

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-2997

JAGUAR DRYWALL OF PONTE VEDRA
BEACH, INC.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 30, 2016, via video teleconference at sites in Jacksonville and Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Young J. Kwon, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Charles A. Sears, CPA
2011 Gibson Road
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner correctly calculated the penalty to be imposed on Respondent for failing

to have a sufficient amount of workers' compensation coverage during the time period in question.

PRELIMINARY STATEMENT

On January 7, 2016, the Department of Financial Services, Division of Workers' Compensation ("the Division"), served a Stop-Work Order and Order of Penalty Assessment on Jaguar Drywall of Ponte Vedra Beach, Inc. ("Jaguar Drywall").

The Division served an Amended Order of Penalty Assessment on February 25, 2016, requiring Jaguar Drywall to pay a \$112,471.92 penalty.

After evaluating records provided by Jaguar Drywall, the Division served a 2nd Amended Order of Penalty Assessment on June 1, 2016, reducing the aforementioned penalty to \$16,532.60.

Charles A. Sears (acting on Jaguar Drywall's behalf) requested an administrative hearing, and the Division referred this matter to DOAH on June 1, 2016.

On June 6, 2016, ALJ W. David Watkins issued an Order scheduling the final hearing to occur on August 16, 2016.

On July 12, 2016, the Division filed an "Agreed Motion to Continue Final Hearing" ("the Motion to Continue") asking ALJ Watkins to continue the final hearing so that the parties could complete their discovery.

ALJ Watkins issued an Order on July 18, 2016, granting the Motion to Continue and re-scheduling the final hearing to occur on September 20, 2016.

On July 18, 2016, ALJ Watkins issued an Order granting Jaguar Drywall's request that Charles A. Sears be authorized to appear as the qualified representative of Jaguar Drywall.

On August 30, 2016, the Division filed a "Motion for Leave to Amend Order of Penalty Assessment" ("the Motion for Leave") asserting that Jaguar Drywall had provided additional business records to the Division and that the resulting review led the Division to conclude that the assessed penalty should be reduced to \$8,021.12. ALJ Watkins issued an Order on August 30, 2016, granting the Motion for Leave.

On August 30, 2016, Jaguar Drywall filed an "Agreed Motion to Continue Final Hearing" ("the Second Motion to Continue"). In support thereof, Jaguar Drywall's qualified representative asserted that he had been devoting a substantial amount of time to addressing an unexpected family matter and was left with insufficient time to prepare for the final hearing. ALJ Watkins issued an Order on August 31, 2016, granting the Second Motion to Continue and re-scheduled the final hearing for November 30, 2016.

On November 21, 2016, the instant case was transferred to the undersigned.

The undersigned convened the final hearing on November 30, 2016. At the outset of the final hearing, the parties notified the undersigned that they had agreed that the Division's investigation was proper, that Jaguar Drywall failed to have a sufficient amount of workers' compensation during the time period in question, and that the Division utilized the correct method in calculating the penalty. The only disagreement concerned whether the Division should have included certain payments to Jaguar Drywall's president and sole shareholder in the penalty calculation.

The Division presented the testimony of Nathaniel Hatten and offered Exhibits 1 through 15 that were admitted into evidence without objection. Jaguar Drywall presented the testimony of Larry Kirkland and offered composite Exhibit 1 that was accepted into evidence without objection.

A one-volume Transcript was filed with DOAH on December 13, 2016.

On January 10, 2017, Jaguar Drywall filed a "Request for Extension of Time to File Proposed Recommended Order" ("the Extension Motion") asking that the parties' deadline for filing the proposed recommended orders be extended to February 2, 2017.

The undersigned issued an Order on January 12, 2017, granting the Extension Motion, and the parties timely filed their proposed recommended orders on February 2, 2017.

The undersigned considered both of the proposed recommended orders in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. The Division is the state agency responsible for enforcing the requirement in chapter 440, Florida Statutes (2016),^{1/} that employers in Florida secure workers' compensation coverage for their employees.

2. While an exemption can be obtained for up to three corporate officers, any employer in the construction industry with at least one employee must have workers' compensation coverage. § 440.02(15), Fla. Stat.

3. At all times relevant to the instant case, Jaguar Drywall was registered with the Florida Department of State, Division of Corporations. In addition, Jaguar Drywall operated as a subchapter S corporation under the Internal Revenue Code.

4. In order to be an S corporation, a corporation must submit "Form 2553 Election by a Small Business Corporation" to the Internal Revenue Service. Also, the corporation in question must be a domestic corporation, have no more than 100 shareholders, and have only one class of stock.^{2/}

5. S corporations pass through corporate income, losses, deductions, and credits to their shareholders for federal tax purposes. Shareholders of an S corporation report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual tax rates. As a result, S corporations avoid the double taxation that occurs when a corporation is taxed on its gross income and its shareholders are taxed on dividends.

6. Jaguar Drywall's employees receive their compensation through an employee leasing company.

7. However, and as explained in more detail below, Jaguar Drywall made payments to particular people and entities during 2015 and 2016 that were not included on the employee leasing contract.

8. Nathaniel Hatten is a penalty auditor for the Division's Bureau of Compliance. Mr. Hatten calculates the penalties that the Division seeks to impose on employers neglecting to have a sufficient amount of workers' compensation coverage.

9. In the course of calculating the penalty at issue in the instant case, Mr. Hatten utilized tax returns, bank statements, and a general ledger from Jaguar Drywall.

10. Mr. Hatten calculated three different penalties for Jaguar Drywall because he had to recalculate the penalty each time he received additional records from Jaguar Drywall.

11. The third and final penalty calculated by Mr. Hatten totaled \$8,021.12.^{3/}

12. The aforementioned penalty resulted from the fact that Jaguar Drywall made direct payments to John Rodriques, Martin Garcia, Primo's Jax Drywall Corporation, Parra Construction Services, Inc., and Larry Kirland. Those payments did not flow through Jaguar Drywalls' employee leasing company. As a result, there was no workers' compensation coverage associated with those payments.

13. Classification codes pertain to various occupations or types of work, and each one has an approved manual rate used by insurance companies to assist in the calculation of workers' compensation insurance premiums.^{4/}

14. Using the class codes associated with the work performed, the approved manual rates, and the direct payments described above, Mr. Hatton determined the individual insurance premiums Jaguar Drywall would have paid if there had been workers' compensation coverage for the aforementioned payments.

15. Jaguar Drywall does not dispute that Mr. Hatten, pursuant to section 440.107(7)(d)1., Florida Statutes, correctly calculated the penalties associated with the direct payments

from Jaguar Drywall to John Rodriques, Martin Garcia, Primo's Jax Drywall Corporation, and Parra Construction Services, Inc.

16. Instead, the dispute between the Division and Jaguar Drywall simply concerns whether certain payments made to Larry Kirkland in 2014 and 2015 should be included in the penalty calculation. The payments in question totaled \$47,134.50 in 2014 and \$23,980.00 in 2015, and Mr. Hatton determined that the corresponding penalties would be \$1,875.96 for 2014 and \$892.06 for 2015.

17. Mr. Kirkland is the president and sole stockholder of Jaguar Drywall. Mr. Kirkland does not work at construction sites and considers himself to be an off-site supervisor.

18. Mr. Kirkland and other employees of Jaguar Drywall receive wages via Matrix Leasing. Those wages are reported on W-2 tax forms, and Jaguar Drywall has obtained workers' compensation coverage for those wages.

19. Mr. Kirkland, as the sole shareholder of Jaguar Drywall, also receives direct payments in the form of "distributions" from Jaguar Drywall's subchapter S earnings.

20. The Division takes the position that the direct payments to Mr. Kirkland fall within the scope of Florida Administrative Code Rule 69L-6.035(1)(e) which provides that

For purposes of determining payroll for calculating a penalty pursuant to subparagraph 440.107(7)(d)1., F.S., the

Department must when applicable, include the following as remuneration to employees, based upon evidence received in its investigation:

* * *

(e) Payments made to employees by or on behalf of the employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distributions, or incentive plans;

21. However, the Division presented no evidence demonstrating that the direct payments were made to Mr. Kirkland in his capacity as an employee of Jaguar Drywall. Instead, the evidence demonstrated that he received the direct payments due to his status as the sole shareholder of Jaguar Drywall. As a result, the Division failed to prove by clear and convincing evidence that it correctly calculated the penalty to be imposed on Jaguar Drywall.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

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

24. 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. See Bend v. Shamrock Servs., 59 So. 3d 153, 157 (Fla. 1st DCA 2011).

Indeed, the Legislature has declared that "the failure of an employer to comply with the workers' compensation coverage requirements under [chapter 440] poses an immediate danger to public health, safety, and welfare." § 440.107(1), Fla. Stat.

25. Accordingly, 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.

26. The Division is required to assess against any employer that has failed to secure the payment of workers' compensation "a penalty equal to" the greater of \$1,000 or "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 . . . within the preceding 2-year period."

(emphasis added). § 440.107(7)(d)1., Fla. Stat. This is a

penal statute that, if ambiguous, must be construed against Petitioner. See Lester v. Dep't of Prof'l & Occ. Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

27. Because the Division seeks to impose an administrative penalty or fine against Jaguar Drywall, the Division has the burden of proving the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Clear and convincing evidence must make the facts "highly probable" and produce in the mind of the trier of fact "a firm belief or conviction as to the truth of the facts sought to be established," leaving "no substantial doubt." Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983).

28. In order to meet its burden, the Division must demonstrate that: (a) Jaguar Drywall was required to comply with the Workers' Compensation Law; (b) that Jaguar Drywall failed to comply with the requirements of the Workers' Compensation Law; and that (c) the penalty assessed by the Division is appropriate.

29. With regard to the instant case, there is no dispute that Jaguar Drywall was required to comply with the Workers' Compensation Law and that Jaguar Drywall failed to do so. Jaguar Drywall only disputes the Division's decision to include subchapter S distributions from Jaguar Drywall to Mr. Kirkland in the penalty calculation.

30. As noted above, rule 69L-6.035(1)(e) provides that

For purposes of determining payroll for calculating a penalty pursuant to subparagraph 440.107(7)(d)1., F.S., the Department must when applicable, include the following as remuneration to employees, based upon evidence received in its investigation:

* * *

(e) Payments made to employees by or on behalf of the employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distributions, or incentive plans;

31. In his capacity as the president of Jaguar Drywall, Mr. Kirkland was an "employee" within the meaning of chapter 440 and received wages through Matrix Leasing. § 440.02(15)(b)1., Fla. Stat. (defining an "employee" in pertinent part as including "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.").

32. In his capacity as the sole shareholder of Jaguar Drywall, Mr. Kirkland also received non-payroll distributions directly from Jaguar Drywall.

33. Therefore, Mr. Kirkland received wages pursuant to his status as an employee of Jaguar Drywall, but he also received distributions pursuant to his status as Jaguar Drywall's sole shareholder.

34. Because rule 69L-6.035(1)(e) limits payroll for calculating the penalty pursuant to section 440.107(7)(d)1. to payments "made to employees," the Division should not have included the direct payments from Jaguar Drywall to Mr. Kirkland in its penalty calculation. See generally Dep't of Fin. Servs., Div. of Workers' Comp. v. Ron's Custom Screen, Inc., Case No. 09-0959 (Fla. DOAH Nov. 24, 2009; Fla. DFS Feb. 22, 2010) (finding that "[t]he testimony of the sole shareholder and the supporting documentary evidence also shows that the disputed amounts were not cash payments to the sole shareholder in his capacity as an employee within the meaning of Florida Administrative Code Rule 69L-6.035(1)(b).") (emphasis added).

35. In reaching this conclusion, the undersigned has not overlooked the fact that rule 69L-6.035(1)(e) includes in the payroll penalty calculation items "such as piecework, profit sharing, dividends, income distributions, or incentive plans." (emphasis added).

36. Because dividends are normally paid to shareholders, the Division could argue that the distributions from Jaguar Drywall to Mr. Kirkland should be included in the payroll penalty calculation.

37. However, the undersigned concludes that the inclusion of "dividends" in rule 69L-6.035(1)(e) renders the rule ambiguous. Unless an employee is a shareholder of his or her

company, a corporation does not normally pay dividends to an employee.

38. Because rule 69L-6.035(1)(e) is penal in nature, any ambiguity must be construed against the Division and in Jaguar Drywall's favor. See generally City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993) (noting that "[w]hen a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes.").

39. The undersigned has also not overlooked the principle that the Division is entitled to deference when interpreting one of its own rules. However, that deference is not absolute. Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106, 110 (Fla. 1st DCA 1992) (noting that "[a]lthough we would generally defer to such an opinion, as we are required to give great weight to an agency's interpretation of its own rule, that deference is not absolute.").

40. The Division's interpretation of rule 69L-6.035(1)(e) is owed no deference because the rule's proper interpretation implicates no expertise on the Division's part. See Doyle v. Dep't of Bus. Reg., 794 So. 2d 686, 690 (Fla. 1st DCA 2001) (stating "a court need not defer to an agency's construction or application of a statute if special agency expertise is not

required."); see also Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages and Tobacco, Case No. 14-3496 (Fla. DOAH Feb. 24, 2015; Fla. DBPR June 11, 2015) (explaining that "[u]nlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules--the very administrative interpretations to which courts defer. The ALJ's duty is to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the agency's interpretation of a statute or rule, as a court would; rather, the ALJ should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party.") (internal citation omitted).

41. In sum, the Division has failed to prove by clear and convincing evidence that the direct payments from Jaguar Drywall to Mr. Kirkland, in his capacity as a company shareholder, rather than a company employee, should be included in the payroll penalty calculation.^{5/}

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 imposing a penalty of \$5,253.10 on Jaguar Drywall of Ponte Vedra Beach, Inc.,

DONE AND ENTERED this 28th day of February, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2017.

ENDNOTES

^{1/} Unless stated otherwise, all statutory citations will be to the 2016 version of the Florida Statutes.

^{2/} The undersigned obtained the information in paragraphs 4 and 5 from the Internal Revenue Service's website, www.irs.gov/business/small-business-self-employed/s-corporation, and that information was a proper subject for official recognition. See generally *E.K.D. v. Facebook, Inc.*, 885 F. Supp. 2d 894, 904 n.2 (S.D. Ill. 2012) (noting that "[t]his Court may judicially notice public records and government documents, including those available from reliable sources on the Internet,

such as the official website of the United States District Court for the Northern District of California.”).

^{3/} Section 440.107(7)(d)1., provides in pertinent part that “[i]n 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 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.”

^{4/} Classification codes come from the Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rule 69L-6.021. Each code within the Scopes® Manual pertains to an occupation or type of work, and each code has an approved manual rate used by insurance companies to assist in the calculation of workers’ compensation insurance premiums. Manual rates associated with potentially dangerous activities will have higher manual rates than activities with little or no potential danger.

^{5/} The outcome of the instant could would very likely have been different if the Division had demonstrated that the wages that Mr. Kirkland received through Matrix Leasing were nonexistent or a token amount. However, the Division made no allegation that the wages paid to Mr. Kirkland as a company employee were unreasonably low or that Jaguar Drywall was using the direct payments to Mr. Kirkland as a means of avoiding tax payments or workers’ compensation coverage. See generally Veterinary Surgical Consultants, P.C. v. Comm’r, 117 T.C. 141, 145-46 (2001) (noting that “[a]n employer cannot avoid Federal employment taxes by characterizing compensation paid to its sole director and shareholder as distributions of the corporation’s net income, rather than wages. Regardless of how an employer chooses to characterize payments made to its employees, the true analysis is whether the payments represent remuneration for services rendered.”).

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.