

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-7532

COBALT SHORE INVESTMENTS, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 27, 2017, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Tabitha G. Harnage, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Jamison Jessup, Qualified Representative
2955 Enterprise Road, Suite B
DeBary, Florida 32713

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 December 10, 2015, the Department of Financial Services, Division of Workers' Compensation ("the Division"), served a Stop-Work Order and Order of Penalty Assessment on Cobalt Shore Investments, LLC ("Cobalt").

The Division issued an Amended Order of Penalty Assessment on February 1, 2016, requiring Cobalt to pay a \$117,086.16 penalty.

After evaluating records provided by Cobalt, the Division issued a 2nd Amended Order of Penalty Assessment on May 17, 2016, reducing the aforementioned penalty to \$16,232.32.

Cobalt requested an administrative hearing, and the Division referred this matter to DOAH on August 18, 2016, where it was assigned case number 16-4692.

Via a Notice of Hearing issued on September 15, 2016, the undersigned scheduled a final hearing for October 24, 2016.

On October 18, 2016, the parties filed an "Agreed Motion to Continue Final Hearing" (the "Motion to Continue"). In support thereof, the Division noted that the parties were attempting to settle their dispute and that unforeseeable circumstances had prevented the Division from deposing a key witness.

Accordingly, the parties requested that the undersigned continue the final hearing "to a later date."

After considering the assertions set forth in the Motion to Continue, the undersigned issued an "Order Closing File and Relinquishing Jurisdiction" that: (a) granted the Motion to Continue; (b) canceled the final hearing; and (c) relinquished jurisdiction to the Division without prejudice to either party moving to re-open the case.

On December 9, 2016, the Division filed a "Motion to Reopen File" notifying the undersigned that the parties had been unable to reach a settlement and that a formal administrative hearing was necessary to resolve their dispute.

The undersigned issued an Order on December 21, 2016, re-opening the formal administrative hearing as case number 16-7532.

On January 11, 2017, the undersigned scheduled the final hearing to occur on February 27, 2017.

The undersigned issued an Order on February 17, 2017, allowing Scott Shirey and Mark Shirey to testify by telephone during the final hearing.

The final hearing was convened as scheduled on February 27, 2017. During the course of the final hearing, the Division presented the testimony of Phil Sley and Chris Byrnes. The Division offered Exhibits 1 through 10 that were admitted into

evidence without objection. Cobalt offered the testimony of Scott Shirey. With no objection from the Division, the undersigned accepted Cobalt's Exhibits 1 through 5 into evidence.

At the beginning of the final hearing, the undersigned granted the Division's ore tenus motion to allow a 3rd Amended Order of Penalty Assessment. As a result, the penalty at issue was reduced from \$16,232.32 to \$13,687.24.

At the close of the proceedings on February 27, 2017, the undersigned left the record open so that the Division could depose Mark Shirey in lieu of live testimony. However, the Division filed a "Motion to Close Record" on March 7, 2017, notifying the undersigned that the Division no longer wished to depose Mark Shirey.

The undersigned issued an Order on March 14, 2017, granting the Division's Motion to Close Record, and directing the parties to file their proposed recommended orders 10 days following the filing of the final hearing transcript with DOAH.

The Transcript was filed with DOAH on March 16, 2017.

On March 24, 2017, Respondent filed a Motion requesting that the deadline for filing proposed recommended orders be extended from March 27, 2017, to April 10, 2017. After concluding that Respondent had demonstrated good cause for an

extension, the undersigned issued an Order on March 27, 2017, granting the Motion.

The parties' Proposed Recommended Orders were timely filed on April 10, 2017, and the undersigned considered those 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 (2015),^{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. Scott Shirey owns Cobalt, and his brother Mark Shirey works for him. Cobalt is in the business of "house flipping."

4. In order to flip a house, Cobalt utilizes a consistent process over the course of several weeks.^{2/} The process requires Mark Shirey to evaluate the sales prices of other houses in close proximity to a Cobalt-owned house. Mark Shirey then formulates an estimate of how much Cobalt could expect to

receive in a sale. In order to achieve a particular return on Cobalt's investment, Mark Shirey's sales forecast governs how much Cobalt elects to invest in renovating a particular house and preparing it for sale.

5. Mark Shirey then decides exactly how to renovate a particular house and hires contractors to do certain jobs.

6. Prior to any actual work being done on a house, Mark Shirey conducts a "trash roll-off" by removing furniture, curtains, food, and other items from the house.

7. At that point, the contractors hired by Cobalt start renovating the house. Mark Shirey monitors their work, ensures they are performing the work correctly, directs their work, and acquires whatever materials they need.

8. In order to control costs and ensure that a particular house will be profitable when it is flipped, Mark Shirey also confers with the contractors as to how particular repairs are to be accomplished.

9. In addition to supervising all manner of contractors such as painters, sheet rockers, tilers, carpenters, landscapers, plumbers, and electricians, Mark Shirey is also responsible for paying them.

10. During the course of each renovation, Mark Shirey periodically confers with his brother over the telephone and updates him on the progress of particular projects.

11. At any one time, Mark Shirey can be in charge of renovating multiple houses.

12. Scott Shirey uses the terms, "foreman," and "supervisor" to describe his brother's work.

13. Chris Byrnes is a compliance investigator for the Division, and he ascertains whether employers have workers' compensation coverage as required by Florida law.

14. On December 10, 2015, Mr. Byrnes was conducting random compliance checks when he drove past 14 Cousineau Road in Pensacola, Florida.

15. He observed that the house at 14 Cousineau Road was being renovated.

16. Mr. Byrnes stopped and spoke to Michael Phare, Jr. The latter had been measuring and cutting a piece of sheetrock in front of the house.

17. Michael Phare, Jr. told Mr. Byrnes that he was assisting his father that week. Mr. Byrnes then went into the house and observed Michael Phare, Sr. performing trim carpentry work on the baseboards in a bathroom.

18. Michael Phare, Sr. stated to Mr. Byrnes that he was working for the house's owner and had been doing so at other locations since July of 2015.

19. Mr. Byrnes then met Mark Shirey. The latter stated that Michael Phare, Sr., Michael Phare, Jr., and another person

at the job site (identified only as "Mr. Tolle") worked for Scott Shirey and that the house was owned by Cobalt.

20. Mr. Byrnes had not observed Mark Shirey performing any work on the home, but Mark Shirey described himself as the foreman and stated that he was directing work at the 14 Cousineau Road address for his brother.

21. Mark Shirey told Mr. Byrnes that Michael Phare, Sr., Michael Phare Jr., and Mr. Tolle were independent contractors who would be receiving 1099 tax forms from Cobalt.

22. Mr. Byrnes later spoke to Scott Shirey over the telephone on December 10, 2015, and the latter stated that the four individuals Mr. Byrnes encountered at the 14 Cousineau Road address were working for him. Scott Shirey described his brother as being a supervisor.

23. The Division served Cobalt with a Stop-Work Order and Order of Penalty Assessment on December 10, 2015, and the Division ultimately determined that Cobalt had failed to obtain sufficient workers' compensation coverage between January 1, 2015, and December 10, 2015 ("the noncompliance period"). See § 440.107(7)(d)1., Fla. Stat. (providing that 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).

24. Phil Sley, a penalty auditor employed by the Division, calculated the aforementioned penalty based on business records provided by Cobalt. Those business records included bank statements, check images, and a spreadsheet produced by Cobalt.

25. For each person for whom Cobalt failed to obtain sufficient worker's compensation coverage during the noncompliance period, Mr. Sley determined how much money Cobalt paid each person during that period.

26. The gross payroll amount for each person is divided by 100 in order to create a percentage, and the percentage associated with each person is then multiplied by an "approved manual rate."

27. An approved manual rate is associated with a particular class code.

28. A class code describes an employee's scope of work based on the type of work he or she performs on a daily basis.

29. The National Council on Compensation Insurance publishes the Scopes Manual, and the Scopes Manual sets forth class codes for numerous types of work.

30. Multiplying the gross payroll percentage by an approved manual rate results in a workers' compensation insurance premium for a particular employee.

31. As required by section 440.107(7)(d)1, each premium amount is multiplied by two in order to calculate a penalty associated with each employee for whom workers' compensation insurance was not obtained.

32. Mr. Sley then added the individual penalties associated with each Cobalt employee in order to calculate the total penalty.

33. The final penalty calculated by Mr. Sley (and set forth in the 3rd Amended Order of Penalty Assessment) is \$13,687.24.

34. During the final hearing, Cobalt's counsel announced that it did not dispute anything in the 3rd Amended Order of Penalty Assessment other than the class code assigned to \$40,000 of salary paid to Mark Shirey during the noncompliance period.

35. In other words, Cobalt agreed that it did not have a sufficient amount of workers' compensation coverage in place during the audit period.

36. Scott Shirey is of the opinion that Mark Shirey's scope of work falls under class code 5606. According to Cobalt,

the penalty associated with the \$40,000 of salary paid to Mark Shirey during the noncompliance period should be \$1,850.52.

37. The Scopes Manual describes class code 5606 as follows:

This classification is available only to project managers, construction executives, construction managers, or construction superintendents having administrative or managerial responsibility for construction or erection projects. When determining eligibility, it is the job duties, and not the job titles, that are the main consideration.

1. "Project Manager, Construction Executive, Construction Manager, or Construction Superintendent" are defined as those persons exercising operational control indirectly through full-time job supervisors or foremen of the employer.

2. When exercising control through a subcontractor, each subcontractor must have a job supervisor or foreman at the specific job site in order to permit the assignment of this classification. The supervisor or foreman of the subcontractor may manage one site or multiple sites. If any of the subcontractors do not have a job supervisor or foreman at any job site visited by the construction executive, all of the payroll of the construction executive for that policy year is assigned to the highest rated construction class code applicable. A sole proprietor or owner/operator with no employees, working as a subcontractor for the insured, would prevent the assignment of this classification to a construction executive because the subcontractor does not have the required job supervisor or foreman.

3. This code does not apply to any person who is directly in charge of or who is performing any degree of actual construction work. Such person must be assigned to the classification that specifically describes the type of construction or erection operation over which they are exercising direct supervisory control provided separate payroll records are maintained for each operation. Any such operation for which separate payroll records are not maintained must be assigned to the highest rated classification that applies to the job or location where the operation is performed.

4. Code 5606 is not available for division of a single employee's payroll with any other classification.

(emphasis added).

38. The Scopes Manual continues by stating that:

Code 5606 is intended to cover the project manager, construction executive, construction manager, or construction superintendent of both specialty and general contracting risks. The project manager, etc., will spend some time in the office and the remainder of time visiting various job sites conferring with the job superintendent or foreperson to keep track of the progress of the work being conducted at each job or project. The qualifications established for the use of Code 5606 are that the project manager, etc., of a construction or erection concern must be exercising supervision through superintendents or forepeople of the employer and cannot have direct charge over the workers at the construction or erection site. The project manager may also exercise supervision through subcontractors, superintendents, or forepeople, but each subcontractor must have an on-site superintendent or foreperson at each and every job site. The important element is determining their job duties and not their

title as well as that the supervision must be indirect rather than direct.

(emphasis added).

39. With regard to Mark Shirey's duties, Scott Shirey testified as follows:

Q: Okay. So earlier - let me go back. So you said we - there's a - that you might call Mark Shirey a supervisor; is that right?

A: I would call him - I don't know. I would call him a house flipper. That's what I'm saying, that's where it gets strange. I'm not sure what I would call him. Yes, he might supervise people, yes, he might be a foreman, but he is me, we flip houses, that's what we do. And if there's a classification code for that, I'd love to have it.

Q: You mentioned when Mr. Jessup was questioning you that Mark would keep you up-to-date and keep you apprised of the construction at the different houses; is that right?

A: That's correct.

Q: How would Mark know about the progress or lack thereof at each individual house to be able to tell you?

A: Well, he would go by and observe it and see what's happening.

Q: What else would he do?

A: I mean, that's - I mean, he would go to Home Depot. If someone needed something, he would go to Home Depot and he would have a discussion with people on the quickest way to do the work.

Q: Okay. You said he keeps track of the contractors and also pays them on Friday, right?

A: That's correct.

Q: What does "keeping track of the contractors" mean?

A: "Keeping track of the contractors" is calling them to say "Where are you, how long will the job take?" A lot of phone calls. That's pretty much it.

Q: Would he also go to the sites and check on the progress also?

A: Correct.

Q: You said earlier that Mark goes to the sites and makes sure the sites are working correctly. Can you elaborate on that?

A: Yeah, I'm looking at specific examples. When someone planted a plant in the wrong place, he would say, "You planted a plant in the wrong place, go dig it up and move it," or you - "You failed to put down a tarp good enough, so you're getting paint on the new floor," or "You have installed a cabinet incorrectly," you know, just like you're observing and seeing what people do.

40. The Division argues that class code 5437 should be assigned to the \$40,000 of salary paid to Mark Shirey between January 1, 2015, and December 10, 2015.

41. With regard to class code 5437, the Scopes Manual provides that

Code 5437 is intended primarily for specialist contractors performing interior carpentry finish or trim such as the installation of paneling, molding, cornices,

parquet or finished wooden flooring, mantels, staircases, cabinets, and counters. Carpentry of this kind generally involves skilled workmanship. The installation of interior doors by trim or finish carpenters is also included in Code 5437. These "specialists" will generally be required to perform a great degree of finish work, cut the door to the proper size to fit the existing framework, perhaps do some routing for any interlocking weather stripping or safety strips, and drill holes for the doorknob, hinges and striker plates.

42. Assigning class code 5437 to the \$40,000 paid to Mark Shirey results in a penalty of \$6,752 being associated with that particular portion of Cobalt's payroll, and that is the only portion of the 3rd Amended Order of Penalty Assessment in dispute.

43. As explained below, the Division has proven by clear and convincing evidence that class code 5606 is inapplicable to the \$40,000 paid to Mark Shirey and that class code 5437 for the work performed by Mr. Phare, Sr. does apply.

44. Furthermore, given that Mark Shirey was exercising direct, on-site supervisory control over work performed at 14 Cousineau Road, it was appropriate that the highest rated classification for the work being performed at the location be assigned to Mr. Shirey.

CONCLUSIONS OF LAW

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

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

47. 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.

48. 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.

49. 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).

50. Because the Division seeks to impose an administrative penalty or fine against Cobalt, 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).

51. In order to meet its burden in the instant case, the Division must demonstrate that: (a) Cobalt was required to comply with the Workers' Compensation Law; (b) that Cobalt failed

to comply with the requirements of the Workers' Compensation Law; and that (c) the penalty assessed by the Division is appropriate.

52. There is no dispute that Cobalt was required to comply with the Workers' Compensation Law and that Cobalt failed to do so. Cobalt only disputes the Division's decision to apply class code 5437 rather than 5606 to \$40,000 paid to Mark Shirey during the noncompliance period.

53. However, given the testimony from Scott Shirey regarding Mark Shirey's responsibilities, the plain language of the description for class code 5606 clearly indicates that it should not be applied to Mark Shirey's work. See generally Wilder v. State, 194 So. 3d 1050, 1052 (Fla. 1st DCA 2016) (noting that the resolution of the case began and ended with the plain language of the relevant statutes).

54. The description for class code 5606 expressly states that "[t]his code does not apply to any person who is directly in charge of or who is performing any degree of actual construction work." As noted above in the Findings of Fact, Mark Shirey exercises direct control over the contractors that he hires. Indeed, the evidence was clear and convincing that Mark Shirey very closely supervises the work of each contractor that Cobalt hires.^{3/}

55. Class code 5606 also provides that a project manager, construction executive, or a construction manager who does

exercise direct control over work at a job site "must be assigned to the highest rated classification that applies to the job or location where the operation is performed."

56. Mr. Byrnes witnessed Michael Phare, Sr. performing trim carpentry work on the baseboards in a bathroom, and that work clearly falls within the scope of class code 5437.

57. Accordingly, the Division has proven by clear and convincing evidence that class code 5437 applies to the \$40,000 at issue paid to Mark Shirey during the noncompliance period.^{4/}

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 \$13,687.24 on Cobalt Shore Investments, LLC.

DONE AND ENTERED this 9th day of May, 2016, in Tallahassee,
Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of May, 2016.

ENDNOTES

^{1/} Unless stated otherwise, all statutory citations will be to the 2015 version of the Florida Statutes.

^{2/} With regard to the process utilized by Cobalt, Scott Shirey testified that

[y]es, because we kind of have - we have a formula. You know, if you're a house flipper, you've got to have a formula about being able to do something over and over again to make money. So we have a formula on how long we have to do something. If you've ever seen any of these flipping shows, time is money, so you've got to have a system to go this is what we do, this is what we do for the first two weeks, this is what we do the third week, this is what we do for this, and you just keep repeating it if you want to make money.

^{3/} The Division could have argued that Mark Shirey engages in "actual construction work" when he cleans a particular house. However, it is not necessary to reach that question given the

unambiguous testimony that Mark Shirey exercised direct control over the contractors he hired.

^{4/} In light of Scott Shirey's testimony regarding the range of contractors that Mark Shirey typically supervised, the Division could possibly have argued that a class code with a higher approved manual rate should have been applied to the payroll at issue. Instead, the Division utilized the class code applicable to the work Mr. Burns witnessed being performed on December 10, 2015, at 14 Cousineau Road in Pensacola. To whatever extent class code 5437 was not the highest rated classification that could have been utilized, that worked to Cobalt's benefit.

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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.