

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 15-3839

NOBLES QUALITY SERVICES, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on September 10, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher Ivey Miller, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: No Appearance

STATEMENT OF THE ISSUE

Whether Respondent violated the provisions of chapter 440, Florida Statutes, by failing to secure the payment of workers' compensation as alleged in the Stop-Work Order and 2nd Amended

Order of Penalty Assessment, and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

On October 22, 2014, the Department of Financial Services, Division of Workers' Compensation (Department), served a Stop-Work Order and Order of Penalty Assessment on Nobles Quality Services, LLC (Respondent), due to an alleged failure to secure workers' compensation insurance coverage for its employees. On March 3, 2015, the Department issued to Respondent a 2nd Amended Order of Penalty Assessment, and alleged therein that Respondent owed a total penalty of \$61,175.36. On April 27, 2015, Respondent filed a request for a disputed-fact hearing. The Department does not challenge the timeliness of Respondent's request for hearing. On July 7, 2015, the Department referred the case to the Division of Administrative Hearings (DOAH) and requested the appointment of an Administrative Law Judge.

At the final hearing, the Department presented the testimony of compliance investigator Robert Etheredge (Investigator Etheredge) and penalty auditor Eric Ruzzo (Auditor Ruzzo). Department Exhibits 1, 2, and 4 through 10 were received into evidence. Respondent was properly notified of the disputed-fact hearing, but elected not to attend.

On November 5, 2015, the Transcript of the disputed-fact hearing was filed with DOAH. The Department was allowed 15 days

from the filing of the Transcript to submit its proposed recommended order. The Department's Proposed Recommended Order was considered by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for the enforcement of the workers' compensation insurance coverage requirements established in chapter 440, Florida Statutes (2014).^{1/}

2. On March 6, 2006, the Florida Department of State, Division of Corporations, issued articles of corporation to Respondent. Respondent's address of record is 4441 Radio Avenue, Sanford, Florida 32773. Respondent's mailing address is 3779 Eagle Preserve Point, Sanford, Florida 32773.

3. On October 22, 2014, Investigator Etheredge conducted a random workers' compensation compliance check at 107 East Circle Drive, New Smyrna Beach, Florida 32169. During the course of the compliance check, Investigator Etheredge observed Matthew Nobles supervising William Boling, who was operating a miter saw, and James Clogston, Jr., who was moving construction materials to the house. These individuals were building a deck on the house in question.

4. Upon questioning by Investigator Etheredge, Matthew Nobles advised that William Boling and James Clogston both worked as employees for Respondent. Matthew Nobles further advised that workers' compensation exemptions were in effect for himself and James Clogston. Matthew Nobles also informed investigator Etheredge that Respondent did not have a workers' compensation policy.

5. Armed with this information, Investigator Etheredge returned to his vehicle and searched the corporate database of the Florida Department of State, Division of Corporations. The search revealed that Respondent's corporate officers are Matthew S. Nobles, Timothy J. Nobles, and James Clogston.

6. Investigator Etheredge then consulted the Coverage and Compliance Automated System (CCAS). CCAS is the workers' compensation compliance database for the State of Florida. Through CCAS, insurance companies and employee leasing companies submit to the State insurance information regarding new policies, amendments to existing policies, and cancellations of policies. CCAS also lists any exemptions currently or previously held by any member of a registered company.^{2/}

7. According to Investigator Etheredge, in reviewing the CCAS database, he did not locate a workers' compensation policy or employee leasing notice for Respondent. CCAS did show, however, that Matthew Nobles had a then-current exemption for the

period June 19, 2014, through June 19, 2016. Prior to this exemption, CCAS also showed that Matthew Nobles had an exemption for the period April 3, 2012, through April 3, 2014.

8. CCAS showed that Timothy Nobles had an exemption for the period March 18, 2014, through October 24, 2014. For James Clogston, Jr., CCAS showed an exemption for the period December 10, 2013, through December 10, 2015. Finally, for William E. Boling, CCAS showed an exemption for the period December 10, 2013, through March 17, 2014.

9. On October 22, 2014, William Boling was neither covered by a workers' compensation policy, nor exempt from being covered by the same. Accordingly, on October 22, 2014, the Department issued to Respondent a Stop-Work Order and a written request for copies of Respondent's business/payroll records for the two-year period covering October 23, 2012, through October 22, 2014.

10. In response to the Department's request for business records, Respondent provided approximately a year's worth of payroll records for the period October 25, 2013, through October 15, 2014. These payroll records are sufficiently detailed, as reflected in the summary of payroll records (Ex. 6), so as to allow the Department to calculate Respondent's weekly payroll for this period with respect to all employees and corporate officers other than William Boling.

11. Florida Administrative Code Rule 69L-6.028(2) provides as follows:

The employer's period of non-compliance shall be either the same as the time period requested in the business records request for the calculation of penalty or an alternative period of non-compliance as determined by the department, whichever is less. The department shall determine an alternative period of non-compliance by obtaining records from other sources, including, but not limited to, the Department of State, Division of Corporations, the Department of Business and Professional Regulation, licensing offices, building permitting offices and contracts, that evidence a period of non-compliance different than the time period requested in the business records request for the calculation of penalty. For purposes of this rule, "non-compliance" means the employer's failure to secure the payment of workers' compensation pursuant to Chapter 440, F.S. (emphasis added).

The payroll records provided by Respondent to the Department establish October 25, 2013, through October 22, 2014, as Respondent's period of non-compliance. The Department failed to offer other evidence sufficient to establish a period of non-compliance commencing prior to October 25, 2013. However, since Respondent did not provide payroll records for the period October 16, 2014, through October 22, 2014, wages for this period shall be imputed for each of Respondent's employees and corporate officers, as appropriate. Accordingly, Respondent's penalty shall be calculated based on the above-established period of non-compliance.

12. In support of its 2nd Amended Order of Penalty Assessment, the Department prepared a penalty calculation worksheet showing a total penalty owed of \$61,175.36. While the evidence does establish that a penalty amount is owed, the evidence does not support the total penalty amount claimed by the Department.

13. As previously noted, CCAS, as to William Boling, showed an exemption for the period December 10, 2013, through March 17, 2014. The evidence also established that Mr. Boling was observed operating a miter saw at the referenced job site on October 22, 2014. Given that Mr. Boling's exemption expired on March 17, 2014, and that he was observed working for Respondent on October 22, 2014, Mr. Boling's wages should be imputed for the period March 18, 2014, through October 22, 2014. The penalty calculation worksheet correctly reflects a penalty, based on imputed wages, in the amount of \$539.58 for Mr. Boling for the period October 16, 2014, through October 22, 2014. The worksheet fails, however, to calculate a penalty for Mr. Boling based on imputed wages for the period March 18, 2014, through October 15, 2014. Furthermore, the worksheet entries for Mr. Boling showing penalties totaling \$21,940.16 are not supported by the evidence as these penalty entries are based on imputed wages for a time not within the period of Respondent's non-compliance.

14. The entry on the penalty calculation worksheet for Timothy Nobles and Matthew Nobles correctly reflects a total penalty of \$1,217.92 and \$1,004.02, respectively, based on information gleaned from Respondent's payroll records.

15. The penalty calculation worksheet entries for Harold Nobles showing penalties totaling \$13,106.38 are not supported by the evidence as these penalty entries are based on imputed wages for a time not within the period of Respondent's non-compliance.

16. As previously noted, James Clogston had an exemption for the period December 10, 2013, through December 10, 2015. There is no evidence establishing that Mr. Clogston had a business relationship with Respondent prior to the effective date of his exemption. The penalty calculation worksheet entries for James Clogston showing penalties totaling \$21,940.16 are not supported by the evidence as these penalty entries are based on imputed wages for a time not within the period of Respondent's non-compliance.

17. The penalty calculation worksheet for the other listed employees (Messrs. Lisk, Knudsen, Taylor, Pingerin, Farrar and Donat (collectively referred to as "other employees")) correctly reflects penalties totaling \$1,427.14 based on information gleaned from Respondent's payroll records.

18. Auditor Ruzzo was assigned by the Department to calculate the penalty owed by Respondent. Auditor Ruzzo

consulted the classification codes listed in the Scopes® Manual, which has been incorporated by reference into the Department's rules. Fla. Admin. Code R. 69L-6.021 and 69L-6.031. The classification codes are four-digit numbers assigned to occupations by the National Council on Compensation Insurance, Inc. (NCCI), to assist in the calculation of workers' compensation insurance premiums. Auditor Ruzzo correctly assigned to Mr. Boling, and the other corporate officers and employees listed on the penalty calculation worksheet, NCCI class code 5654, which is for the area of carpentry. Auditor Ruzzo utilized the appropriate formula in calculating the penalty owed by Respondent for failing to secure the payment of worker's compensation during the determined period of non-compliance.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

20. Petitioner is the agency of the State of Florida charged, pursuant to section 440.107(3), with the duty to:

[E]nforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

- (a) Conduct investigations for the purpose of ensuring employer compliance.
- (b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.
- (c) Examine and copy business records.

* * *

- (g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.
- (h) Enforce the terms of a stop-work order.
- (i) Levy and pursue actions to recover penalties.
- (j) Seek injunctions and other appropriate relief.

21. Petitioner has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins., 707 So. 2d 941 (Fla. 3d DCA 1998). Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

22. It is well established that the Department has "broad powers to investigate employers, to halt any work where employers are not complying, and to assess penalties on those who do not

comply." Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007).

23. Pursuant to sections 440.10 and 440.38, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. Strict compliance by the employer is, therefore, required. See, e.g., Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1185 (Fla. 4th DCA 2005); C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

24. Section 440.02(16)(a) defines "employer" to include "every person carrying on any employment."

25. Section 440.02(15)(a) defines "employee" to include "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment."

26. Section 440.02(17) defines "employment" to include "any service performed by an employee for the person employing him or her," and includes, for construction employers, "[a]ll private employments in which one or more employees are employed by the same employer."

27. Section 440.02(8) defines "construction industry" to mean "for-profit activities involving any building, clearing, filling, excavation, or a substantial improvement in the size or

use of any structure or the appearance of any land." Respondent performed work in the "construction industry" during the period of non-compliance.

28. Section 440.107(7)(a) provides, in part, as follows:

[W]henEVER the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

On October 22, 2014, Respondent had at least one uninsured employee in the construction industry. Thus, the Stop-Work Order issued herein was not only justified, it was required.

29. As for the assessment of penalties against Respondent, section 440.107(d)(1) provides, in part, that:

[I]n addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 2-year period or \$1,000, whichever is greater.

30. Rule 69L-6.028(3) provides, in part, as follows:

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 2.

31. Petitioner has established by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation as required by chapter 440 and that the Department was justified in the issuance of the Stop-Work Order.

32. The 2nd Amended Order of Penalty Assessment was, in part, improperly calculated because the Department did not correctly identify Respondent's period of non-compliance. The clear and convincing evidence establishes combined penalties of \$3,649.08 for Timothy Nobles, Matthew Nobles, and the "other employees." The clear and convincing evidence also establishes a

penalty of \$539.58 for William Boling for the period October 16, 2014, through October 22, 2014.

33. Consistent with the Findings of Fact established above, the Department, with respect to William Boling, should calculate a penalty on imputed wages for the period March 18, 2014, through October 15, 2014, and incorporate the same in the final order issued herein.

34. The Department failed to satisfy its burden of proof with respect to the following:

(a) Penalties totaling \$21,940.16 for William Boling as the penalties are based on imputed wages for a time not within the period of Respondent's non-compliance;

(b) Penalties totaling \$13,106.38 for Harold Nobles as the penalties are based on imputed wages for a time not within the period of Respondent's non-compliance; and

(c) Penalties totaling \$21,940.16 for James Clogston as the penalties are based on imputed wages for a time not within the period of Respondent's non-compliance.

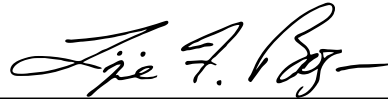
RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order finding that Respondent, Nobles Quality Services, LLC, violated the

provisions of chapter 440 by failing to secure the payment of workers' compensation and assessing against Respondent a penalty in an amount consistent with the above Findings of Fact and Conclusions of Law.

DONE AND ENTERED this 9th day of December, 2015 in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 2015.

ENDNOTES

^{1/} All statutory references are to 2014 Florida Statutes, unless otherwise indicated.

^{2/} An exemption allows an officer of a corporation, or a member of a limited liability company, to exempt himself from the insurance coverage requirements of Florida's Workers' Compensation Law. § 440.05, Fla. Stat. (2014).

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.