

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 14-1419

AUSTERMAN, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

On July 22, 2014, a final administrative hearing in this case was held by video teleconference at sites in Tallahassee and Tampa, Florida, before Linzie F. Bogan, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Bennett M. Miller, Esquire
Dunn and Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether 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 3rd Amended

Order of Penalty Assessment, and if so, what penalty is appropriate.

PRELIMINARY STATEMENT

The issue in this case is a narrow one. It is undisputed that Austerman, Inc. (Respondent), failed, for the period November 16, 2010, through November 15, 2013, to secure the payment of workers' compensation as required by chapter 440, Florida Statutes (2013). The parties filed a Joint Pre-Hearing Stipulation (Stipulation). In the Stipulation, the parties frame the "issues of fact which remain to be litigated" as "[w]hether [Petitioner] utilized the correct NCCI class codes and approved manual rates in assessing the 3rd Amended Order of Penalty Assessment against Respondent." Specifically, Respondent contends that if it is ultimately determined that it is proper for Petitioner to assess a penalty against it, then the amount of the penalty calculated by Petitioner is incorrect due to the misclassification by Petitioner of some of Respondent's employees. Although the issue, as framed in the Stipulation, suggests that Respondent seeks to also challenge the correctness of the "approved manual rates" utilized by Petitioner, Respondent makes no argument regarding this issue in its Proposed Recommended Order.

The disputed fact hearing was held on July 22, 2014. Petitioner's Exhibits 3, 9, 11, 13 and 14 were admitted into

evidence. Respondent's Exhibit 1 was also admitted into evidence. Petitioner offered testimony from three witnesses: Maureen Loganacre, regulatory services manager, National Council on Compensation Insurance; Andre Cannellas, penalty auditor; and John Austerman, owner of Austerman, Inc. John Austerman also testified on behalf of Respondent.

A Transcript from the disputed fact hearing was filed on August 28, 2014, with the Division of Administrative Hearings. On September 8, 2014, the parties filed an Amended Agreed Motion for Extension of Time for Submission of Proposed Recommended Orders. The motion was granted. Both parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The parties agree to the following facts as set forth in the Joint Pre-hearing Stipulation:

A) 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.

B) Respondent, a Florida corporation, was engaged in business operations in the state of Florida from November 16, 2010, through November 15, 2013.

C) Respondent received a Stop-Work Order and Order of Penalty Assessment from the Department on November 15, 2013.

D) Respondent received a Request for Production of Business Records for Penalty Assessment Calculation from the Department on November 15, 2013.

E) Respondent received a 3rd Amended Order of Penalty Assessment from the Department on March 11, 2014.

F) Throughout the penalty period, Respondent was an "employer" in the state of Florida, as that term is defined in section 440.02(16), Florida Statutes (2013).^{1/}

G) All of the individuals listed on the penalty worksheet of the 3rd Amended Order of Penalty Assessment were "employees" in the state of Florida (as that term is defined in section 440.02(15)) of Respondent during the periods of non-compliance listed on the penalty worksheet.

H) None of the individuals listed on the penalty worksheet attached to the 3rd Amended Order of Penalty Assessment had a valid Florida workers' compensation coverage exemption at any time during the periods of non-compliance listed on the penalty worksheet.

I) Respondent did not secure the payment of workers' compensation insurance coverage, nor have others secured the payment of workers' compensation insurance coverage, for any of the individuals named on the penalty worksheet attached to the

3rd Amended Order of Penalty Assessment during the periods of non-compliance listed on the penalty worksheet.

J) None of the individuals listed on the penalty worksheet of the 3rd Amended Order of Penalty Assessment were "independent contractors" (as that term is defined in section 440.02(15)(d)1.) hired by Respondent for any portion of the periods of non-compliance listed on the penalty worksheet.

K) Wages or salaries were paid by Respondent to the individuals listed on the penalty worksheet, whether continuously or not, during the corresponding periods of noncompliance listed on the penalty worksheet.

L) The gross payroll amounts (column "c" of the penalty worksheet of the 3rd Amended Order of Penalty Assessment) for the employees listed on the penalty worksheet are correct.

2. Respondent was engaged in business operations in the state of Florida as an auto recycling store from November 16, 2010, through November 15, 2013. The store operated by Respondent is called A&A Auto Recycling and is located at 5507 9th Street East, Bradenton, Florida. The store consists of an enclosed retail area and an open yard area where vehicles are kept. John Austerman is the business owner and president.

3. Respondent employed at least ten employees at any given time during the period from November 16, 2010, through November 15, 2013.

4. Employees working in the retail area check inventory on the computer, perform customer service, and sell parts.

Employees working in the retail area also "mark parts," such as fenders, when customers bring them in for purchase from the area on Respondent's property where vehicles are kept (the yard).

5. Respondent does not dispute the assignment of classification code 3821 to the employees identified as such on the penalty worksheet of the 3rd Amended Order of Penalty Assessment. Respondent does dispute, however, that classification code 3821 should be assigned to John Austerman.

6. John Austerman conducts physical inventories of approximately 100 vehicles a month that arrive at the store for recycling. Mr. Austerman's inventories include opening the doors and popping the engine hoods of the vehicles. Mr. Austerman walks the auto salvage yard approximately once per week for ten to fifteen minutes so as to ensure that the property is being properly maintained. In addition to vehicle and property inspections, Mr. Austerman also performs customer service, accounting, and clerical work for the business.

7. The National Council of Compensation Insurance ("NCCI"), is the rating bureau that establishes class codes for the workers' compensation industry in Florida.

8. NCCI classification code 3821 provides as follows:

Code 3821 contemplates dismantling or wrecking of used automobiles, motorcycles and trucks for the salvaging of parts. Auto dismantling may consist of the simple removal of saleable parts by means of hand tools and retaining the frames and bodies for future sale to outside scrap collectors. Some dismantlers will also break up stripped chassis and bodies with acetylene torches or shears to be sold in the form of iron or steel scrap. In addition to the dismantling work, salvaged parts may be reconditioned or repaired and sold over the counter. New parts may also be stocked. In the case of larger risks, a number of other functions may often be performed such as auto repairing, gas station operations, glass reconditioning, brake relining, cylinder re-boring, piston grinding, and battery or tire repair.

* * *

Special Conditions: Store employees who do not engage in other operations and have no yard exposure are classified to Code 8046.

9. NCCI classification code 8046 provides as follows:

Code 8046 applies to those employees of automobile recyclers who are engaged in store operations and have no yard exposure to the yard. Duties conducted by these store employees include but are not limited to greeting and assisting customers, checking inventory on computers, pulling smaller parts from an inside parts warehouse an [sic] taking payments. These store employees may appear to have clerical duties but are properly classified to Code 8046. Refer to Code 3821 for all other employees of automobile recyclers.

10. NCCI classification code 8046 applies to auto salvage employees who only work in the retail area of the store and have

no yard exposure. For auto salvage employees, like John Austerman, who engage in other salvage related operations and who have exposure to the yard, code 3821 is the proper classification for such employees.

11. Respondent asserts that all employees assigned the classification code of 8046 on the 3rd Amended Order of Penalty Assessment should be classified as code 8810 because these employees have clerical duties. The credible evidence does not support such a finding.^{2/} As previously noted, NCCI classification code 8046 provides: "These store employees may appear to have clerical duties but are properly classified to Code 8046." Petitioner correctly assigned Respondent's employees appearing on the 3rd Amended Order of Penalty Assessment to classification code 8046.

12. Petitioner assigned the proper classification codes to each of Respondent's employees. Respondent, in its Proposed Recommended Order, makes no argument with respect to the approved manual rates and only argues that the 3rd Amended Order of Penalty Assessment be amended "to reflect that all employees on the penalty calculation worksheet not classified as '3821' [be] properly classified as '8810.'" Given that there is no dispute regarding whether Petitioner applied the appropriate approved manual rates, it is determined that Petitioner assigned the appropriate approved manual rates to assess the workers'

compensation insurance coverage premium amounts that Respondent would have paid during the penalty period had Respondent obtained workers' compensation insurance coverage.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

14. Petitioner is the agency of the State of Florida charged, pursuant to section 440.107(3), with the duty to:

enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

- (a) Conduct investigations for the purpose of ensuring employer compliance.
- (b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.
- (c) Examine and copy business records.

* * *

- (g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.
- (h) Enforce the terms of a stop-work order.
- (i) Levy and pursue actions to recover penalties.
- (j) Seek injunctions and other appropriate relief.

15. Petitioner has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins., 707 So. 2d 941 (Fla. 3d DCA 1998). Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

16. It is well-established that the Department has "broad powers to investigate employers, to halt any work where employers are not complying, and to assess penalties on those who do not comply." Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007).

17. Pursuant to sections 440.10 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 by the employer is, therefore, required. See, e.g., Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1185 (Fla. 4th DCA 2005); C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

18. Section 440.02(16) (a) defines "employer" to include "every person carrying on any employment."

19. Section 440.02(15) (a) defines "employee" to include "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment."

20. Section 440.02(17) defines "employment" to include "any service performed by an employee for the person employing him or her," and includes, for non-construction employers, "[a]ll private employments in which four or more employees are employed by the same employer."

21. By stipulation of the parties, the record contains clear and convincing evidence that Respondent was an "employer" for workers' compensation purposes. As such, Respondent was required to secure and maintain workers' compensation for its employees pursuant to section 440.10.

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

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 \$1,000.00, whichever is greater.

NCCI classification codes

23. Section 440.107(9) provides that "[t]he department shall adopt rules to administer this section."

24. Rule 69L-6.031(1) provides, in pertinent part, that:

(1) Under paragraph 440.107(7)(b), F.S., stop-work orders or orders of penalty assessment issued against a corporation, limited liability company, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals, limited liability company members, or officers as the predecessor corporation or business entity against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

* * *

(b) For employers engaged in the non-construction industry, a corporation, . . . and the successor corporation . . . are engaged in the same or equivalent trade or activity if they each perform or have performed business operations that include operations described in at least one classification code that is in the manufacturing, goods and services, or the office and clerical industry group listed in subsection (6) of this rule. (emphasis added).

25. Rule 69L-6.031(6) provides, in pertinent part, that:

List of class codes, descriptions, and industry groups. A complete description of class codes is contained in the SCOPES® Manual Classifications (October 2005) published by the National Council on Compensation Insurance, Inc. (NCCI) and is available for viewing through the Division of Workers' Compensation, Bureau of Compliance,

2012 Capital Circle, S.E., Hartman Building,
Tallahassee, Florida 32399-4228 or a copy is
available, for a fee, by calling NCCI at
1(800)622-4123. The SCOPES® list of codes,
descriptions and industry groups is as
follows:

* * *

(d) Industry Group: Goods & Services

* * *

24. 3821 AUTOMOBILE RECYCLING & DRIVERS

* * *

47. 8046 AUTOMOBILE PARTS AND ACCESSORIES -
NOC & DRIVERS

26. Respondent argues that "the classification of John Austerman as '3821' . . . was not based on any statute, administrative rule, or properly adopted department policy." The argument is rejected as it is clear that the Department, through rule 69L-6.031, has incorporated by reference the NCCI SCOPES® Manual Classification codes. Dep't of Fin. Servs. v. Barber Custom Builders, Inc., Case No. 13-2536, RO (Fla. DOAH April 30, 2014).

27. By failing to secure the payment of workers' compensation insurance coverage for its employees, Respondent was in violation of chapter 440, Florida Statutes, on November 15, 2013, and for the preceding three years. Petitioner was justified in issuing the Stop-Work Order and the 3rd Amended Order of Penalty Assessment.

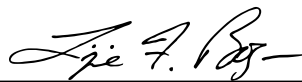
28. Petitioner has established by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation as required by chapter 440, Florida Statutes, that the Department was justified in the issuance of the Stop-Work Order, and that the 3rd Amended Order of Penalty Assessment was correctly calculated in the amount of \$99,571.67.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order assessing a penalty in the amount of \$99,571.67 against Respondent, Austerman, Inc., for its failure to secure and maintain required workers' compensation insurance for its employees.

DONE AND ENTERED this 28th day of October, 2014, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2014.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2013, unless otherwise indicated.

^{2/} Respondent's Exhibit 1 is a workers' compensation rate sheet from a company named Employer Solution. There was no testimony offered during the final hearing from anyone affiliated with Employer Solution. The rate sheet generically places Respondent's employees into two classification codes; clerical 8810 and auto salvage 3821. Respondent relies on this Exhibit for the purpose of establishing that he, and other employees not classified in the 3821 group, should be classified as "clerical 8810." This Exhibit is rank hearsay that neither supplements, explains other admissible evidence, nor is otherwise admissible over objection in civil actions. Accordingly, Respondent's Exhibit 1 is not sufficient in itself to support a finding of fact. § 120.57(1)(c) Fla. Stat. (2014). Even if Respondent's Exhibit 1 were considered, it would be given little if any evidentiary weight because the qualifications of the person expressing an opinion therein are unknown and there is no supporting evidence to explain how the author of the document reached the conclusions stated.

COPIES FURNISHED:

Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Bennett M. Miller, Esquire
Dunn and Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301
(eServed)

Julie Jones, CP, FRP, Agency Clerk
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390
(eServed)

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.