

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 15-0441

KLENK ROOFING, INC.,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, via video teleconference at sites in Daytona Beach and Tallahassee, Florida, on March 13, 2015.

APPEARANCES

For Petitioner: Rebecca C. Arends, Qualified  
Representative  
Trevor Suter, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Ronald Klenk, pro se  
Klenk Roofing, Inc.  
829 Pinewood Street  
Daytona Beach, Florida 32117

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the Respondent, Klenk Roofing, Inc. ("Klenk Roofing"), failed to abide by the

coverage requirements of the Workers' Compensation Law, chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees and, if so, whether the Petitioner properly assessed a penalty against the Respondent pursuant to section 440.107.

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, chapter 440, the Department of Financial Services, Division of Workers' Compensation ("Department"), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On July 23, 2014, the Department issued a "Stop-Work Order" alleging that Klenk Roofing failed to abide by the coverage requirements of the workers' compensation law on that date. The order directed Klenk Roofing to cease business operations and pay a penalty equal to two times the amount Klenk Roofing would have paid in premium to secure workers' compensation during periods within the preceding two years when it failed to do so, or \$1,000, whichever is greater, pursuant to section 440.107(7)(d). The Department also requested business records from Klenk Roofing in order to determine the exact amount of the penalty.

On July 25, 2014, the Department issued an "Agreed Order of Conditional Release from Stop-Work Order," which stated that

Klenk Roofing had come into compliance with the coverage requirements of chapter 440, that Klenk Roofing had paid \$1,000 as a down payment on its penalty, and that Klenk Roofing was conditionally released from the Stop-Work Order pending the payment of the remainder of the penalty or compliance with an agreement to make periodic payments on the penalty.

Klenk Roofing provided some business records to the Department. On September 17, 2014, the Department issued an "Amended Order of Penalty Assessment" that ordered Klenk Roofing to pay a penalty of \$214,335.58, pursuant to section 440.107(7)(d). Klenk Roofing then provided additional business records to the Department. On December 16, 2014, the Department issued a "Second Amended Order of Penalty Assessment" that lowered the assessed penalty to \$87,159.20.

In a letter dated January 5, 2015, Ronald Klenk, the president of Klenk Roofing, disputed the Department's penalty calculation and requested an administrative hearing. On January 26, 2015, the Department forwarded Klenk Roofing's request to the Division of Administrative Hearings ("DOAH"). The hearing was scheduled for March 13, 2015, on which date it was convened and completed.

At the outset of the hearing, the Department made a motion to file a "Third Amended Order of Penalty Assessment" based upon a further review of Klenk Roofing's business records. The Third

Amended Order of Penalty Assessment reduced the penalty assessment to \$19,918.04. Without objection, the undersigned granted the motion and the hearing went forward based on the Third Amended Order of Penalty Assessment.

At the hearing, the Department presented the testimony of its investigator, Kent Howe, and of penalty audit manager, Anita Proano. The Department's Exhibits 2, 4, 5, 7, 8, 10 through 14, 16, 18, and 20 were admitted into evidence. Klenk Roofing presented the testimony of its president, Ronald Klenk. Klenk Roofing offered no exhibits into evidence.

By written motion filed on March 10, 2015, the Department renewed a motion first made orally at the hearing, requesting leave to file the deposition transcript of Ronald Klenk as an exhibit. By order dated April 8, 2015, the undersigned denied the motion on the ground that Mr. Klenk testified at the hearing, which rendered the transcript of his discovery deposition redundant. The order gave leave to the Department to request the admission of specific portions of the transcript for impeachment purposes, but the Department made no further request regarding the deposition.

The one-volume Transcript of the final hearing was filed at the DOAH on March 31, 2015. Ronald Klenk had filed a handwritten letter summarizing the position of Klenk Roofing on March 26, 2015. The Department timely filed a Proposed

Recommended Order on April 9, 2015.

Unless otherwise stated, all statutory references are to the 2014 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for enforcing the requirement of the workers' compensation law that employers secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. Klenk Roofing is a corporation based in Daytona Beach. The Division of Corporations' "Sunbiz" website indicates that Klenk Roofing was first incorporated on February 23, 2005, and remained an active corporation up to the date of the hearing. Klenk Roofing's principal office is at 829 Pinewood Street in Daytona Beach.

3. As the name indicates, Klenk Roofing's primary business is the installation of new roofs and the repair of existing roofs. Klenk Roofing was actively engaged in roofing operations during the two-year audit period from July 24, 2012, through July 23, 2014.

4. Kent Howe is a Department compliance investigator assigned to Volusia County. Mr. Howe testified that his job includes driving around the county conducting random compliance investigations of any construction sites he happens to see. On July 23, 2014, Mr. Howe was driving through a residential neighborhood when he saw a house under construction at 2027 Peninsula Drive in Daytona Beach. He saw a dumpster in the driveway with the name "Klenk Roofing" written on its side. Mr. Howe also saw a gray van with the name "Klenk Roofing" on the door.

5. Mr. Howe saw three men working on the house. He spoke first with Vincent Ashton, who was collecting debris and placing it in the dumpster. Mr. Howe later spoke with Jonny Wheeler and Craig Saimes, both of whom were laying down adhesive tarpaper on the roof when Mr. Howe approached the site.

6. All three men told Mr. Howe that they worked for Klenk Roofing and that the owner was Ronald Klenk. Mr. Ashton and Mr. Wheeler told Mr. Howe that they were each being paid \$10 per hour. Mr. Saimes would not say how much he was being paid.

7. After speaking with the three Klenk Roofing employees, Mr. Howe returned to his vehicle to perform computer research on Klenk Roofing. He first consulted the Sunbiz website for information about the company and its officers. His search confirmed that Klenk Roofing was an active Florida corporation

and that Ronald Klenk was its registered agent. Ronald Klenk was listed as the president of the corporation and Kyle Klenk was listed as the vice president.

8. Mr. Howe next checked the Department's Coverage and Compliance Automated System ("CCAS") database to determine whether Klenk Roofing had secured the payment of workers' compensation insurance coverage or had obtained an exemption from the requirements of chapter 440. CCAS is a database that Department investigators routinely consult during their investigations to check for compliance, exemptions, and other workers' compensation related items. CCAS revealed that Klenk Roofing had no active workers' compensation insurance coverage for its employees and that Ronald and Kyle Klenk had elected exemptions as officers of the corporation pursuant to section 440.05 and Florida Administrative Code Rule 69L-6.012.

9. Mr. Howe's next step was to telephone Ronald Klenk to verify the employment of the three workers at the jobsite and to inquire as to the status of Klenk Roofing's workers' compensation insurance coverage. Mr. Klenk verified that Klenk Roofing employed Mr. Wheeler, Mr. Ashton, and Mr. Saines. Mr. Klenk also informed Mr. Howe that Klenk Roofing did not have workers' compensation insurance coverage for the three employees.

10. Based on his jobsite interviews with the employees, his interview with Mr. Klenk, and his Sunbiz and CCAS computer searches, Mr. Howe concluded that as of July 23, 2014, Klenk Roofing had three employees working in the construction industry and that the company had failed to procure workers' compensation coverage for these employees in violation of chapter 440. Mr. Howe consequently issued a Stop-Work Order that he personally served on Mr. Klenk on July 23, 2014.

11. Also on July 23, 2014, Mr. Howe served Klenk Roofing with a Request for Production of Business Records for Penalty Assessment Calculation, asking for documents pertaining to the identification of the employer, the employer's payroll, business accounts, disbursements, workers' compensation insurance coverage records, professional employer organization records, temporary labor service records, documentation of exemptions, documents relating to subcontractors, documents of subcontractors' workers compensation insurance coverage, and other business records to enable the Department to determine the appropriate penalty owed by Klenk Roofing.

12. Anita Proano, penalty audit supervisor for the Department, was assigned to calculate the appropriate penalty to be assessed on Klenk Roofing. Penalties for workers' compensation insurance violations are based on doubling the amount of evaded insurance premiums over the two-year period



preceding the Stop-Work Order, which, in this case was the period from July 24, 2012, through July 23, 2014.

§ 440.107(7)(d), Fla. Stat. At the time Ms. Proano was assigned, Klenk Roofing had not provided the Department with sufficient business records to enable Ms. Proano to determine the company's actual gross payroll.

13. Section 440.107(7)(e) provides that where an employer fails to provide business records sufficient to enable the Department to determine the employer's actual payroll for the penalty period, the Department will impute the weekly payroll at the statewide average weekly wage as defined in section 440.12(2), multiplied by two.<sup>1/</sup>

14. In the penalty assessment calculation, the Department consulted the classification codes and definitions set forth in the SCOPES of Basic Manual Classifications ("Scopes Manual") published by the National Council on Compensation Insurance ("NCCI"). The Scopes Manual has been adopted by reference in Florida Administrative Code Rule 69L-6.021. Classification codes are four-digit codes assigned to occupations by the NCCI to assist in the calculation of workers' compensation insurance premiums. Rule 69L-6.028(3)(d) provides that "[t]he imputed weekly payroll for each employee . . . shall be assigned to the highest rated workers' compensation classification code for an

employee based upon records or the investigator's physical observation of that employee's activities."

15. Ms. Proano applied NCCI Class Code 5551, titled "Roofing - All Kinds and Drivers," which "applies to the installation of new roofs and the repair of existing roofs." The corresponding rule provision is rule 69L-6.021(2)(uu). Ms. Proano used the approved manual rates corresponding to Class Code 5551 for the periods of non-compliance to calculate the penalty.

16. On September 17, 2014, the Department issued an Amended Order of Penalty Assessment in the amount of \$214,335.58, based upon an imputation of wages for the employees known to the Department at that time. After Klenk Roofing provided further business records, the Department on December 16, 2014, was able to issue a Second Amended Order of Penalty Assessment in the amount of \$87,159.20, based on a mixture of actual payroll information and imputation.

17. The Department eventually received records sufficient to determine Klenk Roofing's payroll for the time period of July 24, 2012, through July 23, 2014. The additional records enabled Ms. Proano to calculate a Third Amended Order of Penalty Assessment in the amount of \$19,818.04.

18. The evidence produced at the hearing established that Ms. Proano utilized the correct class codes, average weekly

wages, and manual rates in her calculation of the Third Amended Order of Penalty Assessment.

19. The Department has demonstrated by clear and convincing evidence that Klenk Roofing was in violation of the workers' compensation coverage requirements of chapter 440. Jonny Wheeler, Vincent Ashton, and Craig Saimes were employees of Klenk Roofing performing services in the construction industry without valid workers' compensation insurance coverage. The Department has also demonstrated by clear and convincing evidence that the penalty was correctly calculated by Ms. Proano, through the use of the approved manual rates, business records provided by Klenk Roofing, and the penalty calculation worksheet adopted by the Department in Florida Administrative Code Rule 69L-6.027.

20. Klenk Roofing could point to no exemption, insurance policy, or employee leasing arrangement that would operate to lessen or extinguish the assessed penalty. At the hearing, Ronald Klenk testified he was unable to obtain workers' compensation coverage during the penalty period because it was prohibitively expensive to carry coverage for fewer than four employees. He stated that the insurers demanded a minimum of \$1,500 per week in premiums, which wiped out his profits when the payroll was low. Mr. Klenk presented a sympathetic picture of a small business squeezed by high premiums, but such

equitable considerations have no effect on the operation of chapter 440 or the imposition of the penalty assessed pursuant thereto.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

22. Employers are required to secure payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

23. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her" and includes "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." §§ 440.02(17)(a) and (b)(2), Fla. Stat.

24. "Employee" is defined, 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." § 440.02(15)(a), Fla. Stat. "Employee" also includes "any person who is an officer of a

corporation and who performs services for remuneration for such corporation within this state.” § 440.02(15)(b), Fla. Stat.

25. 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. See Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

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

[C]lear 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).

27. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

28. Section 440.02(8) defines "construction industry" 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." Section 440.02(8) further provides "[t]he division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section." Klenk Roofing's activities in installing a roof at the residential worksite for payment constituted construction under the Department's statutorily authorized rules. Fla. Admin. Code R. 69L-6.021(2)(dd).

29. The Department established by clear and convincing evidence that Klenk Roofing was an "employer" for workers' compensation purposes because it was engaged in the construction

industry during the period of July 24, 2012, through July 23, 2014, and employed one or more employees during that period.  
§§ 440.02(16)(a) and (17)(b)2., Fla. Stat.

30. Section 440.107(7)(a) provides 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.

Thus, the Department's SWO was mandated by statute.

31. As to the computation and assessment of penalties, section 440.107(7) provides, in relevant part:

(d)1. 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.

32. Ms. Proano properly utilized the penalty worksheet mandated by rule 69L-6.027 and the procedure set forth in

section 440.107(7)(d)1., to calculate the penalty owed by Klenk Roofing as a result of its failure to comply with the coverage requirements of chapter 440.

33. The Department has proven by clear and convincing evidence that it correctly calculated and issued the penalty of \$19,818.04 in the Third Amended Order of Penalty Assessment.

34. Mr. Klenk was a credible and sympathetic witness. The undersigned did not question his testimony as to the difficulty that his small business had in procuring affordable workers' compensation coverage. However, the Legislature has not seen fit to provide an "affordability exemption" to the requirements of chapter 440 and the undersigned lacks the authority to create an equitable exception. See Dep't of Ins. & Treasurer v. Bankers Ins. Co., 694 So. 2d 70, 71 (Fla. 1st DCA 1997) ("[A]gencies are creatures of statute. Their legitimate regulatory realm is no more and no less than what the Legislature prescribes by law.")

#### RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,



RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$19,818.04 against Klenk Roofing, Inc.

DONE AND ENTERED this 28th day of April, 2015, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 28th day of April, 2015.

ENDNOTE

<sup>1/</sup> Section 440.12(2) defines "statewide average weekly wage" as "the average weekly wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported to the Department of Economic Opportunity for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following."

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.