

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-1143

STEVE MUNDINE CONSTRUCTION,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

On April 29, 2016, in Orlando, Florida, a hearing was conducted before J. D. Parrish, an administrative law judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Young J. Kwon, Esquire
Michael Joseph Gordon, Esquire
Florida Department of Financial Services
Workers Compensation Compliance
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: John Laurance Reid, Esquire
Dickens Reid PLLC
517 East College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Respondent, Steve Mundine Construction, Inc., timely challenged the Second Amended Order of Penalty Assessment

and, if not, whether pursuant to the doctrine of equitable tolling Respondent's untimely filed challenge should be accepted.

PRELIMINARY STATEMENT

On March 1, 2016, the Petitioner, Department of Financial Services, Division of Workers' Compensation, forwarded this case for formal proceedings. The Respondent maintains that if his petition to challenge the Second Amended Order of Penalty Assessment was not timely filed, it was due to the Petitioner's action in misleading or lulling the Respondent into inaction. At the hearing the Petitioner presented the testimony of Stephanie Scarton and Cathy Nunez. The Petitioner's Exhibits A through F were admitted into evidence. The Respondent testified on his own behalf and Respondent's Exhibit 1 (an affidavit) was also received in evidence. The Transcript of the proceedings was filed on May 5, 2016. The parties were granted ten days to file their proposed recommended orders. The proposed orders have been fully considered.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with the responsibility of enforcing and assuring employers meet the requirements of chapter 440, Florida Statutes. The law in Florida requires employers to maintain appropriate workers' compensation coverage for their employees.

2. At all times material to this case, the Respondent was doing business in Florida and was subject to the requirements of the law.

3. On May 6, 2015, Stephanie Scarton, an investigator employed by the Petitioner, stopped at one of the Respondent's construction sites and initiated an investigation as to whether the Respondent maintained appropriate workers' compensation for the two employees found at the job site.

4. After determining that the requisite documentation for workers' compensation coverage was not produced, Ms. Scarton issued a Stop-Work Order (Petitioner's Exhibit A). The Stop-Work Order advised the Respondent that he, Steven Mundine, d/b/a, Steve Mundine Construction, Inc., was in violation of Florida law by "failing to obtain coverage that meets the requirements of chapter 440, F.S., and the Insurance Code."

5. Petitioner's Exhibit A included a Notice of Rights that provided, in part:

You have a right to administrative review of this action by the Department under sections 120.569 and 120.57, Florida Statutes.

* * *

FAILURE TO FILE A PETITION WITHIN THE TWENTY-ONE (21) DAYS CONSTITUTES A WAIVER OF YOUR RIGHT TO ADMINISTRATIVE REVIEW OF THE AGENCY ACTION. [Emphasis in original]

6. In response to the Stop-Work Order, the Respondent met with Cathy Nunez on May 7, 2016, and executed an Agreed Order of Conditional Release from Stop-Work Order (Petitioner's Exhibit B). In addition to signing the agreed order, the Respondent submitted an affidavit that provided:

I Steve Mundine have terminated Bill Busch and Karl G. Kerr. I am no longer conducting business as Steve Mundine Const. Inc. I have opened a new company Paradigm Building, LLC but will not work til we applied and received exemptions. Including Richard Hans.

7. Under the terms of the Agreed Order of Conditional Release from Stop-Work Order the Respondent represented that he would remit periodic payments of the remaining penalty amount pursuant to a Payment Agreement Schedule for Periodic Payment of Penalty with the Department or pay the remaining penalty amount in full within 28 days after the service of the Stop-Work Order. As a condition of receiving the conditional release the Respondent remitted \$1,000.00 toward the penalty amount.

8. In order to assist the Petitioner with the accurate calculation of the penalty that would be due, the Respondent was advised that he needed to submit records. When the Respondent asked Cathy Nunez if he needed to retain a lawyer, she did not tell him that he did not need a lawyer. She advised him that a lawyer was not required to produce the records that were needed to make the penalty calculation.

9. The Respondent did produce records to the Petitioner and in turn an Amended Order of Penalty Assessment (Petitioner's Exhibit C) was completed that advised the Respondent that he owed a total penalty of \$63,837.82. Cathy Nunez hand-delivered the Amended Order of Penalty Assessment to the Respondent on July 24, 2015. Included was a second Notice of Rights that advised the Respondent of his right to challenge the assessment. Additionally, the Respondent was advised that a petition to seek administrative review of the action had to be filed within twenty-one days.

10. After considering additional records submitted by the Respondent, the Petitioner prepared a Second Amended Order of Penalty Assessment (Petitioner's Exhibit D) to itemize the revised amount owed by the Respondent. The Second Amended Order of Penalty Assessment ordered the Respondent to pay a total penalty of \$47,006.28.

11. Stephanie Scarton delivered the Second Amended Order of Penalty Assessment to the Respondent on December 22, 2015.

12. At the same time (December 22, 2015), Ms. Scarton presented the Respondent with a Payment Agreement Schedule for Periodic Payment of Penalty (Petitioner's Exhibit E). The payment agreement acknowledged that the Respondent had previously remitted \$1,000.00 toward his penalty and allowed for the remaining \$46,006.28 to be repaid over the course of 60

monthly payments. The Respondent did not agree to sign the payment agreement. Accordingly, a blank agreement was left with the Respondent, not the one providing for the payments previously described.

13. On December 22, 2015, the Respondent disagreed with the repayment amount and believed the penalty had been incorrectly calculated. On December 22, 2015, the Respondent knew he had a limited amount of time to challenge the Second Amended Order of Penalty Assessment.

14. On December 22, 2015, Ms. Scarton hand-delivered to the Respondent the Second Amended Order of Penalty Assessment including a Notice of Rights. The only documents not left with the Respondent on December 22, 2015, were copies of the payment agreement signed by Ms. Scarton.

15. On December 22, 2015, the Notice of Rights provided to the Respondent was identical to the Notice of Rights previously provided to him.

16. Before leaving the Respondent on December 22, 2015, Ms. Scarton reminded the Respondent he had a limited amount of time to file a petition seeking administrative review of the agency action.

17. The Petitioner did not misrepresent the procedural requirements to challenge the agency action, did not lull the Respondent into a false sense of security or inaction, and did

not advise the Respondent as to whether he should retain a lawyer in connection with an administrative review of the penalty assessment. The weight of the credible evidence supports the finding that when the Respondent eventually filed a petition to challenge the agency action, it was beyond the 21 days allowed by law.

CONCLUSIONS OF LAW

18. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), DOAH has jurisdiction over the subject matter of and the parties to this proceeding.

19. Under the law the Respondent had 21 days within which to file a petition to seek administrative review of the Second Amended Order of Penalty Assessment. See Fla. Admin. Code R. 28-106.111. The failure to timely file a request for review constitutes a waiver of the right to challenge agency action. See Whiting v. Dep't of Law Enforcement, 849 So. 2d 1149 (Fla. 5th DCA 2003).

20. In this case the Respondent did not timely file a petition or request for an administrative review of the Second Amended Order of Penalty Assessment.

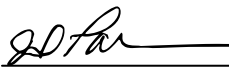
21. The provisions of "equitable tolling" as described in Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988), do not apply to the facts of this case. On at least three occasions the Petitioner advised the Respondent of the requirement to file

within 21 days. The Petitioner did not mislead the Respondent or lull him into inaction. The weight of the credible evidence established that the Petitioner informed the Respondent of his right to seek review of the action, repeatedly advised him of the timeline to do so, and acted properly in providing all documents required by law to effect appropriate service. The doctrine of equitable tolling does not apply to this case.

RECOMMENDATION

Based upon 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 determining the Respondent's request for administrative review of the Second Amended Order of Penalty Assessment was not timely filed.

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



J. D. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 2016.

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.