

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-1608

STUCCO DRYWALL CONTRACTORS,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing by video teleconference on November 20, 2017, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Susan L. Herendeen, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: John Laurance Reid, Esquire
The Law Office of John Reid
Post Office Box 6272
Tallahassee, Florida 32314

STATEMENT OF THE ISSUES

Whether Respondent, Stucco Drywall Contractors, Inc. ("Respondent"), failed to comply with the coverage requirements of the Workers' Compensation Law, chapter 440, Florida Statutes; and, if so, whether Petitioner, Department of Financial Services, Division of Workers' Compensation ("Department"), correctly calculated the penalty assessed against Respondent.

Respondent does not contest the Stop-Work Order for Specific Worksite Only ("SWO"). Rather, Respondent asserts that the penalty contained in the 2nd Amended Penalty Assessment inappropriately includes two business entities ("HT Consulting Contractors" and "NDDS Services") that were "independent contractors" performing non-construction work, rather than "subcontractors" for whom Respondent has statutory liability.

PRELIMINARY STATEMENT

On November 14, 2016, the Department issued an SWO against Respondent. On December 5, 2016, Respondent timely requested an administrative hearing. On January 5, 2017, the Department served an Amended Order of Penalty Assessment ("AOPA"), by email to Respondent's counsel of record, assessing a penalty of \$117,791.66. On March 20, 2017, the Department referred the matter to the Division of Administrative Hearings ("DOAH") to assign an administrative law judge to conduct the final hearing.

On March 23, 2017, the undersigned set the final hearing for May 26, 2017. On May 9, 2017, Respondent filed an unopposed motion to continue the final hearing. On May 10, 2017, the undersigned entered an Order granting the motion, and reset the final hearing for July 26, 2017. On July 10, 2017, Respondent filed another unopposed motion to continue the final hearing. On July 11, 2017, the undersigned entered an Order granting the motion, and reset the final hearing for September 18, 2017. On September 13, 2017, the parties filed a joint motion to continue the final hearing. On September 19, 2017, the undersigned entered an Order granting the motion, and reset the final hearing for November 20, 2017.

On September 7, 2017, the Department issued a 2nd Amended Order of Penalty Assessment, reducing the penalty to \$74,042.40. On October 13, 2017, the Department filed an agreed motion to amend the order of penalty assessment based on the 2nd Amended Order of Penalty Assessment. On October 16, 2017, the undersigned entered an Order granting the motion. The parties' Joint Pre-hearing Stipulation was filed on November 13, 2017.

The final hearing was held on November 20, 2017, with both parties present. The Department presented the testimony of Sarah Beal, penalty auditor. The Department's Exhibits 1 through 19 were received in evidence upon stipulation of the parties. Respondent presented the testimony of Yyheeling Evans, Henry

Torres Castillo, and Bernard Gomez. Respondent's Exhibits A, D, F, L, M, N, O, and P were received in evidence.

The one-volume final hearing Transcript was filed on December 11, 2017. The parties timely submitted proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

The stipulated facts in the parties' Joint Pre-hearing Stipulation have been incorporated as indicated below. Unless otherwise indicated, all statutory references refer to the 2016 Florida Statutes.

FINDINGS OF FACT

The Parties

1. The Department is the state agency responsible for enforcing the requirements of chapter 440 that employers in Florida secure the payment of workers' compensation coverage for the benefit of their employees and corporate officers.

2. Respondent, a Florida for-profit corporation, does stucco and drywall work, and was actively engaged in such business operations in the state of Florida from November 15, 2014, to November 14, 2016, during the two-year audit period. At all times material hereto, Respondent was an "employer" within the meaning of section 440.02(16), and Esperanza Duran and Bernardo Gomez were "corporate officers," as that phrase is defined in section 440.02(9).^{1/}

The Investigation

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

4. On November 14, 2016, the Department's investigator, Xotchilth Valdivia, commenced a random workers' compensation compliance investigation at 12060 Hialeah Gardens Boulevard, Hialeah Gardens, Florida 33018, because she noticed two men doing a plaster job at a commercial construction site. The men said they worked for Plaster Solutions, Inc., adding that Plaster Solutions was a subcontractor for Respondent. The owner of Plaster Solutions, Duval R. Chavez, Sr., came to the worksite and told the investigator he had an exemption from Florida's workers' compensation laws, but no coverage for his two employees. Mr. Gomez came to the worksite and told the investigator he requested proof of workers' compensation insurance when he hired Plastic Solutions, but did not receive it.

5. The investigator searched the Compliance and Coverage Automated System maintained by the Division of Workers' Compensation and found an exemption for Duval R. Chavez, Sr., but no workers' compensation insurance for employees of Plaster Solutions. A similar search retrieved an exemption for Mr. Gomez and an employee leasing policy for Respondent. An employee leasing roster provided by Howard Leasing identified 10 employees

of Respondent. The two men observed performing plaster work, Gilberto Reyes and Alexis Jeovany Ramos Jiminez, were not on the leasing roster and did not have exemptions from Florida's workers' compensation laws.

6. The Department's investigator contacted her supervisor and received permission to issue SWO 16-367-D5 to Plaster Solutions, Inc., and SWO 16-368-D5 to Respondent. Both orders were personally served on the respective business owners at the worksite.

7. Upon service of the SWO, the investigator personally served Respondent with a Business Records Request ("BRR"), requesting business records sufficient to determine the amount of Respondent's unsecured payroll for purposes of assessing a penalty pursuant to section 440.107(7)(d)1., for the audit period of November 15, 2014, to November 14, 2016.

Penalty Calculation

8. The Department's penalty auditor, Sarah Beal, initially calculated a penalty in the amount of \$117,791.66, based on business records (bank statements, proof of coverage or exemption for subcontractors) provided by Respondent. The auditor assigned National Council on Compensation Insurance ("NCCI") class code 5480, Plastering, based on the investigator's observations of plastering work on the date of the site visit and records provided, such as the notations on the memo lines of Respondent's

checks. An attorney for the Department, Young Kwon, served the Amended Order of Penalty Assessment upon Respondent's attorney, by email, on January 5, 2017.

9. The Department issued a 2nd Amended Order of Penalty Assessment on September 7, 2017, reducing the penalty to \$74,042.40, based on clarifying information provided by Respondent. The undersigned granted leave to amend the penalty on October 16, 2017.

10. The 2nd Amended Order of Penalty Assessment calculates a penalty of \$56,170.68 for HT Consulting Contractors and \$12,983.50 for NDDS Services.

11. Respondent concedes it did not secure the payment of workers' compensation coverage for any of the individuals listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment during the periods of non-compliance listed on the penalty worksheet.

12. Respondent does not contest the penalties for the following individuals or entities listed on the 2nd Amended Order of Penalty Assessment: Alexis Jeovany Ramoes Jimenez, ANA Services, Inc., DH Drywall Contractors, Esperanza Duran, Gilberto Reyes, and YYM Frames Enterprises.

13. The only penalties disputed by Respondent are those attributable to HT Consulting Contractors and NDDS Services.

HT Consulting Contractors

14. Respondent contends that HT Consulting Contractors provided non-construction referral services as an independent contractor, and therefore, no penalty should be attributable to HT Consulting Contractors. However, Respondent failed to present persuasive and credible evidence at hearing that HT Consulting Contractors was an independent contractor performing non-construction referral services. Accordingly, the penalty attributable to HT Consulting Contractors is appropriate.

15. HT Consulting Contractors incorporated on August 10, 2015, and was administratively dissolved on September 23, 2016.

16. Henry Torres Castillo testified that he was the sole owner and employee of HT Consulting Contractors, a business which he operated from his residence for a period of one year up until just a few months before the hearing, when he closed the business. At all times material hereto, Mr. Castillo shared his residence with his wife, Ms. Duran, who is Respondent's president.

17. Mr. Castillo testified that he is a former construction worker in the areas of roofing, marble, stucco, and drywall, who only researched and found construction jobs for construction businesses, including Respondent, for which he was paid a commission.

18. Mr. Castillo testified that he drove his personal vehicle to construction jobs to generate leads, met clients at restaurants, traveled to different parts of Florida, and performed detailed research related to the cost of materials and labor for his client construction companies.

19. Bernard Gomez is vice-president of Respondent. Mr. Gomez likewise testified that HT Consulting Contractors was a referral company that only provided referral services to Respondent for which it was paid a commission.

20. Both Mr. Castillo and Mr. Gomez denied that HT Consulting Contractors provided any labor or work in the construction industry.

21. No written contracts, statements, receipts, or invoices evidencing any services provided by HT Consulting Contractors to Respondent were presented at hearing.

22. No detailed written description of any of the jobs for which a referral commission was purportedly paid to HT Consulting Contractors was presented at hearing.

23. No documents evidencing any of the purported detailed research by Mr. Torres were presented at hearing.

24. No federal income tax returns or IRS 1099 forms for HT Consulting Contractors were presented at hearing.

25. No business bank account statements for HT Consulting Contractors for the audit period were presented at hearing.

26. Mr. Castillo did not utilize any business cards or marketing materials on behalf of HT Consulting Contractors.

27. Ms. Duran did not testify at hearing.

28. The Department presented numerous checks from Respondent payable to HT Consulting Contractors. These checks were signed by Ms. Duran as president and on behalf of Respondent.

29. Many of the checks, included within the Department's Composite Exhibit 14, contradict Respondent's position that it paid HT Consulting Contractors for referral services as an independent contractor performing non-construction work. In fact, the checks support the Department's position that HT Consulting Contractors was a subcontractor for whom Respondent has statutory liability.

30. For example, on November 21, 2015, Ms. Duran signed check number 1319 made payable to HT Consulting Contractors in the amount of \$6,000.00. The memo line of the check reads: "Supervisor."

31. On November 20, 2015, Ms. Duran signed check number 1321 made payable to HT Consulting Contractors in the amount of \$3,800.00. The memo line of the check reads: "Supervisor."

32. On March 31, 2016, Ms. Duran signed check number 1417 made payable to HT Consulting Contractors in the amount of

\$12,000.00. The memo line of the check includes the word "labor."

33. On April 20, 2016, Ms. Duran signed check number 1442 made payable to HT Consulting Contractors in the amount of \$10,000.00. The memo line of the check reads: "Pay/employment."

34. On June 1, 2016, Ms. Duran signed check number 1490 made payable to HT Consulting Contractors in the amount of \$15,000.00. The memo line of the check reads: "Employment."

35. On July 12, 2016, Ms. Duran signed check number 1501 made payable to HT Consulting Contractors in the amount of \$10,000.00. The memo line of the check reads: "Pay Employment."

36. On August 29, 2016, Ms. Duran signed check number 1530 made payable to HT Consulting Contractors in the amount of \$11,000.00. The memo line of the check includes the words "sub labor."

37. On September 7, 2016, Ms. Duran signed check number 1534 made payable to HT Consulting Contractors in the amount of \$18,000.00. The memo line of the check includes the words "sub labor."

38. On October 21, 2016, Ms. Duran signed check number 1553 made payable to HT Consulting Contractors in the amount of \$11,000.00. The memo line of the check includes the words "sub labor."

39. Mr. Castillo could not explain the reasons for the notations of the words "labor," "supervisor," and "employment" on the memo lines of checks signed by his wife.

40. However, Mr. Castillo understands that the phrase "sub labor" "mean[s] a subcontractor provides labor."

41. Mr. Castillo could not recall any details about the jobs that generated checks in the amount of \$12,000.00 (check number 1472); \$15,000.00 (check number 1490); and \$10,000.00 (check number 1501).

42. The undersigned had the distinct opportunity to observe the demeanor of Mr. Castillo and Mr. Gomez when they testified at hearing. Mr. Castillo's and Mr. Gomez's testimony that HT Consulting Contractors provided referral services outside the construction industry to Respondent as an independent contractor is rejected as unpersuasive and not credible.

43. In sum, the Department correctly applied NCCI class code 5480 and the penalty attributable to HT Consulting Contractors is appropriate.

NDDS Services

44. Respondent contends that NDDS Services provided non-construction referral services as an independent contractor, and therefore, no penalty should be attributable to NDDS Services. However, Respondent failed to present persuasive and credible evidence at hearing that NDDS Services was an independent

contractor performing non-construction work. Accordingly, the penalty attributable to NDDS Services is proper.

45. Yyheeling Evans testified that she is the sole owner and member of NDDS Services, LLC, a business which she has operated from her home since its creation in 2013.

46. Ms. Evans testified that NDDS Services researches and finds construction jobs for construction businesses, including Respondent, for which she is paid a commission. Mr. Gomez likewise testified that NDDS Services is a referral company that only provided referral services to Respondent for which it was paid a commission.

47. Both Ms. Evans and Mr. Gomez denied that NDDS Services provided any labor or work in the construction industry.

48. No written contracts, statements, receipts, or invoices evidencing any services provided by NDDS Services to Respondent were presented at hearing.

49. No detailed written description of any of the jobs for which a referral commission was purportedly paid to NDDS Services was presented at hearing.

50. No federal income tax returns or IRS 1099 forms for NDDS Services were presented at hearing.

51. No business bank account statements for NDDS Services for the audit period were presented at hearing.

52. Ms. Evans did not utilize any business cards or marketing materials on behalf of NDDS Services.

53. The Department presented numerous checks from Respondent payable to NDDS Services. These checks were signed by Ms. Duran as president and on behalf of Respondent.

54. Several of the checks, included within the Department's Composite Exhibit 14, contradict Respondent's position that it paid NDDS Services for referral services as an independent contractor performing non-construction work. In fact, the checks support the Department's position that NDDS Services was a subcontractor for whom Respondent has statutory liability.

55. On November 9, 2014, Ms. Duran signed check number 1165 made payable to NDDS Services in the amount of \$7,000.00. The memo line of the check reads: "GV 1st Floor."

56. On May 13, 2015, Ms. Duran signed check number 1202 made payable to NDDS Services in the amount of \$15,000.00. The memo line of the check reads: "LAN 20550-As of today."

57. On June 29, 2015, Ms. Duran signed check number 1220 made payable to NDDS Services in the amount of \$9,450.00. The memo line of the check includes the word "finish."

58. Ms. Evans could not recall any details about the jobs that generated the aforementioned checks.

59. Ms. Evans testified that she holds a non-construction exemption. However, Ms. Evans sought a construction industry

exemption for NDDS Services during the applicable audit period and she did not hold a valid exemption during the audit period.

60. The undersigned had the distinct opportunity to observe the demeanor of Ms. Evans and Mr. Gomez when they testified at hearing. Ms. Evans's and Mr. Gomez's testimony that NDDS Services provided referral services outside the construction industry to Respondent as an independent contractor is rejected as unpersuasive and not credible.

61. In sum, the Department correctly applied NCCI class code 5480 and the penalty attributable to NDDS Services is appropriate.

CONCLUSIONS OF LAW

62. 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.

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

64. Section 440.03 provides: "every employer and employee as defined in s. 440.02 shall be bound by the provisions of this chapter."

65. An "employer" is defined, in pertinent part, as ". . . every person carrying on any employment. § 440.02(16)(a), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her" [and] "includes

. . . 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.

66. "Employee" is defined, in pertinent part, as "[a]ll persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor." § 440.02(15)(c)2., Fla. Stat.

67. "Employee" is also defined, in pertinent part, as "[a]n independent contractor working or performing services in the construction industry." § 440.02(15)(c)3., Fla. Stat. (emphasis added).

68. An "[e]mployee does not include: An independent contractor who is not engaged in the construction industry." § 440.02(15)(d)1., Fla Stat. (emphasis added).

69. Providing business referrals is not engaging in the construction industry.

70. Providing labor is engaging in the construction industry.

71. The Department is required by section 440.107(7)(d)1., to 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 the periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 2-year period or \$1,000.00, whichever is greater.

§ 440.107(7) (d)1, . Fla. Stat.

72. 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.

73. Florida Administrative Code 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."

74. Because administrative fines are penal in nature, the Department is required to prove by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation coverage and that it calculated the appropriate amount of penalty owed by Respondent. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

75. However, the burden of proof to show that the two entities served as independent contractors not engaged in the

area of construction rests on Respondent. Respondent is required to prove this defense by a preponderance of the evidence.

§ 440.02(15)(d)1.c., Fla. Stat.

76. Applying the foregoing legal principles to the instant case, the Department proved, by clear and convincing evidence, that Respondent was engaged in the construction industry and failed to secure workers' compensation coverage during the audit period. The Department proved, by clear and convincing evidence, that it used the correct NCCI class code and properly calculated the penalty owed by Respondent as a result of Respondent's failure to comply with the coverage requirements of chapter 440.

77. Respondent failed to demonstrate, by a preponderance of the evidence, that HT Consulting Contractors and NDDS Services were independent contractors performing non-construction work, rather than "subcontractors" for whom Respondent has statutory liability.^{2/}

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 assessing a penalty against Respondent in the amount of \$74,042.40.^{3/}

DONE AND ENTERED this 1st day of February, 2018, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
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 1st day of February, 2018.

ENDNOTES

^{1/} At all times material hereto, Ms. Duran has been the owner and president of Respondent, and Mr. Gomez has been the vice president.

^{2/} Based on the undersigned's determination that Respondent failed to prove that HT Consulting Contractors and NDDS Services were independent contractors performing non-construction work, it is unnecessary to consider whether HT Consulting Contractors and NDDS Services were, in fact, independent contractors within the meaning of the criteria set forth in sections 440.02(15)(d)a.(I) through (VI) and b. The undersigned's findings eliminate any legal significance in the distinction between an employee and an independent contractor under the workers' compensation laws. Bend v. Shamrock Servs., 59 So. 3d 153, 155 (Fla. 1st DCA 2011); Dep't of Fin. Servs. v. Cielo Residential Design and Const., Inc., 2015 Fla. Div. Adm. Hear. LEXIS 462, at *12 (Fla. DOAH Nov. 24, 2015).

Although it is unnecessary for the undersigned to consider whether HT Consulting Contractors and NDDS Services were, in fact, independent contractors within the meaning of the criteria set forth in sections 440.02(15)(d)1.a.(I) through (VI) and b., the undersigned finds, for the reasons detailed above, that

Respondent failed to present persuasive and credible evidence that at least four of the criteria listed in subparagraph a. and any of the conditions in subparagraph b were met.

^{3/} At hearing, Respondent presented profit and loss standards and a general ledger as Exhibit O. According to Mr. Gomez, these documents were prepared by an accountant, who did not testify. In fact, the custodian of the records did not testify. The documents are hearsay and do not fall within any exception to the hearsay rule. They do not supplement or explain other non-hearsay evidence.

Although hearsay is admissible in administrative proceedings, this does not necessarily mean that the undersigned can use the documents in resolving a factual dispute. The documents cannot be used as the sole basis to support a finding of fact because they do not fall within an exception to the hearsay rule and they do not supplement or explain other non-hearsay evidence. See § 120.57(1)(c), Fla. Stat. (2016) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.")

Even if the documents could be used by the undersigned, however, they are unpersuasive, unreliable, and would not support Respondent's position. The profit and loss standards indicate Respondent paid "sales commissions" of \$385,746.02 in 2015 and \$277,856.00 in 2016, while Respondent's job income was only \$1,009,021.00 for 2015 and \$1,235,522.00 for 2016. Such a large percentage of purported sales commissions compared to total income is unbelievable.

COPIES FURNISHED:

John Laurance Reid, Esquire
The Law Office of John Reid
Post Office Box 6272
Tallahassee, Florida 32314
(eServed)

Susan L. Herendeen, Esquire
Department of Financial Services
Division of Workers' Compensation
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.