

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-2480

MICHAEL CLAY BISHOP,
d/b/a J AND M ENTERPRISES,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held in this case on June 30, 2017, via video teleconference with sites in Tallahassee and Panama City, 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

For Respondent: Michael Clay Bishop, pro se
8623 North Lagoon Drive, Unit C3
Panama City Beach, Florida 32408

STATEMENT OF THE ISSUES

Whether Michael Clay Bishop, d/b/a J and M Enterprises ("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 January 31, 2017, the Department served Respondent with a Stop-Work Order and Order of Penalty Assessment, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation for its employees.

On February 21, 2017, Respondent requested a hearing to dispute the Stop-Work Order and Order of Penalty Assessment. On April 25, 2017, Petitioner referred this matter to the Division of Administrative Hearings ("Division"), for assignment of an Administrative Law Judge to conduct a final hearing in the matter.

On May 10, 2017, Respondent, who is not represented by counsel, filed a Motion to Dismiss ("Motion"), arguing that the Division lacked subject matter jurisdiction over his company, which he claimed is an "Unincorporated Business Trust Organization." The Motion raised issues of constitutionality of the Workers' Compensation statute and the jurisdiction of the Division of Workers' Compensation.

On May 11, 2017, the undersigned entered an Order Denying Respondent's Motion to Dismiss, explaining that, to the extent Respondent's Motion was directed to the Department's application

of an otherwise constitutional statute in a way that violated his constitutional rights, Respondent was required to exhaust his administrative remedies and build his record for appeal. The Order also explained that, to the extent Respondent was challenging the facial validity of the Workers' Compensation statute, the Division had no jurisdiction to rule on that challenge and Respondent could seek redress in a court of competent jurisdiction.

The final hearing was scheduled for June 30, 2017, via video teleconference at sites in Tallahassee and Panama City, and commenced as scheduled.

At the final hearing, Petitioner presented the testimony of Department Compliance Investigator, Carl Woodall; Department Compliance Facilitator, Donald Hurst; and Department Penalty Auditor, Eunika Jackson. Petitioner's Exhibits P1, P2, P4 through P6, and P8 through P11, were admitted in evidence.

Respondent offered the testimony of Carl Woodall and Michael Clay Bishop, and introduced Exhibits R1 through R5, which were admitted in evidence.^{1/}

A one-volume Transcript of the proceedings was filed on August 3, 2017. Both parties timely filed Proposed Recommended Orders, which have been considered by the undersigned in preparing this Recommended Order.

Unless otherwise indicated, 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 purports to be a "Private Common Law Non-Associated Unincorporated Business Trust Organization," or "UBTO," engaged in business in Florida.^{2/} Michael Clay Bishop is one of Respondent's trustees.

3. The nature of Respondent's business was a disputed issue at the final hearing.

4. Mr. Bishop testified that he performed handyman services, such as cleaning, yardwork, removal of old furniture, and repair of flood-damaged properties.

5. The record contains Respondent's business card, which Mr. Bishop provided to the Department's Compliance Investigator, Carl Woodall, on January 31, 2017. The business card reads, "J & M Enterprises," and advertises as follows:

Quality repairs, restoration and remodels;
paint interior/exterior, flooring, fencing,
decks, crown molding, concrete.

BIG OR SMALL WE DO IT ALL!

The business card indicates the business is "Insured" and has "references available."

6. Mr. Bishop did not dispute that the business card belonged to Respondent, or that it accurately represented the services provided by Respondent.

7. Respondent accepts monetary payments for work performed by check made out to J and M Enterprises.^{3/} Respondent maintains a business checking account in the name of J and M Enterprises to which Respondent deposits payments for services performed by Respondent.

8. On January 31, 2017, Mr. Woodall encountered Mr. Bishop at a residence undergoing remodeling at 8623 Lagoon Drive in Panama City Beach. Mr. Woodall observed Mr. Bishop engaged in the act of filling cracks in a bar area of the residence with putty, presumably to prepare the surface for painting.

9. Mr. Bishop testified that he was "cleaning some caulking that wasn't done very well." Mr. Bishop objected to characterization of his work as painting, or preparing the surface for painting. However, Mr. Bishop admitted that he was hired by Chris Roberts of Rainbow International as a subcontractor on the remodel.

10. Mr. Woodall testified that he spoke with Chris Roberts on the date in question, who informed him that Mr. Bishop was hired to perform painting services on the remodel, and that he

was compensating J and M Enterprises at the rate of \$20 per hour for the painting services. Mr. Woodall's notes, made on his Field Interview Worksheet, corroborate his testimony on these facts.

11. Mr. Bishop's testimony was neither credible nor reliable. It is inconceivable that Rainbow International hired Respondent to clean caulking at \$20 per hour.

12. The evidence supports a finding that Respondent is engaged in the business of residential painting, including preparation of surfaces for painting.

13. It is uncontested that Respondent was not covered by workers' compensation insurance at all times material hereto. Mr. Bishop testified that he was under a mistaken assumption that he was exempt from workers' compensation insurance since he had no employees. However, at final hearing, he explained that he had been made aware that the requirement applies to any business in the construction industry with one or more employees.

14. Mr. Woodall personally served Mr. Bishop with a Stop-Work Order and Request for Production of Business Records on January 31, 2017.

15. At all times material hereto, Mr. Bishop maintained that Respondent's business records were confidential, pursuant to the business trust agreement, and that to disclose those

business records would violate his obligation to Respondent's trustees.

16. A document purported to be Respondent's trust indenture was admitted in evidence as Respondent's Exhibit R4. Article 29, Section 29.1, of the Indenture is titled, "Disclosure of Documents," and provides as follows:

NO document, record, bank account, or any other written information dealing with the internal affairs or the operations of this UBTO shall be disclosed to any third party, except upon formal written board approval of the Board of Trustees given at a regular or special meeting of the Board of Trustees as set forth above.

17. Respondent did not comply with the Department's request for business records, such as check stubs, bank statements, or tax returns, from which the Department could establish Respondent's payroll for the audit period.^{4/}

18. Department Penalty Auditor, Eunika Jackson, was assigned to calculate the penalty to be assessed against Respondent.

19. 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.

20. The audit period in this case is from February 1, 2015 through January 31, 2017. Respondent provided no evidence that Respondent was not engaged in business at any time during the

audit period. Respondent's trust indenture is dated January 19, 2012.

21. Because Respondent provided no business records from which the Department could establish Respondent's payroll for the audit period, Ms. Jackson imputed Respondent's payroll, pursuant to section 440.112(2).

22. Based upon Mr. Woodall's observations of the work being performed at the jobsite, Ms. Jackson determined that the type of construction work performed was painting. Ms. Jackson consulted the Scopes Manual published by the National Council on Compensation Insurance (NCCI) and utilized classification code 5474, the general painting classification, for purposes of calculating the penalty.

23. Ms. Jackson then applied the corresponding approved manual rates for classification code 5474 for the related periods of non-compliance. Ms. Jackson 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.

24. Because Respondent did not provide records sufficient to determine its payroll during the audit period, Ms. Jackson correctly assigned the statewide average weekly wage (AWW) to Mr. Bishop, the only employee identified on the jobsite on the

date in question. § 440.107(7)(e), Fla. Stat. Ms. Jackson 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.

25. On April 18, 2017, by certified mail, the Department served Respondent with an Amended Order of Penalty Assessment assessing a penalty of \$30,600.44, which was fully imputed.

26. Respondent made a payment of \$1,000 to the Department which has been applied to the imputed penalty. The Department's Penalty Calculation worksheet notes a balance due of \$29,600.44.

CONCLUSIONS OF LAW

27. 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.

28. 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.

29. "Employer" includes "every person carrying on any employment, and the . . . trustees of any person."
§ 440.02(16)(a), Fla. Stat.

30. "'Employee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any . . . contract for

hire . . . whether express or implied, oral or written[.]”
§ 440.02(15)(a), Fla. Stat.

31. “Employment” means “any service performed by an employee for the person employing him or her.” § 440.02(17)(a), Fla. Stat.

32. 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).

33. 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).

34. 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).

35. The Department proved by clear and convincing evidence that Respondent is an employer subject to the Workers' Compensation statute, and that Mr. Bishop is Respondent's employee, who is required to be covered by, or obtain an exemption from, workers' compensation insurance.

36. 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.

37. 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 Michael Clay Bishop, d/b/a J and M Enterprises, violated the workers' compensation insurance law and assessing a penalty of \$30,600.44.

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



SUZANNE VAN WYK
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 September, 2017.

ENDNOTES

^{1/} Respondent's Exhibit R1 was admitted, in part. Paragraphs 4, 10, 11, 12, 13, and 17 were stricken as inadmissible.

^{2/} Florida statutory law does not recognize a UBTO. Chapter 609, Florida Statutes (2017), governs common law declarations of trust, and contemplates use of that business structure by organizations selling certain securities. A common law business trust is required to file its declaration of trust with the Department of State, pay a filing fee of \$350, and be issued a certificate to transact business in this state.

Respondent introduced its purported trust documents in evidence, but did not introduce any proof of filing that instrument with, or any certificate issued by, the Secretary of State. In Respondent's Motion to Dismiss, Mr. Bishop argued the Division lacked jurisdiction over the UBTO, arguing it is not a statutory trust, but is rather a "pure trust" established by the right to contract guaranteed by the U.S. Constitution.

The Internal Revenue Service provides information on its website regarding Abusive Trust Tax Evasion Schemes.

<https://www.irs.gov/business/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-facts-section-iii>

(August 3, 2017). Among the listed tax evasion schemes is an arrangement in which a business owner transfers an ongoing business to an unincorporated business organization, a pure trust, or a constitutional trust, giving the appearance that the taxpayer has relinquished control of his or her business, when in reality the business owner retains control of the businesses' income stream and runs the day-to-day activities.

The legal status of Respondent's business organization is murky, at best. Fortunately, resolution of that issue is not necessary to determine the disputed issues in this matter, namely, whether Respondent secured workers' compensation insurance for its employees; and, if not, whether the Department correctly calculated the penalty to be imposed.

^{3/} Mr. Bishop testified that he sometimes works in exchange for goods, such as the furniture from damaged residences, rather than monetary remuneration.

^{4/} Respondent did not seek a protective order from this tribunal to prevent disclosure of documents relating to the internal operation of the trust during the discovery period.

COPIES FURNISHED:

Michael Clay Bishop
Unit C3
8623 North Lagoon Drive
Panama City Beach, Florida 32408
(eServed)

Michael Joseph Gordon, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Jonathan Anthony Martin, Esquire
Department of Financial Services
Legal Services Division
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.