

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN OGLES, LLC,

Petitioner,

vs.

Case No. 13-4357F

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Respondent.

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RL OGLES ROOFING, LLC,

Petitioner,

vs.

Case No. 13-4424F

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Respondent.

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FINAL ORDER

Pursuant to notice, a final hearing was held in this case on March 18, 2014, in Tallahassee, Florida, before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas L. Dickens, Esquire  
Dickens and Dunn, P.L.  
517 East College Avenue  
Tallahassee, Florida 32301

For Respondent: Trevor Suter, Esquire  
Elizabeth A. Miller, Esquire  
Department of Financial Services  
200 East Gaines Street  
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STATEMENT OF THE ISSUE

Whether Respondent, Department of Financial Services, Division of Workers' Compensation (Department or Respondent), should pay Petitioners', Stephen Ogles, LLC, or RL Ogles Roofing, LLC (Petitioners), attorney's fees and costs under section 57.111, Florida Statutes (2013),<sup>1/</sup> for initiating Division of Administrative Hearings (DOAH) Case Nos. 13-2448 and 13-2517.

PRELIMINARY STATEMENT

On June 12, 2013, the Department issued and served Stop-Work Orders (SWO) and Orders of Penalty Assessment Nos. 13-292-D1 and 13-291-D1. Respondent assessed a penalty of \$3,492.87 against Petitioner, Stephen Ogles, LLC, and \$12,282.06 against Petitioner, RL Ogles Roofing, LLC, for failure to secure the payment of workers' compensation for its employees.

On June 17, 2013, Petitioners filed a timely request for hearing. On September 10, 2013, Petitioners filed an amended request for formal administrative hearing, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

On October 8, 2013, Respondent issued to both Petitioners a Notice of Revocation of Administrative Complaint and Motion for Entry of Order Closing File.

On November 12, 2013, Petitioners timely filed an Application for Attorney's Fees and Costs, and on November 15, 2013, Petitioners filed an Amended Application for Award of Attorney's Fees and Costs. On November 20, 2013, Respondent moved to dismiss the Amended Application for Attorney's Fees and Costs on the grounds that the applications failed to include an affidavit specifying the nature and extent of the legal services rendered in the underlying action. On December 13, 2013, the undersigned issued an Order to Show Cause. Petitioners responded to the Order to Show Cause on December 23, 2014, by submitting an "Itemized List of Services."

By Order dated January 7, 2014, the two cases were consolidated, sua sponte.

Both Petitioners seek, in the instant matter, an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes.

At the final hearing Petitioners testified on their own behalves and also offered the testimony of John David Middleton, Robert Ogles, Sr., and Kathleen Petracco. Respondent offered the testimony of Julie Jones, Ralph Paul Douglas, Jr., and Jonas Hall. Petitioners' Exhibits 1 and 2 were admitted into evidence. Respondent's Exhibits 1, 2, 4, 7, 9, 10, and 11 were also admitted into evidence.

A Transcript of the proceeding was filed with DOAH on April 3, 2014. On April 14, 2014, Respondent filed its Proposed Final Order. The following day, April 15, 2014, Petitioners filed a Proposed Recommended Order.<sup>2/</sup> Both submittals have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Respondent is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees and officers, pursuant to section 440.107, Florida Statutes.

2. Petitioners are in the business of roofing, within the construction industry, as defined by subsection 440.02(8), and are Florida employers over whom Respondent has jurisdiction to enforce the payment of workers' compensation premiums for the benefit of Petitioners' employees.

3. Petitioners are the sole members of their respective limited liability companies, each with one employee.

4. An officer of a corporation may elect to be exempt from chapter 440, Workers' Compensation, by filing a notice of election with the Respondent. § 440.02(15)(b)1., Fla. Stat.

5. An officer of a corporation who elects to be exempt from Florida's Workers' Compensation Law is not an employee. § 440.02(15)(b)3., Fla. Stat.

6. Jonas Hall is employed as an investigator for the Division of Workers' Compensation. He has been conducting workers' compensation compliance investigations for approximately five years, and during that time has been involved in between 2,000 and 3,000 investigations.

7. On June 12, 2013, Respondent issued a Stop-Work Order and Order of Penalty Assessment to Stephen Ogles, LLC, and RL Ogles Roofing, LLC, and a Stop Work Order For Specific Worksite Only to Ogles Construction and Roofing, LLC. Findings of Fact 8 through 18 below set forth the specific facts and circumstances known to Respondent at the time the SWO was issued. These facts are based upon the testimony at hearing of Jonas Hall, which is found credible, as well as documentary evidence offered by Respondent, which is corroborative of Mr. Hall's testimony.

8. Mr. Hall began a random site investigation on June 12, 2013, after he noticed construction work about to be performed at a single-family dwelling located in Live Oak, Florida.

9. Upon investigation, four men were found to be installing roofing at a private residence. One of those workers, Robert Ogles, advised Respondent's investigator that he was working with his three sons, Stephen, Matt, and Robert, Jr.

10. Investigator Hall first spoke to the elder Robert Ogles who advised Investigator Hall that he was the general contractor on the job and that his sons were working as subcontractors. At

no time during the interview did Robert Ogles state that his sons were employees of his company, Ogles Construction and Roofing, LLC.

11. Investigator Hall next spoke to Stephen Ogles who stated that he owned his own business and had a valid workers' compensation exemption.

12. Investigator Hall then spoke to the younger Robert Ogles who also advised him that he owned his own business and had a valid workers' compensation exemption.

13. Finally, Investigator Hall spoke to the third son, Matt Ogles, who also stated that he owned his own business and had a valid workers' compensation exemption.

14. At no time during the interview of June 12, 2013, did any of the three sons state that they were employees of their father's business.

15. After interviewing the four Ogles, Investigator Hall left the jobsite in order to gain access to a wireless internet connection for his computer. Once he obtained a connection, Investigator Hall accessed the Division of Corporations website to look up the correct names of the businesses owned by the four Ogles. With respect to the two Petitioners, the website revealed that Stephen Ogles was the sole member of Stephen Ogles, LLC, and that Robert Ogles, Jr., was the sole member of RL Ogles Roofing, LLC.

16. Investigator Hall then accessed the Coverage and Compliance Automated System (CCAS) to ascertain the status of workers compensation coverage for the four individuals. CCAS revealed that while both Petitioners had at one time held exemptions, both exemptions had expired at the time of Investigator Hall's site visit on June 12, 2013. Based upon this information, Investigator Hall reasonably concluded that both Petitioners were not in compliance with Florida workers' compensation coverage requirements.

17. With respect to the third son, Matt, Mr. Hall's investigation revealed that his company, Matt Ogles, LLC, held a valid exemption, and was therefore compliant with the workers compensation coverage requirements. As such, Investigator Hall did not issue an SWO to Matt Ogles, LLC.

18. After accessing information about Petitioners' status on his computer, Investigator Hall returned to the jobsite. Upon his return, he observed all four of the Ogles working at the jobsite, with two actively working on the roof of the home. Investigator Hall then called those on the roof down, and served the SWOs on Petitioners.

19. The facts uncovered in Investigator Hall's investigation on June 12, 2013, provided the Department with a reasonable basis to issue the SWOs to Petitioners.

20. On June 17, 2013, Petitioners timely filed a Request for Hearing alleging the affirmative defense that Petitioners had valid workers' compensation exemptions. The Request for Hearing filed on behalf of Stephen Ogles, LLC, specifically stated:

3. The Respondent disputes the SWO, to wit:
  - a. The Owner's exemption was not expired.

And although worded somewhat differently, the Request for Hearing filed on behalf of RL Ogles Roofing, LLC, stated:

3. The Respondent disputes the SWO, to wit:
  - a. The WC Exemption was current.

21. The Requests for Hearing filed by Petitioners on June 17, 2013, are consistent with the representations made to Investigator Hall on June 12, 2013, to wit, both Petitioners were subcontractors on the job, and held valid exemptions.

22. On September 10, 2013, Petitioners filed an Amended Request for Hearing disputing the penalty assessment, and contending that Petitioners were employees of Ogles Construction and Roofing, LLC. The Amended Request for Hearing stated in pertinent part:

3. The Respondents disputes the SWO, to wit:
  - a. Ogles Construction and Roofing LLC disputes the penalty assessment.
  - b. RL Ogles, LLC contends that he was an employee of Ogles Construction and Roofing, LLC.



c. Stephen Ogles, LLC contends that he was an employee of Ogles Construction and Roofing, LLC.

23. On October 8, 2013, Respondent issued an Order Releasing Stop-Work Order (Revocation) to Stephen Ogles, LLC, and RL Ogles Roofing, LLC.

24. Two witnesses testified as to the reasonableness of the attorney's fees being sought by Petitioners. Petitioners' witness on the subject, John Middleton, is a Jacksonville attorney with eight years' experience in handling workers' compensation defense matters. Mr. Middleton opined that the \$5,000 in fees being claimed by each Petitioner was not excessive, particularly in view of the successful outcomes for Petitioners in the underlying cases.

25. Respondent's witness, Ralph Paul Douglas, Jr., is a Tallahassee attorney who has concentrated his practice on workers' compensation matters for twenty years. Mr. Douglas testified that Petitioners' attorney in the underlying cases claimed 13.3 hours per case for legal services. However, according to Mr. Douglas, at least 1.3 hours of the total hours should be deducted as not awardable due to those hours relating to the preparation of a motion in response to an order to compel. Such fees "cannot be related to any delay, any confusion caused by that party claiming the fees, . . . obfuscation, . . . anything that does not move the case along in the docket."

26. It was Mr. Douglas's opinion that 12 hours of legal services is a reasonable number for the underlying cases. However, since the same itemized list of services was submitted for both cases, Mr. Douglas concluded that the second itemized list was duplicative and mostly amounted to only ministerial work. The second itemized list should be, therefore, apportioned.

27. Mr. Douglas testified that a \$10,000 fee for the work done on the underlying cases would not be appropriate or reasonable based on the pleadings, the deposition testimony of the attorney performing the work, and the itemization of services. Rather, a reasonable fee would be 12 hours at \$200 per hour for one case (\$2,400) and \$1,200 on the second case. Thus, the total fees that should be awardable for both cases would be \$3,600.

28. While the testimony of both Mr. Middleton and Mr. Douglas is credible, the undersigned gives greater weight to the testimony of Mr. Douglas due to his greater experience in the field of workers' compensation law, and his more detailed analysis of the legal services performed in the underlying cases.

29. The unrebutted testimony presented by Stephen Ogles and Robert Ogles, Jr., established that their respective LLC's employ fewer than 25 full-time employees and have a net worth of less than \$2 million each.

## CONCLUSIONS OF LAW

30. DOAH has jurisdiction in this proceeding pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes (2013).

31. Section 57.111, the Florida Equal Access to Justice Act, authorizes the award of attorney's fees and costs to a small business party that prevails in an administrative proceeding seeking review of or defending against unreasonable government action by a state agency, i.e., when the state agency's actions are not substantially justified and no special circumstances exist that would make the award unjust. Section 57.111(3)(e) defines substantial justification as a reasonable basis in fact and law.

32. The agency has the burden to prove substantial justification. AHCA v. MVP Health, Inc., 74 So. 3d 1141, 1143 (Fla. 1st DCA 2011); Helmy v. Dep't of Bus. and Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

33. It was held in AHCA v. MVP Health, Inc., supra, at 1143-44:

[A]n agency cannot satisfy the "substantial justification" standard simply by showing an action was "not frivolous." This is because "while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified." Dep't of HRS v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). On the other hand, the standard is

not so strict as to require the agency to demonstrate that its action was correct. Id., quoting McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983) (stating the government need not have a "necessarily correct basis [] for the position that it took"). The "substantial justification" standard lies between these two extremes. The closest approximation is that if a state agency can present an argument for its action "that could satisfy a reasonable person[,]" then that action should be considered "substantially justified." Helmy, 707 So. 2d at 368, quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1998).

An additional consideration when evaluating an agency's action under section 57.111 is that the inquiry is limited only to whether the agency had a "reasonable basis in law and fact **at the time**" it took the action. § 57.111(3)(e), Fla. Stat. (2010) . . . . (emphasis [in original]). The reviewing body--whether DOAH or a court--may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted. See Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003) (criticizing an ALJ for being "influenced by consideration of evidence which was presented at [a fees] hearing rather than being focused solely on whether the [agency's underlying] decision had a reasonable basis in law and fact").

34. Using this legal standard, there was, on June 12, 2013, substantial justification for the decision by Respondent to issue Stop-Work Orders to Petitioners. Therefore, an award of attorney's fees in this instance is not warranted.<sup>3/</sup> At the time that Respondent issued its SWOs and the resultant penalty

assessments, Investigator Hall relied on his observation of roofing materials at the scene, along with four men who were actively installing a roof. Statements made by Petitioners, the elder Robert Ogles, and Matt Ogles that they owned their own businesses and held workers' compensation exemptions served only to support the conclusion that Petitioners were subcontractors for their father's business.

35. On June 17, 2013, five days after issuance of the SWOs, Petitioners' counsel filed Requests for Hearing with Respondent stating that Petitioners held valid workers' compensation exemptions. This affirmative defense indicated that Petitioners were working as subcontractors; otherwise, there would be no significance to the possession of valid workers' compensation exemptions. The information provided by Petitioners in their Requests for Hearing substantiates and corroborates Investigator Hall's determination at the work site that the Petitioners were working as subcontractors of Ogles Construction and Roofing, LLC.

36. When Petitioners filed their Amended Requests for Hearing on September 4, 2013, they changed their "subcontractor" defense to that of an alleged "employee" status working for Ogles Construction and Roofing, LLC.

37. It was the changed defense from that of subcontractors to employees that precipitated Respondent's revocation of the two SWOs in the underlying cases.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petitions for attorney's fees and costs are denied.

DONE AND ORDERED this 22nd day of April, 2014, in Tallahassee, Leon County, Florida.



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Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of April, 2014.

ENDNOTES

<sup>1/</sup> All references to Florida Statutes are to the 2013 version, unless otherwise indicated.

<sup>2/</sup> Although denominated a Proposed Recommended Order, Petitioners' submittal has been considered by the above-signed to be Petitioners' Proposed Final Order.

<sup>3/</sup> In its Proposed Final Order, Respondent argues that Petitioners lack standing to seek relief pursuant to section 57.111, since, as limited liability companies, they do not meet the statutory definition of a small business party. Section 57.111(3)(d), provides in relevant part:

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments;

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million; or

c. An individual whose net worth did not exceed \$2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or

2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under section 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

Respondent asserts that a limited liability company is not a "corporation," and, consequently, is not entitled to reap the benefits of section 57.111. While the undersigned is unaware of any appellate case law directly on point, at least one DOAH administrative law judge has addressed the issue. In John Gerrity Wade, A.R.N.P., R.N. v. Department of Health, Board of Nursing, Case No. 02-3027F (Fla. DOAH Feb. 3, 2003), Administrative Law Judge Michael Parrish held:

In this regard, it should also be noted that the definition of a "small business party" in section 57.111, Florida Statutes, does not mention a "limited liability company," nor does it mention a "member" of such a company. And there does not appear to be any logical way to stretch the language of section 57.111, Florida Statutes, far enough to encompass a "limited liability company" or a "member" of such a company.

(id. at 6.)

Conversely, other DOAH administrative law judges have had no qualms about entertaining attorney's fees cases brought pursuant to section 57.111 by limited liability companies. See, e.g., Charles DeMoss Enterprises, LLC v. Dep't of Fin. Svcs., Div. of Workers' Comp., Case No. 08-4865F (Fla. DOAH May 21, 2009).

Finally, the undersigned notes that chapter 440, the authority by which the Division of Workers' Compensation brings enforcement actions, takes a broader view of the term "corporation." Section 440.02(15)(b)(1) provides that any officer of a "corporation" may elect to be exempt from chapter 440 by filing notice of the election with the Department, and that section 440.02(9) expressly encompasses a member of a limited liability company within the meaning of "corporate officer":

(9) "Corporate officer" or "officer of a corporation" means 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. The term "officer of a corporation" includes a member owning at least 10 percent of a limited liability company created and approved under chapter 608.

(emphasis added)



COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.