

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-6877

A-Z ROOFING, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held in this case on April 3, 2017, via video teleconference with sites in Tallahassee and Jacksonville, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Michael Joseph Gordon, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Ethelyn Roseboro, pro se
A-Z Roofing, Inc.
450 Busch Drive, Suite 5B
Jacksonville, Florida 32218

STATEMENT OF THE ISSUES

Whether A-Z Roofing, Inc. ("Respondent"), failed to secure the payment of workers' compensation insurance coverage for its employees; and, if so, whether the Department of Financial

Services, Division of Workers' Compensation ("Petitioner" or "Department"), correctly calculated the penalty to be assessed against Respondent.

PRELIMINARY STATEMENT

On September 23, 2016, the Department served Respondent with a Stop-Work Order for Specific Worksite Only (Stop-Work Order) and an Order of Penalty Assessment, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation for its employees.

On October 19, 2016, Respondent requested a hearing to dispute the Stop-Work Order and Penalty Assessment. On November 18, 2016, Petitioner referred this matter to the Division of Administrative Hearings, which scheduled a final hearing for April 3, 2017.

On January 18, 2017, the Department served an Amended Order of Penalty Assessment on Respondent, assessing a penalty of \$273,556.12. Following review of business records provided by Respondent, the Department moved to amend the Amended Order of Penalty Assessment. The motion was granted and the penalty sought was amended to \$82,094.68 effective April 3, 2017.

The final hearing commenced as scheduled. Petitioner presented the testimony of Department Compliance Investigator, Ann Johnson; Department Facilitator, Pete Vallejo; and

Department Penalty Auditor, Phillip Sley. Petitioner's Exhibits P1 through P11 were admitted in evidence.

Respondent presented the testimony of Ethelyn Roseboro, Respondent's President, and introduced Respondent's Exhibits R1 and R2.

A one-volume Transcript of the proceedings was filed on April 24, 2017. Petitioner timely filed a Proposed Recommended Order, which has been considered by the undersigned in preparing this Recommended Order. Respondent did not make any post-hearing filing.

All references to the Florida Statutes herein are to the 2016 version.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the requirement of chapter 440, Florida Statutes, that employers in Florida secure workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Respondent is a Florida for-profit corporation engaged in the construction industry with headquarters in Jacksonville, Florida. Ethelyn Roseboro is Respondent's President.

3. On September 23, 2016, the Department's Compliance Investigator, Ann Johnson, inspected a jobsite at 1229 Blue Eagle Drive in Jacksonville, Florida. Ms. Johnson observed three men at the jobsite performing roofing work on a home

undergoing renovations. Two of the men were on the roof stripping off old shingles and tarpaper, while a third was on the ground retrieving the discarded materials.

4. Ms. Johnson interviewed the men she observed working at the jobsite. The man working on the ground originally identified himself as Tony Brown, but later admitted that his name was actually Allen Roberts.

5. In response to Ms. Johnson's inquiry as to who was Mr. Roberts' employer, Mr. Roberts stated that he did not know and directed Ms. Johnson to his co-worker Donald Purdy.

6. Mr. Purdy disclosed, after initially misleading Ms. Johnson, that he was a friend of the homeowner, Jessica Longo.

7. A third worker at the site identified himself as Marvin Gainer.

Initial Investigation and Stop-Work Order

8. Ms. Johnson reviewed the local building department's permit records and determined that Bracy Building Contractors, Inc. ("Bracy Builders"),^{1/} had pulled a permit to replace the siding on the structure for the owner, Ms. Longo. No permit was pulled for a re-roof.

9. Ms. Johnson contacted Brad Bracey at Bracy Builders, who indicated that he had subcontracted the roofing work to

Respondent, A-Z Roofing, Inc. Ms. Johnson next contacted Ms. Roseboro at A-Z Roofing, Inc.

10. Ms. Roseboro informed Ms. Johnson that Respondent had, in turn, subcontracted the roofing job to JR Home Repairs, Inc. ("JR Home") and directed Ms. Johnson to Cary Spires as the contact.

11. Prior to contacting Mr. Spires, Ms. Johnson reviewed information in the Coverage and Compliance Automated System, or CCAS, the Department's internal database, for JR Home. Ms. Johnson determined that JR Home did not have workers' compensation insurance coverage for its employees.

12. Ms. Johnson then contacted Cary Spires, who indicated he provided workers' compensation insurance through a contract with Staff Force.

13. Ms. Johnson spoke with Brent Abdula at Staff Force, who confirmed that JR Home was not a client, and thus does not have workers' compensation insurance coverage through Staff Force.

14. However, Mr. Abdula confirmed that Respondent is a client with workers' compensation insurance coverage through Staff Force. Unfortunately, the employee roster maintained by Staff Force did not include Mr. Roberts, Mr. Purdy, or Mr. Gainer.

15. Ms. Johnson followed up with Mr. Spires and informed him that JR Home was not a client of record with Staff Force, and further that none of the three workers at the jobsite in question were covered under Respondent's contract with Staff Force. At that time, Mr. Spires admitted that he did not have workers' compensation insurance coverage for his employees.

16. Ms. Johnson next reviewed the Department of State, Division of Corporations' information on A-Z Roofing, Inc., and determined it was an active Florida corporation with Ms. Roseboro listed as its President.

17. Ms. Johnson researched A-Z Roofing, Inc., in the CCAS database and determined that Respondent did not have independent workers' compensation insurance coverage.

18. Finally, Ms. Johnson issued the Site Specific Stop-Work Order which is the subject of the case at hand. Unable to reach Ms. Roseboro, Ms. Johnson initially served the Stop-Work Order by posting it at the jobsite on September 23, 2016.

19. After several failed attempts to reach Ms. Roseboro, Ms. Johnson hand-delivered the Stop-Work Order to Ms. Roseboro at her office on September 29, 2016.

20. Along with the Stop-Work Order, Petitioner served Respondent with a Request for Production of Business Records ("BRR") to facilitate calculating the penalty for the failure to secure workers' compensation insurance.

21. In response to the BRR, Respondent provided to the Department some bank statements and its 2014 and 2015 federal income tax returns.

Respondent's Responsibility for the Job

22. Ms. Roseboro testified that, although the work at the jobsite had been "brought to her" by Mr. Spires, her company did not perform the work, and did not subcontract with JR Home to perform the work.

23. Ms. Roseboro testified that she was in the process of getting "everything in place for the job to start," but was not aware that work had begun when Ms. Johnson contacted her about the work being performed at the jobsite. Ms. Roseboro first testified that she had not pulled a permit for the job, and had not activated the permit for the job. Later she testified that once she found out the "job was being worked on without my knowledge, I voided the permit and the guys were not paid and they did not go back to the job site." Her testimony was confusing and unreliable.

24. In Respondent's defense, Ms. Roseboro offered into evidence a copy of the building permit and certificate of completion issued by the Jacksonville Building Department to Justin Larsen Construction, Inc., for a re-roof of the dwelling at 1229 Blue Eagle Trail in Jacksonville. The permit was pulled

on September 28, 2016, and the certificate of completion was issued on October 12, 2016.

25. Ms. Roseboro offered the documents to prove that Respondent "did not complete the roofing job." Those documents only prove that on a date subsequent to Ms. Johnson's investigation of the jobsite, another roofing company pulled a permit and completed a re-roof of the subject property. It does not establish that Respondent was not responsible for the job on the date of the inspection, or that Respondent did not subcontract the job to JR Home, which did not have workers' compensation insurance coverage for its employees (and which may have begun the work without a permit).

26. Ms. Roseboro maintained at hearing that JR Home subcontracted the re-roofing job at the subject property to Respondent, not vice-versa. Ms. Roseboro's testimony conflicted with Ms. Johnson's testimony that Mr. Roseboro informed her via telephone on September 23, 2016, that Respondent had hired JR Home to perform the work. Ms. Johnson's testimony on this point was more credible and is accepted as true.

27. The Department proved that Respondent subcontracted the re-roof job to JR Home, which did not provide workers' compensation insurance coverage for its employees.

Penalty Calculation

28. Department Penalty Auditor, Phillip Sley, was assigned to calculate the penalty to be assessed against Respondent.

29. Pursuant to section 440.107(7)(d), Florida Statutes, the Department's audit period is the two-year period preceding the date of the Stop-Work Order. The audit period in this case is from September 24, 2014 through September 23, 2016.

30. Based upon Ms. Johnson's observations of the work being performed at the jobsite, as well as review of records submitted by Respondent, Mr. Sley determined that the type of construction work performed was roofing. Mr. Sley consulted the Scopes Manual published by the National Council on Compensation Insurance (NCCI) and assigned classification code 5551 (Roofing - All Kinds & Drivers) for purposes of calculating the penalty.

31. Mr. Sley then applied the corresponding approved manual rates for classification code 5551 for the related periods of non-compliance. Mr. Sley applied the correct approved manual rates and correctly utilized the methodology specified in section 440.107(7)(d)1. and Florida Administrative Code Rules 69L-6.027 and 69L-6.028 to determine the penalty to be imposed.

32. Because Respondent did not provide records sufficient to determine its payroll during the audit period, Mr. Sley correctly assigned the statewide average weekly wage (AWW) to

those employees identified on the jobsite on the date in question. § 440.107(7)(e), Fla. Stat. Mr. Sley likewise correctly utilized the AWW multiplied by two when applying the statutory formula for calculating the penalty to be assessed. See § 440.107(7)(d)1., Fla. Stat.

33. On January 18, 2016, the Department served Respondent with an Amended Order of Penalty Assessment assessing a penalty of \$267,278.36, which was fully imputed.

34. Respondent provided additional records subsequent to issuance of the Amended Order of Penalty Assessment which allowed the Department to determine Respondent's actual payroll for 2014 and 2015, rather than relying on imputed numbers. Based on this additional information, the Department issued a Second Amended Order of Penalty Assessment on April 3, 2016, in the amount of \$82,094.68.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat.

36. Employers are required to secure payment of workers' compensation for their employees unless exempted or excluded. See §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

37. Where a contractor sublets any part of his or her contract work to a subcontractor:

[A]ll of the employees of such contractor and subcontractor . . . engaged on such contract work shall be deemed to be employed in one and the same business . . . and the contractor shall be liable for, and shall secure, the payment of [workers'] compensation [insurance for] all such employees.

§ 440.10(1)(b), Fla. Stat.

38. Further, a "contractor shall require a subcontractor to provide evidence of workers' compensation insurance."

§ 440.10(1)(c), Fla. Stat.

39. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbett, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

40. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the Workers' Compensation Law and that the penalty assessments were correct under the Law. See Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

41. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

42. The only issue on which evidence was conflicting was whether Respondent had engaged JR Home as a subcontractor on the subject re-roof. As found herein, Ms. Johnson's testimony on this issue was more credible than Ms. Roseboro's and is accepted as true. Ms. Roseboro's testimony was a self-serving attempt to shift responsibility for securing workers' compensation insurance to JR Home.

43. The Department demonstrated by clear and convincing evidence that Respondent was engaged in the construction industry in Florida during the audit period and that Respondent failed to secure the payment of workers' compensation insurance for its employees at times during the audit period as required by Florida's Workers' Compensation Law.

44. The Department likewise demonstrated by clear and convincing evidence that it correctly calculated the penalty to be imposed under the law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers'

Compensation, finding that A-Z Roofing, Inc., violated the workers' compensation insurance law and assessing a penalty of \$82,094.68.

DONE AND ENTERED this 26th day of May, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2017.

ENDNOTE

^{1/} A review of the online public records of the Florida Division of Corporations reveals that the correct name of the company is Bracey Building Contractors, Inc. The small typographical error in the records of the Department has no effect.

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.