

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 13-4577

MICHAEL CRIBBS, d/b/a MICHAEL
CRIBBS CONSTRUCTION OF
PENSACOLA, INC., A DISSOLVED
FLORIDA CORPORATION, AND MICHAEL
CRIBBS CONSTRUCTION OF
PENSACOLA, INC.,

Respondents.

RECOMMENDED ORDER

On July 2, 2014, a duly-noticed hearing was held by video teleconference at locations in Pensacola and Tallahassee, Florida, before F. Scott Boyd, 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 Respondents: Michael James Rudicell, Esquire
Michael J. Rudicell, P.A.
4309 B Spanish Trail
Pensacola, Florida 32504

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents violated the provisions of chapter 440, Florida Statutes (2013),^{1/} by failing to secure the payment of workers' compensation as alleged in the Stop-Work Order and Second Amended Order of Penalty Assessment, and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

Following a site inspection, Petitioner issued a Stop-Work Order, Order of Penalty Assessment, and Request for Production of Business Records for Penalty Assessment Calculation to Respondents on July 25, 2013, by hand delivery at the worksite. Respondents provided some records in response to the Request for Production of Business Records. The matter was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge on November 21, 2013. An Amended Order of Penalty Assessment was filed on November 21, 2013.

The final hearing was conducted on July 2, 2014. Following motion, leave was granted to amend the Amended Order of Penalty Assessment to reduce the asserted penalty, based in part on information contained in supplied records. The parties offered 21 exhibits, J-1 through J-21, which were admitted with the express caveat that hearsay contained within them was not sufficient in itself to support findings of fact, but could be used only to supplement or explain other evidence. Petitioner

presented the testimony of two witnesses: Ms. Angelia Brown, compliance investigator, and Mr. Phil Sley, penalty auditor. Respondents offered the testimony of Mr. Michael Cribbs.

The one-volume Transcript was filed with the Division of Administrative Hearings on July 15, 2014. An Agreed Motion for Extension of Time for Submission of Proposed Recommended Orders was granted on July 25, 2014. The parties timely filed proposed recommended orders on August 4, 2014, which were carefully considered.

FINDINGS OF FACT

1. Petitioner, Department of Financial Services, Division of Workers' Compensation (the Department), 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 corporate officers.

2. Ms. Angelia Brown has been a compliance investigator with the Department since 2007. On July 25, 2013, Investigator Brown conducted a site visit to a residential structure at 606 Orby Street, Pensacola, Florida. She observed three men performing roofing work on a detached two-car garage. One of the men showed her a job "ticket" indicating he was a "leased" laborer from Action Labor, an employee leasing company specializing in daily labor. Neither of the other men showed her tickets.

3. Investigator Brown said that Mr. Robert Reed told her he was working for Mr. Michael Cribbs and that he had been on the site for a couple of days, but did not have a job ticket from Action Labor at that time. She testified that Mr. James Kingry told her he had not discussed pay with Mr. Cribbs, but that he did expect to be paid.

4. Investigator Brown examined the information on the permit board at the job site and determined that a permit had been issued to Michael Cribbs Construction of Pensacola, Inc., and that the permit was active.

5. Based upon the information provided by the three men, Investigator Brown checked workers' compensation information by accessing the Coverage and Compliance Automated System (CCAS) maintained by the Department. The database indicated no workers' compensation coverage in effect for Mr. Cribbs or for Michael Cribbs Construction of Pensacola, Inc. CCAS further showed that Mr. Cribbs, as president of Michael Cribbs Construction of Pensacola, Inc., had an exemption on file, but that this exemption had lapsed from March 8, 2012, through July 15, 2012.

6. Investigator Brown called Action Labor and was informed that only Mr. Louis Sampson was "on ticket" for the day; that there was no active or current ticket for Mr. Reed, although he had been on ticket in the past; and that there were no records at all on Mr. Kingry. There was clear and convincing evidence that

Respondents had periodically "leased" employees from Action Labor, including evidence that Mr. Sampson was employed by Action Labor and was working at the Orby Street site on July 25, 2013.

7. Investigator Brown next contacted Mr. Cribbs. She told him that she was at the Orby Street site and explained the reason she was there. Mr. Cribbs told her that Mr. Sampson and Mr. Reed were "covered" and that Mr. Kingry was his former business partner of 20 years and was not being paid. Investigator Brown told Mr. Cribbs that Mr. Reed was not on an Action Labor ticket. Mr. Cribbs replied that he had a ticket for Mr. Reed and that he would look for it.

8. Investigator Brown accessed the Department of State, Division of Corporations' website. That database indicated that Michael Cribbs Construction of Pensacola, Inc., was inactive, and that it had been dissolved on September 28, 2012, for failure to file an annual report.

9. Based upon her investigation, Investigator Brown concluded that Mr. Reed and Mr. Kingry were employees of Michael Cribbs, d/b/a Michael Cribbs Construction of Pensacola, Inc., a dissolved Florida corporation, and were not covered by workers' compensation. She contacted her supervisor.

10. Respondents received a Stop-Work Order and Order of Penalty Assessment from the Department on July 25, 2013.

11. Respondents received a Request for Production of Business Records for Penalty Assessment Calculation from the Department on July 25, 2013. It requested records for the three-year period from July 26, 2010, through July 25, 2013.

12. In response to the Request for Production of Business Records, Mr. Cribbs provided some records to the Department's Pensacola Office. He did not provide business records sufficient to enable the Department to determine payroll for the calculation of a penalty, however. There was clear and convincing evidence that Mr. Cribbs had operated in the construction industry as a corporate officer of Michael Cribbs Construction of Pensacola, Inc.

13. Mr. Phillip Sley is a penalty calculator employed by the Department. He reviewed the business records that had been provided by Respondents, including insurance policies, bank statements, exemption documents, and some payroll documents, and calculated a penalty.

14. Respondents received an Amended Order of Penalty Assessment from the Department on August 6, 2013. It assessed a penalty for failure to secure workers' compensation coverage based upon imputed wages for Mr. Reed and Mr. Kingry for almost all of the three-year period and imputed wages for Mr. Cribbs for the period of March 8, 2012, through July 15, 2012, when his exemption had lapsed.

15. Mr. Cribbs subsequently provided some additional documents, including tax returns and bank images, but these were still insufficient to fully determine the payroll. Mr. Sley recalculated a penalty based in part upon documents that were provided and in part on imputed information.

16. Records provided by Respondents indicate that Michael Cribbs Construction of Pensacola, Inc., was an employer for periods from July 26, 2010, until its dissolution on September 28, 2012. Mr. Cribbs, as a sole proprietor, was an employer from September 29, 2012, until the site visit on July 25, 2013.

17. The assessed penalty amount was reduced for Mr. Reed and Mr. Kingry, but additional penalties were assessed for six other individuals, based upon payments to them on various dates from September 2, 2010, through December 31, 2012. There was clear and convincing evidence at hearing that these six individuals were employees of Michael Cribbs Construction of Pensacola, Inc., and Mr. Cribbs. The new assessment represented a net reduction in the overall penalty.

18. Respondents requested an administrative hearing, which was conducted on July 2, 2014. A motion to adopt the Second Amended Order of Penalty Assessment, consistent with the Department's latest calculations, was granted.

19. At hearing, Mr. Cribbs testified that the owners of the house at the Orby Street site had been paying a framing crew, but when he checked on them they had framed the garage roof incorrectly, so he fired them.

20. The framing work being done on the detached garage at the Orby Street site was for-profit activity involving building and substantial improvement in the size and use of the residential structures at that location. There was clear and convincing evidence that the work was activity within the construction industry.

21. Mr. Cribbs testified that, after firing the framing crew, he asked Mr. Reed to come to the job because he had worked with Mr. Reed before through Action Labor and that Mr. Reed "seemed to know what he was doing." He testified that he told Mr. Reed to call in to Action Labor. He also testified that he had a ticket for Mr. Reed and that he considered Mr. Reed to be an employee of Action Labor. He acknowledged that Mr. Reed failed to call in to Action Labor. Mr. Reed was an employee of Respondents, as defined in section 440.02, Florida Statutes, on July 25, 2013.

22. Mr. Cribbs testified that Mr. Kingry was a good friend he had known since they met in 1979 while doing framing work. He testified that they had been partners through the years, that their wives were best friends, and that they fished together. He

said that he had used Mr. Kingry--who earlier had his own company and exemption--as a subcontractor on a few jobs when construction was booming after hurricane Ivan in 2004. He testified that they had not worked together at all since that time.

23. Mr. Cribbs testified that his mother had been in and out of the emergency room and hospital with lung and brain cancer. He said he called Mr. Kingry from the hospital and asked him to go by the Orby Street job just to make sure that Mr. Reed knew what he was doing in cutting in the roof. He said he wasn't expecting Mr. Kingry to do any work because he knew that Mr. Kingry had an injured knee, and only expected him to be at the site for "maybe 30 minutes." Mr. Cribbs testified that there was no expectation that Mr. Kingry was going to be paid for going out there and that Mr. Kingry never asked him about pay.

24. Mr. Kingry was engaged in construction activity on the roof on July 25, 2013. There was insufficient evidence at hearing to refute Mr. Cribbs's testimony or otherwise demonstrate that Mr. Kingry was paid for his work, however. There was insufficient evidence to show that Mr. Kingry had been an employee of Mr. Cribbs or Michael Cribbs Construction of Pensacola, Inc., on July 25, 2013, or at any time during the preceding three years.

25. Mr. Cribbs further testified at hearing that he had maintained all of the records he was required to have, but that

most of them had been destroyed. He testified that, when he was married, he had kept the records in his house, but that, after he was divorced, he moved into a rental property and kept the records in some filing cabinets in a shed out back. Mr. Cribbs testified that about two years ago someone broke the lock on the shed, stole the filing cabinets, and left the papers strewn on the dirt floor of the shed. Mr. Cribbs said that shortly afterwards it rained heavily and flooded. He said that none of the records could be salvaged. This would have been about July 2012, near the time when Mr. Cribbs renewed his expired exemption. Mr. Cribbs admitted that he did not file a police report on the stolen file cabinets.

26. Mr. Cribbs said he went to his bank to get copies of some records, but that, for portions of the three-year period, he did not have a bank account.

27. Investigator Brown testified that she had checked job sites of Mr. Cribbs or Michael Cribbs Construction of Pensacola, Inc., on two earlier occasions and that no violations were found. The first time, it was determined that workers at the site were being paid directly by the homeowners and that Mr. Cribbs's exemption was in place, so everything was in compliance. The second time, the Department received a complaint. There was an active permit, but, at the time of the site visit, all work had been completed.

28. Respondents were engaged in construction industry business operations in the state of Florida during the periods of September 2, 2010, through December 31, 2010, and August 17, 2012, through December 31, 2012.

29. Mr. Cribbs was engaged in construction industry business operations at the Orby Street site on July 25, 2013.

30. Mr. Reed was an "employee" of Mr. Cribbs, as defined in section 440.02, on July 25, 2013.

31. Respondents did not secure the payment of workers' compensation insurance coverage for Mr. Reed on July 25, 2013.

32. Neither Mr. Reed nor Mr. Kingry held valid workers' compensation exemptions during the period of July 26, 2010, through July 25, 2013. Mr. Cribbs did not possess an exemption during the period of March 8, 2012, through July 15, 2012.

33. None of the employees listed in the penalty worksheet of the Second Amended Order of Penalty Assessment can be classified as an independent contractor, as defined in section 440.02(15)(d)1.

34. The class codes, manual rates, and average weekly wages identified on the penalty worksheet of the Second Amended Order of Penalty Assessment are correct to the extent a penalty is due.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this

proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013).

36. The Department has the responsibility to enforce workers' compensation requirements, including the requirement that employers secure the payment of workers' compensation, pursuant to section 440.107(3), Florida Statutes (2013).

37. The Department has the burden of proof to show, by clear and convincing evidence, that Respondents committed the violations alleged in the Administrative Complaint. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996) (the imposition of administrative fines which are penal in nature and implicate significant property rights must be justified by a finding of clear and convincing evidence of a related violation); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987) (evidence must be clear and convincing to support penal sanction such as revocation of a professional license).

38. The clear and convincing standard of proof has been described by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

39. Section 440.10(1)(a) provides in relevant part:

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.

40. Section 440.02(16)(a) defines "employer" to include "every person carrying on any employment." Section 440.02(17) defines "employment" as "any service performed by an employee for the person employing him or her." This definition excludes certain types of labor and services not applicable here, and includes, "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer."

41. Section 440.02(8) defines "construction industry" in pertinent part as "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land."

Allied Trucking of Fla. v. Lanza, 826 So. 2d 1052, 1052-1053 (Fla. 1st DCA 2002).

42. Section 440.02(15)(b) provides, in part, that any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous, is an employee.

43. Section 440.02(15)(b)1. provides, in part, that a corporate officer may elect to be exempt from the requirements of chapter 440 by filing a notice of election to be exempt with the Department as provided in section 440.05.

44. Under the doctrine of lent employment, a lending employer, such as a help supply services company, is known as the "general employer" and the borrowing employer, the "special employer." At common law, an employee lent by a general employer is presumed to continue as an employee of the general employer, not a borrowed servant of the special employer. Gayer v. Fine Line Constr. & Elec., Inc., 970 So. 2d 424, 427 (Fla. 4th DCA 2007); Derogatis v. Fawcett Mem'l Hosp., 892 So. 2d 1079 (Fla. 2d DCA 2004).

45. In the workers' compensation context, the Florida Statutes extend immunity to a special employer who uses employees of a "help supply services company." The definition of "help supply services company" includes "employee leasing company." Caramico v. Artcraft Indus., Inc., 727 So. 2d 348, 349 (Fla. 5th DCA 1999); Maxson Constr. Co. v. Welch, 720 So. 2d 588, 590 (Fla. 2d DCA 1998).

46. However, when a special employer utilizes an employee leasing company, the special employer remains liable for securing the payment of workers' compensation if payment has not been secured by the employee leasing company. Section 440.11, entitled "Exclusiveness of liability," provides in subsection (2):

The immunity from liability described in subsection (1) shall extend to an employer and to each employee of the employer which uses the services of the employees of a help supply services company, as set forth in North American Industrial Classification System Codes 561320 and 561330, when such employees, whether management or staff, are acting in furtherance of the employer's business. An employee so engaged by the employer shall be considered a borrowed employee of the employer and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company. (emphasis added).

See Hazealeferiou v. Labor Ready, 947 So. 2d 599, 604 (Fla. 1st DCA 2007); Tu-Lane Invs., Inc. v. Orr, 889 So. 2d 961, 963 (Fla. 1st DCA 2004).

47. Mr. Cribbs testified that he believed that Mr. Reed was an employee of Action Labor. But even if Action Labor had been the general employer of Mr. Reed on that day, Mr. Cribbs would still be required to provide workers' compensation coverage for

Mr. Reed if Action Labor did not, as required by section 440.11(2).

48. With respect to the status of Mr. Kingry, section 440.02(15)(d)6. specifically excludes volunteers from the definition of an employee. Under the structure of the statute, receiving remuneration is a part of the basic definition of "employee" under section 440.02(15)(a):

"Employee" means 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. (emphasis added).

49. The Department's burden thus includes proof that remuneration was received. There is no burden, in the nature of an "affirmative defense," for Respondents to prove that Mr. Kingry was a volunteer.^{2/}

50. The Department offered no competent evidence to show that Mr. Kingry received remuneration for his work. While Investigator Brown did testify that Mr. Kingry told her that he expected to be paid when she talked to him at the job site, that testimony was hearsay and cannot itself support a finding that Mr. Kingry was paid for his work. Mr. Kingry's deposition testimony, differing from the testimony of Mr. Cribbs, is similarly hearsay. There was no suggestion that the deposition

fell under any exception that would allow its admission over objection in a civil action. Petitioner failed to prove by clear and convincing evidence that Mr. Kingry was an employee of Mr. Cribbs or Michael Cribbs Construction of Pensacola, Inc. Solomon v. Huddleston, 657 So. 2d 78, 79-80 (Fla. 1st DCA 1995) (worker not an employee without evidence of monetary or other compensation for services).

Computation of Penalty

51. Section 440.107(7)(d)1. provides:

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, whichever is greater.

52. In order to compute the amount the employer would have paid in premium, the Department must determine the rate of pay and the period of employment. The statutes require employers to maintain detailed business records containing this information and to provide them to the Department when requested. § 440.107(5), Fla. Stat. The Department has adopted Florida Administrative Code Rule 69L-6.015, outlining the records that employers are required to maintain and provide to the Department upon request. As noted,

Respondents did not provide most of this information to the Department. Mr. Cribbs testified that he had maintained the required records, but that they were later destroyed by flooding, an act over which he had no control. However, Respondents cite no authority, and research revealed none, to suggest that under such circumstances the Department is precluded from imputing the missing information.

53. In the absence of sufficient business records, the statute directs the Department to impute a weekly payroll for each employee based upon the statewide average weekly wage as defined in section 440.12(2) multiplied by 1.5 for the time period requested in the Business Records Request.

§ 440.107(7)(e), Fla. Stat.; Fla. Admin. Code R. 69L-6.028(3).

54. Evidence at hearing suggested that Mr. Cribbs individually became an employer only upon the administrative dissolution of Michael Cribbs Construction of Pensacola, Inc., on September 28, 2012. In light of Respondents' failure to adequately respond to the Business Records Request, however, the Department's imputation of wages for Mr. Reed may be extended back for the full period over which records were requested from Mr. Cribbs. Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563 (Fla. 1st DCA 2007) (employer's failure to produce required business records necessary to establish the duration of non-compliance takes precedence over

any evidence at hearing that actual length of noncompliance was shorter).

55. Rule 69L-6.028(3) provides, in relevant part:

When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the time period requested in the business records request for purposes of calculating the penalty provided for in Section 440.107(7)(d), F.S., the imputed weekly payroll for each employee, corporate officer, sole proprietor or partner shall be calculated as follows:

(a) For each employee, other than corporate officers, identified by the department as an employee of such employer at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.

* * *

(b) If the employer is a corporation, for each corporate officer of such employer identified as such on the records of the Division of Corporations at the time of issuance of the stop-work order, the imputed weekly payroll for each week of the employer's non-compliance for each such corporate officer shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5.

56. As for penalties assessed for the lapse in Mr. Cribbs's exemption and for wages indicated in records for the six other employees, penalties for wages paid by the corporation prior to its dissolution on September 28, 2012, are attributable to the corporation, while any penalties for wages paid after that date are attributable to Michael Cribbs d/b/a Michael Cribbs Construction of Pensacola, Inc. No attempt was made here to separately allocate those penalties.^{3/}

57. The Department did not meet its threshold burden of proving that Mr. Kingry was an employee on July 25, 2013. The imputation of wages for his employment during the period for which insufficient records were provided is therefore not appropriate. Dep't of Fin. Servs, Div. of Workers' Comp. v. Decorative Concrete & Curbing, Inc., Case No. 08-5817 (Fla. DOAH Mar. 20, 2009; Fla. DFS May 22, 2009).

58. Section 440.02(8) authorizes the Department to establish standard industrial classification codes and definitions for the construction industry by rule. As stipulated, the class codes, manual rates, and average weekly wages identified on the Penalty Worksheet are correct.

59. The portion of the penalty in the Second Amended Order of Penalty Assessment based upon wages imputed to Mr. Kingry--the sum of \$23,598.38--should not be assessed. The remaining penalty of \$30,529.96 is appropriate.

RECOMMENDATION

Upon consideration of the above Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order determining that Respondents violated the requirement in chapter 440, Florida Statutes, to secure workers' compensation coverage, and imposing a total penalty assessment of \$30,529.96.

DONE AND ENTERED this 22nd day of August, 2014, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2014.

ENDNOTES

^{1/} All references to statutes and rules are to the versions in effect from 2010 through 2013, except as otherwise indicated. No relevant changes in statutes or administrative rules were identified during the time of the alleged violations.

^{2/} Under rules of statutory construction, the burdens would be different had the definition initially included all workers and

had a subsequent section exempted volunteer workers from coverage requirements. See, e.g., Purifoy v. State, 359 So. 2d 446, 448-449 (Fla. 1978).

^{3/} Such allocation is unnecessary because penalties accruing to the corporation are the responsibility of Mr. Cribbs. §§ 440.02(16)(a) & 440.107(7)(b), Fla. Stat.

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.