

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-7184

DAVID FELICIANO, d/b/a D AND S
HANDYMAN, INC., A DISSOLVED
FLORIDA CORPORATION, AND D AND S
HANDYMAN, INC.,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 30, 2017, via video teleconference sites in Lakeland and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondents: David Feliciano Morant, pro se
111 2nd Street
Davenport, Florida 33837

STATEMENT OF THE ISSUES

Whether Respondents,^{1/} David Feliciano, d/b/a D and S Handyman, Inc., a Dissolved Florida Corporation, and D and S Handyman, Inc., failed to provide workers' compensation coverage; and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On September 7, 2016, Petitioner, Department of Financial Services, Division of Workers' Compensation (Department), issued and served a Stop-Work Order (SWO) and an Order of Penalty Assessment against Respondent. Respondent, through its owner/registered agent David Feliciano a/k/a David Feliciano Morant, disputed the Order of Penalty Assessment, and on November 17, 2016, the Department filed an Amended Order of Penalty Assessment against Respondent, calculating the monetary penalty at \$6,859.70. The case was forwarded to the Division on December 7, 2016, for the assignment of an administrative law judge. The hearing was scheduled for January 30, 2017, and completed on that date.

At the hearing, the Department presented the testimony of Investigator Richard Murvin and Penalty Auditor (PA) Christopher Richardson. The Department offered ten exhibits, all of which were admitted into evidence.^{2/} Respondent called Mr. Feliciano to testify. Respondent did not offer any exhibits.

A transcript of the proceeding was ordered. The parties were allowed, by rule, to submit a proposed recommended order (PRO) to the undersigned administrative law judge within ten days of the filing of the transcript at the Division. The one-volume Transcript was filed on February 14, 2017; the PROs were due Friday, February 24, 2017. The Department timely filed its PRO which has been considered in the preparation of this Recommended Order. To date, Respondent has not filed any post-hearing submissions.

References to statutes and rules are to the 2016 versions, unless otherwise noted.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the various requirements of chapter 440, Florida Statutes. Section 440.107(3) mandates, in relevant part, that employers in Florida must secure workers' compensation insurance coverage for their employees.

2. The testimony and evidence substantiates that D and S Handyman, Inc., a Dissolved Florida Corporation, is engaged in the construction industry in Florida as D and S Handyman, Inc., and that David Feliciano is its sole proprietor.

3. On September 7, 2016, Investigator Murvin conducted a random jobsite workers' compensation compliance investigation (Compliance Investigation). Investigator Murvin spoke with

Mr. Feliciano who was working at a jobsite at 713 Lake Cummings Boulevard, Lake Alfred, Florida. During their discussion, Mr. Feliciano stated he had his own corporation (Respondent), and that Respondent was a subcontractor of ANS Plumbing to this job. Respondent was to install the plumbing at this jobsite. Mr. Feliciano claimed he had an exemption.

4. Investigator Murvin checked the Florida Department of State, Division of Corporations', Sunbiz website to verify Respondent's status. Mr. Murvin determined that David Feliciano, d/b/a D and S Handyman, Inc., was no longer an active corporation but that when it was active, Mr. Feliciano was the sole corporate officer and registered agent.

5. Investigator Murvin then checked the Department's Coverage and Compliance Automated System (CCAS) to see whether Respondent had a workers' compensation insurance policy or any current exemptions.

6. CCAS is the Department's internal database that contains workers' compensation insurance policy information and exemption information. Insurance providers are required to report coverage and cancellation information, which is then input into CCAS.

7. Investigator Murvin's CCAS search revealed that Respondent had no workers' compensation coverage or exemptions during the relevant period.

8. An exemption is a method by which a corporate officer can exempt himself from the requirements of chapter 440. See § 440.05, Fla. Stat.

9. Mr. Feliciano held an exemption as Respondent's owner from December 11, 2013, until it expired on December 11, 2015.

10. Investigator Murvin then contacted ANS Plumbing and confirmed that Respondent was subcontracted to install the plumbing at the jobsite. ANS Plumbing also confirmed that Mr. Feliciano of Respondent had an "exemption on file."^{3/}

11. Finding no insurance in place, Investigator Murvin contacted his supervisor, who directed him to issue the SWO. The SWO was issued and served on Mr. Feliciano/Respondent on September 7, 2016. Additionally, a business records request (BRR) was also served on Mr. Feliciano for Respondent's business records. This BRR sought additional information concerning Respondent's construction business between December 12, 2015 (the day after Mr. Feliciano's exemption expired), through September 7, 2016 (the date the SWO issued).

12. Respondent did not provide any business records to the Department in response to the BRR. The lack of business records compelled the Department to use the imputation formula to determine Respondent's payroll.

13. The Department assigned PA Richardson to calculate the appropriate penalty. For the penalty assessment calculation,

PA Richardson consulted the classification codes listed in the Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rules 69L-6.021 and 69L-6.031. Classification codes are assigned to various occupations to assist the calculation of workers' compensation insurance premiums.

14. Based on the information obtained from the jobsite, PA Richardson assigned the appropriate class code for plumbing, 5183.^{4/} PA Richardson determined the gross payroll for Respondent for the entire period of non-compliance, which included two separate periods of non-compliance, i.e., December 12, 2015, through December 31, 2015, and January 1 through September 2016. There were different rates for each period. PA Richardson then utilized the corresponding approved manual rates for those classification codes and the related periods of non-compliance.

15. PA Richardson applied the correct approved manual rates and correctly utilized the methodology specified in section 440.107(7)(d)1. and rules 69L-6.027 and 69L-6.028 to determine the penalty of \$6,859.70.

16. The Department has demonstrated by clear and convincing evidence that Respondent was engaged in the construction industry (specifically plumbing) in Florida between December 12, 2015, and September 7, 2016; that Respondent employed Mr. Feliciano; and that Respondent did not have the requisite workers' compensation

insurance or an exemption to cover Mr. Feliciano during the applicable period.

CONCLUSIONS OF LAW

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

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

19. Pursuant to sections 440.10, 440.107(2), and 440.38, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. Strict compliance with the Workers' Compensation Law is required by the employer. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989); Dep't of Fin. Servs. v. L & I Consolidated Servs., Inc., Case No. 08-5911 (Fla. DOAH May 28, 2009; Fla. DFS July 2, 2009).

20. Florida law defines "employment" as "any service performed by an employee for the person employing him or her" and, "with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) and (b)2., Fla. Stat.

21. Section 440.02(8) defines "construction industry" as "for-profit activities involving any building, clearing, filling, excavation, or a substantial improvement in the size or use of any

structure or the appearance of any land." The Department is given authority to, "by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the terms 'construction industry' as set forth in this section." The Department has done so, in rule 69L-6.021, specifically paragraph (2)(s).

22. The burden of proof in matters such as this is on the Department because it is asserting the affirmative of the issue, i.e., that Respondent did not have workers' compensation insurance in place for its employees or have a valid exemption in place. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

23. The administrative fines being proposed by the Department are penal in nature. The standard of proof for such cases is clear and convincing evidence. See Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

24. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil and administrative cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2d DCA 1970). Further, clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a 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. 1st DCA 1983)

(Citations omitted).

25. Section 440.107 requires employers to obtain workers' compensation insurance coverage for its employees and officers (except that officers may obtain an exemption from coverage). Subcontractors have the same responsibility as contractors for obtaining coverage for their employees. See § 440.10, Fla. Stat.

26. Section 440.107(7)(d)1. provides that the Department:

[S]hall 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.

This statutory provision mandates that the Department assess a penalty for non-compliance with chapter 440 and does not provide any authority for the Department to reduce the amount of the penalty.

27. Rule 69L-6.027 adopts a penalty calculation worksheet for the Department's penalty auditors to utilize "for purposes of calculating penalties to be assessed against employers pursuant to section 440.107, Florida Statutes."

28. The Department properly utilized the penalty worksheet mandated by rule 69L-6.027 and the procedure mandated by section 440.107(7)(d)1. and (7)(e) to calculate the penalty owed by Respondent as a result of its failure to comply with the coverage requirements of chapter 440.

29. The Department proved by clear and convincing evidence that it correctly calculated the penalty in the amount of \$6,859.70.

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 imposing a penalty of \$6,859.70 against Respondent, David Feliciano, d/b/a D and S Handyman, Inc., a Dissolved Florida Corporation, and D and S Handyman, Inc.

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



LYNNE A. QUIMBY-PENNOCK
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 28th day of February, 2017.

ENDNOTES

^{1/} For ease in reading this Recommended Order, Respondents David Feliciano, d/b/a D and S Handyman, Inc., a Dissolved Florida Corporation, and D and S Handyman, Inc., shall be referred to in the singular as Respondent.

^{2/} Mr. Feliciano "objected" to Exhibits 1 and 4; however, his objections were not clear but rather an attack on the process.

^{3/} ANS Plumbing has the appropriate workers' compensation coverage in place.

^{4/} Petitioner's PRO incorrectly provides "class code 5038 (plumbing) because this code matched the description of the job duties performed by Respondent." PA Richardson testified the class code was 5183. See Transcript page 76, line 24; page 78, line 3; and page 79, lines 1 and 3.

COPIES FURNISHED:

David Feliciano Morant
111 2nd Street
Davenport, Florida 33837

Trevor S. Suter, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399
(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.