

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 12-1622

JAMES F. HOWARD CONSTRUCTION,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 4, 2013, in Pensacola, Florida, before James H. Peterson III, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Robert O. Beasley, Esquire
Litvak, Beasley and Wilson, LLP
226 East Government Street
Pensacola, Florida 32502

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated the provisions of chapter 440, Florida Statutes,^{1/} by failing to

secure the payment of workers' compensation, as alleged in the Stop-Work Order and Third Amended Order of Penalty Assessment.

PRELIMINARY STATEMENT

On March 29, 2012, the Department of Financial Services, Division of Workers' Compensation (Department or Petitioner), issued a Stop-Work Order for Specific Worksite Only and Order of Penalty Assessment (Stop-Work Order) against Respondent James F. Howard Construction, Inc., ordering the corporation to immediately cease all business operations at 2544 North D Street, Pensacola, Florida 32501. The Stop-Work Order advised Respondent of its right to have administrative review of the Department's action by filing a petition for hearing within 21 days. Respondent timely requested an administrative hearing by filing a document entitled "Election of Proceeding" (Request for Hearing) in which Respondent contested one or more of the Department's allegations in the Stop-Work Order.

When Respondent failed to respond to the Department's initial request for business records, the Department calculated an imputed penalty and issued an Amended Order of Penalty against Respondent. Thereafter, the Department transmitted the Request for Hearing to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing.

After it began receiving business records through discovery from Respondent, the Department twice amended the Amended Order of Penalty Assessment, resulting in a Third Amended Order of Penalty Assessment calculated pursuant to section 440.107(7), Florida Statutes, in the amount of \$11,335.70, which was served upon Respondent by the Department at the final hearing held April 4, 2013.

At the hearing, the Department presented the testimony of three witnesses, all of whom were employed by the Department, including: Government Analyst Mark Mark, Compliance Investigator Angelia Brown, and Penalty Auditor Catherine Ferguson. Petitioner's Exhibits P-1 through P-3, P-5, P-6, partial Exhibit P-7, Exhibits P-8, P-10, P-11, P-13, and P-14 were received into evidence. Respondent presented the testimony James F. Howard, a corporate officer of Respondent, and offered no individual exhibits. The parties offered two joint exhibits which were received into evidence as Joint Exhibits A and B.

The proceedings were transcribed and a transcript was ordered. The parties requested and were given 20 days from the filing of the transcript with the Division of Administrative Hearings within which to submit proposed recommended orders. The Transcript, consisting of two volumes, was filed on April 24, 2013. By Order granting the parties' stipulation for extension of time, the parties were given until May 21, 2013,

within which to file their proposed recommended orders. The Department timely filed its Proposed Recommended Order. Respondent filed its Proposed Recommended Order on May 23, 2013, two days after the extended deadline. The Department, however, did not seek to strike Respondent's Proposed Recommended Order, and there does not appear to be any prejudice in considering Respondent's late-filed Proposed Recommended Order. Therefore, the Proposed Recommended Orders of both parties have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the statutory requirement that employers secure workers' compensation coverage for the benefit of their employees.

2. Respondent is a corporation with its principal office 3981 North W Street, Unit 36, Pensacola, Florida 32505. At all relevant time periods, Respondent has been engaged in business as a contractor in the construction industry.

3. On March 28, 2012, after receiving a public referral regarding alleged uninsured construction activity at 2544 North D Street in Pensacola, Florida (the Site), Department Compliance Investigator Angelia Brown visited the Site. Upon Ms. Brown's arrival, there were plumbers and a siding company at the Site. According to Ms. Brown, she also saw an individual attaching u-

shaped metal clips between the inside beams and the roof and soffits of the house that was being constructed at the Site.

4. The plumbers had a workers' compensation policy and the siding workers had exemptions from workers' compensation requirements.

5. Ms. Brown spoke to the man who appeared to be attaching the metal clips. Based upon that conversation, Ms. Brown concluded that the man was a subcontractor and Respondent's employee. The evidence, however, does not support that conclusion.

6. The man, whose name is apparently Robert Madron, was not called as a witness at the final hearing. According to Ms. Brown, Mr. Madron told her he had his own company. Ms. Brown, however, was unable to obtain information verifying that assertion.

7. Further, while Mr. Howard had paid Mr. Madron prior to Ms. Brown's visit for unsolicited work Mr. Madron had performed for Mr. Howard, consisting of picking up trash and repairing some equipment owned by Mr. Howard, Mr. Howard denied that Respondent ever employed Mr. Madron.

8. Rather than showing that Mr. Madron was a subcontractor with his own business or an employee of Respondent, the evidence adduced at the final hearing indicated that Mr. Madron, who was known as "Gomer" by Mr. Howard, was an unemployed, homeless

person, living in nearby woods. Mr. Madron would often come to the Site and surrounding neighborhood looking for work and food.

9. Mr. Howard was surprised that Ms. Brown had taken Mr. Madron seriously, because Mr. Howard believes that Mr. Madron's facial expressions and unbalanced, awkward gait are obvious indicators that Mr. Madron is unstable and has mental problems.

10. Ms. Brown issued a Stop-Work Order to Mr. Madron the day of her first visit at the Site, March 28, 2012.

11. The evidence presented at the final hearing, however, failed to show that Mr. Madron was ever employed by Respondent.

12. The next day, March 29, 2012, Ms. Brown returned and observed four other individuals working at the Site. The individuals included Robert Jones, Charles Lyons, Martin Shaughnessy, and Allen Weeden. While Ms. Brown concluded that these individuals were Respondent's employees on March 29, 2012, the evidence shows that they were paid for the work that day by Pacesetter Personnel, an employee-leasing company.

13. Aside from alleging that Respondent employed Mr. Madron, the Third Amended Order of Penalty Assessment is based upon Respondent's alleged employment and failure to provide workers' compensation coverage for Mr. Jones, Mr. Lyons, Mr. Shaughnessy, and Mr. Weeden. In addition, the Third Amended Order of Penalty Assessment alleges that Respondent employed its

officer, Mr. Howard, during a lapse in Mr. Howard's exemption from workers' compensation.

14. There was no testimony from Robert Jones, Charles Lyons, Martin Shaughnessy, or Allen Weeden offered at the final hearing and the evidence is otherwise insufficient to show that those individuals were employed by Respondent on March 29, 2012.

15. The Department's investigator, Ms. Brown, further concluded that Pacesetter Personnel had not provided worker's compensation coverage for those four men on March 29, 2012. Her conclusion, however, was based on a conversation she said she had with Pacesetter Personnel. The Department did not offer the testimony from anyone at Pacesetter, nor did it offer any non-hearsay evidence to support Ms. Brown's conclusion that Pacesetter Personnel was not providing workers' compensation to those four individuals.

16. Further, the only evidence that the Department offered to prove that Messrs. Jones, Lyons, Shaughnessy, and Weeden were ever employed by Respondent, or to support the Third Amended Penalty Assessment, consists of Mr. Howard's cancelled checks to those individuals.

17. The Third Amended Penalty Assessment seeks an assessment for Robert Jones from January 1 to March 28, 2012. At the final hearing, Mr. Howard testified that Mr. Jones is a

relative, and the payment to Mr. Jones was a loan to help Mr. Jones with moving expenses. There is no contrary evidence.

18. The Third Amended Penalty Assessment provides an assessment for Charles Lyons for the periods from July 1, 2010 to December 31, 2010, and from January 1, 2011 to December 31, 2011. The assessment is based upon one check to Mr. Lyons in the amount to \$480. Mr. Howard testified that Mr. Lyons had an exemption from workers' compensation. The Department presented no contradictory evidence.

19. The Third Amended Penalty Assessment seeks an assessment for Martin Shaughnessy for several time periods based upon several checks from Mr. Howard. Mr. Howard testified that Mr. Shaughnessy had an exemption and the Department presented no contrary evidence.

20. The Third Amended Penalty assessment also seeks an assessment for James Howard, individually, from July 17 to August 11, 2011, during which time there was a lapse in his certificate of exemption from workers' compensation. The evidence showed that, other than that 26-day lapse, Mr. Howard has maintained his exemption since 2003.

21. The Department presented no evidence that Mr. Howard provided services to, or was paid by, Respondent during the time that his exemption had lapsed. The only evidence presented was a check from Respondent's checking account showing a payment to

Mr. Howard's mother during the lapse period. Mr. Howard testified that the check was to reimburse his mother for the use of her American Express card to purchase materials and supplies. The Department presented no countervailing evidence.

22. In sum, the evidence presented at the final hearing was insufficient to support the Stop Work Order or Third Amended Penalty Assessment.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

24. The Department is responsible for enforcing the requirement that employers coming within the provisions of chapter 440, Florida Statutes, obtain workers' compensation coverage for their employees "that meets the requirements of [chapter 440] and the Florida Insurance Code" § 440.107(2), Fla. Stat.

25. As the party asserting the affirmative in this proceeding, the Department has the burden of proof. See, e.g., Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

26. Because the Department is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by

clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

27. Chapter 440 broadly defines "employer" as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

28. "Employment" subject to Florida's workers' compensation law "means any service performed by an employee for the person employing him or her . . . [and] with respect to the construction industry, [includes] all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a)&(b)(2), Fla. Stat.

29. The definitional section of chapter 440 defines "employee" as "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." § 440.02(15)(a), Fla. Stat.

30. The term "employee" as used in chapter 440 also includes "[a]n independent contractor working or performing services in the construction industry . . . [as well as a] sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry." § 440.02(15)(c), Fla. Stat.

31. In addition, the chapter 440 definition of "employee" includes "[a]ll 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,^[2/] for work performed by or as a subcontractor." § 440.02(15)(c)(2), Fla. Stat.

32. Officers of corporations, however, including up to three listed officers of a corporation involved in the construction industry who each own at least a 10 percent share of the corporation, may elect to be exempt from the requirement that they be covered by workers' compensation insurance. An officer of a corporation who validly elects to be exempt by filing a notice of the election with the Department is not an employee. § 440.02(15)(b), Fla. Stat. (emphasis added).

33. The Department argues that it properly issued and served the Stop-Work Order and business records request upon Respondent because Robert Madron was working for Respondent as a subcontractor on March 28 and 29, 2012. See Petitioner's Proposed Recommended Order (PRO), ¶41. However, as noted in the Findings of Fact, above, the Department failed to prove that Robert Madron was ever employed by Respondent.

34. The Department further argues that Charles Lyons, Robert Jones, Allen Weeden, and Martin Shaughnessy were

Respondent's employees on March 29, 2012, even if leased through Pacesetter Personnel because "leased employees are employees of the employer who utilizes the leasing company's services." See Department's PRO, ¶ 37 (citing Hazealeferiou v. Labor Ready, 947 So. 2d 599 (Fla. 1st DCA 2007)).

35. The Department's use of the decision in Hazealeferiou, supra, for the proposition that Respondent should be subject to the Third Amended Penalty Assessment because the leased employees were Respondent's employees is contrary to Department's investigator's admission that "[i]f they're being paid by Pacesetter, they are employed by Pacesetter." Transcript of Final Hearing (Transcript), p. 168; see also Transcript, p. 170 ("They worked for Pacesetter.").

36. Moreover, a review of the opinion in Hazealeferiou makes it clear that a company obtaining employees through an employee leasing company is not subject to workers' compensation liability unless the employee leasing company fails to provide coverage. See Hazealeferiou, 947 So. 2d 604.

37. As explained by the Department's Government Analyst, Mr. Mark, when a leasing company is involved, "[t]he employer enrolls and signs a client agreement with the leasing company to pay all payroll through the leasing company and the leasing company will provide workers' compensation coverage under their policy." See Transcript, p. 36.

38. A conclusion that the employee-leasing company was the employer and provided workers' compensation for the leased employees is consistent with the requirements of section 468.529(1), Florida Statutes, which provides in pertinent part:

A licensed employee leasing company is the employer of the leased employees An employee leasing company shall be responsible for timely payment of reemployment assistance taxes pursuant to chapter 443, and shall be responsible for providing workers' compensation coverage pursuant to chapter 440.

39. Therefore, it is concluded that the Department did not prove by clear and convincing evidence that the leased employees were employed by Respondent on March 29, 2012, for purposes of imposing liability upon Respondent for failure to provide workers' compensation coverage. Rather, the evidence and law indicate that, for purposes of workers' compensation liability, they were employees of an employee-leasing company.

40. Further, considering the Findings of Fact in view of applicable law, it is concluded that the Department failed to provide sufficient evidence to justify the Stop-Work Order or its business records request, and the evidence submitted at the final hearing was otherwise inadequate to support the Third Amended Order of Penalty Assessment.

41. In sum, Petitioner failed to establish by clear and convincing evidence that Respondent 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 Third Amended Order of Penalty Assessment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Division of Workers' Compensation enter a final order dismissing the Stop-Work Order and Third Amended Order of Penalty Assessment issued against Respondent.

DONE AND ENTERED this 28th day of June, 2013, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 2013.

ENDNOTES

^{1/} Unless otherwise indicated, all citations to Florida Statutes are to the 2011 version in effect at the time of the allegations.

^{2/} Section 440.10(1)(a), (b), and (c), Florida Statutes, provides:

(a) 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.

(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.

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

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.