

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 16-0710

M. C. JENNINGS, JR. CONSTRUCTION  
CORP.,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in Miami and Tallahassee, Florida, on April 28, 2016.

APPEARANCES

For Petitioner: Thomas Nemecek, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399

For Respondent: Kristian Eiler Dunn, Esquire  
Dunn and Miller, P.A.  
215 East Tharpe Street  
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Respondent violated the provisions of chapter 440, Florida Statutes (2016), by failing to secure the payment of workers' compensation coverage, as alleged in the Stop-work Order.<sup>1/</sup>

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 January 7, 2016, the Department of Financial Services, Workers' Compensation Division ("Department") served a Stop-work Order and Order of Penalty Assessment ("Stop-work Order") on Respondent for failing to secure workers' compensation for its employees as required by chapter 440, Florida Statutes. Respondent timely filed a request for a formal administrative hearing. On February 10, 2016, this matter was referred to the Division of Administrative Hearings ("DOAH"). On April 19, 2016, the Department served an Amended Order of Penalty Assessment on Respondent via the Order Granting Petitioner's Motion for Leave to Amend Order of Penalty Assessment. The penalty assessed was \$8,753.66.

On April 28, 2016, the final hearing was held as scheduled. The Department presented the testimony of Humberto Rivero, compliance investigator and Sarah Beal, penalty auditor. The

Department offered Exhibits 1, 2 and 4 through 16, which were admitted into evidence. Respondent presented the testimony of Ms. Patricia Krossman in an attempt to qualify her as an expert witness. The Department had filed a Daubert motion prior to the final hearing and conducted voir dire of Ms. Krossman. Respondent failed to qualify Ms. Krossman as an expert. Respondent's other witness, Mr. Miles Jennings, was precluded from testifying at the final hearing because of his evasive conduct and refusal to answer questions at his deposition. Respondent did not offer any exhibits.<sup>2/</sup>

The Transcript of the final hearing was filed with DOAH on May 18, 2016. Both parties timely filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

References to statutes and rules are to the 2016 versions, unless otherwise indicated.

#### FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the requirement of chapter 440 that employers in Florida secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. Respondent, M.C. Jennings Jr. Construction Corp., is an active Florida for-profit corporation with its principal office

located at 3125 Mundy Street, Miami, Florida 33133. Miles Jennings, Jr., is Respondent's president and registered agent.

3. Respondent admits that during the time period of January 8, 2014, to January 7, 2016, Respondent was a business engaged in the construction industry.

#### The Investigation

4. On January 6, 2016, the Department's compliance investigator, Humberto Rivero, conducted a compliance check at Respondent's business address in response to a public referral.

5. Prior to visiting the business, Mr. Rivero checked the Division of Corporations' website to obtain the federal employee identification number and information on the corporate officers.

6. After this, Mr. Rivero searched the Coverage and Compliance Automated System ("CCAS") to verify whether or not Respondent is covered with workers' compensation insurance and whether there is an exemption for the corporate officers. Mr. Rivero also searched the National Council on Compensation Insurance ("NCCI").

7. Mr. Rivero routinely checks for coverage before going out for a site visit in response to public referrals. Upon searching the NCCI database and the CCAS database, Mr. Rivero learned that Respondent had no workers' compensation coverage and so the referral appeared to be accurate. Mr. Rivero also determined there were no exemptions.

8. Next, Mr. Rivero arrived at the business address for Respondent, went into a fenced yard, up the steps to a trailer, and identified himself and the reason he was there. Mr. Rivero described the office trailer as the type he goes into on construction projects. There was a desk, manuals, schedules, and drawings or blueprints on a rack. Mr. Rivero did not personally observe any construction activity at the site.

9. Mr. Rivero spoke with Shawn Denise Welch-Perryman. Ms. Welch-Perryman indicated she did not have access to information on workers' compensation and could not get Mr. Jennings because he was in a meeting and could not to be disturbed. Ms. Welch-Perryman said Ms. Hallman, the property manager for Respondent, may be able to help.

10. Mr. Rivero contacted Darlene Hallman by telephone. Ms. Hallman indicated she did not have access to information on workers' compensation. Ms. Hallman admitted she is an employee of Respondent and has been there for several years. Ms. Hallman said she gets paid by company check, but did not want to disclose how much.

11. After this, Mr. Rivero interviewed Ms. Welch-Perryman, as he had with Ms. Hallman, and Ms. Welch-Perryman admitted to being an employee of Respondent. Ms. Welch-Perryman also gets paid by company check.

12. Mr. Rivero was provided with the name Ed Fowler, Respondent's insurance agent. Mr. Rivero talked to Mr. Fowler to check on whether Respondent was covered. Mr. Fowler said the company did not have coverage, but it was working on it.

13. This information was consistent with the searches Mr. Rivero performed prior to his visit at Respondent's business location.

14. Mr. Rivero told Ms. Welch-Perryman to have Mr. Jennings call him by the end of that day, January 6th. Mr. Jennings did not call Mr. Rivero on the 6th.

15. On January 7, 2016, Mr. Rivero spoke with Mr. Jennings by phone. During this conversation, Mr. Jennings confirmed that the two women were his employees and he did not have insurance, but was working on securing it.

16. Mr. Jennings agreed to meet with Mr. Rivero at the office trailer at 1 p.m. When Mr. Rivero returned that afternoon, the site was locked with the fence closed by padlock.

17. Mr. Rivero called Ms. Welch-Perryman and Ms. Hallman to see why the site was locked and left messages, but received no response. Mr. Rivero called his supervisor, Scarlet Aldana, to inform her of what he found. She advised Mr. Rivero to call Mr. Jennings and tell him of the consequences of not being there and not having insurance.

18. Mr. Rivero called Mr. Jennings and left a message. After waiting about 15 minutes, Mr. Rivero called his supervisor again to explain the situation. Ms. Aldana authorized a Stop-work Order to be issued and posted in a prominent place. Mr. Rivero posted the Stop-work Order on Respondent's mailbox and photographed it.

19. While at the business location, Mr. Rivero was with senior investigator Julio Cabrera. Mr. Rivero was directed by Mr. Cabrera to photograph a dump truck on site with a general contractor's number on it. According to Mr. Rivero, there were many more pieces of equipment, but he focused on photographing the posting of the Stop-work Order and the dump truck.

20. According to the records of the Department of Business and Professional Regulation, an active general contractor license number belongs to Mr. Jennings and Respondent.

21. On January 15, 2016, Mr. Jennings contacted Mr. Rivero to say he had come into compliance by purchasing coverage for nine employees.

22. Mr. Rivero asked for the broker's name and phone number so he could verify coverage. Mr. Rivero spoke by phone with Stan Shelton at Madison Insurance Company. Mr. Shelton verified the company had coverage for nine employees, paid a down payment of \$500, and the premium was \$31,763.

23. On January 19, 2016, Mr. Rivero met with Mr. Jennings and went over the business records request, informing Mr. Jennings that in order to calculate a penalty, the Department needed certain records. Mr. Jennings was informed of the ten business days he had to submit the records.

#### Penalty Calculation

24. Penalty Auditor Sarah Beal was assigned to calculate the penalty in this case.

25. Ms. Beal did not receive any records from Respondent in response to the business records request.

26. Without any records, Ms. Beal had to impute the gross payroll which is equal to two times the average weekly wage that was in effect when the Stop-work Order was issued. Ms. Beal determined the period of noncompliance to be the full two years of January 8, 2014, to January 7, 2016. Ms. Beal identified the employees on the penalty worksheet from the investigator's on-site observations and narrative.

27. Based on Mr. Rivero's observations on January 6, 2016, and the information he had gathered, Ms. Beal initially used the classification code 8810 listed in the Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rule 69L-6.021(1). Classification codes are four-digit codes assigned to various occupations by the NCCI to assist in the calculation of workers' compensation insurance premiums.



28. Classification code 8810 applies to clerical workers and Ms. Beal preliminarily used this code for Ms. Hallman, Ms. Welch-Perryman, and Mr. Jennings. Ms. Beal then utilized the corresponding approved manual rates for those class codes and the period of noncompliance to determine a penalty, which she submitted to her supervisor for review.

29. Ms. Beal was subsequently directed to change the class code for Mr. Jennings to Scopes Code 5606, a construction class code for construction foreman/project manager.

30. On April 8, 2016, based on Ms. Beal's re-calculation, using class code 5606 for Mr. Jennings, the Department issued an Amended Order of Penalty Assessment to Respondent. The Amended Order of Penalty Assessment assessed a penalty of \$8,753.66.

#### CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the subject matter of and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

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

33. 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).

34. 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).

35. Florida law defines "employment" as "any service performed by an employee for the person employing him or her," and "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a), (b)2, Fla. Stat.

36. 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.

37. "Corporate officer" or "officer of corporation" is defined as "any person who fills an office provided for in the corporate charter or articles of incorporation filed with the Division of Corporations of the Department of State or as permitted or required by chapter 607." § 440.02(9), Fla. Stat.

38. 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."

39. Section 440.107(3)(g) authorizes the Department to issue stop-work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements.

40. Despite admitting during discovery that it was engaged in the construction industry during the relevant period, Respondent argues that the Department improperly issued the Stop-work Order because Mr. Rivero did not personally observe construction activity taking place at the worksite. Further, by refusing to provide any records during the investigation or in response to discovery, Respondent asserts that the Department was precluded from making a determination that the business was in the construction industry.

41. Respondent reasons that because a non-construction business must have four or more employees before it is required to secure workers' compensation insurance, and Mr. Rivero only saw three employees who were not actively engaged in

construction, the Stop-work Order and the resulting penalty assessments were in error.

42. In support, Respondent cites rule 69L-6.028, which states:

(d) The imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be assigned to the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of that employee's activities.

43. Because the Department received no records from Respondent, Respondent asserts that there is no basis upon which Mr. Jennings should have been designated as a class code 8810 for the construction industry.

44. This argument suggests that any construction employer can frustrate the purposes of the Workers' Compensation Law by refusing to turn over records to the Department and engaging in sanctionable discovery practices.

45. Respondent's argument is specious at best. Respondent wholly ignores the facts, supported by competent substantial evidence, that were known to the Department at the time the Stop-work Order was issued:

- a. The name of the business is M.C. Jennings Jr. Construction Corp.;
- b. Mr. M.C. Jennings, Jr., and Respondent hold active general contractor licenses;

c. Respondent operates out of a construction trailer with construction equipment and related construction-related materials on the premises;

d. Mr. Rivero spoke to two employees who admitted working for Respondent during the relevant time period; and

e. There was no evidence of these employees carrying on any business other than that related to M.C. Jennings Jr. Construction Corp.

46. The only logical inference to be drawn from these facts is that Respondent was a business engaged in construction activities as of the date of the on-site inspection.

47. This is also the only rational explanation for why Respondent would admit the same during discovery and immediately take steps to secure coverage for nine workers to lift the Stop-work Order. If Respondent was not actively engaged in construction activities, there would be no immediate need to lift the Stop-work Order.

48. There is no mandate in statute or rule that the investigator, at the time of issuing a Stop-work Order to a business with less than four employees, must demonstrate by clear and convincing evidence, that a business is engaged in construction activities. In fact, the statutory scheme is such that once the Stop-work Order issues, the employer has the right to present business records that would conclusively demonstrate the nature of its business and an entitlement to an amended

penalty assessment to conform to the provided business records. Here, the Respondent purposely chose not to provide any records.

49. Mr. Rivero correctly concluded that Respondent was not in compliance with the coverage requirements of chapter 440 on January 7, 2016. Therefore, the Department properly issued and served the Stop-work Order.

50. The Department has the duty of enforcing the employer's compliance with the requirements of the Workers' Compensation Law. 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.

51. 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.

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

53. 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.

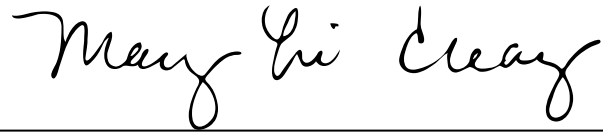
54. Ms. Beam properly utilized the penalty worksheet mandated by rule 69L-6.027 and the procedure mandated by section 440.107(7)(d)1. and (7)(e) to calculate the penalty owed by Respondent as a result of its failure to comply with the coverage requirements of chapter 440.

55. The Department has proven by clear and convincing evidence that it correctly calculated and issued the penalty in the amount of \$8,753.66 in the Amended Order of Penalty Assessment pursuant to section 440.107(7)(d)1. and rule 69L-6.027.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order upholding the Stop-work Order and the Amended Order of Penalty Assessment and assess a penalty against Respondent in the amount of \$8,753.66.

DONE AND ENTERED this 27th day of June, 2016, in  
Tallahassee, Leon County, Florida.



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MARY LI CREASY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of June, 2016.

ENDNOTES

<sup>1/</sup> The issues identified in the Notice of Hearing were:

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

However, as a result of Respondent's blatant discovery violations and refusal to comply with the undersigned's Order Granting Motion to Compel, issued April 8, 2016, Respondent was precluded, as a discovery sanction, from disputing the amount of the penalty derived from the Stop-work Order and Amended Order of Penalty Assessment. This ruling is consistent with Respondent's representation that it supplied no business records and did not cooperate with the deposition of its corporate officer, Miles C. Jennings, Jr., because it did not intend to contest that amount of the penalty assessment, but rather only the issue of whether any penalty was warranted. See Order Granting Motion for Sanctions dated April 19, 2016.

<sup>2/</sup> The deposition transcript of Mr. Miles Jennings, Jr., was not introduced into evidence at the final hearing. However, it was



made part of the record when the Department filed it with DOAH on April 27, 2016, in conjunction with its Second Motion for Sanctions.

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.