

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES
DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-2801

ALELUYA ROOFING PLUS
CONSTRUCTION, INC.,

Respondent.

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RECOMMENDED ORDER

On September 24, 2015, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Leon Melnicoff, Qualified Representative
Thomas Nemecek, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Mariem Josefina Paez, Esquire
The Law Offices of Mariem J. Paez, PLLC
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Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

The issues are whether Petitioner has proved that Respondent failed to secure workers' compensation insurance, as required by section 440.10, Florida Statutes, and, if so, the amount of the penalty, pursuant to section 440.107.

PRELIMINARY STATEMENT

By Stop-Work Order issued on September 25, 2013, Petitioner ordered Respondent to stop work at a construction site located at 4311 Southwest 15th Street in Miami. The Stop-Work Order includes an Order of Penalty Assessment, which provides the formula for calculating a penalty, but does not calculate a penalty. By letter dated October 20, 2013, Respondent requested a hearing on the ground that its employees were not performing work at the site at the time of the inspection that led to the Stop-Work Order.

Petitioner proposed a penalty of \$15,594.34 by Amended Order of Penalty Assessment dated October 30, 2013, and filed in the subject case on August 6, 2015, with a Motion for Leave to Amend Order of Penalty Assessment. On September 11, 2015, the Administrative Law Judge granted Petitioner's motion for leave to amend.

At the hearing, Petitioner called three witnesses and offered into evidence 12 exhibits: Petitioner

Exhibits 1-11 and 13. Respondent called no witnesses and offered into evidence one exhibit. All exhibits were admitted.

During the hearing, the parties and the Administrative Law Judge accessed and took official notice of the official website of the Miami-Dade County for building permits:

egvsys.miamidade.gov:1608/WWWSERV/ggvt/bnzaw960.dia.

Additionally, the Administrative Law Judge gave the parties additional time to file supplemental information concerning the building permit. Respondent filed additional materials, which are admitted as Respondent Exhibit 1.

The court reporter filed the transcript on October 9, 2015. Petitioner filed a proposed recommended order on October 19, 2015.

FINDINGS OF FACT

1. On September 18, 2013, the owner and Jesus Rodriguez, representing Respondent, signed a permit application for reroofing of a single-family residence located at 4311 Southwest 15th Street, Miami. An official of the Miami-Dade County Department of Regulatory and Economic Resources approved the plans on September 27, 2013.

2. The record does not disclose when work commenced. However, at about 9:00 a.m. on September 25, 2013, an investigator of the Division of Workers' Compensation was randomly canvassing the area, noticed roofing work at the subject

address, and conducted an inspection. The investigator observed three persons on the roof engaged in roofing work. When the investigator asked the three workers for whom they worked, one of them replied, "Oval Construction," and added that it was owned by Pedro Alfaro and Jesus R. Rodriguez (Mr. J. Rodriguez). When asked for a phone number for the owners, the worker gave the investigator a cell number for Mr. Alfaro.

3. Prior to calling Mr. Alfaro, while still at the work site, the investigator researched Oval Construction and learned that it was an active corporation with two corporate officers: Mr. Alfaro and Mr. J. Rodriguez. The investigator learned that the corporation showed no workers' compensation exemptions for the officers or any workers' compensation coverage.

4. While still at the worksite, the investigator then called Mr. Alfaro and asked him if Oval Construction had workers' compensation insurance. Mr. Alfaro said that Mr. J. Rodriguez handled such matters, so the investigator told Mr. Alfaro to have Mr. J. Rodriguez call the investigator immediately.

5. Mr. J. Rodriguez did so and informed the investigator that the three workers worked for him, but not under Oval Construction; they worked for Respondent, and Respondent had workers' compensation insurance. Mr. J. Rodriguez stated that he did not have the insurance information at the moment, but would call back with the information.

6. In the meantime, the investigator researched Respondent and learned that it was an active corporation with two officers: Mr. J. Rodriguez and Mr. Alberto Rodriguez (Mr. A. Rodriguez), who were not related. (Mr. J. Rodriguez is deceased.) Both officers had current workers' compensation exemptions, and the database indicated that Respondent leased its employees from South East Personnel Leasing Company. The investigator contacted South East Personnel Leasing and learned that the leasing contract had terminated on July 24, 2013, and Respondent had no current workers' compensation coverage through South East Personnel Leasing. At this point, the investigator called Mr. J. Rodriguez, who repeated that the workers were employed by Respondent, not Oval Construction.

7. Subsequently, the investigator tried unsuccessfully several times to speak to Mr. J. Rodriguez. A few days after the inspection, Mr. A. Rodriguez called the investigator and arranged for a meeting between the investigator and Mr. J. Rodriguez for October 1, 2013. On October 1, 2013, the investigator and Mr. J. Rodriguez met, and the investigator served on him, in the name of Respondent, a Request for Production of Business Records for Penalty Assessment Calculation for the three-year period ending on September 25, 2013. Respondent never produced any business records to Petitioner.

8. On October 2, 2013, Mr. J. Rodriguez caused the transfer of the building permit for the roofing work from Respondent to Blue Panther Roofing. On October 1, 2013, Mr. J. Rodriguez signed a Hold Harmless agreement holding Miami-Dade County harmless and assuming responsibility for any work already performed under the building permit issued to Respondent.

9. Mr. A. Rodriguez testified that he knew nothing about the subject job. But Mr. J. Rodriguez was the qualifying general contractor of Respondent, was an officer of Respondent, and owned 20% of Respondent. In fact, Mr. J. Rodriguez was the only licensed or certified contractor employed by Respondent and was the sole person who could obtain building permits for work to be performed by Respondent. Mr. A. Rodriguez's lack of knowledge of the subject job is therefore not dispositive because Mr. J. Rodriguez had the authority to, and did, apply for the building permit in the name of Respondent, and he had the authority to, and did, obligate Respondent to do the subject reroofing work.

10. During the above-described three-year period, according to Petitioner Exhibit 6, page 20, Respondent had workers' compensation insurance from October 4, 2010, through January 1, 2013. Additionally, according to Petitioner Exhibit 6, page 23, Respondent had workers' compensation insurance through South East Personnel Leasing from October 18, 2012, through February 20,

2013, and March 7, 2013, through July 24, 2013. This is borne out by the testimony of the investigator. (Tr., pp. 99-101.)

12. Respondent thus did not have workers' compensation coverage for a total of 85 days during the three years at issue, during which time Respondent actively performed construction work in Florida. The three periods of noncoverage during the three years at issue are September 26 through October 3, 2010, for a total of 8 days; February 21, 2013, through March 6, 2013, for a total of 14 days; and July 25, 2013, through September 25, 2013, for a total of 63 days. A conflict in the evidence prevented Petitioner from proving by clear and convincing evidence a fourth period of noncoverage: October 4 through 17, 2012.

13. Additionally, Mr. J. Rodriguez was listed as secretary of Respondent and exempt from workers' compensation insurance from March 1, 2013, through March 1, 2015, so he would be counted as an employee during the noncoverage periods of September 26, through October 3, 2010, and February 21, 2013, through February 28, 2013. Mr. A. Rodriguez was listed as president of Respondent and exempt from workers' compensation insurance from October 22, 2012, through October 22, 2014, so he would be counted as an employee during the noncoverage period of September 26, 2010, through October 3, 2010. Mr. A. Rodriguez's wife, Yubanis Ibarra, was also a corporate officer and was not

exempt during one week of one noncoverage period: September 26 to October 3, 2010.

13. On October 30, 2013, Petitioner issued an Amended Order of Penalty Assessment assessing a penalty of \$15,594.34 pursuant to section 440.107(7)(d). The Amended Order of Penalty Assessment is supported by a Penalty Calculation Worksheet, which based the penalty on the three employees found on the job on the day of the inspection as employees during all periods of noncoverage and the three above-identified corporate officers during their respective periods of nonexemption that occurred while they served as officers.

14. Subject to two exceptions, the Amended Order of Penalty Assessment correctly calculates the gross payroll based on the statewide average weekly wage multiplied by 1.5, applies the correct manual rates to the gross payroll, determines the correct evaded premium, and determines the correct penalty based on the premium multiplied by 1.5. The first exception is that Petitioner failed to prove by clear and convincing evidence a lack of coverage for the above-described 13 days in October 2012. This failure of proof noted in the preceding paragraph concerns four employees who generated total penalties of \$2510.88, so the corrected total penalty would be \$13,084.46.

15. The second exception concerns the proof of the duration of employment of the three employees working on the roof at the

time of the inspection on September 25, 2013. Petitioner has proved by clear and convincing evidence their employment only during the noncoverage period of July 24, 2013, through September 25, 2013, as discussed in the Conclusions of Law. For the two other noncoverage periods--three, if the period noted in paragraph 15 already had not been rejected--the penalty of \$3220.05 has not been established, leaving a net penalty of \$9864.41.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57, and 440.107(13), Fla. Stat. (2013). (All statutory references are to the 2013 Florida Statutes.)

17. Due to the penal nature of this proceeding, in which Petitioner seeks to impose monetary penalties against Respondent, Petitioner is required to prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

18. Employers are required to obtain the payment of workers' compensation for their employees. § 440.10(1)(a). An employer is any person carrying on employment. § 440.02(16)(a). In the construction industry, employment occurs when at least one employee is employed by an employer. § 440.02(17)(b)2. Respondent employed at least three employees on September 25,

2013, so it was obligated to have workers' compensation insurance.

19. Section 440.107(7) provides Petitioner with considerable authority in calculating the penalty for a failure to secure workers' compensation, but does not specifically address how to determine the number of employees during a period of noncoverage. Section 440.107(7)(d)1. authorizes Petitioner to apply the manual rates to the employer's payroll, and section 440.107(7)(e) authorizes Petitioner to establish a payroll based on the statewide average weekly wage multiplied by 1.5:

When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

20. Florida Administrative Code Rule 69L-6.028(3) addresses this omission in the statutes by providing:

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 1.5. Employees include sole proprietors and partners in a partnership.

(b) If the employer is a corporation, for each corporate officer of such employer identified as such on the records of the Division of Corporations at the time of issuance of the stop-work order, the imputed weekly payroll for each week of the employer's non-compliance for each such corporate officer 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 1.5.

21. Rule 69L-6.028(3)(b) addresses officers. Their span of employment is the period during which they are listed as officers, so their earnings contribute to the penalty during any noncoverage period within their service as officers.

22. But a nonofficer employee does not have such a clearly defined span of employment. Instead, rule 69L-6.028(3)(a) provides that a nonofficer employee's earnings contribute to the penalty if Petitioner identifies the employee "as an employee of such employer at any time during the period of the employer's non-compliance." "Compliance" means a failure of coverage,

section 440.107(1), so a period of non-compliance is one of the noncoverage periods noted above.

23. In this case, Petitioner has proved by clear and convincing evidence that the three employees were employees during the period of noncoverage in which the inspection took place: July 24, 2013, through September 25, 2013. There is no basis to interpret section 440.107 to read "during the periods" of noncoverage. As noted above, this is a penal statute that, if ambiguous, must be construed against Petitioner. See, e.g., Osborne Stern, supra; Lester v. Dep't of Prof'l & Occupational Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

24. Failing to have proved that these three employees were employees during any noncoverage period other than July 24, 2013, through September 25, 2013, Petitioner has claimed excessive penalties on their account. The penalties for the period of October 4, 2012, through October 17, 2012, has already been eliminated. As noted in the Findings of Fact, removing the penalties on account of these three employees for the periods of September 26, 2010, through October 3, 2010, and February 20, 2013, through March 6, 2013, eliminates another \$3220.05, leaving a net penalty of \$9864.41.

RECOMMENDATION

It is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order finding Respondent guilty of not securing workers' compensation and imposing a penalty of \$9864.41.

DONE AND ENTERED this 13th day of November, 2015, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2015.

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.