

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 13-3217

MAD DOG MARKETING GROUP, INC.,

Respondent.

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RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (DOAH), on November 5, 2013, by video teleconferencing at sites located in Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399

For Respondent: Kristian Eiler Dunn, Esquire  
Dickens and Dunn, P.L.  
517 East College Avenue  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether the Stop-Work Order and the Third Amended Order of Penalty Assessment entered by Petitioner on July 25, 2013, and August 13, 2013, respectively, should be upheld.

PRELIMINARY STATEMENT

This matter arose from the requirement that employers of a certain number of employees must secure workers' compensation insurance for them. On July 25, 2013, Petitioner, the Department of Financial Services, Division of Workers' Compensation (Department), served a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) on Respondent for failure to secure the required workers' compensation insurance required by chapter 440, Florida Statutes. An Amended Order of Penalty Assessment was filed on August 2, 2013, assessing a penalty of \$53,213.47. Respondent requested a review of that assessment, and, on August 21, 2013, the assessment was further amended to \$44,062.81. After further review, on October 28, 2013, the Department issued its Third Amended Order of Penalty Assessment for \$42,251.43. Thereafter, upon the request of Respondent, the matter was referred to DOAH for a hearing involving disputed issues of material fact.

At the hearing, Petitioner presented the testimony of Sharon Belcher, president of Respondent; Investigator Tracey Gilbert;

and Penalty Auditor Chad Mason from the Department, and offered 11 exhibits, all of which were admitted into evidence.

Respondent presented the testimony of Sharon Belcher and Mark Cristillo, an employee of ADP Insurance and offered four exhibits, all of which were admitted into evidence.

A one-volume Transcript of the final hearing was filed on November 21, 2013. After the hearing, Respondent and Petitioner filed their proposed findings of fact and conclusions of law on December 10 and 11, 2013, respectively.

References to statutes are to Florida Statutes (2013) unless otherwise noted.

#### FINDINGS OF FACT

1. The Department is the state agency tasked with the responsibility of enforcing the requirement of section 440.107(3), Florida Statutes, that employers in Florida secure the payment of workers' compensation for their employees.

2. Respondent, Mad Dog Marketing Group, Inc., is a corporation organized under chapter 607, Florida Statutes, and was registered with the Florida Department of State, Division of Corporations, throughout the period of July 26, 2010, to July 25, 2013.

3. At all times relevant to this proceeding, Respondent was engaged in the operation of a hardware store business with three locations in Florida.

4. On July 25, 2013, based upon an anonymous referral, Tracey Gilbert, the Department's compliance investigator, commenced a workers' compensation compliance investigation of Respondent by visiting the job site, an appliance parts store at 730 West Brandon Boulevard, Brandon, Florida, and interviewing Sharon Belcher.

5. According to Ms. Gilbert, Ms. Belcher informed her that she had 11 employees at the time of the site visit and that she did not have workers' compensation coverage for them. Ms. Belcher showed Ms. Gilbert an application for workers' compensation insurance and said she had not taken action with it since the company wanted a \$10,000 premium. She also showed Ms. Gilbert some OSHA and workplace posters, but not the typical "broken arm poster" that describes workers' compensation coverage for a place of business.

6. Ms. Belcher then gave Ms. Gilbert a list of Respondent's 11 current employees.

7. On her laptop computer, Ms. Gilbert consulted the Department's Coverage and Compliance Automated System (CCAS) database to determine whether Respondent had secured workers' compensation coverage or an exemption from the requirements for coverage for its employees. CCAS is the database Ms. Gilbert routinely consults during the course of her investigations. She determined from CCAS that Respondent neither had workers'

compensation coverage for her employees nor had received an exemption from such coverage from the Department.

8. Ms. Belcher's recollection of her meeting with Ms. Gilbert differs from Ms. Gilbert's. Ms. Belcher recalled that she had applied for insurance with ADP on July 11, 2013, received the "broken arm poster," and believed she was covered at the time Ms. Belcher conducted her investigation. She offered an exhibit showing photographs of posters (but not the "broken arm poster") on the office bulletin board. She also offered an exhibit she testified was the UPS label from the tube containing the "broken arm poster." No photograph of the "broken arm poster" was produced as an exhibit.

9. Ms. Gilbert did not contact ADP to verify whether Respondent had coverage on the date of her site visit to the Brandon store.

10. Ms. Gilbert issued a Stop-Work Order to Respondent and a concurrent Request for Production of Business Records for Penalty Assessment Calculation at 11:20 a.m. on July 25, 2013.

11. Ms. Belcher first submitted an application for workers' compensation coverage on July 11, 2013, but coverage was not bound on that date.

12. Ms. Belcher submitted the paperwork to bind her insurance coverage on the afternoon of July 25, 2013, according to Mark Cristillo, an employee of ADP Insurance. Mr. Cristillo

testified that he had made several attempts during the month of July 2013 to obtain the signed documents from Ms. Belcher, including an attempt as late as July 23, 2013, at 11:45 a.m. Ms. Belcher told Mr. Cristillo at that time that she had not reviewed the quote package.

13. At 11:20 a.m., the time Ms. Gilbert's issued the Stop-Work Order on July 25, 2013, Ms. Belcher had not bound her insurance coverage. When she submitted the payment with the signed documents to ADP later that afternoon, the coverage was bound effective 12:01 a.m. on July 25, 2013.

14. The records produced by Ms. Belcher were given to Chad Mason, one of the Department's penalty auditors, to calculate the penalty. He reviewed the records and determined the amount of gross payroll paid to Respondent's employees during the three-year penalty period preceding the investigation during which Respondent was not in compliance with the workers' compensation coverage requirements.

15. Using Respondent's bi-weekly payroll chart, Respondent's Florida Department of Revenue UCT-6 reports, and the classification codes for each employee, Mr. Mason calculated a Third Amended Order of Penalty Assessment of \$42,251.43, based upon what Respondent would have paid in workers' compensation premiums had it been in compliance with Florida's Workers' Compensation Law. The order was issued on October 24, 2013.

16. Mr. Mason determined that the appropriate codes for Respondent's employees were 8010 and 8810, which are hardware store employees and general clerical employees, respectively. These codes were derived from the Scopes Manual, which lists all of the various jobs that may be performed in the context of workers' compensation. The manual is produced by NCCI, the National Council on Compensation Insurance, Inc., the nation's most authoritative data collecting and disseminating organization for workers' compensation.

17. The parties stipulated prior to hearing that all of the individuals listed on the penalty worksheet of the Amended Order of Penalty Assessment were "employees" in the state of Florida of Respondent during the periods of non-compliance listed on the penalty worksheets. However, Respondent claimed that some of the employees were out-of-state and not subject to Florida law.

18. Ms. Belcher testified that, as of July 25, 2013, three of its employees, Fred Hasselman, Douglas Strickland, and Josh Hyers, were employees of the Tennessee store and not subject to a Florida penalty. Mr. Hyers was a Florida employee prior to July 1, according to Ms. Belcher. However, all three of the employees were listed on the Florida Department of Revenue's UCT-6 form for the time period of the non-compliance. The UCT-6 form lists those employees who are subject to Florida's Unemployment Compensation Law. Mr. Mason reasonably relied upon

the UCT-6 filings for the relevant time period to calculate Respondent's gross payroll in Florida. No evidence was produced to show them listed as Tennessee employees on that state's comparable tax form or any official document from outside Florida. The logical assumption is that they are Florida employees under the law.

19. Accepting all the employees disclosed by Respondent as Florida employees led Mr. Mason to make his calculations of the penalty assessment using the appropriate codes from the Scopes Manual for hardware store and general clerical workers, 8010 and 8810. All the named employees on the Third Amended Order of Penalty Assessment were paid by Respondent in the amounts indicated on the penalty worksheet that accompanies that assessment during the penalty period of July 26, 2010, through July 25, 2013. Even though small discrepancies came up at the hearing regarding the classifications of some of Respondent's employees, the parties had stipulated to the accuracy of the classifications of those employees so those numbers will be accepted for purposes of this decision.

20. Based upon the testimony at the hearing and the pre-hearing stipulations of the parties, the penalty assessment in the amount of \$42,251.43 is accurate. Mr. Mason correctly applied the methodology for determining the amount of coverage required, determining that the appropriate premium for the three-



year period would have been \$28,167.50. When multiplied by the factor used to calculate the penalty, 1.5 times the premium, the total amount due is \$42,251.43.

21. The Department has proven by clear and convincing evidence that at the time the Stop-Work Order was issued and served on Respondent on the morning of July 25, 2013, Respondent had not secured workers' compensation coverage for its employees as required by chapter 440.

22. On two occasions, August 2 and August 21, 2013, Ms. Gilbert returned to Respondent's Brandon location after the Stop-Work Order had been issued. The first was to serve the Amended Order of Penalty Assessment and the second was to serve the Second Amended Order of Penalty Assessment. On both occasions, the business was open in violation of the Stop-Work Order. A business under a Stop-Work Order may elect to enter into a payment plan after a ten percent down payment to keep the business open while a challenge to DOAH is under way. Respondent had not entered into such a plan. Therefore, the Department seeks \$1,000 penalty for each of the days Ms. Gilbert visited the Brandon store and saw it open for business. This total additional penalty of \$2,000 could have been greater had the Department further investigated whether the business remained open on other days after the Stop-Work Order had been imposed.

## 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.

24. Because administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant time period and that the penalty assessments are correct. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996).

25. The Department is the agency responsible for enforcement of chapter 440. As the responsible agency, the Department must abide by the statutes and rules that govern it.

26. Pursuant to sections 440.10, 440.107(2), 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. Strict compliance with the Workers' Compensation Law is required. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

27. Section 440.107(2) states that "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

28. Pursuant to section 440.107(3)(g), "The department shall enforce workers' compensation coverage requirements . . . the department shall have the power to: Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section."

29. Section 440.02(16)(a) defines "employer," in part, as "every person carrying on any employment." "Employment" is defined as "any service performed by an employee for the person employing him or her" and the definition includes "[a]ll private employments in which four or more employees are employed by the same employer." § 440.02(17)(a) and (b)2., Fla. Stat.

30. The Workers' Compensation Law requires employers to secure the payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2006).

31. Pursuant to section 440.05, the Department may grant applications for certificates of election of exemption from the Workers' Compensation Law.

32. Pursuant to section 440.05(6), "a certificate of election to be exempt which is issued . . . in accordance with this section is valid for 2 years after the effective date stated thereon."

33. "Corporate officer" or "officer of a corporation" is defined as "any person who fills an office provided for in the

corporate charter or articles of incorporation filed with the Division of Corporations of the Department of State or as permitted or required by chapter 607." § 440.02(9), Fla. Stat.

34. Corporate officers can become exempt from the coverage requirements of chapter 440, but must affirmatively make that election. See §§ 440.02(15)(b) and 440.05, Fla. Stat; and Fla. Admin. Code Rule 69L-6.012(2). Ms. Belcher had not sought an exemption from coverage.

35. In determining the number of employees of a particular employer, "[t]he prevailing theory is that liability of an employer should not vary from day to day according to the number of persons in his employ on each day, but should be governed by the established mode or plan of his business or operation, and from that determine he regularly and customarily employs the requisite number." Mathers v. Sellers, 113 So. 2d 443, 445 (Fla. 1st DCA 1959).

36. Respondent is a corporation in a non-construction industry, and at all times relevant for the calculation of the monetary penalty in this matter, had four or more employees conducting business in Florida. For the purpose of determining Respondent's employees, the employees at each distinct business location who were paid by Respondent are considered its employees.

37. The Department shall issue a penalty of \$1,000 per day against an employer for each day the employer conducts business operations in violation of a stop-work order. § 440.107(3), Fla. Stat.

38. The Department is empowered to examine and copy the business records of any employer conducting business in Florida to determine whether it is in compliance with the Workers' Compensation Law. See § 440.107(3), Fla. Stat. Whenever the Department finds an employer who is required to have such coverage but fails to do so, such failure is deemed an immediate serious danger to the 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. See § 440.107(1) and (7)(a), Fla. Stat.

39. Section 440.107(7)(d)1. provides that:

. . . 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.

The method of penalty calculation described in section 440.107(7)(d) is mandatory.

40. By not providing for the payment of workers' compensation insurance, Respondent violated chapter 440 on July 25, 2013, and for the three years preceding that date. No evidence was produced to demonstrate any coverage existed for the three-year period immediately preceding the date of the site visit by the Department. The Department was therefore justified in issuing the Stop-Work Order and Order of Penalty Assessment, the Amended Order of Penalty Assessment, the Second Amended Order of Penalty Assessment, and the Third Amended Order of Penalty Assessment.

41. Respondent was open for business on both August 2 and August 21, 2013, when Ms. Gilbert returned to serve amended orders of penalty assessment. The Department was therefore justified in assessing an additional penalty of \$1,000 per day to Respondent for each day the business operated in violation of the Stop-Work Order. Had the Department presented further evidence on the period of time the business remained open in violation of the Stop-Work Order, it would have been entitled to assess even greater penalties against Respondent, since it is unlikely from the testimony of the witnesses that the business was open only on those two days.

42. The Department utilized the appropriate worksheet, occupation codes, and salary information for calculating the appropriate penalty to be assessed against Respondent for

conducting business without the required workers' compensation coverage. Its calculation of the penalty in the amount of \$42,251.43 is accurate. Further, the Department is justified in assessing an additional penalty of \$2,000 against Respondent representing \$1,000 for each of the two days Ms. Gilbert witnessed Respondent's Brandon business open in violation of the Stop-Work Order. The total amount of the penalty to be imposed is therefore \$44,251.43.

43. Respondent's argument that it had workers' compensation insurance coverage in place as of 12:01 a.m. on July 25, 2013, fails to pass the smell test. The evidence was conflicting on the point of when Ms. Belcher, on behalf of Respondent, applied for and had insurance coverage bound. She testified she applied for coverage on July 11, yet Mr. Cristillo, the representative of the insurer ADP, testified that as late as the morning of July 23, 2013, Ms. Belcher still was questioning the premium and the coverage had not been bound. When Ms. Gilbert appeared on the morning of July 25, 2013, she was shown an application and a bulletin board with posters pertaining to workplace safety, but not the traditional "broken arm poster" supplied by workers' compensation insurers listing the policy number and contact telephone number to call in case of a claim.

44. The trail of evidence leads to the fact that Ms. Belcher contacted ADP on the afternoon of July 25, 2013,

after Ms. Gilbert had made her site visit and issued the Stop-Work Order and Order of Penalty Assessment that morning. The company issued the policy on that date, making it effective retroactively to 12:01 a.m. that day, which happens to be prior to the time of Ms. Gilbert's morning visit. At best, this is an attempt by a skilled lawyer to find a loophole in the statute requiring workers' compensation coverage by all employers with four or more employees. At worst, this is an attempt to back date insurance coverage to thwart the Workers' Compensation Law. The undersigned accepts the testimony of ADP's employee, Mr. Cristillo, as true and finds that Ms. Belcher, as president of Respondent realized the "wolves were at the door" and finalized her purchase of insurance after the Stop-Work Order was issued. The coverage was not in place at the time of the Stop-Work Order and Order of Penalty Assessment, making the Department's actions in penalizing Respondent and ceasing work at the Brandon jobsite justified. This ruling is consistent with other final orders of the Department. See, e.g., Dep't of Fin. Servs. v. Po'Boys, Inc., Case No. 13-0605 at 15, 16 (Fla. DOAH May 23, 2013; Fla. DFS July 30, 2013) (citing U.S. Builders, L.P. v. Dep't of Fin. Servs., Case No. 07-4428 (Fla. DOAH Jan. 14, 2009; Fla. DFS Feb. 23, 2009) ("back dated" coverage not material because Florida law does not recognize retroactive compliance with workers' compensation requirements); Dep't of Fin. Servs. v.



H.R. Elec., Case No. 04-2965 (Fla. DOAH Jun. 8, 2006; Fla. DFS Aug. 22, 2006) (retroactive coverage obtained after issuance of stop-work order does not satisfy employer's obligation); and Dep't of Labor & Emp. Sec. v. E. Pers. Servs., Inc., Case No. 99-2048 (Fla. DOAH Oct. 12, 1999; Fla. DLES Nov. 30, 1999) (obtaining coverage after compliance investigator visits site and determines no coverage in effect is no defense to stop-work order or penalty assessment).

45. While these actions are nothing to applaud, however, the evidence does not support finding Ms. Belcher and her attorney attempted to defend an action they knew or should have known was not in compliance with chapter 440 at the time of the initial investigation. Therefore, based upon the record before the undersigned, the evidence is insufficient to find a violation of section 57.105, Florida Statutes, resulting in the award of attorney's fees and costs to the Department. If the Department has further evidence to produce or that may be discovered through post-hearing discovery solely on the issue of attorney's fees and costs pursuant to section 57.105, it may seek these through separate motion.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department issue a final order upholding the Stop-Work Order and Third Amended Order of Penalty

Assessment, and assess a penalty in the amount of \$42,251.43. It is further RECOMMENDED that the Department fine Respondent an additional \$1,000 per day for the two days Respondent did not comply with the Stop-Work Order, resulting in a total penalty of \$44,251.43.

DONE AND ENTERED this 20th day of December, 2013, in Tallahassee, Leon County, Florida.



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ROBERT S. COHEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
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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.