

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-3168

BARGAIN BOB'S CARPETS, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on August 3, 2015, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: David Steinfeld, Esquire
Law Office of David Steinfeld, P.L.
3801 PGA Boulevard, Suite 600
Palm Beach Gardens, Florida 33410

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated chapter 440, Florida Statutes (2014),^{1/} by failing to secure the payment of workers' compensation coverage as alleged in the Stop-work Order and 2nd Amended Order of Penalty Assessment, and if so, the amount of the penalty that should be assessed.

PRELIMINARY STATEMENT

On January 23, 2015, Petitioner, Department of Financial Services, Division of Workers' Compensation, issued a Stop-work Order, ordering Respondent, Bargain Bob's Carpets, Inc., to cease business operations on the alleged basis that it failed to secure payment of workers' compensation coverage meeting the requirements of chapter 440 and the Insurance Code. Petitioner issued an Amended Order of Penalty Assessment on February 24, 2015. On April 23, 2015, Petitioner issued a 2nd Amended Order of Penalty Assessment, assessing a penalty of \$31,061.68. Respondent requested an administrative hearing to contest the penalty assessed in the 2nd Amended Order of Penalty Assessment. The matter was referred to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing was held on August 3, 2015. Petitioner presented the testimony of Peter Sileo and Eric Ruzzo. Petitioner's Exhibits 1 through 11 were admitted into evidence without objection. Respondent presented the testimony of John

Charles and Andrew Calideen, Respondent's owners and corporate officers. Respondent did not offer any exhibits for admission into evidence.

The one-volume Transcript was filed on August 18, 2015, and the parties were given until August 28, 2015, to file proposed recommended orders. Respondent timely filed its Proposed Recommended Order on August 19, 2015, and Petitioner filed its Proposed Recommended Order on August 31, 2015. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Department of Financial Services, Division of Workers' Compensation, is the state agency responsible for enforcing the requirement in chapter 440 that employers in the state of Florida secure the payment of workers' compensation insurance covering their employees.

2. Respondent, Bargain Bob's Carpets, Inc., is a corporation registered to do business in Florida. Its principal business address is 3954 Byron Drive, Riviera Beach, Florida.

The Compliance Investigation

3. As the result of an anonymous referral, Petitioner's compliance investigator, Peter Sileo, investigated Respondent to

determine whether it had secured workers' compensation coverage for its employees as required by chapter 440.

4. Before Sileo visited Respondent's business location, he checked the State of Florida Coverage and Compliance Automated System ("CCAS") computer database, which contains information regarding workers' compensation insurance policies that have been obtained by employers. The CCAS database showed no record of any workers' compensation policies covering Respondent's employees having been issued.

5. On Sileo's first visit to Respondent's business location, he observed a man loading carpeting into a van. Upon being questioned, the man identified himself as Gary Persad. He told Sileo that he was a carpet installation subcontractor for Respondent.

6. Sileo checked CCAS and determined that Persad was covered by workers' compensation insurance.

7. On January 23, 2015, Sileo again visited Respondent's business location, which is a warehouse housing large rolls of carpeting and other flooring materials.

8. There, Sileo met John Charles, an owner and corporate officer of Respondent. Charles claimed that he did not know that Respondent was required to have workers' compensation coverage for its employees.

9. Charles told Sileo that Respondent sold flooring but did not install it and that all installation was performed by subcontractors.

10. At the time of the inspection, Sileo determined that Respondent employed five employees: Charles and Calideen, each of whom own more than ten percent of Respondent's business; Alex Stark; Peter Phelps; and Anthony Frenchak.

11. Sileo served a Stop-work Order, ordering Respondent to cease all business operations in the state pending demonstrating compliance with the workers' compensation coverage requirement. Sileo also served a Request for Production of Business Records for Penalty Assessment Calculation.

12. Respondent subsequently demonstrated compliance with the workers' compensation coverage requirement, and Petitioner lifted the Stop-work Order.^{2/}

13. Respondent also produced business records consisting of spreadsheets showing quarterly payroll, transaction listings, affidavits, insurance coverage documents, and other records.

The Penalty Assessment

14. Eric Ruzzo, a penalty auditor with Petitioner, used these records to calculate the penalty to be assessed against Respondent. The \$31,061.68 penalty is reflected in the 2nd Amended Order of Penalty Assessment, issued April 23, 2015, that is the subject of this proceeding.

15. To calculate the applicable penalty, Petitioner determines the employer's gross payroll for the two-year period preceding the noncompliance determination—the so-called "penalty period"—from a review of the employer's business records. For days during the penalty period for which records are not provided, Petitioner imputes the gross payroll based on the average weekly wage for the state of Florida.

16. Here, the penalty period commenced on January 24, 2013, and ended on January 23, 2015, the day on which the compliance inspection was conducted, and Respondent was determined to not be in compliance with the workers' compensation coverage requirement.

17. Initially, Respondent produced payroll records that did not identify the subcontractors Respondent hired to install the carpeting. Ruzzo identified the subcontractors using Respondent's transaction records. Respondent subsequently provided information, including affidavits and certificates of exemption regarding the subcontractors it had hired during the penalty period.

18. At all times during the penalty period, Respondent employed four or more non-construction employees, including Charles and Calideen.^{3/}

19. Based on the business records produced, Ruzzo compiled a list of the persons, including the subcontractors and

non-construction employees who were on Respondent's payroll, but not covered by workers' compensation insurance during the penalty period. This list of employees and the penalty computation for each is set forth on the Penalty Calculation Worksheet attached to the 2nd Amended Order of Penalty Assessment.

20. Using the National Council on Compensation Insurance ("NCCI") workers' compensation insurance occupation class codes set forth in the NCCI Scopes Manual, Ruzzo determined the occupation class code applicable to each employee listed on the Penalty Calculation Worksheet.

21. Respondent's subcontractors were classified in NCCI class code 5478, which is the class code for the flooring installation industry. This is consistent with Florida's construction industry class code rule, Florida Administrative Code Rule 69L-6.021(2)(kk), which identifies the installation of carpet and other floor covering as NCCI class code 5478.

22. Alex Stark, Amber Krembs, Jacquelyn Skwarek, and Monica Stahl were classified in NCCI class code 8018, which applies to workers engaged in selling merchandise, including carpeting and linoleum, at the wholesale level.

23. Calideen, Frenchak, and Phelps were classified in NCCI class code 8742, which applies to outside salespersons primarily engaged in sales off of the employer's premises.

24. Charles was classified in NCCI class code 8810, which applies to clerical office employees.

25. Ruzzo then determined the period of Respondent's noncompliance for each employee listed on the Penalty Calculation Worksheet.

26. For each of these employees, Ruzzo determined the gross payroll paid to that employee for the period during which Respondent was noncompliant, divided the employee's gross payroll by 100 pursuant to Petitioner's calculation methodology, then multiplied that amount by the numeric rate set by NCCI for that employee's specific occupation class code. This calculation yielded the workers' compensation coverage premium for that specific employee for which Respondent was noncompliant during the penalty period. The premium amount then was multiplied by two, as required by statute, to yield the penalty to be imposed for failure to provide workers' compensation coverage for that specific employee.

27. Respondent did not provide records covering Charles, Calideen, Stark, Frenchak, or Phelps for the period between January 1, 2015, and January 23, 2015. For this period, Ruzzo imputed the gross payroll for each of these employees using the statewide average weekly wage as defined in section 440.12(2),^{4/} multiplied by two. Ruzzo then performed the same computations discussed above to determine the penalty amount to be imposed

for Respondent's failure to provide workers' compensation for those employees during this time period.

28. Ruzzo added the penalty determined for each employee using actual gross payroll and imputed payroll, as applicable, to arrive at the total penalty assessment amount of \$31,061.68.

Respondent's Defense

29. Respondent is engaged in the retail sale of various types of flooring, such as carpeting, and hires subcontractors to install the flooring. The evidence did not establish that Respondent engaged in wholesale sales of flooring.

30. Charles testified that Respondent had attempted to operate its business as a "cash and carry" operation in which Respondent would sell the flooring to retail customers, who would take the purchased flooring from Respondent's premises and would be solely responsible for securing their own installation services. In Charles' words, "[t]hat didn't work. The public demanded that we provide them, as part of the sale, installers—I might be saying it wrong legally, but they demanded that it all be done in one shot." Thus, Respondent began hiring subcontractors to do the installation work. Charles explained that Respondent makes retail sales of flooring to customers, either on Respondent's premises or at the customer's premises through its outside sales people. The flooring is then cut from the roll on Respondent's premises and placed in the installer's

vehicle. The installer transports the purchased flooring to, and installs it at, the customer's premises. Charles estimated that Respondent currently does approximately five percent of its business as "cash and carry" sales, and the remaining 95 percent consists of sales requiring installation.

31. Charles testified that he and Calideen, as corporate officers of Respondent, previously had obtained exemptions from the workers' compensation coverage requirements for themselves; however, they were unaware that the exemptions had to be renewed, so their exemptions had expired. As of the date of the 2nd Amended Order of Penalty Assessment, neither Charles nor Calideen possessed valid certificates of exemption from the workers' compensation coverage requirement.

32. Charles testified that Respondent always had tried to operate in compliance with the law. He was of the view that because he and Calideen were exempt from the worker's compensation coverage requirement, Respondent effectively employed only three employees—one fewer than the workers' compensation coverage requirement threshold of four employees applicable to non-construction industry businesses.

33. Charles and Calideen testified that when Respondent initially hired subcontractors, they required copies of their insurance policies, including proof of workers' compensation coverage or exemption therefrom. Calideen testified that

thereafter, he and Charles assumed that the subcontractors were in compliance with the workers' compensation laws, and they did not know that they needed to obtain updated certificates of workers' compensation exemption or coverage from the subcontractors.

34. On that basis, Charles asserted that Respondent should not be required to "babysit" its subcontractors to ensure that they are in compliance with the workers' compensation law. Respondent thus asserts that it should not be responsible for securing workers' compensation coverage for subcontractors whose workers' compensation policies or exemptions had expired during the penalty period.

35. The undisputed evidence establishes that Charles' employment entails clerical work.

36. Calideen testified, credibly, that Stark's employment duties entail selling flooring on Respondent's business premises, and that he does not engage in sales off the premises.

37. Calideen testified, credibly, that Frenchak and Phelps primarily are engaged in outside sales off of Respondent's premises.

38. Calideen testified, credibly, that he performs clerical duties rather than sales duties.

39. Calideen and Charles both testified, credibly, that employees Krembs, Skwarek, and Stahl performed computer-related

duties for Respondent, such as entering business information into Respondent's computer databases, and that they did not work on Respondent's business premises.

40. Calideen testified, credibly, that subcontractor Mike Smith was hired on a one-time basis to paint parking place stripes at the newly-repaved parking lot behind Respondent's business premises.

Findings of Ultimate Fact

41. The credible, persuasive evidence establishes that Respondent is engaged in the retail sale of carpeting and other flooring materials and that Respondent itself does not install the flooring.

42. The credible, persuasive evidence establishes, and the parties stipulated, that Respondent is not a member of the construction industry.

43. The credible, persuasive evidence establishes that at all times during the penalty period, Respondent employed more than four employees who were engaged in non-construction employment. Accordingly, Respondent was required to secure workers' compensation coverage for its employees, including Charles and Calideen, whose previously-issued certificates of exemption had expired and were not in effect during the penalty period.

44. The undisputed evidence establishes that at certain times during the penalty period, Respondent employed subcontractors who performed floor installation. The evidence clearly establishes that the subcontractors, in installing the flooring, perform a service that is integral to Respondent's business and that they work specifically at Respondent's direction for each particular installation job.

45. Even though Respondent is not classified as a member of the construction industry, it nonetheless is a "statutory employer" of its subcontractors, who are members of the construction industry. Thus, Respondent is responsible for securing workers' compensation coverage for its subcontractors who failed to secure an exemption or coverage for themselves.^{5/}

46. The credible, persuasive evidence establishes that Petitioner correctly calculated the penalty attributable to flooring installation subcontractors for which Respondent was noncompliant during the penalty period.

47. However, the unrebutted evidence establishes that subcontractor Mike Smith was hired on a one-time basis to paint parking lot stripes in Respondent's parking lot. Thus, Petitioner's classification of Smith in NCCI class code 5478—which is a construction industry code that applies to workers engaged in flooring installation—obviously is incorrect, and no evidence was presented showing the correct NCCI class code in

which Smith should be classified. Accordingly, Smith should not be included in Petitioner's calculation of the penalty to be assessed against Respondent.

48. The credible, persuasive evidence establishes that Petitioner correctly calculated the penalty attributable to Respondent's noncompliance with respect to Charles, Frenchak, and Phelps during the penalty period.

49. The credible, persuasive evidence establishes that Stark is engaged in retail sales on Respondent's business premises. However, in calculating the penalty, Petitioner classified Stark in NCCI class code 8018, which applies to salespersons engaged in selling merchandise at the wholesale level, rather than at the retail level. Thus, Petitioner incorrectly classified Stark in NCCI class code 8018. There is no evidence in the record identifying the correct NCCI class code in which Stark should be classified. Accordingly, Stark should not be included in Petitioner's calculation of the penalty to be assessed against Respondent.

50. The credible, persuasive evidence establishes that Calideen performs clerical employment duties and does not perform sales duties, so he should be classified in NCCI class code 8810, rather than in class code 8742. Accordingly, Petitioner should recalculate the portion of the penalty

attributable to Respondent's noncompliance for Calideen using NCCI class code 8810.

51. The credible, persuasive evidence establishes that Krembs, Skwarek, and Stahl are not employed as salespersons at the wholesale level. Thus, Petitioner incorrectly classified these employees in NCCI class code 8018. In its Proposed Recommended Order, Petitioner contends that because Respondent disputes the classification of these employees in class code 8018, Respondent is responsible for identifying the correct applicable class code, which it has not done. This position disregards that in this proceeding, Petitioner bears the burden of proof, by clear and convincing evidence, to show that its proposed penalty assessment against Respondent is accurate. Thus, Petitioner—not Respondent—is responsible for correctly identifying the NCCI class codes applicable to Respondent's employees. Here, the credible, persuasive evidence establishes that in calculating the penalty, Petitioner incorrectly classified Krembs, Skwarek, and Stahl in class code 8018,^{6/} and no evidence was presented showing the correct NCCI class code applicable to these employees. Accordingly, Krembs, Skwarek, and Stahl should not be included in Petitioner's calculation of the penalty to be assessed against Respondent.

CONCLUSIONS OF LAW

52. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569 & 120.57(1), Fla. Stat.

53. This is a penal proceeding brought to enforce the workers' compensation coverage requirements in chapter 440. Thus, Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the violations alleged in the administrative charging Document—here, the 2nd Amended Order of Penalty Assessment. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

54. The clear and convincing evidence standard of proof has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which witnesses testify must be distinctly remembered; the testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

55. Pursuant to sections 440.10, 440.107(2), and 440.38, every employer is required to obtain workers' compensation insurance coverage for the benefit of its employees unless

exempted or otherwise excluded under chapter 440. Strict compliance with the workers' compensation law by the employer is required. See C & L Trucking v. Corbett, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989); Dep't of Fin. Servs. v. L & I Consol. Servs., Inc., Case No. 08-5911 (Fla. DOAH May 28, 2009; Fla. DFS July 2, 2009).

56. "Employment" is defined, in pertinent part, as "any service performed by an employee for the person employing him or her," and includes "[a]ll private employments in which four or more employees are employed by the same employer."

§ 440.02(17), Fla. Stat.

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

58. "Employee" is defined to include "any person who receives remuneration from an employer for the performance of work or service under any appointment or contract for hire or apprenticeship." § 440.02(15)(a), Fla. Stat.

59. As discussed above, the evidence establishes that at all times during the penalty period, Respondent was an employer who employed at least four persons, so it is responsible for securing workers' compensation coverage for its employees.

§ 440.10(1)(a), Fla. Stat.; § 440.02(17)(b)2., Fla. Stat.

60. Section 440.05 authorizes corporate officers to obtain an exemption from the workers' compensation coverage requirement by filing a notice of exemption with Petitioner, pursuant to the process and conditions established in section 440.05 and rule 69L-6.012. Exemption certificates are valid for a specified period and must be renewed in order for the covered corporate officer to remain exempt. See Fla. Admin. Code R. 69L-6.012. As discussed above, although Charles and Calideen previously had obtained certificates of exemption, those certificates had expired, so Respondent was required to secure workers' compensation coverage for them.

61. Additionally, the subcontractors who Respondent hired to perform flooring installation and who did not have valid certificates of exemption or workers' compensation coverage during the penalty period are "statutory employees" of Respondent, pursuant to section 440.10(1)(b). That statute states in pertinent part:

(b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

62. This law imputes employment, by the employer, of its subcontractors for purposes of securing workers' compensation coverage. Thus, if a subcontractor has secured its own coverage, or has a valid certificate of exemption, then the employer is not liable for securing workers' compensation for that subcontractor. However, if the subcontractor has not secured workers' compensation coverage and does not have a valid certificate of exemption, then the employer is liable for securing workers' compensation coverage for that subcontractor. See Smith v. Larry Rice Constr., Inc., 730 So. 2d 336, 339 (Fla. 1st DCA 1999) (where a subcontractor does not have valid certificate of exemption, he or she is a "statutory employee" of the employer, pursuant to section 440.10, for purposes of liability to secure workers' compensation coverage for the subcontractor).

63. Here, it is undisputed that Respondent contracted with subcontractors to perform flooring installation services, which were an integral component of its flooring sales to customers, and that some of those subcontractors did not have valid certificates of exemption or workers' compensation coverage during certain intervals in the penalty period. Accordingly, Respondent is liable, under section 440.10, for securing workers' compensation coverage for those subcontractors, and its failure to do so violates chapter 440. See id.

64. Thus, in calculating the penalty to be assessed against Respondent, Petitioner correctly considered the flooring installation subcontractors identified in the Penalty Calculation Worksheet and correctly computed the portion of the penalty applicable to these subcontractors, as shown on the Penalty Calculation Worksheet.

65. However, as discussed in detail above, the evidence establishes that Petitioner did not correctly classify certain employees in the correct NCCI class code, so that the portion of the penalty attributable to those employees has not been correctly calculated. As directed above, the portions of the penalty attributable to those employees either should be removed from Petitioner's final assessment as not supported by the credible, persuasive evidence in the record, or where supported by the record evidence, should be recalculated in conformance with the findings above.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Department of Financial Services, Division of Workers' Compensation, issue a final order amending the penalty to be assessed against Respondent as follows:

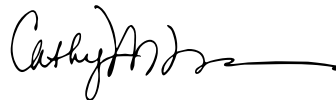
1. Subtracting the penalty assessed for subcontractor Mike Smith, as shown on the Penalty Calculation Worksheet; and

2. Subtracting the penalties assessed for Respondent's alleged noncompliance with respect to employees Amber Krembs, Jacquelyn Skwarek, and Monica Stahl, as shown on the Penalty Calculation Worksheet; and

3. Reclassifying employee Andy Calideen in NCCI class code 8810 and recalculating the portion of the penalty attributable to Respondent's noncompliance for Calideen using this class code; and

4. Reclassifying employee Alexander Stark in NCCI class code 5784 and recalculating the portion of the penalty attributable to Respondent's noncompliance for Stark using this class code.

DONE AND ENTERED this 22 day of January, 2016, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22 day of January, 2016.

ENDNOTES

1/ The penalty period applicable to this proceeding commenced on January 24, 2013, and ended on January 23, 2015. Accordingly, the 2012, 2013, and 2014 versions of chapter 440 apply to this proceeding. Provisions of chapter 440 pertinent to this proceeding were amended over the course of the penalty period; however, those amendments primarily were technical and, in any event, do not affect the outcome in this proceeding. Thus, for brevity and clarity, the undersigned has cited to the 2014 version of chapter 440.

2/ Respondent demonstrated that it had come into compliance with the workers' compensation coverage requirement and paid a penalty of \$1,000 as a down payment on total penalty owed.

3/ Petitioner classified the employees on Respondent's payroll, other than the subcontractors, as non-construction industry employees. This is germane because under section 440.02(17)(a)2., private employments in non-construction industries in which fewer than four employees are employed by the same employer are not considered "employment" for purposes of triggering the requirement for the employer to secure workers' compensation coverage for those employees.

4/ Section 440.12(2) defines "statewide weekly average wage" as the weekly average wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported to the Florida Department of Economic Opportunity ("DEO") for the four calendar quarters ending each June 30, which is determined by DEO on or before November 30 of each year and is used in determining the maximum weekly compensation rate for injuries occurring in the immediately following calendar year.

5/ Section 440.10(1)(c) affirmatively places the burden on the contractor to require the subcontractor to provide evidence of workers' compensation insurance or a valid certificate of exemption. Although Respondent considers this to constitute "babysitting," the Legislature, in enacting this statute, specifically intended to provide workers' compensation coverage protection for subcontractors equal to that provided for actual employees. See Andrews v. Drywall Enter., Inc., 569 So. 2d 821, 823 (Fla. 1st DCA 1990).

6/ At the final hearing, the undersigned noted that the NCCI classification codes were part of the record evidence and informed Petitioner that if the testimony and other evidence

presented at the final hearing supported reclassification of these employees, Petitioner could address reclassification of Respondent's employees in its Proposed Recommended Order. Petitioner declined to do this and continued to take the position that these employees were properly classified in NCCI class code 8018.

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.