

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-1192

PIONEER CONSTRUCTION, LLC,

Respondent.

_____ /

RECOMMENDED ORDER OF DISMISSAL

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),^{1/} on May 26, 2016, by video teleconference sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Leon Melnicoff, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Michael Cantrell, Esquire
Law Office of Michael L Cantrell, PA
Post Office Box 6876
Brandon, Florida 33508

STATEMENT OF THE ISSUES

Whether Respondent timely filed a request for an administrative hearing, and, if not, whether the doctrine of

equitable tolling provides a defense to the applicable deadline for filing a petition for hearing.

PRELIMINARY STATEMENT

The Department of Financial Services, Division of Workers' Compensation (the "Department"), served a Stop-Work Order and Order of Penalty Assessment on Respondent, Pioneer Construction, LLC ("Respondent"), on November 10, 2015. The Department subsequently served an Amended Order of Penalty Assessment on Respondent on December 29, 2015.

On February 16, 2016, the Department received a written petition from Respondent disputing the penalty amount in the Amended Order of Penalty Assessment.

The Department referred this matter to the Division of Administrative Hearings ("DOAH") on March 2, 2016, and requested assignment of an Administrative Law Judge ("ALJ") to conduct a formal evidentiary hearing. With its referral, the Department filed a Motion to Dismiss Petition asserting a threshold issue regarding whether Respondent filed its petition for hearing with the Department within 21 days after Respondent received notice of the Department's Amended Order of Penalty Assessment.

The final hearing was held on May 26, 2016. The Department presented the testimony of Gene Brimmer, an investigator with the Department. Department Exhibits 1 through 8 were admitted into evidence. Daniel Hedman testified on behalf of Respondent. Respondent Exhibit 1 was admitted into evidence.

A one-volume Transcript of the final hearing was filed with DOAH on June 24, 2016. At the close of the hearing, the parties were advised of the ten-day deadline following DOAH's receipt of the hearing transcript to file post-hearing submittals. Both parties submitted post-hearing memorandums which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

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

2. On November 10, 2015, following an investigation to determine whether Respondent had secured sufficient workers' compensation insurance coverage, the Department served a Stop-Work Order on Respondent. Gene Brimmer, an investigator with the Department, personally served the Stop-Work Order on Respondent. Mr. Brimmer hand-delivered the Stop-Work Order to Daniel Hedman, Respondent's owner.

3. With the Stop-Work Order, Mr. Brimmer also provided Mr. Hedman a document entitled Request for Production of Business Records for Penalty Assessment Calculation. The Department requested certain financial documents to calculate the appropriate penalty.

4. Mr. Brimmer and Mr. Hedman met on November 25, 2015. At this meeting, Mr. Hedman produced a number of Respondent's bank statements and payroll records for the Department's consideration in its penalty calculation.

5. Mr. Brimmer and Mr. Hedman met again on December 29, 2015. At this meeting, Mr. Brimmer personally served on Respondent an Amended Order of Penalty Assessment (the "Penalty Assessment"). The Penalty Assessment levied a total penalty of \$58,944.86 against Respondent.

6. On the back of the Penalty Assessment document was a page entitled "Notice of Rights." The Notice of Rights advised Respondent, in pertinent part:

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

To obtain review, you must file a written petition requesting review.

* * *

You must file the petition for hearing so that it is received by the Department within twenty-one (21) days of your receipt of this agency action. The petition must be filed with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, FL 32399-0390.

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

Mr. Brimmer explained the Notice of Rights to Mr. Hedman.

Mr. Brimmer discussed the 21-day deadline for Respondent to request a hearing with the Department to dispute the Penalty Assessment.

7. In addition to the Penalty Assessment and Notice of Rights, Mr. Brimmer provided Mr. Hedman with a Penalty Audit Summary Report. This report included a Department auditor's review of Respondent's payroll records. The auditor noted that the records Mr. Hedman provided in November 2015, did not account for Respondent's total labor costs for the preceding years. The Penalty Audit Summary Report informed Mr. Hedman that, to recalculate the penalty, a cash ledger would be required to remove the imputed payroll amount.

8. In light of the Penalty Audit Summary Report, during the December 29, 2015, meeting, Mr. Brimmer informed Mr. Hedman that the Department would be willing to review additional business records and consider whether to recalculate the penalty. Mr. Brimmer told Mr. Hedman that he could have 20 business days to produce more records. Mr. Brimmer, however, never guaranteed that the additional documentation would result in a reduced penalty. Neither did Mr. Brimmer represent that that Department would issue another penalty assessment order or another Notice of Rights under which Respondent could file a request for an administrative hearing.

9. Twenty-one days after December 29, 2015, was January 19, 2016.

10. On January 22, 2016, within 20 business days from his meeting with Mr. Brimmer on December 29, 2015, (but, 24 days after receiving the Notice of Rights) Mr. Hedman provided additional business records to Mr. Brimmer on Respondent's behalf. Mr. Brimmer testified that if the Department had recalculated the penalty based on Respondent's supplemental business records, it would have issued another penalty assessment order. The new penalty assessment order would have included a new Notice of Rights and another 21-day period within which Respondent could file a petition for hearing.

11. Unfortunately for Respondent, the additional business records Mr. Hedman produced did not change the Department's mind. On February 2, 2016, Mr. Brimmer e-mailed Mr. Hedman informing him that the Department would not be adjusting the Penalty Assessment. As an additional consequence, because Mr. Hedman did not submit a written request for a hearing by January 19, 2016, Respondent missed the 21-day deadline to file a petition for administrative hearing to contest the Penalty Assessment.

12. Upon receiving Mr. Brimmer's e-mail, Mr. Hedman panicked. He called Mr. Brimmer on February 9, 2016, to discuss the status of the Penalty Assessment. Mr. Brimmer advised Mr. Hedman to review the Notice of Rights.

13. At the final hearing, Mr. Hedman testified that, based on his conversation with Mr. Brimmer on December 29, 2015, he understood that he had 20 business days to challenge the Penalty Assessment. Mr. Hedman explained that, by providing additional business records, he thought he had complied with what was needed to contest the penalty. Mr. Hedman claimed that if Mr. Brimmer had not requested additional records, he would have filed a petition for hearing within 21 days.

14. Following his telephone conversation with Mr. Brimmer on February 9, 2016, Mr. Hedman prepared a letter to the Department requesting a hearing to contest the Penalty Assessment. In his letter, Mr. Hedman stated:

When I turned in those records [on January 22, 2016] Agent Brimmer stated this should "take care of things" so I thought things were being taken care of and I was waiting for a response. The response by e-mail didn't come . . . until Feb. 2, 2016.

* * *

After speaking with Agent Brimmer and explaining that I didn't know I needed to apply for a hearing, since he had told me submitting the requested records should "take care of things," and furthermore certainly was never told anything about a 21-day deadline for requesting such, Agent Brimmer said he agreed and suggested I write to apply for a hearing.

15. The Department received Mr. Hedman's request for a hearing on February 16, 2016.

16. Based on the evidence set forth at the final hearing, the Department established that Respondent did not file its petition requesting an administrative hearing with the Department within 21 days of Respondent's receipt of the Penalty Assessment. Therefore, the legal issue to determine is whether Respondent's petition should be dismissed as untimely filed, or whether Respondent may circumvent the filing deadline based on the defense of equitable tolling.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

18. Unless otherwise provided by law, persons seeking a hearing regarding an agency decision shall file a petition for hearing with the agency within 21 days of receipt of the agency's written notice. See Fla. Admin. Code R. 28-106.111(2). Any person who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. See Fla. Admin. Code R. 28-106.111(4). A request for hearing that has been untimely filed shall be dismissed. See § 120.569(2)(c), Fla. Stat.

19. Filing "shall mean received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing." Fla. Admin. Code R. 28-106.104(1). As detailed above, to meet with the 21-day filing

requirement, Respondent's petition for hearing was to be received by the Department no later than January 19, 2016. The facts establish that the Department received Respondent's petition on February 16, 2016, which is 49 days after the Department served the Penalty Assessment on Respondent.

20. Respondent failed to timely request a hearing to dispute the Penalty Assessment. Therefore, pursuant to section 120.569(2)(c), Respondent's petition for hearing must be dismissed. See Cann v. Dep't of Child. and Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2002) and Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149 (Fla. 5th DCA 2003).

21. Notwithstanding the above, rule 28-106.111(4) states that equitable tolling is a defense to a person's failure to request an administrative hearing within 21 days. "Equitable tolling requires that the party be misled or lulled into inaction; that he was prevented from asserting his rights in some extraordinary way; or that he has timely asserted his rights in the wrong forum." Whiting, 849 So. 2d at 1151 (citing Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988)).

22. Based on the competent substantial evidence in the record, the undersigned concludes that Respondent failed to establish a defense of equitable tolling of the 21-day filing deadline. The Notice of Rights served with the Penalty Assessment clearly informed Respondent had it had 21 days to file a petition for hearing with the Department.^{2/} The Department's

notice was proper, and Respondent knew the proper forum. Respondent's explanation as to why it failed to timely file a petition for hearing did not establish that it was misled or lulled into inaction, was prevented from asserting its rights in some extraordinary way, or that it timely asserted its rights in the wrong forum.

23. The undersigned finds this matter analogous to Whiting. In Whiting, the agency served the appellant its decision via certified mail, then, personally served a second copy of its decision the following day. The appellant calculated his response due date from the second service date. However, the appellant did not file his request for appeal until the day after the response deadline he calculated. Whiting ruled that the appellant's "mistaken belief as to when the time period ended" was insufficient to support a claim of equitable tolling. Whiting, 849 So. 2d at 1151; see also Jancyn Mfg. Corp. v. State, Dep't of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (wherein the court refused to apply the equitable tolling doctrine where the failure "was the result of appellant's own inattention, and not the result of a mistake or agency misrepresentation").

24. The Notice of Rights explicitly notified Respondent of its right to file a petition for hearing within 21 days. Mr. Brimmer never represented that Respondent's opportunity to produce additional business records abrogated or supplanted the 21-day deadline. While Mr. Brimmer's presentation to Mr. Hedman

of two parallel "20 day" time periods might not serve as the best practice due to a possible miscommunication,^{3/} Mr. Brimmer never withdrew the Notice of Rights. Neither did he convey that the Notice of Rights no longer applied to the Penalty Assessment or that Respondent could disregard the significance of the 21-day filing date. At most, Mr. Hedman's decision to submit additional payroll documents instead of a petition was based on his own "mistaken belief" that the Department would recalculate its penalty assessment and issue another Notice of Rights.^{4/} Consequently, Respondent has not established that the Department's actions misled or lulled it into inaction or somehow prevented it from filing a request for hearing within the 21-day deadline.

25. Accordingly, because section 120.569(2)(c) compels the dismissal of untimely petitions, and because equitable tolling provides no exception in this case, Respondent's request for an administrative hearing must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Financial Services, Division of Workers' Compensation, enter a final order dismissing Respondent's request for an administrative hearing as untimely filed.

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



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2016.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2016),
unless otherwise noted.

^{2/} The undersigned's conclusion would be the same even if
Mr. Hedman had produced the supplemental business records to
Mr. Brimmer by January 19, 2016. As plainly stated in the Notice
of Rights and pursuant to Fla. Admin. Code R. 28-106.111, to
request an administrative hearing, Respondent was required to
file a "petition for hearing" with the Department within 21 days
of receipt of the Penalty Assessment.

^{3/} A wiser practice would be for the Department to offer a
shorter period of time for a business to produce records or to
emphasize the rigidity of the 21-day period in which to file a
petition for hearing.

^{4/} Mr. Brimmer did not inform Mr. Hedman that "this should 'take
care of things'" until he received Respondent's supplemental
business records on January 22, 2016. By this time, the 21-day
time period for Respondent to request an administrative hearing
had already run.

COPIES FURNISHED:

Leon Melnicoff, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229
(eServed)

Michael Cantrell, Esquire
Law Office of Michael L Cantrell, PA
Post Office Box 6876
Brandon, Florida 33508
(eServed)

Julie Jones, CP, FRP, Agency Clerk
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390
(eServed)

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.