

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-1613

HOLLYWOOD CONSTRUCTION OF
NORTHWEST FLORIDA, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 22, 2015, via video teleconference in Panama City and Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: R. Gage Golden, pro se
Hollywood Construction of
Northwest Florida, LLC
3003 State Avenue
Panama City, Florida 32405

STATEMENT OF THE ISSUES

The issues are whether Respondent, Hollywood Construction of Northwest Florida, LLC (Hollywood Construction), failed to secure workers' compensation insurance as required by chapter 440, Florida Statutes (2014); and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

This proceeding arose out of the requirement in Florida's Workers' Compensation Law that employers must secure the payment of workers' compensation insurance for their employees.

On January 22, 2015, Petitioner, the Department of Financial Services, Division of Workers' Compensation (the Department), served an Order of Penalty Assessment on Hollywood Construction. The Order of Penalty Assessment alleged that Hollywood Construction was not in compliance with the workers' compensation coverage requirements of chapter 440, between August 7, 2012, and August 6, 2014. Furthermore, the Order of Penalty Assessment required Hollywood Construction to pay a penalty of \$100,326.46.

Hollywood Construction responded to the Order of Penalty Assessment by requesting a formal administrative hearing on February 4, 2015.

On May 12, 2015, the Department served a 2nd Amended Order of Penalty Assessment which established a monetary penalty of \$89,886.28.

On September 21, 2015, and one day prior to the final hearing in this matter, the Department issued a 3rd Amended Order of Penalty Assessment indicating the Department was now seeking to impose a penalty of \$21,853.80.

The final hearing took place as scheduled on September 22, 2015, at which the Department presented the testimony of two witnesses, and the Department's Exhibits 1 through 6, 8, 10, and 11 were admitted into evidence. Hollywood Construction presented the testimony of one witness and offered no exhibits.

The proceedings were recorded and a one-volume Transcript was filed with the Division of Administrative Hearings on October 28, 2015. The Department filed a Proposed Recommended Order, which has been carefully considered in the preparation of this Recommended Order. Hollywood Construction did not file a proposed recommended order.

Unless indicated otherwise, all statutory citations are to the 2014 version 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 in chapter 440, that employers in

Florida secure workers' compensation coverage for their employees.

2. An employer can satisfy that requirement by purchasing a workers' compensation insurance policy or by leasing employees through an employee leasing company with a workers' compensation insurance policy. With regard to the latter, the employer pays the employee leasing company, and the employee leasing company then compensates the leased employees for their labor.

3. Donald Hurst is employed as a workers' compensation investigator for the Department. He works out of a district office in Pensacola, Florida, and his territory covers Bay, Gulf, Franklin, and Liberty Counties.

4. Hollywood Construction is a construction business with its principal office in Panama City, Florida.

5. On approximately August 6, 2014, Mr. Hurst received a phone call from Barry Hutchinson, who claimed to be an injured employee of Hollywood Construction.

6. That phone call prompted Mr. Hurst to access a website managed by the Florida Department of State, Division of Corporations, where he learned of Hollywood Construction's address and that R. Gage Golden was responsible for the business operations.

7. Mr. Hurst also accessed the Coverage and Compliance Automated System (CCAS), which is a Department-maintained

database that records whether a particular employer has workers' compensation coverage. CCAS indicated that Hollywood Construction had workers' compensation coverage through an employee leasing company in lieu of procuring its own workers' compensation insurance policy.

8. Because Mr. Hutchinson alleged that he was a Hollywood Construction employee who had no workers' compensation coverage, Mr. Hurst decided that further investigation was warranted and visited the job site where Mr. Hutchinson stated he had been working. The purpose of this visit was to verify whether any workers at the job site had coverage.

9. After finding no one at the reported job site, Mr. Hurst served Hollywood Construction with a Request for Production of Business Records on August 14, 2014, seeking various types of business records that would reveal whether Hollywood Construction had been directly paying employees or subcontractors between May 6, 2014, and August 6, 2014.

10. The business records produced by Hollywood Construction indicated that Hollywood Construction had made direct payments to Mr. Hutchinson. Accordingly, and because Hollywood Construction had no workers' compensation coverage outside its employee leasing arrangement, Mr. Hurst concluded that Hollywood Construction had failed to procure all necessary workers' compensation coverage.

11. Next, Mr. Hurst hand-delivered to Hollywood Construction on September 3, 2014, a document entitled "Request for Production of Business Records for Penalty Assessment Calculation." The aforementioned document sought additional records pertaining to the period from August 7, 2012, through August 6, 2014 (i.e., the audit period), that would enable the Department to ascertain how much money Hollywood Construction had paid directly to employees and/or subcontractors.

12. The requested records corresponded to the two-year period established by section 440.107(7)(d) for penalty calculations.

13. After reviewing those records, the Department concluded that multiple individuals were receiving direct payments from Hollywood Construction, rather than from Hollywood Construction's employee leasing company.

14. As a result, Mr. Hurst personally served on January 22, 2015, an Order of Penalty Assessment requiring Hollywood Construction to pay a penalty of \$100,326.46.

15. At some point thereafter, Hollywood Construction produced additional records to the Department, and the Department issued a 2nd Amended Order of Penalty Assessment on May 11, 2015, imposing a penalty of \$89,886.28.

16. Ultimately, the Department issued a 3rd Amended Order of Penalty Assessment on September 21, 2015, requiring Hollywood Construction to pay a penalty of \$21,853.80.

17. The \$21,853.80 penalty sought by the Department is based on Hollywood Construction's payroll during the audit period and the premium Hollywood Construction would have paid if it had obtained all of the necessary workers' compensation coverage during the audit period.

18. In order to calculate Hollywood Construction's payroll during the audit period and the resulting premium, the Department relied on information provided by Hollywood Construction to ascertain the nature of its employees' work and assigned each employee a classification code from the Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rule 69L-6.021.

19. Classification codes pertain to various occupations or types of work, and each one has an approved manual rate used by insurance companies to assist in the calculation of workers' compensation insurance premiums.

20. An approved manual rate corresponds to the risk associated with a particular occupation or type of work. Therefore, the manual rate corresponding to a roofer will be higher than the manual rate corresponding to secretarial work.

21. The Department's review also indicated that some of the payments at issue were non-wage expenses. For example, Hollywood Construction was reimbursing individuals for procuring items such as building materials and gasoline.

22. Payments intended to reimburse employees for procuring such items are non-wage expenses that do not count towards an employer's workers' compensation obligation because those payments are not payroll.

23. However, the Department was of the opinion that Hollywood Construction's records were insufficiently detailed to enable the Department to ascertain whether all the payments at issue were wages or non-wage payments.

24. Accordingly, and pursuant to rule 69L-6.035(1)(i), the Department presumed that 80 percent of the payments at issue were payroll that would count toward calculating a business' workers' compensation premium.

25. Using the approved manual rates and the wages paid during the audit period (adjusted as described immediately above), the Department determined the individual insurance premiums Hollywood Construction would have paid for the employees in question if Hollywood Construction had procured workers' compensation coverage during the audit period.

26. Then, and as required by section 440.107(d)(1), the Department multiplied each individual premium by two in order to

calculate the penalty associated with each employee, and those individual amounts totaled \$21,853.80.

27. R. Gage Golden (Hollywood Construction's representative/owner) credibly testified during the final hearing that none of the payments used to calculate the \$21,853.80 penalty were wages. Instead, those payments were non-wage expenses that should not influence Hollywood Construction's workers' compensation obligation.

28. Furthermore, Mr. Golden argued that there is insufficient guidance in the relevant statutes and rules as to how business records must be maintained.

29. The undersigned finds (as a matter of ultimate fact) that the Department failed to carry its burden of proving that \$21,853.80 is the appropriate penalty and/or that the Department utilized the correct methodology in calculating that penalty.

30. Hollywood Construction's records sufficiently demonstrate that certain categories of payments were expenses, and a review of Hollywood Construction's business records in Exhibit 10 indicates that the Department erroneously deemed certain payments to be wages rather than expenses.

31. Specifically, Hollywood Construction's Transaction Listing on pages 89 through 92 of the Department's exhibits indicates that James Franklin (a Hollywood Construction employee)

received eight payments between January 3, 2013, and May 2, 2013, totaling \$1,239.00.

32. If \$1,239.00 is reduced by 20%, then the resulting figure is \$991.20, and the Department's penalty calculation worksheet alleges that James Franklin received \$991.20 worth of payments directly from Hollywood Construction between January 1, 2013, and June 30, 2013.

33. However, Hollywood Construction's General Ledger on pages 176 and 177 of the Department's exhibits indicates that the payments made to Mr. Franklin between January 3, 2013, and May 2, 2013, were travel reimbursements rather than wages. Because travel reimbursements are not payroll, the aforementioned payments should not have been used in calculating Hollywood Construction's penalty.

34. Further review of Hollywood Construction's business records suggests that other payments identified in the General Ledger as expenses may have been treated as wages for purposes of calculating the \$21,853.80 penalty. For example, the General Ledger notes that several payments were made to Hollywood Construction employees and characterizes those payments as "Purchases/Materials" (pages 137 through 140 of the Department's exhibits); Employee Travel Reimbursement (pages 140 through 143 and 176 through 181 of the Department's exhibits); "Sales/Estimating Exp" (pages 146, 147, 182 and 183 of the

Department's exhibits); "Auto/Truck" (pages 149, 150, and 189 of the Department's exhibits); "Purchases/Job Costs" (pages 168 through 176 of the Department's exhibits); and "Maintenance/Repairs" (page 185 of the Department's exhibits).

35. To whatever extent that the Department's proposed penalty of \$21,853.80 includes any payments identified by Hollywood Construction's General Ledger as "Purchases/Materials," "Employee Travel Reimbursement," "Sales/Estimating Exp.," "Auto/Truck," "Purchases/Job Costs," or "Maintenance/Repairs," those payments must be excluded from the penalty calculation.

36. The undersigned also finds (as a matter of ultimate fact) that there is no evidence that Mr. Golden or anyone associated with Hollywood Construction intentionally understated Hollywood Construction's payroll so as to lessen its workers' compensation obligation. Furthermore, the Department has not alleged that the business records provided by Hollywood Construction are inaccurate or untrustworthy.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2015).

38. Chapter 440 is known as the "Workers' Compensation Law." § 440.01, Fla. Stat.

39. In this case, the Department is seeking an administrative fine. Accordingly, the Department bears the burden of proof and must establish its case by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

40. 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). As stated by the Florida Supreme Court:

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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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,

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

41. To meet this burden, the Department must demonstrate that: (a) Respondent was required to comply with the Workers' Compensation Law; (b) that Respondent failed to comply with the

requirements of the Workers' Compensation Law; and that (c) the penalty assessed by the Department is appropriate.

42. As for the first requirement, every employer is required to secure workers' compensation coverage for the benefit of its employees, unless exempted or excluded under chapter 440. Indeed, the Legislature has declared that "the failure of an employer to comply with the workers' compensation coverage requirements under [chapter 440] poses an immediate danger to public health, safety, and welfare." § 440.107(1), Fla. Stat.

43. Employment is defined in section 440.02(17)(a) as "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)(b)2., Fla. Stat.

44. An employee is defined in pertinent part as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment" § 440.02(15)(a), Fla. Stat.

45. With regard to the instant case, there is no dispute that Hollywood Construction was required to comply with the Workers' Compensation Law. Instead, Hollywood Construction disputes the Department's allegation that it failed to comply with the Workers' Compensation Law and the \$21,853.80 penalty the Department is seeking to impose.

46. With regard to the appropriateness of the Department's proposed penalty and Hollywood Construction's compliance with the Workers' Compensation Law, rule 69L-6.015 imposes substantial record-keeping requirements on employers.

47. For instance, "[e]very employer shall maintain employment records pertaining to every person to whom the employer paid or owes remuneration for the performance of any work or service in connection with any employment under any appointment or contract for hire or apprenticeship."

Fla. Admin. Code R. 69L-6.015(3).

48. Furthermore, and of particular relevance to the instant case, is the requirement in rule 69L-6.015(6) that "[e]very employer shall maintain a journal of its check and cash disbursements as well as a copy of each cashier's check, bank check, and money order, indicating chronologically the disbursement date, to whom the money was paid, the payment amount, and the purpose." (emphasis added).

49. If an employer's records are insufficient to enable the Department to ascertain whether payments are wages or expense reimbursements, then the amounts in question will be deemed payroll for purposes of calculating a penalty pursuant to section 440.107(7)(d)1. See Fla. Admin. Code R. 69L-6.035(1)(f) (mandating that payroll shall include "[e]xpense 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.").

50. As noted above, Hollywood Construction's business records were sufficiently detailed to enable the Department to distinguish whether certain payments were wages or non-wage expenses. Therefore, the Department failed to prove by clear and convincing evidence that \$21,853.80 is the correct penalty and/or that it utilized the correct methodology in calculating that penalty.

51. To whatever extent that the Department's proposed penalty of \$21,853.80 includes payments listed in Hollywood Construction's General Ledger as "Purchases/Materials," Employee Travel Reimbursement, "Sales/Estimating Exp," "Auto/Truck," "Purchases/Job Costs," or "Maintenance/Repairs," those payments should be excluded from the penalty calculation.

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, recalculate the proposed penalty by excluding payments listed in Hollywood Construction's General Ledger as "Purchases/Materials," Employee Travel Reimbursement, "Sales/Estimating Exp," "Auto/Truck," "Purchases/Job Costs," or "Maintenance/Repairs." If the recalculated penalty is greater than \$0.00, then it is further

RECOMMENDED that the Department enter a final order finding that Hollywood Construction of Northwest Florida, LLC, failed to secure the payment of workers' compensation insurance coverage at certain times between August 7, 2012, and August 6, 2014, in violation of section 440.107.

DONE AND ENTERED this 3rd day of December, 2015, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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 3rd day of December, 2015.

COPIES FURNISHED:

R. Gage Golden
Hollywood Construction of
Northwest Florida, LLC
3003 State Avenue
Panama City, Florida 32405

Trevor S. Suter, Esquire
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.