CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION

Petitioner,

v.

DOAH CASE NO.: 16-0711
DWC CASE NO.: 16-029-D3-WC

SUNSHINE RENTAL OF CITRUS, LLC,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before me for a final order. The Recommended Order concludes the Department properly issued a Stop-Work Order (SWO) to Sunshine Rental of Citrus, LLC (respondent). The Administrative Law Judge (ALJ) recommended the Department enter a final order assessing a recalculated penalty by limiting imputed income amounts to Joseph and Margaret Melchiore, and applying a different classification code than that utilized to prepare the Amended Order of Penalty Assessment. The Department and respondent both timely filed exceptions to the Recommended Order, and responses to each other's exceptions.

Respondent submitted three related exceptions. Respondent first objects to the ALJ's conclusion, in recommended order paragraph 28, that "[t]he Department properly issued a SWO upon finding that Sunshine did not have the appropriate coverage." Respondent contends the ALJ made no finding that it is a construction entity, and that the evidence supports only a finding

that respondent is not an entity engaged in construction and has less than four employees. Respondent asserts, therefore, that the only conclusion which can be permissibly be drawn in this case is that respondent is not an employer within the meaning of chapter 440, Florida Statutes, and has no obligation to secure the payment of workers' compensation benefits for its employees. Respondent's second and third exceptions build on this argument, and call for recommended order paragraph 30 and the "Recommendation," both of which recommend assessment of a penalty, to be rejected on the grounds that the ALJ erroneously concluded respondent violated chapter 440. Respondent's exceptions are not well-taken.

Recommended order paragraphs eight through ten, fairly read, find that respondent is a construction entity, and that finding is reflected in recommended order paragraph 28. The finding is supported by competent substantial evidence, outlined in paragraphs eight and ten. The ALJ questioned the construction classification code (and thus the applicable manual rate) by which the Department calculated the penalty, because the ALJ found only the Melchiores were shown to be employees, and they were observed performing only clerical/administrative tasks. The ALJ, therefore, recommended the Department recalculate the penalty using a different classification code.

Respondent posits that, where the Department cannot prove specific employees engaged in construction activities at a particular jobsite, the Department cannot consider the employer to be "engaged in the construction industry" within the meaning of chapter 440, Florida Statutes. Respondent cites no statutory or decisional support for this proposition, and there appears to be none. Section 440.02(8), Florida Statutes, defines the "construction industry" to include "any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land." The Department, in determining whether a particular

entity is an "employer" required to secure workers' compensation coverage, may consider any evidence that the entity does or does not engage in such construction activity. *See M. C. Jennings, Jr. Construction Corp., v. Dep't of Fin. Serv.*, Case No. 16-0710 (DOAH Jun. 27, 2016; DFS Sept. 12, 2016); *see generally*, *Allied Trucking of Florida, Inc. v. Lanza*, 826 So. 2d 1052 (Fla. 1st DCA 2002). Therefore, a construction employer may be subject to a stop-work order and/or a penalty for a failure to secure coverage even where the Department's investigation does not observe employees actively performing construction tasks. Respondent's exceptions are rejected.

The Department's exception contends the ALJ did not make a finding of fact establishing the Melchiores' work activities with sufficient specificity to apply an alternative classification code to recalculate the penalty as the ALJ recommended. The Department requests the proceeding be remanded to the ALJ for that purpose. Alternatively, the Department argues for imposition of a $34,362.56 penalty, calculated by applying the construction code used in the Amended Order of Penalty Assessment to only the Melchiores. The Department's exception is logical, but is rejected.

Although competent evidence of a general nature may establish that an entity is an "employer" required to secure coverage under the Act, the penalty to be imposed for failure to secure coverage is based on a determination of the insurance premium the employer avoided. § 440.107(7)(d)1., Fla. Stat. The penalty calculation is dependent on the specific tasks performed by identified employees within the look-back period. *Id.* The record in this proceeding, as it currently exists, is sufficient to support imposition of only the minimum $1000 penalty mandated by section 440.107(7)(d)1. Given that the Act's coverage objective has already been obtained in this case, the Department's and DOAH's regulatory and quasi-judicial resources may be most

efficiently applied by imposing the minimum mandatory penalty and reaching final disposition of this proceeding. To the extent recommended order paragraph 30 and the "Recommendation" could be read to be inconsistent with this result, they are rejected on the basis that the record does not presently support a penalty calculation based on a yet-unidentified class code/manual rate.

Accordingly, a $1,000.00 penalty is imposed against Sunshine Rental of Citrus, LLC, for its failure to secure workers' compensation. The record indicates respondent has already remitted payment of the penalty.

DONE and ORDERED this 12th day of October, 2016.

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHT TO APPEAL

A party adversely affected by this final order may seek judicial review as provided in section 120.68, Florida Statutes, and Florida Rule of Appellate Procedure 9.190. Judicial review is initiated by filing a notice of appeal with the Agency Clerk, and a copy of the notice of appeal, accompanied by the filing fee, with the appropriate district court of appeal. The notice of appeal must conform to the requirements of Florida Rule of Appellate Procedure 9.110(d), and must be filed (i.e., received by the Agency Clerk) within thirty days of rendition of this final order.

Filing with the Department's Agency Clerk may be accomplished via U.S. Mail, express overnight delivery, hand delivery, facsimile transmission, or electronic mail. The address for overnight delivery or hand delivery is Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390. The facsimile number is (850) 488-0697. The email address is Julie.Jones@myfloridacfo.com.

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