

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 15-2717

TOUCH FREE TECHNOLOGY, LLC,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

On August 26, 2015, an administrative hearing in this case was conducted by video teleconference in Sarasota and Tallahassee, Florida, by William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Michael Hric, Esquire  
Michael Hric, P.A.  
1800 2nd Street, Suite 920  
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue in the case is whether Touch Free Technology, LLC (Respondent), should be assessed a penalty, and, if so, in what

amount, for an alleged failure to comply with workers' compensation requirements referenced herein.

PRELIMINARY STATEMENT

On October 21, 2014, the Department of Financial Services, Division of Workers' Compensation (Petitioner), issued an Order of Penalty Assessment against the Respondent, alleging that the Respondent failed to "obtain coverage that meets the requirements of chapter 440, F.S. and the Insurance Code." On November 7, 2014, the Petitioner issued an Amended Order of Penalty Assessment proposing a penalty of \$20,480.86.

By separate petitions dated November 10 and December 3, 2014, the Respondent disputed the alleged violation and proposed penalty assessment, and requested a formal hearing.

On April 1, 2015, the Petitioner issued a Second Amended Order of Penalty Assessment against the Respondent, wherein the proposed penalty assessment was reduced to \$14,994.72.

On May 15, 2015, the Petitioner forwarded the Respondent's request for hearing to the Division of Administrative Hearings. The hearing was initially scheduled to commence on July 2, 2015, and was rescheduled for August 26, 2015, at the request of the parties.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 17 admitted into evidence. The Respondent presented the testimony of one witness.

The Transcript of the hearing was filed on September 16, 2015. Both parties filed Proposed Recommended Orders that have been reviewed in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Pursuant to section 440.107, Florida Statutes (2014),<sup>1/</sup> the Petitioner is the state agency charged with enforcing compliance with Florida's workers' compensation requirements.

2. On October 21, 2014, Germaine Green, an investigator employed by the Petitioner, observed two individuals installing automated car wash equipment into a structure located at 5740 Ranch Lake Road, Lakewood Ranch, Florida 34202.

3. Ms. Green identified the individuals performing the installation as Mark Hawkins and Randy Allore, and observed that they were being supervised by Timothy Smith.

4. The Respondent is a business located at 6160 15th Street, East, Bradenton, Florida 34203. The Respondent was engaged in business activities during the period from October 22, 2012, through October 21, 2014, including the installation, maintenance and servicing of automated car wash equipment.

5. Mr. Smith is the "managing member" of the Respondent.

6. On October 21, 2014, Mr. Smith admitted to the inspector that the Respondent did not have workers' compensation coverage or exemptions from coverage requirements. Ms. Green's review of

state workers' compensation coverage records confirmed the admission.

7. Mr. Hawkins and Mr. Allore advised the Petitioner's investigator that they did not operate a business and that they did not have their own workers' compensation coverage.

8. The Respondent asserts that the services of Mr. Hawkins and Mr. Allore were supplied by "Tommy's Car Wash Systems," from whom the Respondent acquired the equipment, and that they were not directly employed by the Respondent.

9. Pursuant to section 440.02(15)2, an uninsured subcontractor is considered an employee of the Respondent for purposes of workers' compensation coverage. Under the statute, Mr. Hawkins and Mr. Allore were the Respondent's employees.

10. On October 21, 2014, the Petitioner's investigator requested that Mr. Smith provide certain business records, and the Respondent complied with the request.

11. The records were reviewed by Eric Ruzzo, the Petitioner's penalty auditor. Mr. Ruzzo determined that, in addition to the three individuals observed by the Petitioner's investigator on October 21, 2014, two additional individuals, Marie Smith and Don Meissner, Jr., were employed by the Respondent.

12. 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. They are also used in determining the penalty assessed for violations of workers' compensation requirements.

13. NCCI Code 3724 ("Machinery or Equipment Erection or Repair NOC & Drivers") specifically includes "automatic car washing equipment," such as that which the Petitioner's investigator observed being installed by the Respondent on October 21, 2014.

14. Mr. Ruzzo properly determined that NCCI Code 3724 was applicable to the job duties of Mr. Smith, Mr. Meissner, Mr. Hawkins and Mr. Allore, and calculated the penalty assessment on that basis.

15. The Respondent asserted that Mr. Ruzzo's determination of the applicable NCCI Code was erroneous, but the assertion was not supported by the evidence.

16. Mr. Hawkins and Mr. Allore were installing automatic car wash equipment when observed by Ms. Green. The evidence established that Mr. Smith and Mr. Meissner, when required to do so, performed repairs to such equipment. Installation and repairs of automatic car wash equipment are specifically included within NCCI Code 3724.

17. Mr. Ruzzo determined that Ms. Smith was the Respondent's office manager and properly assigned NCCI Code 8810 ("Clerical Office Employees NOC") in calculating the penalty related to Ms. Smith.

18. Mr. Ruzzo reviewed the business records submitted by the Respondent and initially calculated a penalty assessment of \$20,480.86. Following a review of additional records provided by the Respondent, Mr. Ruzzo reduced the penalty assessment to \$14,994.72.

19. The employment classifications assigned to the Respondent's personnel were correct. The amended penalty assessment was properly calculated by Mr. Ruzzo.

#### CONCLUSIONS OF LAW

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

21. 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).

In this case, the burden has been met.

22. Every Florida employer is required to obtain workers' compensation coverage for employees unless a specific exemption or exclusion is provided by law. See §§ 440.10 and 440.38, Fla. Stat.

23. Section 440.02, provides the following relevant definitions:

(8) "Construction industry" means 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. . . . The 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.

\* \* \*

(15) (a) "Employee" means 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, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

\* \* \*

(c) "Employee" includes:

1. A sole proprietor or a partner who is not engaged in the construction industry, devotes full time to the proprietorship or partnership, and elects to be included in the

definition of employee by filing notice thereof as provided in s. 440.05.

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.

3. An independent contractor working or performing services in the construction industry.

4. A sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

\* \* \*

(16) (a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. . . . "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

\* \* \*

(17) (a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her. (Emphasis added).



24. By statutory definition, the Respondent's business of automatic car wash equipment installation constitutes activity in the construction industry.

25. For purposes of workers' compensation coverage, Mr. Hawkins and Mr. Allore are considered employees of the Respondent under the statutory definition. The Respondent's assertion that their services were supplied by the manufacturer of the equipment is immaterial under the statute, because the statute assigns the ultimate responsibility for assuring that proper coverage is in place to the Respondent. It was the Respondent's obligation to obtain the coverage or to confirm that they were otherwise covered.

26. Mr. Smith, Mr. Meissner, and Ms. Smith were clearly employees of the Respondent.

27. Mr. Ruzzo properly assigned NCCI codes to the Respondent's employees and properly calculated the penalty assessment against the Respondent.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Petitioner, Department of Financial Services, Division of Workers' Compensation, enter a final order assessing a penalty of \$14,994.72 against the Respondent, Touch Free Technology, LLC.

DONE AND ENTERED this 16th day of October, 2015, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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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 16th day of October, 2015.

ENDNOTE

<sup>1/</sup> All citations to the Florida Statutes are to the 2014 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.