is owed, including any penalties imposed by Respondent, Department of Financial Services, Division of Workers' Compensation ("Department").

PRELIMINARY STATEMENT

This case commenced with the posting of a Stop-Work Order at All Phase's corporate offices. All Phase timely filed a request for a formal administrative hearing.

At the final hearing, the Department presented the testimony of Jonathan Hill, compliance investigator; and Jordan Rimert, penalty auditor. The Department offered nine exhibits into evidence, each of which was admitted. All Phase presented the testimony of its sole owner, David M. Robey. All Phase did not offer any exhibits into evidence during the final hearing.

The parties advised that a transcript of the final hearing would be ordered. By rule, the parties have ten days from the date the transcript is filed to file proposed recommended orders ("PROs"). The Transcript was filed at the Division of Administrative Hearings on September 20, 2012. All Phase and the Department each filed its PRO on October 1, 2012. The All Phase PRO included three exhibits. However, inasmuch as those

exhibits had not been properly offered into evidence during the final hearing, they were not relied upon by the undersigned in making findings in this Recommended Order. Other than those exhibits, each party's PRO was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the State agency responsible for, inter alia, monitoring businesses within the State for compliance with workers' compensation insurance compliance.

2. At all times relevant hereto, All Phase was a limited liability company duly existing pursuant to the laws of the State of Florida. All Phase came into existence on April 2, 2007. The sole member and manager of All Phase is David M. Robey. The address of record for All Phase is 1906 North Armenia Avenue, Suite 214, Tampa, Florida. The Registered Agent for All Phase listed in, Department of State, Division of Corporation, records is TK Registered Agent, Inc., located at 101 E. Kennedy Boulevard, Suite 2700, Tampa, Florida.

3. On or about June 9, 2011, the Department received an anonymous call concerning All Phase. The call, which the Department calls a "public referral," was from an anonymous source claiming that All Phase was not providing workers' compensation insurance for its employees. Mr. Hill was assigned to investigate the complaint.

4. Mr. Hill first determined from the Department's coverage and compliance automated system ("CCAS") that there was no current workers' compensation coverage listed for All Phase. CCAS showed that All Phase had coverage in place from January 1, 2010, until January 1, 2011, but there was no coverage after that period. The calendar year 2010 coverage had been provided by a professional employer organization (PEO).

5. After ascertaining there was no current workers' compensation coverage, Mr. Hill visited the All Phase offices in Tampa on June 9, 2011. Upon locating the office, Mr. Hill went inside and met a woman who identified herself as Michelle Little, secretary for All Phase. Ms. Little advised Mr. Hill that Mr. Robey, the owner, was at a meeting in Orlando. She told Mr. Hill that Mr. Robey was a certified general contractor, who was involved in various construction jobs. Mr. Hill later independently verified Mr. Robey's general contractor's certification and license.

6. Ms. Little said there were four employees in the office, plus Mr. Robey and his brother, a job estimator. Mr. Hill could not independently verify Ms. Little's description of the office staff. Mr. Hill then checked to see if there was any workers' compensation insurance coverage in place for the alleged employees, but did not find any. Mr. Hill called Mr. Robey and left a message; he told Mr. Robey to return the call

by the end of that business day or Mr. Hill would have a Stop-Work Order ("SWO") entered. Mr. Hill did not receive a return telephone call.

7. On the next day, June 10, 2011, Mr. Hill went to the All Phase offices and posted an SWO on a door of the building. Mr. Robey disputes whether the SWO was left on the front door or rear door of the building, but there is no consequence as to that distinction. Mr. Hill also mailed a copy of the SWO via certified mail to the address of All Phase's registered agent, TK Registered Agent, Inc.^{1/} Two days later, Mr. Hill sent out a "Request for Production of Business Records for Penalty Assessment Calculation" ("Business Records Request"). The Business Records Request listed 13 categories of documents and information needed by the Department to accurately calculate the penalty for All Phase's failure to have workers' compensation coverage in place.

8. The Business Records Request contained a clear and concise warning that failure to produce the requested records would result in the Department imputing a weekly payroll amount for each purported employee. When Mr. Robey failed to produce the requested records, Mr. Hill prepared an Order of Penalty Assessment ("OPA"). The OPA was amended on July 7, 2011, showing a total penalty of \$34,141.15 for failure to provide

adequate workers' compensation coverage. The OPA was sent via certified mail to All Phase's registered agent of record.

9. The OPA addresses only two employees for All Phase: David M. Robey and Michelle Little. Mr. Hill could not verify that any other employees described by Ms. Little earlier actually worked for All Phase. Mr. Robey was assigned a class code of 5403, i.e., carpentry, not otherwise classified; Ms. Little was assigned code 8810, i.e., clerical office employee. The other office workers and estimator were not included in the calculation because Mr. Hill could not find any evidence they ever worked for the company. Mr. Robey maintains that Ms. Little was not really an employee of All Phase, but inasmuch as she held herself out to be the business' secretary and was working in the All Phase office when Mr. Hill went to investigate, the Department's designation of her as an employee of All Phase is justified and reasonable.

10. Mr. Robey also maintains that he was not actively engaged in construction but was merely acting as a management company. He did not adequately explain what part a management company plays in a construction project, but said at times when he was doing construction he would get workers' compensation coverage. There is no persuasive evidence to support Mr. Robey's claim concerning his business. He is a certified

general contractor working under a company with the words "construction and development" in its title.

11. Mr. Robey had various explanations for not providing the Department with his business records. He first said that his company had been evicted from his office after losing all of its business. He said the company stopped operating and therefore did not maintain any records. He said the records at his old office became unavailable after he was evicted. Then Mr. Robey said he was afraid to turn over his records lest the Department find evidence of other payments to friends and family members that could be claimed to be payroll payments. He was afraid the assessment would be even higher if that happened. No matter the actual reason, All Phase did not respond to the Business Records Request. Had Mr. Robey provided his business records it is possible his assessment could have gone down (if the facts he alluded to, but did not prove at final hearing were true, e.g., that Ms. Little was just a friend helping out and that Mr. Robey was the only employee of the company and was eligible for an exemption from coverage, etc.).

12. Mr. Rimert did the calculations for the penalty appearing in the OPA. He calculated the amount of the workers' compensation insurance premium All Phase should have paid during the past three years for Mr. Robey and Ms. Little. Absent their actual salaries, Mr. Rimert used the average weekly wage set

forth in the information bulletin issued by the National Council on Compensation Insurance, Inc., to impute wages for the two known employees. Applying the manual rates for each class code, Mr. Rimert calculated the premium and then, pursuant to statute, multiplied the amount by one and a half. His calculations form the basis for the assessed penalty in the OPA.

13. One portion of Mr. Rimert's calculations is amiss: The three-year period he utilized for making the assessment calculation included the period of time All Phase was providing workers' compensation coverage through a PEO. Mr. Rimert said that he simply presumed that the employees covered by the PEO could also have been paid directly by Mr. Robey for other work done during the time the PEO was providing coverage. Mr. Rimert's calculations supposed a full 40-hour work week for the employees, so any work Mr. Robey supposedly paid directly to himself and Ms. Little would have been in excess of a normal work week. There is no persuasive evidence to suggest that Mr. Robey or Ms. Little worked more than a regular 40-hour week.

14. Mr. Robey testified, and the Department did not refute, that Ms. Little did not even live in the State of Florida for all of the three years used in Mr. Rimert's calculations. That being the case, Ms. Little could not be an employee of All Phase for the entire period. However, there was

insufficient evidence to establish exactly what periods of time Ms. Little lived outside the State of Florida.^{2/}

15. The Department established that All Phase failed to provide workers' compensation insurance coverage for Mr. Robey for the periods: June 10, 2008, through December 31, 2008, for a penalty of \$7,415.10; January 1, 2009, through March 31, 2009, for a penalty of \$2,888.93; April 1, 2009, through June 30, 2009, for a penalty of \$3,108.59; July 1, 2009, through December 31, 2009, for a penalty of 5,906.24; and January 1, 2011, through June 9, 2011, for a penalty of \$4,403.90. (There was, however, PEO coverage in place from January 1, 2010, through December 31, 2010.) The total penalty for failing to cover Mr. Robey is \$17,816.52.

16. The Department established that All Phase failed to provide workers' compensation insurance coverage for Ms. Little for the periods: June 10, 2008, through December 31, 2008, for a penalty of \$190.67; January 1, 2009, through March 31, 2009, for a penalty of \$63.35; April 1, 2009, through June 30, 2009, for a penalty of \$68.63; July 1, 2009, through December 31, 2009, for a penalty of \$129.51; and January 1, 2011, through June 9, 2011, for a penalty of \$100.55. (Again, the PEO coverage was in place for January 1, 2010, through December 31, 2010.) The total penalty for failing to cover Ms. Little is \$552.71. The total penalty owed by All Phase for its two employees is \$18,369.23.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).^{3/}

18. The Department has the burden of proof in this case. Because the penalties being proposed are penal in nature, the standard of proof is clear and convincing evidence. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

19. Pursuant to sections 440.10 and 440.38, Florida Statutes, every employer is required to secure the payment of workers' compensation insurance for the benefit of its employees unless the employee is exempted or excluded under chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

20. The Department may assess a penalty against an employer who has failed to obtain the requisite workers' compensation coverage in an amount 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 during the periods for which it failed to secure payments of workers' compensation § 440.107(7)(d), Fla. Stat.

21. Further, section 440.107(7) (e) states that:

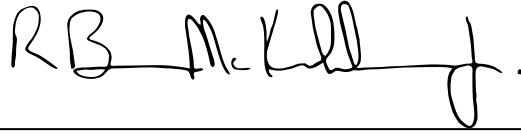
When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll . . . the imputed weekly payroll for each employee . . . shall be the statewide average weekly usage as defined in s. 440.12(2), multiplied by 1.5.

22. The Department has proven by clear and convincing evidence that All Phase failed to provide workers' compensation insurance coverage for each of its employees during the periods of June 2008, through December 31, 2009, and January 1, 2011, through June 9, 2011. The Department properly imputed income to the employees for these periods, when they were working and not otherwise covered. However, the Department acknowledges that All Phase had workers' compensation coverage during the period January 1, 2010, through December 31, 2010.

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 Workers' Compensation, assessing a penalty against All Phase Construction and Development, LLC, in the amount of \$18,369.23, which will be due and owing within 30 days of the date of the Final Order. Neither All Phase Construction and Development, LLC, nor any of its principles, shall be eligible to operate as a business in this State until the assessed penalty has been paid in full.

DONE AND ENTERED this 9th day of October, 2012, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of October, 2012.

ENDNOTES

^{1/} Mr. Robey testified that he no longer used that registered agent due to financial reasons, but the entity is still listed as the registered agent of record in the State of Florida, Division of Corporations, records.

^{2/} The affidavit from Ms. Little attached to All Phase's proposed recommended order might have, if introduced properly at final hearing, established the dates Ms. Little worked for All Phase. However, the affidavit as submitted is not admissible evidence.

^{3/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 version.

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.