

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-0711

SUNSHINE RENTAL OF CITRUS, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, a final administrative hearing was held in this matter before the Honorable R. Bruce McKibben, Administrative Law Judge for the Division of Administrative Hearings ("DOAH"), in Crystal River, Florida, on May 20, 2016.

APPEARANCES

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

For Respondent: Kristian Eiler Dunn, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Sunshine Rental of Citrus, LLC ("Sunshine"), should have a penalty assessed against it by Petitioner, Department of Financial Services, Division of Workers' Compensation (the "Department"), and, if so, the amount of such penalty or assessment.

PRELIMINARY STATEMENT

On January 16, 2016, the Department issued a Stop Work Order ("SWO") and Order of Penalty Assessment, requiring Sunshine to immediately cease all business activities based upon the Department's finding that Sunshine was operating without valid workers' compensation insurance coverage. Sunshine timely filed a request for a formal administrative hearing. At the final hearing conducted in this matter, the Department called two witnesses: Dale Russell, compliance investigator; and Lawrence Pickle, penalty auditor. The Department's Exhibits P-1, P-2, P-4 through P-12, P-14 through P-17, P-19 and P-20 were admitted into evidence. Sunshine called two witnesses: Joseph Melchiore and Margaret Melchiore, owners of the business at issue in this proceeding. Sunshine's Exhibits R-1 through R-3 and R-5 through R-7 were admitted.

A Transcript was filed on June 13, 2016.

The parties are allowed by rule to submit proposed recommended orders (PROs) to the Administrative Law Judge within

10 days of the filing of the transcript at DOAH. Sunshine, however, requested additional time to file its PRO and the parties were given until June 30. Each party timely filed a PRO and each was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the State agency responsible for, inter alia, ensuring that all businesses operating in this State have workers' compensation insurance coverage.

2. Sunshine is a validly-existing limited liability company in the State of Florida. It was formed on April 18, 2007, for the purpose of conducting any and all lawful business. The company is primarily engaged in the business described in its website as "a family-owned nursery, rock yard, stone yard and landscaping company." The principal address of the company is listed in the Florida Division of Corporations' records as 6658 West Sunripe Loop, Crystal River, Florida.

3. On January 26, 2016, Dale Russell, a compliance investigator with the Department, conducted an investigation at 7045 North Walden Woods Drive, Homosassa, Florida. Upon arrival at the site, Mr. Russell observed two men installing driveway paver stones at a residence. Mr. Russell identified himself as an investigator for the Department and asked the men for whom they were working, i.e., by whom were they employed. The men

allegedly advised Mr. Russell that they were employed by Sunshine. Mr. Russell asked their names and was told they were Mike Stevens and Carlos Esptri. Inexplicably, Mr. Russell did not obtain any further information from the men such as phone numbers, addresses, or driver's license numbers. The men then gave Mr. Russell the telephone number for Sunshine.

4. Mr. Russell checked the Department's compliance and coverage automated system (CCAS) to verify workers' compensation insurance coverage for the men under Sunshine's name. According to CCAS, there was no coverage for the two men.

5. Mr. Russell called the number the men had provided, but there was no answer even though he called during normal business hours. So, Mr. Russell drove from Homosassa to Crystal River and went to Sunshine's business location, 6658 Gulf to Lake Highway. When he went inside the business premises, Mr. Russell spoke with Joseph and Margaret Melchiore, who identified themselves as the owners of Sunshine. The Melchiores initially told Mr. Russell that they did not have workers' compensation insurance because they did not need it. According to Mr. Russell, Mrs. Melchiore told him that the two workers he had identified were actually subcontractors, ostensibly operating under their own insurance. Mr. Russell explained that since the two workers were not working under any particular company of their own but were installing pavers for Sunshine, they were

deemed employees of Sunshine and needed to be covered by Sunshine's insurance.

6. Based upon this discussion, Mr. Russell issued a SWO and made a formal request for production of business records upon Sunshine. The SWO and records request were hand-delivered to the Melchiores at the business location on the same day Mr. Russell first talked with them.

7. The day after Mr. Russell served the SWO on Sunshine, Mr. and Mrs. Melchiore went to the workers' compensation compliance office in Tampa and applied for exemptions from workers' compensation insurance coverage for themselves. In the applications for exemption, applicants were given the option of selecting construction industry or non-construction industry as their area of employment. The Melchiores both checked the construction industry boxes and identified themselves as members of a limited liability company. At final hearing, they could not explain why they made that selection when seeking an exemption. They indicated on the exemption request forms that the scope of work to be done as "nursery, stone, pavers" without further explanation. The Melchiores also entered into an Agreed Order for the purpose of lifting the SWO so they could continue to make a living. They made an initial payment of \$1,000 with the agreement to enter into a "Payment Agreement Schedule for Periodic Payment of Penalty." No such agreement was entered

into between Sunshine and the Department and no further payments were made.

8. At final hearing the Melchiores stated the company does not provide any physical labor or other construction work; they only sell materials. This testimony is contradicted by the pictures and statements in their website, including: "We deliver and install at a reasonable price," and "[W]e can provide you with our installation services." Likewise, the signage at their business location said at one point in time, "PAVERS INSTALLED." The fact that the Melchiores applied for an exemption and entered into an Agreed Order is strongly suggestive that they were aware of their need for and failure to maintain workers' compensation insurance.

9. However, the Department could not prove by clear and convincing evidence that the Melchiores were engaged in physical labor in the construction industry. They were only observed (by Mr. Russell) performing clerical or retail sales-type work.

10. The Department calculated the amount of the penalty based on the Melchiores apparent and seemingly admitted involvement in the construction industry. An Amended Order of Penalty Assessment - in the amount of \$91,211.04 - was served on Sunshine. Sunshine did not timely provide the Department with complete business records, so the penalty amount had been established by way of imputing income for Sunshine's employees.

Sunshine eventually provided the Department with most, but not all, of the requested records. Inasmuch as the records were not complete, the Department auditors were not able to make an absolute determination of Sunshine's payments to employees. For example, there were numerous checks missing from the records; the October 2014 records are missing in their entirety; and the 2016 records - from the period of time around the disputed construction in Homosassa - are missing a page. The Department had asked for the financial records immediately upon issuing the SWO, but Sunshine did not do so because they were "looking for an attorney." As a result, the records were not timely received by the Department and were not complete when ultimately provided (and were never totally complete, even at final hearing).

11. Mr. Russell never spoke to the two workers from the Homosassa site again and they did not appear at the final hearing in this matter. Their hearsay statements (i.e., that they were employed by Sunshine) were never completely confirmed by other competent and substantial evidence. However, Mrs. Melchiore's claim that she did not know the two men was not entirely believable. Based on the fact that the men gave Sunshine's number to Mr. Russell, and that Mrs. Melchiore initially admitted knowing them but stated they were subcontractors, it is more likely than not that the men were at least known to Sunshine. Mrs. Melchiore testified at final

hearing that when she and Mr. Russell talked, she disavowed knowing of the two workers at all. Mr. Russell's testimony was more credible, but there remains a legitimate question as to what was actually said.

12. The one instance of paver installation addressed by the Department (other than the Homosassa site discussed above) allegedly occurred at a business known as First Fruit Markets, also located in Homosassa. It is undisputed that Mr. Melchiore installed pavers in front of that business establishment. He did so, however, reputedly as a gift to the young couple who had recently opened the business. Mr. Melchiore claimed that he was not paid for the work he performed, that it was done on a Sunday afternoon when he was not working for Sunshine, and it was a gift. The owners of the business were not called as witnesses to substantiate Mr. Melchiore's claim. The evidence shows that there is a sign at the fruit market identifying the pavers as being from Sunshine. Whether that sign indicates the work was done by Sunshine or was just appreciation shown by the owners of the business was not established by the evidence.

13. Sunshine introduced into evidence several 1099-MISC forms showing payments by the company to John Gray, the Melchiores son. The purpose of those 1099s was to show that Sunshine used independent contractors to do work for them. Further, the 1099s were meant to suggest that the Melchiores did

not pay anyone, including their son, in cash. Again, Mr. Gray did not testify to substantiate that suggestion.

14. The evidence established that Sunshine owned trucks used in the business. There was, unfortunately, no evidence presented as for what purpose the trucks were used by the business. One picture on the Sunshine website shows a front-end loader putting materials into the back of a truck with a Sunshine decal on the door, but whether the truck was used for delivery only (and whether such work required workers' compensation coverage) was not established by evidence in the record.

15. Sunshine's failure to timely provide its business records resulted in the imputed method being employed to determine the amount of the penalty to be assessed. First, the payroll was calculated by using the average weekly wage in effect at the time of the issuance of the SWO and, per statute, multiplying by two. Class Code 5221 - under the construction umbrella - was assigned to the work being done by Sunshine. The period of non-compliance was set at January 27, 2014 through December 31, 2014; January 1, 2015 through December 31, 2015; and January 1, 2016 through January 26, 2016. Those are the dates within the Department's two-year audit period that Sunshine was deemed to be out of compliance.

16. The imputed gross payroll amount was \$334,161.00 for the first period of non-compliance, \$359,789.88 for the second period, and \$12,814.44 for the third. By comparison, the gross payroll relating to the Melchiores only was: \$167,080.05 for the first period; \$89,947.47 for the second period; and \$12,814.44 for the third period (the "Melchiore payroll").

17. The total payroll figures, divided by 100, resulted in the amounts of \$3,341.61, \$3,597.89 and \$1,281.44, respectively. Comparatively, the Melchiore payroll figures, divided by 100, equals \$1,670.80, \$8,994.74, and \$128.14, respectively.

18. The approved manual rates set for the three periods were 6.38, 6.25, and 7.02, reflecting the rates for Class Code 5221.

19. The premium owed by the employer on the total payroll for the first period was calculated at \$21,315.58; \$22,486.81 for the second; and \$1,799.08 for the third. For the Melchiore payroll only, the calculated amounts would be \$10,659.70, \$5,621.68, and \$899.54, respectively. The premium amounts, multiplied by two, resulted in assessed penalties for the total payroll of \$42,631.16; \$44,973.62 for the second; and \$3,598.16 for the third, for a total penalty of \$91,211.04. For the Melchiores-only payroll, the penalty amounts would be \$21,319.40; \$11,243.36; and \$1,799.08, for a total penalty of \$34,362.56.

20. There was not sufficient evidence presented at final hearing to establish what the total penalty would have been had a non-construction Class Code been assigned to the Melchiores.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over this matter pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless otherwise stated specifically herein, all references to Florida Statutes will be to the 2016 version.

22. The burden of proof in matters such as this is on the Department because it is asserting the affirmative of the issue, i.e., that Sunshine did not have workers' compensation insurance in place for its employees or have a valid exemption in place. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

23. The administrative fines being proposed by the Department are penal in nature. The standard of proof for such cases is clear and convincing evidence. See Dep't of Banking and Fin. Div. of Secs. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

24. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil and administrative cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2nd

DCA 1970). Further, clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the 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.

Slomowitz v. Walker, 429 So. 2nd 797, 800 (Fla. 1st DCA 1983).
(Citations omitted).

25. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every employer is required to secure the payment of workers' compensation for the benefit of its employees unless the employee is 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).

26. The alleged admissions by Mrs. Melchiore during her interview with Mr. Russell would be statements that constitute exceptions from the hearsay rule, if such statements had actually been made. See § 90.803(18), Fla. Stat. However, the inferences which could be drawn from her testimony and the hearsay statements of the reputed employees fall far short of

clear and convincing evidence. Thus, only the Melchiores are proven to be employees of Sunshine for purposes of this matter.

27. The Department was unable to estimate the amount of penalty for Sunshine's failure to have workers' compensation insurance in place, as Sunshine never produced a complete set of its business records. The Department therefore was required to impute the income and calculate a penalty in accordance with section 440.107.

28. Section 440.107(7)(a), states, in relevant part:

Whenever 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.

The Department properly issued a SWO upon finding that Sunshine did not have the appropriate coverage.

29. As to penalties, Section 440.107(7)(d)1., states:

In 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 the chapter a penalty equal to 1.5 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 payment of worker's compensation required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

30. The penalty for the Melchiores when using the construction Class Code would be \$34,362.56. The penalty when using a non-construction Class Code would presumably be less, but would depend on the Class Code assigned and applied to the imputed payroll amounts.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation enter a Final Order assessing a penalty against Respondent, Sunshine Rental of Citrus, LLC, based upon the imputed income amounts for Joseph and Margaret Melchiore and applying the appropriate Class Code.

DONE AND ENTERED this 7th day of July, 2016, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
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This 7th day of July, 2016.

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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.