

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 14-6004

AXIOM CONSTRUCTION DESIGN  
CORPORATION,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 24, 2015, in Bartow, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Hugh Dolisca, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Nancy Jo Lair-Goodfellow, C.P.A.  
Goodfellow and Company, CPA, Inc.  
344 South Woodland Boulevard  
Deland, Florida 32720

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Axiom Construction Design Corporation (Axiom), failed to provide

workers' compensation coverage, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 23, 2014, Petitioner, Department of Financial Services, Division of Workers' Compensation (Department), issued an Order of Penalty Assessment against Axiom. On October 13, the Department filed a 2nd Amended Order of Penalty Assessment against Axiom. Axiom disputed the Order of Penalty Assessment and requested an administrative hearing. The case was forwarded to the Division on December 18, for the assignment of an administrative law judge. The hearing was originally scheduled for February 10, 2015.

On March 18, 2015, the Department filed a Motion to Amend the Order of Penalty Assessment (Motion). The Motion was heard and granted. The 3rd Amended Order of Penalty Assessment was for \$20,221.62, which was \$1,271.58 less than the 2nd Amended Order of Penalty Assessment.

Following one continuance, the final hearing was scheduled for and heard on March 24. At the hearing, Axiom's president, Michael Pratt, appeared with Nancy Jo Lair-Goodfellow, who was accepted as Axiom's qualified representative.

At the hearing, the Department presented the testimony of investigator supervisor Jamari Bellaflores-Brown and penalty auditor Rean Knopke from the Department. The Department

presented 15 exhibits, all of which were admitted into evidence. Axiom called Mr. Pratt to testify. Axiom offered Exhibits one, and three through five, which were admitted into evidence. The Department's counsel requested to file its proposed recommended order 15 days after the transcript was filed. Axiom's qualified representative did not object, and the request was granted.

The one-volume Transcript was filed on April 8. On April 9, a Notice of Filing Transcript was issued, wherein the parties were informed that the Transcript had been filed and their proposed recommended orders (PROs) were to be filed before the close of business on April 23. On April 14, an Agreed Motion for an Extension of Time to Submit the PROs was filed. The motion was granted, and the parties were informed to file their PROs before the close of business on May 11. The Department filed its PRO on May 11. On May 11, Axiom filed an Emergency Motion for Extension to File Proposed Recommended Order, citing good cause and containing the notice that the Department did not object. The motion was granted and Axiom timely filed its PRO on May 18. Each PRO has been considered in the preparation of this Recommended Order. Axiom filed an attachment to its PRO that was not produced at hearing, and therefore not subject to cross examination. That attachment has not been considered.

References to statutes are to Florida Statutes (2014), unless otherwise noted.

## FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the various requirements of chapter 440, Florida Statutes. Section 440.107(3) mandates, in relevant part, that employers in Florida must secure workers' compensation insurance coverage for their employees.

2. At all times relevant, Axiom was a small Florida corporation engaged in the construction industry, principally installing drywall. Axiom's principal office is located at 1067 Walt Williams Road, Lakeland, Florida. Mr. Pratt is Axiom's owner, sole corporate officer, and registered agent.

3. On July 23, 2014, Randall Durham conducted a job site workers' compensation compliance investigation (Compliance Investigation). Mr. Durham spoke with Mr. Pratt at a job site at 109 Cattleman Road, the new Sarasota mall. Mr. Pratt and Al Lappohn were working the job site at the new mall. Mr. Pratt had a workers' compensation policy in place with Southeast Personnel Leasing. Mr. Lappohn did not have an exemption from workers' compensation coverage, and he was not covered by Axiom's Southeast Personnel Leasing policy.

4. On July 23, 2014, Mr. Pratt, as Axiom's representative, was hand-served a Stop-Work Order<sup>1/</sup> and a Request for Production of Business Records for Penalty Assessment Calculation (Request). This Request encompassed all of Axiom's payroll documents,

account documents, disbursements, workers' compensation coverage policies, and professional employer organization records from January 4, 2013, through July 23, 2014.

5. Mr. Pratt provided the certificates of liabilities, payroll and tax records for 2013, and additional business records to the Department. These records were given to Mr. Knopke to calculate the penalty. In reviewing the records, Mr. Knopke determined that Mr. Pratt, Mr. Lappohn and Frank Cutts were employees of Axiom, and that Axiom did not provide workers' compensation coverage for them.

6. Mr. Cutts worked for Axiom at a Family Dollar Store build-out in Orlando in early 2014. Mr. Cutts swept up after the drywall was installed in the store, and was paid \$125.

7. Axiom conceded it owed the workers' compensation penalty based on the work Mr. Lappohn and Mr. Cutts performed.

8. The business records provided that during the audit period Mr. Pratt had dual employment, payment being paid outside of leasing. Dual employment is when a business has a leasing policy and there is extraneous payroll that is paid outside of the leasing policy. Payments received outside of a leasing policy are considered unsecured payroll for the purposes of calculating a penalty against an employer. Mr. Knopke included Mr. Pratt's outside distributions in the penalty calculation.

9. The "Scopes Manual" is published by the National Council on Compensation Insurance, Inc. (NCCI), the nation's most authoritative data collecting and disseminating organization for workers' compensation. The manual contains certain codes related to the construction industry and trades considered to be within that industry. The installation of drywall, wallboard, sheetrock, plasterboard or cement board is considered to be "construction" under the relevant codes in the manual. The manual, with its codes and classifications, is relied upon in the insurance industry and has been adopted by the Department in Florida Administrative Code Rule 69L-6.021.

10. Mr. Knopke, using the manual, determined the appropriate classification code for Respondent's employees was 5445. Mr. Knopke applied the correct rates and used the methodology found in section 440.107(7)(d)1., and Florida Administrative Code Rules 69L-6.027 and 69L-6.028 to calculate the penalty assessment. Based upon the testimony and exhibits, the 3rd Amended Penalty Assessment in the amount of \$20,221.62 is accurate and correct.

#### CONCLUSIONS OF LAW

11. The Division has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

12. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the workers' compensation law and that the penalty assessments were correct under the law. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

13. In Evans Packing Company v. Department of Agriculture & Consumer Services, 550 So. 2d 112, 116, n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

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 evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

14. Employers are required to secure workers' compensation coverage for their employees. Chapter 440 is known as the "Workers' Compensation Law." §§ 440.10(1)(a) and 440.38(1), Fla. Stat. Section 440.107(3) charges the Department with the responsibility for enforcing compliance with the workers' compensation law and requires issuance of Stop-Work Orders and Penalty Assessment Orders in carrying out the enforcement of workers' compensation coverage requirements.

15. Section 440.02(15) (a) defines "employee" in part as:

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.

16. Section 440.02(16) (a) defines "employer" in part as:

every person carrying on any employment, . . . "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

17. Section 440.02(17) (b)2. defines "employment" in pertinent part as:

with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

18. Section 440.107(2) provides in pertinent part:

For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code.

19. Section 440.107(7) (d)1. provides in pertinent part:

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 2 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 2-year period or \$1,000, whichever is greater.

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

20. Section 440.02(8) provides:

"Construction industry" means 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. . . . The division may, by rule, establish codes and definitions thereof that meet the criteria of the term "construction industry" as set forth in this section.

21. Pursuant to that authority, the Department's Division of Workers' Compensation promulgated Florida Administrative Code Rule 69L-6.021, which adopts the classification codes and descriptions found in the Scopes Manual, as referenced in the above findings of fact.

22. Rule 69L-6.035 provides the definition of payroll for calculating penalty as:

(1) For purposes of determining payroll for calculating a penalty pursuant to Section 440.107(7)(d)1., F.S., the Department shall when applicable include any one or more of the following as remuneration to employees based upon evidence received in its investigation:

- (a) Wages or salaries paid to employees by or on behalf of the employer;
- (b) Payments, including cash payments, made to employees by or on behalf of the employer;
- (c) Payments, including cash payments, made to a third person or party by or on behalf of the employer for services provided to the employer by the employees;
- (d) Bonuses paid to employees by or on behalf of the employer;
- (e) Payments made to employees by or on behalf of the employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distributions, or incentive plans;
- (f) Expense reimbursements made to employees by or on behalf of the employer, to the extent that the employer's business records do not confirm that the expense was incurred as a valid business expense;
- (g) Loans made to employees by or on behalf of the employer to the extent that such loans have not been repaid to the employer;
- (h) Payments or allowances made by or on behalf of the employer to employees for tools or equipment used by employees in their work or operations for the employer, even in cases where the tools are supplied directly by the employee or to the employee through a third party;
- (i) Total contract price of a service provided by the employer, excluding the cost for materials as evidenced in the employer's business records or contract. In the event the costs for materials is included in the total contract price and cannot be separately identified in the total contract price, eighty percent of the total contract price shall be the employer's payroll; and
- (j) Income listed in "Form 1099 Miscellaneous Income" issued to a person, excluding the cost of materials as evidenced by business records from the person to whom the Form 1099 Miscellaneous Income was issued. In the event such records are not provided to the Department to determine the cost of such materials, the entire amount of

the income listed on the "Form 1099  
Miscellaneous Income" shall be included in  
the employer's payroll.

23. Based upon Axiom's concessions and records, Mr. Knopke correctly calculated the third amended penalty, for the period of noncompliance with the workers' compensation law using the penalty calculation adopted in the statute and rules.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, issue a final order upholding the 3rd Amended Order of Penalty Assessment, and assess a penalty in the amount of \$20,221.62.

DONE AND ENTERED this 2nd day of June, 2015, in Tallahassee, Leon County, Florida.



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LYNNE A. QUIMBY-PENNOCK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of June, 2015.

ENDNOTE

<sup>1/</sup> Axiom's representative, Mr. Pratt, paid a \$1,000.00 fine, and was given temporary authority to work again. No other evidence was presented on this payment or the temporary authority to continue to work at the mall location.

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.