STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 15-1596

LEONARD LEONARD, d/b/a LEO'S TOUCH HAND CAR WASH,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on May 14, 2015, by video teleconferencing at sites located in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Leon Melnicoff, Qualified Representative
Alexander Brick, Esquire
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Gil Godfrey, Esquire
Suite 205
7400 Southwest 50th Terrace
Miami, Florida 33155

STATEMENT OF THE ISSUE

The issue is whether the Stop-Work Order, Amended Stop-Work Order, and Amended Order of Penalty Assessment entered by Petitioner on January 14 and 22, 2015, and February 23, 2015, respectively, should be upheld.

PRELIMINARY STATEMENT

On January 14, 2015, following an anonymous lead, Department of Financial Services' Investigator Jose Lopez conducted a workers' compensation check at 6075 Biscayne Boulevard in Miami. He confirmed that two businesses operated from that location, Europa Car Wash and Café, LLC ("Europa"), and Leo's Touch Hand Car Wash ("Leo's Touch"). Mr. Lopez determined from state records that Europa had secured workers' compensation coverage, but that Leo's Touch had not. After discussing the requirements of the Workers' Compensation Law for covering employees of a Florida business, Mr. Lopez, on the basis of Leo's Touch's failure to secure workers' compensation coverage for its four employees, served a Stop-Work Order and Order of Penalty Assessment ("Stop-Work Order") to Leo's Touch. On January 22, 2015, the Department of Financial Services (the "Department") served an Amended Stop-Work Order and Order of Penalty Assessment ("Amended Stop-Work Order") on Leo's Touch which removed an errant Federal Employers Identification Number from the Stop-Work Order. On February 26, 2015, the Department served an Amended

Order of Penalty Assessment ("AOPA") to Leo's Touch assessing a total penalty of $50,505.36. Leo's Touch timely filed a request for a formal administrative hearing. The request was referred to DOAH on March 23, 2015.

At the hearing, Petitioner presented the testimony of Jose Lopez, a compliance investigator, and Nathaniel Hatten, a penalty auditor, and offered 14 exhibits, all of which were admitted into evidence. Respondent presented the testimony of Leonard Leonard, the owner of Leo's Touch, and Georgia Leonard, his wife, and offered no exhibits into evidence.

A one-volume Transcript of the final hearing was filed on June 8, 2015. After the hearing, Petitioner and Respondent filed their proposed findings of fact and conclusions of law on June 17 and 18, 2015, respectively.

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 statutory requirement that employers secure the payment of workers' compensation for the benefit of its employees.

2. At all times relevant to this matter, Leonard Leonard owned Leo's Touch, a business located at 6705 Biscayne Boulevard, Miami, Florida 33137.

3. Leo's Touch actively engaged in business as a car wash in Florida throughout the period of January 15, 2013, through January 14, 2015.

4. On January 14, 2015, the Department's investigator, Jose Lopez, received a public, anonymous referral, which led him to 6705 Biscayne Boulevard, Miami, Florida 33137 to conduct a workers' compensation compliance investigation of Leo's Touch.

5. Investigator Lopez determined that two businesses operated at 6705 Biscayne Boulevard--Leo's Touch and Europa.

6. At the work site, Mr. Lopez observed Leonard Leonard, Jean Philippe Valbonard, Keny Nilas, Franc Maitre, and Mario Elma washing cars. Messrs. Valbonard, Nilas, Maitre, and Elma wore uniform shirts reading "Leo's Touch Hand Car Wash."

7. Mr. Leonard told Mr. Lopez that he owned the business. Mr. Leonard directed Investigator Lopez to enter Europa to obtain the information regarding the occupational license and workers' compensation insurance for the business.

8. Mr. Morris, the manager of Europa, informed Mr. Lopez that Leo's Touch is a separate entity subleasing the premises from Europa and that the café is not responsible for the employees of Leo's Touch.

9. Mr. Leonard told Mr. Lopez that Leo's Touch had no workers' compensation insurance for its employees.

10. Mr. Lopez then searched the Department's Coverage and Compliance Automated System for workers' compensation coverage or exemptions for Leo's Touch. Leo's Touch had no workers' compensation coverage or exemptions.

11. Messrs. Valbonard, Nilas, Maitre, and Elma told Investigator Lopez they were employees of Leo's Touch for various lengths of time ranging from six months to two years.

12. Mr. Lopez determined at this point that Leo's Touch employed at least four uninsured employees in violation of the Workers' Compensation Law.

13. On January 14, 2015, Mr. Lopez witnessed Mr. Leonard, as well as three other employees (Messrs. Valbonard, Nilas, and Maitre), onsite washing cars. Mr. Elma arrived at the site to collect his pay, but was not observed washing cars that day. From his investigation that day, Mr. Lopez determined that Mr. Leonard employed four individuals at the car wash. He concluded that workers' compensation coverage was required on the part of Leo's Touch.

14. On January 14, 2015, Mr. Lopez served Leo's Touch with the Stop-Work Order, as well as a Request for Production of Business Records for Penalty Assessment Calculation ("Business Records Request"). The Business Records Request sought production of Leo's Touch's employer licenses, payroll documents, business accounts documents, and workers' compensation coverage

to enable the Department to determine the appropriate penalty owed by Leo's Touch.

15. Nathaniel Hatten, a penalty auditor for the Department, was assigned to calculate the appropriate penalty to be assessed Leo's Touch in February 2015. Penalties for workers' compensation violations are based upon the amount of evaded insurance premiums over the two-year period preceding the Stop-Work Order, multiplied by two. At the time of Mr. Hatten's assignment, Leo's Touch had not provided the Department with any business records. Mr. Hatten was, therefore, not able to determine Leo Touch's gross payroll.

16. Without sufficient payroll records from Leo's Touch to accurately calculate the amount of penalty due, Mr. Hatten was required to impute income using twice the statewide average weekly wage effective at the time the Stop-Work Order was issued to Leo's Touch. He calculated the penalty assessment to be $50,505.36, which was the result of the methodology required by section 440.107(7)(e), Florida Statutes, and Florida Administrative Code Rule 69L-6.028. The Department served the AOPA on Leo's Touch on February 26, 2015.

17. For the penalty assessment calculation, Mr. Hatten consulted the classification codes listed in the Scopes Manual. Classification codes are four-digit codes assigned to occupations by the National Council on Compensation Insurance ("NCCI") to

assist in the calculation of workers' compensation insurance premiums.

18. Mr. Hatten assigned Class Code 8380, Automobile Service or Repair Canter & Drivers, to Leo's Touch's payroll because Investigator Lopez observed Messrs. Valbonard, Nilas, Maitre, and Elma washing cars on the day of the site visit. The NCCI Scopes Manual class code description for 8380 specifies that "Code 8380 includes all types of car wash facilities."

19. Mr. Hatten applied the appropriate manual rates corresponding to Class Code 8380 for the periods of non-compliance in the penalty calculation. Mr. Hatten utilized the manual rates to satisfy his statutory obligation to determine the evaded workers' compensation insurance premium amounts pursuant to section 440.107(7)(d)1.

20. Leo's Touch provided no records to the Department until the beginning of May 2015. The records were not provided within the time frame mandated by rule 69L-6.028(4). The records provided by Leo's Touch were insufficient to enable the Department to determine the payroll of Leo's Touch. The records contained no information about the identity of employees, amounts of pay, or employment periods. Therefore, the Department had no choice but to impute Leo's Touch's payroll.

21. Mr. and Mrs. Leonard both gave impassioned testimony about how little the business earns; how they relied upon Europa

to have been providing any necessary workers' compensation coverage; how the four identified workers were no more than casual employees; and how they could under no circumstances have ever generated sufficient income to support an assessment of more than $50,000. They appeared sincere in their testimony, yet produced no credible evidence in the form of payroll records, testimony from the four employees, or testimony or records from Europa to support their contentions.

22. The Department demonstrated by clear and convincing evidence that Leo's Touch violated the Workers' Compensation Law by employing at least four nonexempt uninsured employees.

CONCLUSIONS OF LAW

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

24. Because administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant time period and that the penalty assessments are correct. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996).

25. The Department is the agency responsible for enforcement of chapter 440, Florida Statutes. As the responsible

agency, the Department must abide by the statutes and rules that govern it.

26. Pursuant to sections 440.10, 440.107(2), and 440.38, Florida Statutes, 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 with the Workers' Compensation Law is required. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

27. Section 440.107(2) states that "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

28. Pursuant to section 440.107(3)(g), "[t]he department shall enforce workers' compensation coverage requirements" and "shall have the power to . . . [i]ssue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section."

29. Section 440.02(16)(a), Florida Statutes, defines "employer," in part, as "every person carrying on any employment."

30. "Employment" is defined as "any service performed by an employee for the person employing him or her," and the definition includes "[a]ll private employments in which four or more employees are employed by the same employer." § 440.02(17)(a) and (b)2., Fla. Stat. Leo's Touch employed at least four

individuals on January 14, 2015: Jean Philippe Valbonard, Keny Nilas, Franc Maitre, and Mario Elma. Therefore, Leo's Touch was required to secure the payment of workers' compensation insurance coverage.

31. A statutory exception exists for employment which is "both casual and not in the course of trade, business, profession, or occupation of the employer." § 440.02(15)(d)5., Fla. Stat. Casual employment "refers only to employments for work that is anticipated to be completed in 10 working days or less." § 440.02(5), Fla. Stat. Messrs. Valbonard, Nilas, Maitre, and Elma all stated they worked for Leo's Touch for more than ten days. The only business for Leo's Touch was washing cars. Accordingly, their employment required workers' compensation coverage. See Dep't of Fin. Servs., Div. of Workers' Comp. v. All Custom Hurricane Shutters & Sec., Inc., Case No. 03-2472 (Fla. DOAH Apr. 9, 2004; Fla. DFS June 23, 2004) (rejecting claim that an employee was casual because the employee was building storm shutters which was required in the course of the employer's business).

32. Part-time, as well as full-time, employees are required to be covered by workers' compensation insurance. See Dep't of Fin. Servs., Div. of Workers' Comp. v. Valou Enterprises, Inc., d/b/a Mr. Rooter Plumbing, Case No. 08-3739 (Fla. DOAH Apr. 28, 2009; Fla. DFS June 3, 2009) (finding that a part-time employee

of a business was required to be covered by workers' compensation insurance).

33. The Workers' Compensation Law requires employers to secure the payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2006).

34. Section 440.107(7)(a), Florida Statutes, 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.

On January 14, 2015, Leo's Touch had at least four uninsured and nonexempt employees. Therefore, the Stop-Work Order was mandated.

35. Pursuant to section 440.05, the Department may grant applications for certificates of election of exemption from the Workers' Compensation Law.

36. Pursuant to section 440.05(6), "[a] certificate of election to be exempt which is issued on or before January 1, 2013, in accordance with this section shall be valid for 2 years after the effective date stated thereon." Leo's Touch did not have a

certificate of exemption for the period or any part of the period for which the two-year assessment applies.

37. In determining the number of employees of a particular employer:

> The prevailing theory is that liability of an employer should not vary from day to day according to the number of persons in his employ on each day, but should be governed by the established mode or plan of his business or operation, and from that determine he regularly and customarily employs the requisite number.

Mathers v. Sellers, 113 So. 2d 443, 445 (Fla. 1st DCA 1959).

38. Respondent is a sole proprietorship in a non-construction industry, and at all times relevant for the calculation of the monetary penalty in this matter, had four or more employees conducting business in Florida. For the purpose of determining Respondent's employees, the employees at each distinct business location who were paid by Respondent are considered its employees.

39. The Department is empowered to examine and copy the business records of any employer conducting business in Florida to determine whether it is in compliance with the Workers' Compensation Law. See § 440.107(3), Fla. Stat. Whenever the Department finds an employer who is required to have such coverage but fails to do so, such failure is deemed an immediate serious danger to the 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. See § 440.107(1) and (7)(a), Fla. Stat.

40. Section 440.107(7)(d)1. provides that the Department:

> [S]hall 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.

41. The Department is required to impute the payroll of any employer that is out of compliance and fails to provide business records sufficient to enable the Department to determine the employer's payroll for the period requested for the calculation of a penalty. § 440.107(7)(e), Fla. Stat. The imputed payroll is equal to two times the statewide average weekly wage. Id.

42. Rule 69L-6.028 sets forth the method for imputing an employer's payroll:

> (3) 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 2. Employees include sole proprietors and partners in a partnership.
>
> * * *
>
> (4) If the department imputes the employer's payroll, the employer shall have twenty business days after service of the first amended order of penalty assessment to provide business records sufficient for the department to determine the employer's payroll for the period requested in the business records request for the calculation of the penalty or for the alternative period of non-compliance. The employer's penalty will be recalculated pursuant to Section 440.107(7)(d), F.S., only if the employer provides all such business records within the twenty days after the service of the first amended order of penalty assessment. Otherwise, the first amended order of penalty assessment will remain in effect.

The imputation methodology is required for all employees identified by the Department when it cannot determine the employer's payroll. It does not vary or allow the Department to impute for some employees and not others during any period of time in which the Department is able to determine only a portion of the employer's payroll.

43. Rule 69L-6.028(3)(d) mandates 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."

44. By not providing for the payment of workers' compensation insurance, Respondent violated chapter 440 on January 14, 2015, and for the two years preceding that date. Further, Leo's Touch failed to provide the Department with records within 20 business days of service of the AOPA and never provided payroll records or any documents sufficient to prove either the four employees were not subject to workers' compensation coverage or that the amounts they were paid could be established without imputation. No evidence was produced to demonstrate any coverage existed for the two-year period immediately preceding the date of the site visit by the Department. Despite the honest and impassioned testimony given by Respondent and his wife, they were unable to produce any documentation or credible testimony that they did not employ at least four individuals; that their payroll was anything other than what was imputed to them; or that they should be exempt from the statutory requirement to secure workers' compensation coverage for their employees. While it stretches the imagination to conclude sufficient revenues were generated by a hand car wash

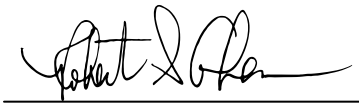
to support the imputed income and the penalty assessment, without credible, tangible evidence to support his defense against the Department's penalty assessment, Respondent did not successfully counter the strong evidence offered by the Department. The Department was, therefore, justified in issuing the Amended Stop-Work Order and the AOPA.

45. The Department utilized the appropriate worksheet, occupation codes, and salary information for calculating the appropriate penalty to be assessed against Respondent for conducting business without the required workers' compensation coverage. Its calculation of the penalty in the amount of $50,505.36 is accurate and is supported by clear and convincing evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department issue a final order upholding the Amended Stop-Work Order and Amended Order of Penalty Assessment, and assess a penalty in the amount of $50,505.36.

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



ROBERT S. COHEN
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 2nd day of July, 2015.

COPIES FURNISHED:

Gil Godfrey, Esquire
Suite 205
7400 Southwest 50th Terrace
Miami, Florida 33155
(eServed)

Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-6502
(eServed)

Leon Melnicoff, Qualified Representative
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229
(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.