

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-1229

BEST BUILD, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on October 20, 2017, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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

For Respondent: John Laurance Reid, Esquire
Law Office of John Reid PLLC
1030-9 East Lafayette Street
Tallahassee, Florida 32314

STATEMENT OF THE ISSUES

The issues are whether Respondent, Best Build, LLC ("Best Build"), failed to secure workers' compensation coverage for its

employees; and, if so, whether the Department of Financial Services, Division of Workers' Compensation ("Department"), correctly calculated the penalty assessment imposed against Respondent.

PRELIMINARY STATEMENT

This proceeding arose from the requirement that employers must secure workers' compensation insurance for their employees. On November 3, 2016, the Department served a Stop-Work Order and Order of Penalty Assessment ("Stop-Work Order" or "SWO") on Respondent for failing to secure workers' compensation for the benefit of its employees as required by chapter 440, Florida Statutes. An Agreed Order of Conditional Release from Stop-Work Order was issued on November 4, 2016. Respondent filed its petition for hearing on November 18, 2016, disputing the Department's action and specifically disputing the issue of material fact that stated Respondent "did not have worker[s]' compensation coverage for employees on November 3, 2016." On December 8, 2016, the Department served an Amended Order of Penalty Assessment ("AOPA") on Respondent by certified mail, assessing a penalty of \$238,681.52. On February 22, 2017, the matter was referred to DOAH and was assigned to the undersigned.

On March 6, 2017, the Department filed its Agreed Response to Initial Order, and a hearing was scheduled in this matter for

May 16, 2017, by video teleconference at sites located in West Palm Beach and Tallahassee, Florida.

On April 25, 2017, Respondent filed Respondent's Agreed Motion to Continue Final Hearing, and the continuance was granted. An Order Granting Continuance and Rescheduling Hearing by Video Teleconference, setting the final hearing for July 11, 2017, was issued on April 26, 2017. On June 27, 2017, Respondent filed its Second Agreed Motion to Continue Final Hearing, which was granted. The hearing was reset for September 8, 2017. The Department filed an agreed motion for continuance on August 28, 2017. The hearing was rescheduled for October 20, 2017, and proceeded as scheduled.

At the hearing, Petitioner presented the testimony of Shelley Senfeld, compliance investigator; Odi Gibson, compliance supervisor; and Jorge Yajure, penalty auditor; and offered four exhibits, all of which were admitted into evidence. Respondent presented the testimony of Alvin Bellefleur, managing member (officer) of Best Build; Julio Jimenez, president (officer) of Hemy Services Group, Inc.; and offered four exhibits, all of which were admitted into evidence.

The one-volume Transcript of the final hearing was filed on November 16, 2017. Petitioner and Respondent timely submitted their Proposed Recommended Orders on December 11, 2017.

References to statutes are to Florida Statutes (2017), unless otherwise noted.

FINDINGS OF FACT

1. The Department is the state agency responsible for ensuring that all employers maintain workers' compensation insurance for themselves and their employees. § 440.107, Fla. Stat.

2. It is the duty of the Department to make random inspections of jobsites and to answer complaints concerning potential violations of workers' compensation rules.

3. At all times relevant hereto, Best Build was a limited liability company duly existing pursuant to the laws of the State of Florida. Best Build organized on November 20, 2002. Alvin Bellefleur is the owner, sole managing member, and registered agent of Best Build. The address of record for Best Build is 378 Northlake Boulevard, Suite 213, North Palm Beach, Florida 33408.

4. At approximately 9:30 a.m. on November 3, 2016, the Department's investigator, Shelly Senfeld, conducted a routine visit to a large construction site at 544 North Haverhill Road in West Palm Beach. She was joined by other staff members of the Department.

5. Ms. Senfeld observed eight individuals performing masonry/stucco work at the site.

6. Ms. Senfeld first approached a worker named Orturio Flores. Mr. Flores did not speak English and conversed with Ms. Senfeld in Spanish.

7. Ms. Senfeld stated that two other workers that she encountered at the jobsite, Messrs. Gregorio Avila and Santos Martel, also spoke Spanish and did not speak English.

8. Ms. Senfeld asked if she could speak with the "jefe," which is the Spanish word for boss.

9. Ms. Senfeld approached Salvador Rodriguez who stated he was the supervisor for the site. He stated that all workers on-site worked for Best Build, which was subcontracted from Lotspeich of Florida.

10. Ms. Senfeld later discovered that Mr. Rodriguez was not an employee of Best Build, but rather a subcontractor. Mr. Rodriguez had his own company and held a valid workers' compensation exemption.

11. In total, Ms. Senfeld observed eight individuals working on the jobsite on behalf of Best Build. She identified by name seven individuals: Messrs. Orturio Flores, Gregorio Avila, Santos Martel, Salvador Rodriguez, Artadio Lopez, Christopher Rosier, and Filadelfo Flores Cabrera.

12. Ms. Senfeld testified that Best Build had workers' compensation insurance coverage through a Professional Employee

Organization ("PEO"), known as Cornerstone Capital Group ("Cornerstone").

13. Ms. Senfeld testified that she had spoken with Ms. Brittany Alexander at Cornerstone who stated that Best Build was a client of the PEO.

14. Ms. Senfeld offered hearsay testimony, stating that Ms. Alexander indicated that only two individuals were listed on the roster with the PEO, and, as a result, were covered by workers' compensation insurance.

15. Counsel for Best Build objected to the introduction of this hearsay testimony as it was a sole basis for the finding that only two individuals were covered by the PEO roster.

16. Since Ms. Alexander did not testify at the final hearing and a copy of the PEO's roster from the date of the SWO was never admitted into evidence, the statement of Ms. Alexander, as recalled by Ms. Senfeld, would serve as a sole basis for a finding of fact and, therefore, cannot be considered.

17. Ms. Senfeld then spoke by telephone with Best Build owner Alvin Bellefleur, who indicated at the time that he had hired a subcontractor named Hemy Services Group, Inc. ("Hemy"), and had been provided a certificate of insurance showing the subcontractor was in compliance with the requirements of chapter 440.

18. Ms. Senfeld stated that Mr. Bellefleur identified the insurer from the certificate of insurance provided by Hemy as being Norguard Insurance and that the policy was valid through May 2017.

19. Best Build's certificate of insurance provided by Hemy was offered into evidence. It did state that policy was valid through May 2017 and that the insurer was Norguard Insurance.

20. Ms. Senfeld reviewed the insurance policy held by Hemy through the Department's database known as "CCAS," which showed that the policy was set to cancel for non-payment of premium by November 5, 2016, two days after the issuance of the SWO.

21. Ms. Senfeld also identified through the CCAS that the policy for Hemy was for a gross payroll amount of \$26,000.

22. Ms. Senfeld further opined that since the gross payroll was only \$26,000, that Hemy was a shell company which was underinsured for workers' compensation.

23. No evidence was introduced to support Ms. Senfeld's opinion that Hemy was, in fact, a shell company. This allegation cannot be credited.

24. Mr. Bellefleur testified that four of the individuals on the jobsite were employees while the remaining individuals were employed by subcontractor Hemy.

25. The individuals whom Mr. Bellefleur identified were employees of Best Build were Messrs. Lopez, Rosier, Flores

Cabrera, and Castro Fuster. The remaining individuals on the AOPA, entered into evidence by the Department as Exhibit D, were employees of Hemy. They are Messrs. Avila, Flores, and Martel.

26. The certificates of insurance provided by Respondent covered Best Build and Hemy for the period of June 1, 2015, through the date of the SWO, November 3, 2016 (the policies actually were effective through January 1, 2017).

27. Looking back two years, for payroll and penalty purposes, a gap in coverage exists for the period of six months and 26 days (November 4, 2014-May 31, 2015). No insurance certificate was produced by Respondent for that period, and the Department's CCAS records failed to show coverage for that period.

28. Mr. Bellefleur testified that Messrs. Lopez, Rosier, Flores Cabrera, and Castro Fuster were added to the PEO roster prior to the issuance of the SWO.

29. Mr. Bellefleur entered into evidence copies of some Best Build business records, specifically payroll records, showing that Messrs. Lopez, Rosier, Flores Cabrera, and Castro Fuster were paid through Cornerstone and were covered by a valid workers' compensation insurance policy. However, those records consisted of only a single payroll period, October 30, 2016, through November 5, 2016, and, except for Mr. Bellefleur, appear to cover just the hours for that pay period (from no hours for

Messrs. Avila, Lopez Cueyar, Roger Maldonado, and Nestor Perez, to hours ranging from ten hours for Mr. Artadio Lopez to 20 hours for Messrs. Fuster, Flores, and Rosier). The hours listed for Mr. Bellefleur show a cumulative number for the year of 600, while no cumulative hours are provided for the other eight employees. While this is a credible payroll report, it does not cover the other 23.75 months of the penalty period. No explanation was given for Respondent's failure to provide the remaining payroll records for the two-year period at issue.

30. Mr. Bellefleur also testified that he sought confirmation of workers' compensation coverage by the representative of Hemy.

31. At about the time Hemy was retained as a subcontractor by Best Build, Mr. Bellefleur received a copy of Hemy's local business tax receipt for Miami-Dade County and an executed IRS Form W-9.

32. Mr. Bellefleur testified that when hiring a subcontractor, he also seeks verification that it is in compliance with chapter 440.

33. Mr. Bellefleur confirmed that Hemy provided Best Build with a certificate of insurance at the time their services were retained.

34. Mr. Bellefleur entered into evidence a copy of the certificate of insurance provided to him by Hemy. While the

undersigned has no reason to doubt the authenticity of the coverage certificates for both Best Build and Hemy, without the payroll records, it is impossible to determine a mitigation of any payroll or penalty for periods not covered by the insurance certificates.

35. On cross-examination, Ms. Senfeld conceded that the workers' compensation insurance policy held by Hemy appeared on its face to be valid as of the date the SWO was issued.

36. Despite the validity of the insurance certificates for June 1, 2015, through November 3, 2016, without business records having been submitted by Respondent, the Department has no basis for mitigation of any payroll determination, except for the one pay period reflected in the records described in paragraph 29 above. Accordingly, payroll must be imputed for the periods not covered by the records produced.

37. However, the penalty assessment may be mitigated for the periods covered by the certificates of insurance, namely all but the six months and 26 days from November 4, 2014, through November 3, 2016 (208 days total).

38. Reviewing the records of insurance coverage leaves 208 days of the 730 days (the Department's two-year auditing period) looking back from the date of the SWO, November 3, 2016.

39. Based upon Ms. Senfeld's observations at the jobsite on November 3, 2016, the Department's auditor assigned National

Council on Compensation Insurance ("NCCI") classification code 5022, applying to individuals engaged in the stucco occupation, to determine the penalty to be imposed for the periods when workers' compensation coverage has not been secured.

40. The auditor applied the approved manual rates for classification code 5022 to the related periods of non-compliance. The application of these rates was utilized by the methodology specified in section 440.107(7)(d)1. and Florida Administrative Code Rule 69L-6.027, to determine the final penalty. The Department determined the gross payroll for Respondent's employees pursuant to this same statutory methodology. As for the one payroll period represented by the only payroll-related exhibit offered by Respondent at hearing, the Department could not use that as the sole basis for determining the actual payroll over a two-year period. One weekly payroll report is insufficient to make such an extrapolation.

41. On December 8, 2016, the Department served the AOPA on Respondent, assessing a penalty of \$238,681.52. This penalty was fully imputed.

42. Since Respondent provided evidence of workers' compensation insurance coverage for 522 days out of the 730 days of the two-year period for imputing the penalty, the penalty

should be reduced by 72 percent (522/730). The result is a penalty to be assessed of \$66,830.83.

CONCLUSIONS OF LAW

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

44. The burden of proof in this matter is on the Department because it is asserting the affirmative of the issue. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

45. Because administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant time period and that the penalty assessments are correct. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996).

46. The Department is the agency responsible for enforcement of chapter 440. As the responsible agency, the Department must abide by the statutes and rules that govern it.

47. 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. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

48. Section 440.107(2) states that "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

49. Pursuant to section 440.107(3)(g):

(3) The department shall enforce workers' compensation coverage requirements . . . the department shall have the power to:

* * *

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

50. Section 440.02(16)(a) defines "employer," in part, as "every person carrying on any employment." Further,

[i]f the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

51. The workers' compensation law requires employers to secure the payment of compensation for their employees.

§§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2015).

52. 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.

53. The Department is empowered to examine and copy the business records of any employer conducting business in Florida to determine whether it is in compliance with the Workers' Compensation Law. See § 440.107(3), Fla. Stat. Whenever the Department finds an employer who is required to have such coverage but fails to do so, such failure is deemed an immediate serious danger to the 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. See § 440.107(1), (7)(a), Fla. Stat.

54. The Department properly issued a SWO since the eight individuals providing work on the jobsite on behalf of Best Build were either covered by a workers' compensation exemption, by a valid workers' compensation insurance policy through a PEO (employees Bellefleur, Fuster, Flores Cabrera, Lopez, and Rosier), or through a valid workers' compensation insurance policy held by a subcontractor (employees Avila, Flores, and Martel); however, no evidence was produced to demonstrate

coverage for the period of November 4, 2014, through May 31, 2015.

55. As to penalties, section 440.107(7)(d)1. states:

In 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.

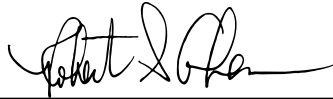
56. The Department proved by clear and convincing evidence that Respondent failed to provide the requested proof of insurance for the period of November 4, 2014, through May 31, 2015. However, the remainder of the assessment period, June 1, 2015, through November 3, 2016, was covered under certificates of insurance issued to either Best Build or Hemy.

57. Unfortunately for Respondent, it failed to provide the business records of payroll that could have excused it completely from the payment of a penalty assessment. Had those records shown a lower payroll, the assessment, even for the period where no workers' compensation insurance coverage had been secured, November 4, 2014, through May 31, 2015, might have been excused from penalty as well.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order assessing Respondent \$66,830.83.

DONE AND ENTERED this 20th day of December, 2017, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of December, 2017.

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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.