

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-2464

GULF COAST SITE PREP, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 29, 2015, in Tallahassee, Florida, before Suzanne Van Wyk, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas Nemecek, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Kristian Eiler Dunn, Esquire
Dunn and Miller, P.A.
215 East Tharpe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

Whether Respondent, Gulf Coast Site Prep, Inc., failed to comply with the coverage requirements of the Workers'

Compensation Law, chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees, and, if so, what penalty should be assessed against Respondent pursuant to section 440.107, Florida Statutes (2014).^{1/}

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 March 27, 2015, the Department issued a "Stop-Work Order for Specific Worksite Only," alleging that Respondent failed to comply with the coverage requirements of the workers' compensation law on that date. The Order directed Respondent to cease business operations at the specific worksite and pay a penalty equal to two times the amount Respondent would have paid in premiums 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 Respondent in order to determine the exact amount of the penalty. Respondent provided no records.

Respondent timely requested an administrative hearing to dispute the Department's Stop-Work Order and the imposition of a

penalty. On May 1, 2015, the Department forwarded Respondent's request to the Division of Administrative Hearings (Division). The hearing was scheduled for September 3, 2015, but was subsequently rescheduled to October 29, 2015, and was convened as rescheduled.

At the hearing, the Department presented the testimony of Jill Scogland, compliance investigator for the Division of Workers' Compensation, and Eunika Jackson, a Department penalty auditor. The Department's Exhibits 1 through 3, 6 through 10, and 12 through 16 were admitted into evidence. Respondent presented no testimony and offered no exhibits.

The one-volume Transcript of the final hearing was filed with the Division on November 12, 2015. The parties jointly requested, and the undersigned granted, an extension of time until December 14, 2015, to file post-hearing submissions. Both parties timely filed Proposed Recommended Orders which have been considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

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. Respondent, Gulf Coast Site Prep., Inc., is a Florida for-profit corporation organized on March 3, 2008. Respondent's registered business address is 952 TR Miller Road, Defuniak Springs, Florida. Ashley Adams is Respondent's President and Registered Agent.

3. On March 27, 2015, the Department's investigator-in-training, Jill Scogland, and lead investigator, Sharon Kelson, conducted a random workers' compensation compliance check at Lot 34 in the Driftwood Estates residential subdivision in Santa Rosa Beach, Florida.

4. Ms. Scogland observed two men on site. David Wayne Gibson was operating a front-end loader spreading dirt on site. Colby Smith was shoveling dirt on site.

5. While Ms. Scogland was inspecting the site, a third man, Ashley Adams, arrived driving a dump truck with a load of dirt.

6. Mr. Adams identified himself as the owner of Gulf Coast, and stated that he had an exemption from the requirement for workers' compensation insurance and that he thought Mr. Gibson did as well.

7. Mr. Adams advised Ms. Scogland that he hired both Mr. Gibson and Mr. Smith to work at the site.^{2/}

8. At hearing, Respondent challenged the evidence supporting a finding that Respondent hired Mr. Gibson.^{3/}

Specifically, Respondent argues that Ms. Scogland's testimony that Mr. Adams told her he hired Mr. Gibson is unreliable because Ms. Scogland did not include that information in her field notes. Respondent claims that Ms. Scogland's status as investigator-in-training on the date of the inspection is indicative of her unreliability.

9. To the contrary, Ms. Scogland's testimony regarding both the persons and events on the date of the inspection was clear and unequivocal. While Ms. Scogland admitted her field notes were not as detailed on the date in question as they are for more recent inspections, she was confident that her investigation of the facts was thorough. The fact that Ms. Scogland did not write down what Mr. Adams said does not render her testimony unreliable. The undersigned finds Ms. Scogland's testimony to be clear and convincing.

10. Ms. Scogland reviewed the Department of State, Division of Corporations' online information and identified Mr. Gibson as President and Registered Agent of David Wayne Gibson Tractor Service, Inc. According to Ms. Scogland, the online records indicated the corporation had been administratively dissolved in September 2013.

11. Ms. Scogland next accessed the Department's Coverage and Compliance Automated System (CCAS) and determined that Mr. Gibson had obtained a workers' compensation coverage

exemption for himself, but the exemption had expired on February 15, 2015. The information contained in CCAS is information on new policies, cancellations, etc., reported to the Department by insurance agencies as required by administrative rule.

12. Next, Ms. Scogland accessed the Division of Corporations' website, verified Gulf Coast as an active corporation, and identified Mr. Adams as the sole officer of Gulf Coast.

13. Ms. Scogland then accessed CCAS and determined that, although Gulf Coast did not have workers' compensation coverage, Mr. Adams had an active exemption effective from February 12, 2014 through February 12, 2016. Mr. Adams had a prior exemption that expired on April 14, 2013, but had no valid exemption in place between April 14, 2013 and February 12, 2014.

14. After contacting her supervisor, Michelle Lloyd, Ms. Scogland served Mr. Adams, on behalf of Gulf Coast, with a site-specific Stop-Work Order for failure to ensure workers' compensation coverage for its employees.

15. Ms. Scogland also served Mr. Adams with a Request for Production of Business Records for Penalty Assessment Calculation. The request was for Gulf Coast's payroll, account, and disbursement records, as well as records identifying its subcontractors, payments thereto, and workers' compensation

coverage thereof, from March 28, 2013 through March 27, 2015 (the penalty period).^{4/}

16. Mr. Adams did not provide any records to the Department in response to the records request.

17. The Department's penalty auditor, Eunika Jackson, was assigned to calculate the penalty to be assessed against Gulf Coast for failure to secure workers' compensation insurance during the penalty period.

18. The penalty to be assessed against an employer for failure to secure workers' compensation coverage is two times the amount the employer would have paid in workers' compensation insurance premiums when applying approved manual rates to the employer's payroll during the penalty period. § 440.107(7)(d), Fla. Stat.

19. Ms. Jackson consulted the Scopes Manual, which is published by the National Council on Compensation Insurance (NCCI), and identified class code 6217--Excavation and Drivers-- as the appropriate construction class code for the work being performed at the worksite.

20. Respondent contests the assignment of class code 6217 to Mr. Adams, who was driving a dump truck and delivering a load of dirt to the site. Respondent admits that Mr. Gibson's operation of the front-end loader was properly classified as Excavation and Drivers.

21. NCCI Scopes Manual provides the following with regard to classification code 6217:

Includes burrowing, filling or backfilling.

* * *

Code 6217 is applied to specialist contractors engaged in general excavation including ditch digging, burrowing, filling or backfilling provided such operations are not otherwise classified in the manual. The operations involve the removal of earth, small boulders and rocks by power shovels, trench diggers or bulldozers and piling it at the jobsite for backfill. The material may also be removed by dump trucks for fill in some other area.

Code 6217 includes excavation in connection with building foundations, swimming pools, landscape gardening and waterproofing operations.

* * *

This classification also is applied to specialist contractors engaged in grading land and landfilling, provided these operations are not otherwise classified in this manual. This classification includes ditch digging, burrowing, filling or backfilling, and operations such as scraping, cutting, piling or pushing the earth to rearrange the terrain. These operations utilize equipment such as bulldozers, motor graders and carryalls. [emphasis supplied].

22. Mr. Adams' operation of the dump truck falls squarely within the definition of Excavation and Drivers. The material in the dump truck was fill for the site under excavation, a purpose which is directly addressed in the manual under

code 6217. Under Respondent's interpretation, fill removed from the site by a dump truck would be an excavation activity, but would no longer be excavation when the dump truck arrived at another site (or at another location on the same site) with the fill. That interpretation is illogical.

23. No evidence was introduced to support a finding that typical operation of a dump truck in preconstruction was classified by a different code in the Scopes Manual.

24. It is found that Ms. Jackson properly applied the Scopes Manual in assigning code 6217 to the work being performed by Mr. Adams on the site.

25. Having no payroll records from Gulf Coast, Ms. Jackson had to impute the statewide average weekly wage as Respondent's payroll for Mr. Adams and his subcontractor, Mr. Gibson. The average weekly wages were calculated based on the Workers' Compensation and Employers Liability approved rate manual also published by NCCI and adopted by the Department by administrative rule.

26. Ms. Jackson calculated a penalty of two times the workers' compensation insurance premiums that would have applied to the purchase of insurance for Mr. Adams and Mr. Gibson during periods of non-compliance during the penalty. The period of non-compliance for Mr. Adams was April 15, 2013 to February 11, 2014, during which time his exemption had lapsed. The period of

non-compliance for Mr. Gibson was February 16, 2015 to March 27, 2015, during which his exemption had expired. § 440.107(7)(e), Fla. Stat.

27. Utilizing the penalty calculation worksheet adopted by Florida Administrative Code Rule 69L-6.027, Ms. Scogland calculated a penalty of \$12,181.42.

28. On May 20, 2015, the Department issued an Amended Order of Penalty Assessment against Gulf Coast in the amount of \$12,181.42.

29. The Department correctly calculated the penalty based on the statutory formulas and adopted rules governing workers' compensation insurance.

CONCLUSIONS OF LAW

30. 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. (2015).

31. Employers are required to secure payment of workers' compensation for their employees unless exempted or excluded. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbett, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

32. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat.

33. "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.

34. "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.

35. Respondent admitted in its Proposed Recommended Order that Mr. Gibson was its employee and was operating without coverage. Respondent concedes that it is responsible for that portion of the penalty based on Mr. Gibson's period of non-compliance.

36. "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. Thus, Mr. Adams was Respondent's employee during the penalty period.

37. 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. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

38. 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 or 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).

39. The Department proved by clear and convincing evidence that Mr. Adams was Respondent's employee and was without coverage during the period of non-compliance.

40. Contrary to Respondent's contention, the Department also proved by clear and convincing evidence that the amount of the penalty calculated was correct. Classification code 6217 was correctly applied to Mr. Adams' excavation operation at the worksite.

41. The Department proved by clear and convincing evidence that Gulf Coast violated the workers' compensation insurance law and that \$12,181.42 is the correct penalty to be applied.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order upholding the Stop-Work Order and Amended Penalty Assessment against Respondent, Gulf Coast Site Prep., Inc., for its failure to secure and maintain required workers' compensation insurance for its employees.

DONE AND ENTERED this 14th day of January, 2016, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2016.

ENDNOTES

^{1/} Except as otherwise noted herein, all references to the Florida Statutes are to the 2014 version.

^{2/} Ms. Scogland's testimony that Mr. Adams told her he hired Mr. Gibson and Mr. Smith is admissible as an exception to

hearsay pursuant to section 90.803(18), Florida Statutes. Her testimony was reliable and unrefuted by any other evidence.

^{3/} Respondent appears to have conceded this point in his Proposed Recommended Order wherein he stated, "It has also been established that David Gibson was the lawful subcontractor employed by Respondent." Resp. Pro. Rec. Order, ¶ 16 (Dec. 14, 2015). The undersigned addresses it in an abundance of caution.

^{4/} Pursuant to section 440.107(7)(d), the penalty period for an employer who fails to secure workers' compensation coverage is the two years immediately preceding the date the Stop-Work Order is issued.

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.