

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-2524

MOONLIGHT GENERAL CONTRACTORS,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

On September 2, 2015, an administrative hearing in this case was conducted by video teleconference in Tampa and Tallahassee, Florida, by William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Abbey Khdair, pro se
Moonlight General Contractors, Inc.
Post Office Box 291972
Tampa, Florida 33687

STATEMENT OF THE ISSUE

The issue in the case is whether Moonlight General Contractors, Inc. (Respondent), should be assessed a penalty for

an alleged failure to comply with the workers' compensation requirements referenced herein, and, if so, in what amount.

PRELIMINARY STATEMENT

On April 1, 2015, the Department of Financial Services, Division of Workers' Compensation (Petitioner), issued a Stop-Work Order and Order of Penalty Assessment, alleging that the Respondent failed to "obtain coverage that meets the requirements of Chapter 440, F.S. and the Insurance Code." By letter dated April 10, 2015, the Respondent disputed the allegations and requested a formal hearing.

On May 4, 2015, the Petitioner forwarded the Respondent's request for hearing to the Division of Administrative Hearings.

On May 7, 2015, the Petitioner issued an Amended Order of Penalty Assessment proposing a penalty of \$192,425.94.

The hearing was initially scheduled to commence on July 8, 2015, and, at the request of the parties, was rescheduled for September 2, 2015.

On September 1, 2015, the Respondent filed a letter requesting that the hearing be postponed, but the request was denied.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 8 admitted into evidence. The Respondent presented the testimony of one witness.

The Transcript of the hearing was filed on September 24, 2015. The Petitioner filed a Proposed Recommended Order that has been reviewed in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Pursuant to section 440.107, Florida Statutes (2015),^{1/} the Petitioner is the state agency charged with enforcing compliance with Florida's workers' compensation requirements.

2. At all times material to this case, the Respondent was a business providing services in the construction industry with a main office located at 1900 18th Avenue South, St. Petersburg, Florida.

3. On April 1, 2015, Kent Howe, employed by the Petitioner as a Compliance Investigator, observed two men working on a roof of a residential structure located at 2513 Anastasia Drive South, Daytona, Florida (the "subject property".)

4. Mr. Howe specifically observed that a portion of the roof structure was exposed and that the individuals were working on the roof trusses.

5. Mr. Howe testified that the men identified themselves as "Milan Kreal" and "Svatopluk Vavra" and that they identified the Respondent as their employer.

6. Mr. Howe accessed corporate records maintained online by the Department of State, Division of Corporations, and identified Abbey Khdair as the sole corporate officer for the Respondent.

7. Mr. Howe accessed the Petitioner's Coverage and Compliance Automated System (CCAS) to determine whether the Respondent was in compliance with applicable workers' compensation requirements. CCAS is a database maintained by the Petitioner that contains workers' compensation coverage information provided to the Petitioner by insurance providers.

8. Pursuant to section 440.05, corporate officers can be exempted from workers' compensation coverage requirements. Mr. Howe determined through CCAS that Mr. Khdair had an active exemption for himself as the corporate officer, but the two individuals working on the subject property had no workers' compensation coverage.

9. Mr. Howe contacted Mr. Khdair, who told Mr. Howe that the two men were employed through an employee leasing company identified as "Skilled Resources."

10. Personnel employed through licensed employee leasing companies can have workers' compensation coverage arranged through the leasing companies.

11. Mr. Howe contacted Skilled Resources and determined that, although on occasion the Respondent had obtained employees from Skilled Resources, the individuals working on the subject property had not been supplied to the Respondent by Skilled Resources.

12. Mr. Howe thereafter issued a Stop-Work Order and posted it at the jobsite.

13. On April 2, 2015, the Stop-Work Order was personally served on Mr. Khdair, along with a Request for Production of Business Records for Penalty Assessment Calculation for the period from April 2, 2013, through April 1, 2014 (the "audit period"). On that same date, Mr. Khdair paid a \$1,000 penalty down payment towards the penalty assessment, in order to obtain a release from the Stop-Work Order and allow the subject property roof to be secured from potential inclement weather.

14. By letter dated April 10, 2015, Mr. Khdair advised the Petitioner that, prior to April 1, 2015, the Respondent and the property owner had entered into a contract to perform work related to "a new gable roof, electrical, plumbing, and HVAC work." Mr. Khdair wrote that he obtained the building permit for the project and that the property owner was to hire additional subcontractors to work under the permit Mr. Khdair had obtained.

15. Mr. Khdair wrote that he "inadvertently" referred Mr. Howe to Skilled Resources when Mr. Howe contacted him on April 1, 2015, and that the property owner had hired the workers without Mr. Khdair's knowledge or consent. Mr. Khdair wrote that, prior to Mr. Howe's telephone call, Mr. Khdair was unaware that there were any people working at the subject location, other

than those who were to have obtained their own sub-permits in relation to the project.

16. On April 10, 2015, Mr. Khdair also submitted a letter purporting to be from the property owner stating that the owner had personally hired Mr. Vavra and "Guy Ackerly" to work on the roof.

17. Neither of the two individuals observed by Mr. Howe working at subject property on April 1, 2015, identified himself as "Guy Ackerly."

18. The task of calculating the penalty assessment was assigned to Eunika Jackson, employed by the Petitioner as a Penalty Auditor.

19. The Respondent failed to provide any business records to the Petitioner. Accordingly, Ms. Jackson calculated the penalty assessment pursuant to section 440.107(7)(e), which provides that in the absence of business records sufficient to determine payroll, the Petitioner is required to impute wages for the employees working without workers' compensation coverage.

20. As the corporate officer, Mr. Khdair had obtained an exemption from the coverage requirements.

21. The National Council on Compensation Insurance (NCCI) assigns classification codes for various occupations related to levels of risk presented by the specific tasks performed by an employee. The codes are used to establish rates charged for

workers' compensation coverage and are relevant for determining the penalty assessed for violations of workers' compensation requirements.

22. For purposes of enforcing compliance with Florida's workers' compensation requirements, the Petitioner has adopted the NCCI codes through Florida Administrative Code Rules 69L-6.021.

23. Ms. Jackson correctly determined that NCCI Code 5551 is applicable in this case. NCCI Code 5551 (titled "Roofing-All Kinds & Drivers") specifically applies to "the installation of new roofs and the repair of existing roofs" and includes "the installation and/or repair of joists, trusses, rafters, roof decks, sheathing, and all types of roofing materials."

24. In determining the penalty assessment, Ms. Jackson calculated the penalty based on the Respondent having three employees without workers' compensation coverage. Ms. Jackson applied the procedures set forth in section 440.107(7)(d) and rules 69L-6.027 and 69L-6.028, and determined that the penalty assessment was \$192,425.94, which reflects a penalty of \$64,141.98 for each of the three individuals.

25. Although Ms. Jackson's calculation of the penalty was procedurally correct, the evidence establishes only that there were two individuals working on the roof of the subject property.

CONCLUSIONS OF LAW

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

27. The administrative fine at issue in this proceeding is penal in nature. In order to prevail, the Respondent must demonstrate by clear and convincing evidence that the Petitioner was required to be in compliance with the applicable statutes on the referenced date, that the Petitioner failed to meet the requirements, and that the proposed penalty is appropriate. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

28. Every Florida employer is required to obtain workers' compensation coverage for employees unless a specific exemption or exclusion is provided by law. As the contractor who obtained the permit for the roof replacement, the Respondent is obligated to comply with workers' compensation requirements applicable to persons hired to perform the work. See §§ 440.10 and 440.38, Fla. Stat.

29. When contacted on April 1, 2015, by the Petitioner's Compliance Investigator, the Respondent acknowledged that there were people working on the roof and asserted that they had been obtained through an employment agency.

30. A few days later, the Respondent claimed that, prior to being contacted by the investigator, he was not aware that anyone was working on the roof. At the same time, the Respondent submitted a letter purportedly from the subject property owner attempting to shift responsibility for hiring the workers to the property owner.

31. The letter is uncorroborated hearsay, insufficient to support a finding a fact. See §§ 120.57(1)(c), Fla. Stat. Further, the attempt to shift responsibility to the homeowner is immaterial because, as the responsible contractor, the Respondent is obligated to comply with the workers' compensation requirements.

32. The same letter also serves as the basis for identifying "Guy Ackerly" as one of the two individuals allegedly employed to work on the subject property roof. The Petitioner's Compliance Investigator observed only two individuals on the roof at the subject property on April 1, 2015, and they identified themselves as "Milan Kreal" and "Svatopluk Vavra."

33. The penalty assessment was calculated on the basis of three individuals classified as NCCI Code 5551 employees. The evidence is insufficient to establish that there was a third person hired to work on the roof of the subject property.

34. Accordingly, the appropriate penalty assessment is \$128,283.96, based on the Respondent's failure to comply with

workers' compensation requirements for the two individuals identified as "Milan Kreal" and "Svatopluk Vavra."

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 enter a Final Order against the Respondent imposing a penalty assessment in the amount of \$128,283.96, as set forth herein.

DONE AND ENTERED this 23rd day of October, 2015, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2015.

ENDNOTE

^{1/} All citations to the Florida Statutes are to the 2015 edition unless stated otherwise.

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.