

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 14-3106

SUNBURST CONSTRUCTION, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on October 28, 2014, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Alexander Brick, Esquire
Assistant General Counsel
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-6502

For Respondent: Kristian E. Dunn, Esquire
Dunn & Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Sunburst Construction, Inc. ("Sunburst"), failed to properly maintain workers' compensation insurance coverage for his employees and, if so, what penalty should be assessed.

PRELIMINARY STATEMENT

On April 30, 2014, Petitioner, Department of Financial Services, Division of Workers' Compensation (the "Department") issued a Stop Work Order (SWO) against Respondent. Respondent requested an administrative hearing to contest the SWO and the Amended Order of Penalty Assessment (OPA) issued pursuant thereto. Petitioner's request was forwarded to the Division of Administrative Hearings so that a formal administrative hearing could be conducted. The hearing was held on the date set forth above, and both parties were in attendance.

At the final hearing, Petitioner called two witnesses: Stephanie Scarton, workers' compensation investigator for the Department; and Chad Mason, penalty auditor for the Department. Petitioner's Exhibits 1, 3, 5-7, and 10-14 were admitted into evidence. Respondent called five witnesses: Cecil Moore, owner of Sunburst; Carlos Barbecho, foreman; Edlezar Cano-Lopez; Robert Raley; and Jose Antonio Pillo. Respondent's Exhibits 3-8 were admitted into evidence.

A transcript of the final hearing was ordered by the Department. The Transcript was filed at the Division of Administrative Hearings on November 24, 2014. By rule, parties were allowed ten days, i.e., until December 6 (a Saturday, so actually until December 8) to submit proposed recommended orders. A motion was filed on December 5 requesting additional time for submitting the proposed recommended order; the motion was granted. Petitioner and Respondent each timely submitted a Proposed Recommended Order and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for ensuring that all employers maintain workers' compensation insurance for themselves and their employees. It is the duty of the Department to make random inspections of job sites and to answer complaints concerning potential violations of workers' compensation rules.

2. Sunburst is a business created by Cecil Moore and has been in operation for 35 years in the construction industry. At all times relevant hereto, Sunburst was duly-licensed to do business in the State of Florida. Construction work is assigned a Class Code of 5651 for purposes of calculating workers' compensation insurance coverage.

3. On April 30, 2014, the Department's investigator, Stephanie Scarton, was driving on South Peninsula Drive in Daytona Beach, Florida, when she noticed what appeared to be construction activity going on. As she is charged with doing, Scarton went to find out whether people working at the construction site were legally covered by workers' compensation insurance. She talked to four people at the job site and made a determination that workers' compensation coverage was missing. Scarton's and Sunburst's statements of the facts surrounding the coverage are significantly different in detail. Each will be set forth below.

Scarton's Version of the Facts

4. According to Scarton, she observed three people working at the site: Two men were engaged in carpentry, specifically, securing bolts to beams on a form used for pouring concrete. One man was grinding a screw or some other metal object.

5. Scarton identified herself to the man who was grinding the metal object. The man was Carlos Barbecho. The man did not speak English very well, but conversed with Scarton, telling her that he (Barbecho) worked for Sunburst. According to Scarton, Barbecho also told her that the other two men, Edlezar "Eddie" Cano-Lopez and Jeronimo Cano-Lopez, also worked for Sunburst. Neither of the two men (who were brothers) spoke English. Barbecho acted as an interpreter for Scarton as she asked the

brothers if they worked for Sunburst. They allegedly "shook their heads up and down," i.e., they nodded affirmation. However, Scarton could not verify exactly what question Barbecho posed to the brothers in Spanish.

6. Meanwhile, another man, Raley, showed up at the site on his bicycle. He reported that he was an independent contractor and was not related to Sunburst. He was doing some pressure washing on the house located at the site.

7. The investigator then went to her vehicle to research Sunburst, finding it to be a duly-registered Florida corporation. She checked the building permit which had been issued by the City of Daytona Beach and found that it had been pulled by Sunburst. She then checked the Coverage and Compliance Automated System (CCAS) used by the Department to track workers' compensation coverage by businesses and individuals. According to CCAS, there was no coverage for Sunburst but Moore had a personal exemption.

8. When she found there was no coverage for Sunburst but that its employees were working at the job site, Scarton contacted Moore directly via telephone. Barbecho had provided Scarton with Moore's number. Scarton testified that Moore admitted the men were his employees, but that he believed he had up to 24 hours to obtain workers' compensation coverage for them.

9. Scarton eventually ascertained that Sunburst did have appropriate workers' compensation coverage for Barbecho through a

leasing company, but neither of the Cano-Lopez brothers was on the policy.

Sunburst's Version of the Facts

10. Moore has owned Sunburst for over 35 years. He has always maintained workers' compensation coverage for his employees and has never been cited for failing to do so.

11. In April 2014, Sunburst was in the midst of renovations at the South Peninsula Drive job site. Barbecho was the foreman on the job. He had been working for Sunburst for about two years as a foreman or job manager. Moore had obtained workers' compensation coverage for Barbecho through a leasing company.

12. On April 30, 2014, Barbecho was working at the job site when the Cano-Lopez brothers came up and asked if there was work for them to do. They had been referred to the site by Pillo, a man who had worked with Moore for many years and often found laborers for him. Barbecho called Moore to see if he wanted to hire the brothers or not. Meanwhile, the men stood around talking as they waited for a determination from Moore.

13. Raley had also been at the site on that date. He was preparing to pressure-wash the outside of the house so that it could be painted. Just about the time he was leaving on his bicycle to retrieve a chair from his nearby home, the Cano-Lopez brothers arrived. Raley paid them no mind as he had never seen them before at the job site. When he returned with his chair,

Raley met Scarton, who identified herself as an investigator for the Department. Although Raley told Scarton that he was an independent contractor, he was actually doing the pressure-washing because he owed a favor to Moore. Raley watched Scarton talk to the brothers and could see that there was a large communication problem based upon language. Scarton then began talking more to Raley because he spoke English much better than the other men there.

14. Barbecho says he only met the Cano-Lopez brothers the morning that Scarton showed up at the work site. He did not have authority to hire them on behalf of Sunburst, but put a call into Moore to see if he wanted to hire the men.

15. Barbecho maintains that he never told Scarton the men were employees of Sunburst. He does not remember being asked to ask the brothers, in Spanish, whether they were employees of Sunburst. The men had arrived on the job site just minutes prior to Scarton's arrival, and Barbecho had not really talked to them at all other than to give a casual greeting.

16. Edlezar Cano-Lopez says he is not now nor has he ever been an employee of Sunburst. He has never done any work for or received any money from Moore or Sunburst. (He was hoping that Moore would pay him for his time traveling to Tallahassee and appearing at the final hearing, but there was no specific agreement in that regard.)

17. When Moore got a call from Scarton, he told her that he did not know who the Cano-Lopez brothers were, that they were not his employees, and that he had coverage for all of his bona fide employees. He has no recollection of telling Scarton that he believed he had 24 hours to get the workers covered by insurance.

18. Scarton asked Moore to come to the job site and he complied with her request. At the job site, Scarton served Moore with a Stop Work Order (SWO) and explained that he needed to cease doing business until it was addressed. The basis of the SWO was that two putative employees, the Cano-Lopez brothers, did not have workers' compensation insurance coverage.

The Stop Work Order and Penalty Assessment

19. At the same time, Scarton made a request for business records in order to determine what penalty should be assessed. The request had a list of various types of documents needed by the Department to make its penalty assessment. Moore was given 20 days to produce the records to the Department.

20. Moore contacted his bank about obtaining the requested records. He was told that it would take five to seven days to pull the records together, but in fact it took more than three weeks. The records were therefore not timely submitted to the Department.

21. Based upon the absence of business records, the Department calculated a penalty assessment which imputed income

to the Cano-Lopez brothers for a period of three years. This assessment was in accordance with the Department's rules and guidelines. A penalty assessment of \$61,568.36 was imposed on Sunburst.

22. After the penalty assessment was calculated by the Department, the requested business records were eventually received from the bank by Moore. The records contained summaries of statements, but did not include check images. The check images were provided at a later date. However, the check images showed a large number of checks made out to "cash" so the Department could not really ascertain whether any of them were for payroll or not. Moore explained that his employee leasing company required cash, so each week he would find out what amount was needed and issue a check made payable to "cash" and obtain the needed funds. Moore's explanation is plausible.

23. The Department did not take heed of the business records provided by Moore because they did not arrive within the prescribed 20-day window. The Department's auditor did, however, create a draft penalty assessment based upon the records.^{1/}

The Cano-Lopez Brothers

24. The dispositive issue in this case appears to be the employee status of Eddie and Jeronimo Cano-Lopez. Eddie testified at final hearing (through an interpreter) that he has never been an employee of Sunburst. He and his brother were at

the job site on April 30 for the purpose of obtaining employment, but they were never hired and have never been paid for doing any work for Sunburst.

25. There are no check images or other business records that reflect Sunburst ever paid the Cano-Lopez brothers for doing work. Moore did not hire them and did not know they were at the work site on April 30 until advised by Barbecho and Scarton that very day. Moore's denial that he told Scarton he was intending to add the Cano-Lopez brothers to his insurance coverage within 24 hours is credible. Scarton inspects 45 to 55 business sites per month and could easily be confused about who told her they were adding employees. After 35 years in the industry, it is unlikely Moore would be confused about the requirements for coverage of his employees.

26. The foreman, Barbecho, met the Cano-Lopez brothers for the first time on April 30 at the job site. He knew that in order to work for Sunburst, the brothers would first have to fill out an application. In fact, the Cano-Lopez brothers filled out an application after the SWO had been entered. The applications were delivered to Sunburst's employee leasing company the next day in hopes of alleviating the SWO. But as the SWO was still in place, the Cano-Lopez brothers never engaged in work for Sunburst, and have not to this day. And in the words of the

Department's investigator, "An employee is someone who is being paid by the business." Scarton testimony, transcript page 46.

27. The Department calculated its penalty assessment as follows: It ascertained the average wage for construction laborers and assigned that figure to each of the Cano-Lopez brothers. The appropriate class code was assigned. A period of three years of non-compliance was imputed, per rule. The gross payroll for that three-year period was assigned to each of the brothers. The gross payroll amount was divided by 100. The resulting sum was multiplied by the manual rate, resulting in a premium. The premium was then multiplied by 1.5 to reach the penalty amount.

28. The calculation of the penalty was based upon the mistaken presumption that the Cano-Lopez brothers were employees of Sunburst. It is clear from the evidence presented that neither Eddie nor Jeronimo Cano-Lopez were ever employees of Sunburst. Scarton's recollection of the events (without the benefit of any contemporaneous note) was refuted by the testimony of Moore, Barbecho, Raley, and Eddie Cano-Lopez, thus her testimony does not constitute clear and convincing evidence.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this

proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

30. The burden of proof in this matter is on the Department because it is asserting the affirmative of the issue. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. The administrative fines being proposed by the Department are penal in nature. The standard of proof for such cases is clear and convincing evidence. See Dep't of Banking and Fin. Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

32. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2nd DCA 1970). Further, clear and convincing evidence has been defined as evidence which:

[R]equires 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.

Slomowitz v. Walker, 429 So. 2nd 797, 800 (Fla. 1st DCA 1983)

(citations omitted).

33. The clearest and most convincing evidence presented at final hearing established only that the Cano-Lopez brothers were physically present at the job site on April 30, 2014. The Department's investigator relied upon non-verbal communication and interpretations to ascertain that the Cano-Lopez brothers were employees of Sunburst. Her testimony, while received as honest and forthright, was not of such weight to produce a firm belief or conviction in the mind of the undersigned.

34. Pursuant to sections 440.10 and 440.38, Florida Statutes, every employer is required to secure the payment of workers' compensation for the benefit of its employees unless the employee is exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989). The evidence in this case, is that Sunburst had workers' compensation coverage for each of its bona fide employees.

35. Section 440.107(7)(a) states, in relevant part:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to 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. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

36. The Department properly issued a SWO upon finding that Respondent did not have the appropriate coverage. Although the evidence at final hearing indicates the Department's finding was ultimately in error, the Department was still within its rights to have issued the SWO based on its bona fide belief that no coverage existed.

37. As to penalties, section 440.107(7)(d)1. states:

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 the 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 payment of worker's compensation required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

38. No penalty is warranted in this matter due to the Department's failure to meet its burden of proof as stated above.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services rescinding the Stop-Work Order and Amended Penalty Assessment.

DONE AND ENTERED this 5th day of January, 2015, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2015.

ENDNOTE

^{1/} The Department objected to discussion of the draft penalty assessment on the basis that it was part of a settlement discussion. Sunburst's attorney had not been advised of a settlement, so discussion of the draft was not precluded. One cannot have a settlement conference unless both parties are involved.

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.