

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case Nos. 16-0355
16-0361
16-0362
16-0364
16-0365
16-0367

NORTHLAKE MOBILE ENTERPRISES,
INC. (15-136-D2); MB FOOD AND
BEVERAGE, INC. (15-137-D2);
CONGRESS VALERO, INC. (15-138-
D2); HENA ENTERPRISES, INC. (15-
139-D2); HAYMA ENTERPRISES, INC.
(15-140-D2); AND BLUE HERON BP,
INC. (15-141-D2), ET AL.,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in West Palm Beach and Tallahassee, Florida, on April 6, 2016.

APPEARANCES

For Petitioner: Tabitha G. Harnage, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondents: Frank Joseph Blotney, Esquire
Bull and Blotney, LLP
Suite 101-B
4524 Gun Club Road
West Palm Beach, Florida 33415

STATEMENT OF THE ISSUE

Whether Respondents violated the provisions of chapter 440, Florida Statutes, by failing to secure the payment of workers' compensation coverage, as alleged in the Stop-Work Orders, and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

This proceeding arose out of the requirement in Florida's Workers' Compensation Law that employers must secure the payment of workers' compensation insurance for their employees. On March 30, 2015, the Department of Financial Services (Department) served each Respondent a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) for failing to secure workers' compensation for their employees as required by chapter 440, Florida Statutes (2015). The Department received business records from Respondents and, in turn, issued each an amended penalty. On January 14, 2016, the Department served the six Amended Orders of Penalty Assessment on Respondents, assessing penalties as follows: \$1,367.06 for Northlake Mobile Enterprises, Inc. (Northlake); \$9,687.00 for MB Food and Beverage, Inc. (MB); \$12,651.42 for Congress Valero, Inc. (Congress Valero); \$18,508.88 for Hena Enterprises, Inc. (Hena); \$7,257.48 for Hayma Enterprises, Inc. (Hayma); and \$4,031.60 for Blue Heron BP, Inc. (Blue Heron).

On April 27, 2015, Respondents filed a consolidated Petition with the Department, which requested a hearing and disputed the penalties totaling \$53,503.44. On January 22, 2016, this matter was referred to the Division of Administrative Hearings (DOAH). The six cases were consolidated and assigned DOAH Case No. 16-0355.

On April 6, 2016, a final hearing was held as scheduled.^{1/} The Department presented the testimony of Investigator Robert Feehrer and Penalty Auditor Christopher Richardson. The Department offered eight exhibits, all of which were received into evidence. Respondents presented the testimony of Nazma Akter and offered no exhibits.

The two-volume transcript of the final hearing was filed with DOAH on April 28, 2016. Respondents' motion for extension of time to file proposed recommended orders was granted without objection on April 6, 2016, allowing the parties until May 18, 2016, to file their proposed recommended orders. Petitioner timely filed a proposed recommended order. Respondents filed their proposed recommended order on May 20, 2016, and upon Petitioner's motion, it was struck as untimely and not considered in the preparation of this Recommended Order.

References to statutes and rules are to the 2015 versions, unless otherwise indicated.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the requirement of chapter 440, Florida Statutes, that employers in Florida secure workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Respondents are gas station/convenience stores located in South Florida. Northlake was created by Nazma Akter on May 6, 2014. MB was created by Ms. Akter on March 23, 2010. Congress Valero was created by Muhammad Saadat on July 21, 2011. Hena was created by Ms. Akter and Abu Ahsan on December 14, 2011. Hayma was created by Ms. Akter on December 14, 2011. Blue Heron was created by Ms. Akter on August 4, 2009. At all times relevant hereto, Respondents were duly-licensed to conduct business in the state of Florida.

3. On February 2, 2015, the Department's Compliance Investigator Robert Feehrer, began a workers' compensation compliance investigation of Gardenia, LLC.

4. Investigator Feehrer called the number listed for Gardenia, LLC, and was provided with a corporate office address.

5. On February 10, 2015, upon arrival at Gardenia, LLC's, corporate office located at 165 US Highway 1, North Palm Beach, Florida, 33408, Investigator Feehrer spoke with Operations Manager Mohammad Hossain. Mr. Hossain stated that Gardenia, LLC, was a paper corporation and existed only for the purpose of

paying unemployment taxes on the "six stores." Mr. Hossain went on to provide Investigator Feehrer with a list of Respondents and names of the employees that worked at each store. As an employee of Gardenia, LLC, and Respondents, Mr. Hossain's statements are party opponent admissions and bind Respondents. Lee v. Dep't of Health & Rehab. Servs., 698 So. 2d 1194, 1200 (Fla. 1997).

6. With Mr. Hossain's statements and the list of Respondents' employees, Investigator Feehrer then consulted the Division of Corporations website, www.sunbiz.org, and confirmed that Respondents were current, active Florida companies. Investigator Feehrer then consulted the Department's Coverage and Compliance Automated System ("CCAS") for proof of workers' compensation coverage and exemptions associated with Respondents.

7. Investigator Feehrer's CCAS search revealed that Respondents had no workers' compensation policies and no exemptions.

8. On February 24, 2015, Investigator Feehrer conducted site visits at each of the six stores. Ms. Akter and Mr. Hossain accompanied Investigator Feehrer during these site visits.

9. At all times material hereto, Ms. Akter was a corporate officer or managing member of each of the six Respondents. Muhammed Saadat and Abu Ahsan were corporate officers or managing members of Congress Valero, Hena, and Blue Heron. Kazi Ahamed

was a corporate officer or managing member of Congress Valero and Hayma. Kazi Haider and Mohammed Haque were managing members of Hayma. All received compensation from the companies with which they were involved.

10. Although Investigator Feehrer only personally observed one employee working at each location during his site visits, the payroll records revealed that at least four employees (including corporate officers or managing members without exemptions) received compensation for work at each location during the relevant period.

11. Investigator Feehrer required additional information to determine compliance, and with Respondents' permission, contacted Respondents' accountant. Investigator Feehrer met with the accountant at least two times to obtain relevant information prior to March 30, 2015. Upon Ms. Akter's authorization, the accountant provided tax returns and payroll information for Respondents' employees. Information from Ms. Akter and Mr. Hossain also confirmed the specific employees at each of the six stores during the period of March 30, 2013, through March 30, 2015.

12. On March 30, 2015, based on his findings, Investigator Feehrer served six Stop-Work Orders and Orders of Penalty Assessment. The Stop-Work Orders were personally served on

Ms. Akter. Mr. Hossain was present as well and confirmed the lists of employees for each of the six stores were accurate.

13. In April 2015, the Department assigned Penalty Auditor Christopher Richardson to calculate the six penalties assessed against Respondents.

14. Respondent provided tax returns for the audit period and payroll transaction details were provided, as well as general ledgers/breakdowns, noting the employees for each Respondent company.

15. Based on Investigator Feehrer's observations of the six stores on February 24, 2015, Auditor Richardson used the classification code 8061 listed in the Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rule 69L-6.021(1). Classification code 8061 applies to employees of gasoline stations with convenience stores. Classification codes are four-digit codes assigned to various occupations by the National Council on Compensation Insurance to assist in the calculation of workers' compensation insurance premiums.

16. In the penalty assessment, Auditor Richardson applied the corresponding approved manual rate for classification code 8061 for the related periods of non-compliance. The corresponding approved manual rate was correctly utilized using

the methodology specified in section 440.107(7) (d)1. and rule 69L-6.027 to determine the final penalties.

17. The Department correctly determined Respondents' gross payroll pursuant to the procedures required by section 440.107(7) (d) and rule 69L-6.027.

18. On January 14, 2016, the Department served the six Amended Orders of Penalty Assessment on Respondents, assessing penalties of \$1,367.06 for Northlake, \$9,687.00 for MB, \$12,651.42 for Congress Valero, \$18,508.88 for Hena, \$7,257.48 for Hayma, and \$4,031.60 for Blue Heron.

19. The Department has demonstrated by clear and convincing evidence that Respondents were engaged in the gasoline station, self-service/convenience store industry in Florida during the periods of noncompliance; that Respondents failed to secure the payment of workers' compensation for their employees, as required by Florida's Workers' Compensation Law; and that the Department correctly utilized the methodology specified in section 440.107(7) (d)1. to determine the appropriate penalties.

CONCLUSIONS OF LAW

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

21. Chapter 440 is known as the "Workers' Compensation Law." § 440.01, Fla. Stat.

22. Because administrative fines are penal in nature, the Department is required to prove by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation and that it calculated the appropriate amount of penalty owed by Respondent. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

23. Pursuant to sections 440.10, 440.107(2), 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 with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989); Dep't of Fin. Serv. v. L & I Consolidated Serv., Inc., Case No. 08-5911 (Fla. DOAH May 28, 2009; Fla. DFS July 2, 2009).

24. Section 440.107(2) states "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

25. Officers, partners, shareholders, and sole proprietors may elect to be exempt from the coverage requirements of chapter 440. §§ 440.02(15)(b) and 440.05, Fla. Stat. Section 440.05(3) sets out certain affirmative actions required by one who elects to be exempt from the coverage requirements. An applicant must file a notice of election to be exempt with the Department and pay a \$50 fee to elect to be exempt.

26. Section 440.02(16)(a) defines "employer" in part as "every person carrying on any employment."

27. Florida law defines "employment" as "all private employments in which four or more employees are employed by the same employer."

28. Florida law defines "employee" in part as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment."

§ 440.02(15)(a), Fla. Stat. Also included in the definition of "employee" is "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous."

§ 440.02(15)(b), Fla. Stat.

29. Investigator Feehrer correctly concluded that Respondent was not in compliance with the coverage requirements of chapter 440 on March 30, 2015. Therefore, the Department properly issued and served the Stop-Work Orders.

30. The Department has the duty of enforcing the employer's compliance with the requirements of the Workers' Compensation Law. § 440.107(3), Fla. Stat. To that end, the Department is empowered to examine and copy the business records of any employer conducting business in the state of Florida to determine whether it is in compliance with the Workers' Compensation Law. § 440.107(3), Fla. Stat.

31. Section 440.107(7)(d)1. provides that the Division:

[S]hall 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.

This statutory provision mandates that the Department assess a penalty for non-compliance with chapter 440 and does not provide any authority for the Department to reduce the amount of the penalty.

32. Rule 69L-6.027 adopts a penalty calculation worksheet for the Department's penalty auditors to utilize "[f]or purposes of calculating penalties to be assessed against employers pursuant to section 440.107, Florida Statutes."

33. The Department applied the proper methodology in computing the Amended Order of Penalty Assessment pursuant to section 440.107(7)(d)1. and rules 69L-6.027 and 69L-6.028.

34. Auditor Richardson properly utilized the penalty worksheet mandated by rule 69L-6.027 and the procedure mandated by section 440.107(7)(d)1. and (7)(e) to calculate the penalty owed by Respondents as a result of their failure to comply with the coverage requirements of chapter 440.

35. Therefore, the Department proved by clear and convincing evidence that it correctly calculated and issued the penalties in the Amended Orders of Penalty Assessment against Respondents.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a consolidated final order upholding the Stop-Work Orders and the Amended Orders of Penalty Assessment in the amounts of \$1,367.06 for Northlake Mobile Enterprises, Inc.; \$9,687.00 for MB Food and Beverage, Inc.; \$12,651.42 for Congress Valero, Inc.; \$18,508.88 for Hena Enterprises, Inc.; \$7,257.48 for Hayma Enterprises, Inc.; and \$4,031.60 for Blue Heron BP, Inc.

DONE AND ENTERED this 16th day of June, 2016, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 2016.

ENDNOTE

^{1/} At 4:48 p.m. on April 5, 2016, the eve of the final hearing, Respondents filed a Motion to Continue Administrative Hearing (Motion) alleging that they received the Department's proposed exhibits, totaling over 200 pages, that afternoon and needed time to have the exhibits reviewed by an "expert witness." Oral argument was heard on this Motion at the outset of the final hearing.

The record reflects that Respondents took no discovery to prepare for the hearing. Nor did the parties meet and confer to exchange exhibits 15 days in advance of the hearing as required by the undersigned's Order of Pre-hearing Instructions issued February 5, 2016. The Joint Pre-hearing Stipulation filed by the parties on March 31, 2016, did not designate any expert witness for Respondents. Although Respondents listed "Accountant for MFC Associates," no such individual was identified. Further, it was clear upon inquiry that counsel for Respondents did not even know the identity of the purported accountant.

During oral argument on the motion, Respondents asserted the hearing should be postponed because their accountant was sick. It was clear that Respondents made little or no preparations to have an accountant present at the final hearing. Counsel's lack of preparation or failure to timely file an appropriate motion to compel the production of documents, which Petitioner intended to introduce as exhibits at hearing, does not constitute good cause sufficient to justify the continuance of the final hearing. For these reasons, the Motion was denied and the final hearing went forward as scheduled.

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.