

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-3385

DOHERTY HOME REPAIR, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was conducted in this case on November 6, 2017, before Robert L. Kilbride, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christina Pumphrey, Esquire
Department of Financial Services
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For Respondent: Michael R. Morris, Esquire
Morris & Morris
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Doherty Home Repair, Inc., failed to obtain workers' compensation coverage that meets the requirements of chapter 440, Florida statutes (2017); and, if so, whether the penalty assessed in the 2nd Amended Order of Penalty Assessment was properly calculated.

PRELIMINARY STATEMENT

On January 21, 2016, Petitioner, Department of Financial Services, Division of Workers' Compensation ("Department" or "Petitioner"), issued a Stop-Work Order and Order of Penalty Assessment, alleging that Respondent, Doherty Home Repair, Inc. ("Respondent" or "Doherty Home Repair"), failed to secure the payment of workers' compensation in violation of various sections of chapter 440.

The Department served its first Amended Order of Penalty Assessment on Respondent on March 10, 2016.

On June 22, 2016, Respondent timely filed a request for a formal administrative hearing.

On July 5, 2016, the Department served a 2nd Amended Order of Penalty Assessment on Respondent which assessed a penalty of \$244,964.44.

On June 14, 2017, the Department referred this matter to DOAH. The final hearing was originally scheduled for August 31,

2017, but was continued until November 6, 2017, at the request of Petitioner.

On November 6, 2017, the final hearing was held. At the hearing, the Department presented the testimony of Lynne Murcia, a Division penalty auditor. The Department's Exhibits 1 through 12 were admitted.^{1/} Respondent presented the testimony of Ryan Doherty, owner of Doherty Home Repair. Respondent offered no exhibits.

A Joint Pre-hearing Stipulation was filed by the parties on October 20, 2017, and considered by the undersigned at the final hearing, in deliberations, and in the preparation of this Recommended Order.

The one-volume Transcript of the final hearing was filed with DOAH on November 27, 2017. The parties timely filed proposed recommended orders, which were given due consideration in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2017 version, unless otherwise indicated.

FINDINGS OF FACT

Based on the evidence and stipulated facts, the undersigned makes the following Findings of Fact:

1. Respondent was actively involved in business operations in the state of Florida during the period of January 22, 2014, through January 21, 2016, inclusively.

2. Respondent received the Stop-Work Order and Order of Penalty Assessment from the Department on January 21, 2016.

3. Respondent received the Request for Production of Business Records for Penalty Assessment Calculation from the Department on February 10, 2016.

4. Respondent was an "employer," as defined in chapter 440, throughout the penalty period.

5. Respondent received the Amended Order of Penalty Assessment from the Department on March 10, 2016.

6. Respondent received the 2nd Amended Order of Penalty Assessment from the Department on July 5, 2016.

7. All of the individuals listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment were "employees" of Respondent during the periods of noncompliance listed on the penalty worksheet of the Amended Order of Penalty Assessment.

8. None of the individuals listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment had a valid Florida workers' compensation coverage exemption at any time during the periods of noncompliance listed on the penalty worksheet of the Amended Order of Penalty Assessment.

9. Respondent did not secure the payment of workers' compensation insurance coverage, nor have others secured the payment of workers' compensation insurance coverage, for any of the individuals named on the penalty worksheet of the 2nd Amended

Order of Penalty Assessment during the periods of noncompliance listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment.

10. None of the individuals listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment were "independent contractors" hired by Respondent for any portion of the periods of noncompliance listed on the penalty worksheet.

11. Wages or salaries were paid by Respondent to its employees listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment, whether continuously or not, during the corresponding periods of noncompliance listed on the penalty worksheet of the 2nd Amended Order of Penalty Assessment.

12. The Request for Production of Business Records for Penalty Assessment Calculation was served on Respondent on April 2, 2016.

13. Respondent failed to provide all of the required business records for the period requested in the Request for Production of Business Records for Penalty Assessment Calculation.

14. The employees on the penalty worksheet of the 2nd Amended Order of Penalty Assessment are classified under the correct class codes, as defined by the National Council on Compensation Insurance, Inc. ("NCCI"), "Scopes® Manual."

15. The approved manual rates used on the penalty worksheet of the 2nd Amended Order of Penalty Assessment, as defined by the NCCI Scopes® Manual, are the correct manual rates for the corresponding periods of noncompliance listed on the penalty worksheets.

16. Doherty Home Repair, Inc., is Respondent's correct legal name.

17. The Department is the state agency charged with the responsibility to investigate and enforce the workers' compensation insurance coverage laws in the state under chapter 440 and to ensure that employers secure workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

18. Respondent is a private company providing general construction and home repair services. It maintained its primary business records on a computer during the relevant time periods.

19. Ryan Doherty testified that his work computers were stolen during a "break in" at his office.^{2/} However, he had possession of the computers containing most of his business records, for one to one and one-half months after the date the original Stop-Work Order was issued.

20. Respondent did provide 2014 tax and other business records to the Department for purposes of (1) investigating

alleged violations of the workers' compensation insurance coverage laws and (2) calculating a penalty.

21. Byron Fichs Active Electric^{3/} was included in the records provided by Respondent as an employee, for purposes of a penalty calculation. The period of noncompliance was January 23, 2014, through December 31, 2014. Pet. Ex. 6, p. 19.

22. Gross payroll for the audit period for Byron Fichs Active Electric was determined based upon records provided by Respondent and totaled \$4,342.27. Pet. Ex. 6, p. 19.

23. Information contained in Respondent's U.S. Income Tax Return for 2014 indicated that Respondent paid a total of \$640,100.00 in labor-related expenses for 2014. Pet. Ex. 10, p. 62.

24. That amount was broken down into essentially two categories in 2014--Subcontractors and Specific employees.

25. Subcontractors: \$535,980.00 of the labor-related expenses was for sub-contractors. Pet. Ex. 10, p. 62.

26. Specific Employees: \$104,120.00 of the total labor-expenses (\$640,100.00) was attributable to specific employees. Pet. Ex. 10, p. 66, Overflow Statement.

27. However, only \$503,674.36^{4/} was included by the Department as Gross Payroll for subcontractors in 2014 on the worksheet for purposes of a penalty calculation. Pet. Ex. 6, p. 19.

28. Tax records for 2014 indicated payments totaling \$104,120.00 were made to Seth Anthony, Shawn Bronson, Joseph Horucth, Mark Lucas, John Concepcion, Jordan Beene, James Stift, and Jerry Brunnell. Pet. Ex. 10, p. 66.

29. Due to the payments indicated on the tax and business records, the individuals listed above were included as employees for purposes of penalty calculation. Pet. Ex. 6, p. 19.

30. The amounts in the 2014 tax records were prorated to determine gross payroll for each individual for purposes of penalty calculation. The period of noncompliance for each person was January 23, 2014, through December 31, 2014. Pet. Ex. 6, p. 19.

31. Mr. Doherty was listed as an employee for purposes of penalty calculation. The gross wage attributed to Mr. Doherty in 2014 was based upon the average weekly wage ("AWW"), since the records based on income were more than the AWW. Pet. Ex. 6, p. 19.

32. Mr. Doherty's period of noncompliance during the year 2014 was April 19, 2014, through December 31, 2014. Pet. Ex. 6, p. 19.

33. Significantly, payroll for the remainder of the penalty audit period (January 1, 2015, through December 31, 2015, and January 1, 2016, through January 21, 2016) was imputed by the Department because it properly determined that Respondent did not

provide adequate business records to determine Respondent's actual payroll.^{5/} Pet. Ex. 6, pp. 19-20.

34. The four employees that were found working on the job site on the day the Stop-Work Order was issued, as well as Mr. Doherty, a corporate officer, were included by the Department as employees for purposes of imputing payroll and calculating the penalty for the remainder of the audit period, January 1, 2015, through January 21, 2016. Pet. Ex. 6, p. 19.

35. The four employees are identified in Respondent's business records as Dave Mason, Dan, Erick, and Joe. Pet. Ex. 6, p. 19.

36. Based upon the records provided for the period of January 23, 2014, through December 31, 2014, and the imputed payroll established for the period of January 1, 2015, through January 21, 2016, a penalty of \$244,964.44 was calculated. Pet. Ex. 6, p. 19.

37. As a result, a 2nd Amended Order of Penalty Assessment was issued assessing a total penalty of \$244,964.44. Pet. Ex. 6, pp. 16-17.

38. After the 2nd Amended Order of Penalty Assessment was issued, Respondent provided the Department with a "massive" amount of additional business records. The actual date of delivery of these additional records to the Department was not clear.

39. Nonetheless, it was clear that it was on a date after the 2nd Amended Order of Penalty Assessment was issued.

40. These business records, despite being voluminous, were incomplete, and the Department's penalty auditor, if required, would have been unable to calculate or recalculate a penalty based on the records delivered by Respondent after the 2nd Amended Order of Penalty Assessment was issued.

41. A large amount of timesheets for various workers were also received after the issuance of the 2nd Amended Order of Penalty Assessment, but again they were incomplete; and there were no wages associated with any of the timesheets, no hourly rates were stated, and no total amount paid to the employees for the week was listed.^{6/}

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the subject matter and the parties to this proceeding, pursuant to sections 120.569 and 120.75(1), Florida Statutes.

43. The Department is the state agency responsible for investigating and enforcing the law requiring that employers secure the payment of workers' compensation for the benefit of their employees and corporate officers.

44. The Florida Workers' Compensation Law requires every employer to secure the payment of workers' compensation coverage

for the benefit of its employees unless exempted or excluded under chapter 440.

45. 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.

46. An "employee" is defined in pertinent part as, "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment." § 440.02(15)(a), Fla. Stat.

47. An "employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation," and "all 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)(b) and (c)2., Fla. Stat.

48. The workers' compensation program was created and is governed by statute. As such, the statute must be strictly construed. See Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182 (Fla. 4th DCA 2005); Dep't of Fin. Servs. v. L & I Consol. Servs., Inc., Case No. 08-5911 (Fla. DOAH May 28, 2009; Fla. DFS July 2, 2009).

49. Likewise, in order to avail itself of the benefits conferred by the statute, an affected employer must comply with the rules and conditions stated in chapter 440. Cont'l Ins. Co. v. Indus. Fire & Cas. Ins. Co., 427 So. 2d 792, 793 (Fla. 3d DCA 1983).

50. To that end, employers must maintain and produce certain records to comply with section 440.107 and to take advantage of the statute's benefits and protection.

51. Those records are specifically identified and outlined in Florida Administrative Code Rule 69L-6.015. In large part, Respondent failed to maintain or produce the required records. This resulted in the Department properly imputing wages to certain employees for certain periods of time. § 440.107(7)(e), Fla. Stat.

52. Section 440.10(1)(c) provides that "a contractor shall require a subcontractor to provide evidence of workers' compensation."

53. Similarly, rule 69L-6.015(9)(c) requires each contractor to maintain evidence of workers' compensation insurance of any of the subcontractors it uses.

54. Contractors are liable for payment of workers' compensation insurance for employees of subcontractors unless the subcontractor has secured payment. § 440.10(1)(b), Fla. Stat.

Here, there was not sufficient proof that Respondent's subcontractors maintained workers' compensation coverage.

55. Rule 69L-6.028 elaborates and outlines the procedures to be used when imputing payroll for penalty calculation purposes under section 440.107(7)(e). In pertinent part, rule 69L-6.028 provides:

(4) If the Department imputes the employer's payroll, the employer will have twenty business days after service of the first amended order of penalty assessment to provide business records sufficient for the Department to determine the employer's payroll for the period requested in the business records request for the calculation of the penalty or for the alternative time period(s) of non-compliance. The employer's penalty will be recalculated pursuant to paragraph 440.107(7)(d), F.S., only if the employer provides all such business records within the twenty days after service of the first amended order of penalty assessment. Otherwise, the first amended order of penalty assessment will remain in effect.

56. In this case, the Department seeks to penalize Respondent and assess a penalty. Therefore, it has the burden of proof to show by clear and convincing evidence that Respondent committed the violations alleged in the Stop-Work Order, and that the proper penalty was calculated and assessed. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

57. The clear and convincing evidence standard of proof has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

58. 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 this chapter has failed to secure the payment or worker's compensation required by this chapter or to produce the required business records under subsection (5) within 10 business days after receipt of the written request of the department, 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.

59. As stipulated, the employer in this case failed to secure the payment of workers' compensation insurance coverage, or have others secure the payment for workers' compensation insurance coverage for the individuals listed on the penalty calculation worksheet of the 2nd Amended Order of Penalty

Assessment. As such, the issuance of the Stop-Work Order and Order of Penalty Assessment was appropriate pursuant to section 440.107(7).

60. The crux of the dispute in this case, as agreed by the parties, is whether the Department correctly calculated the penalty in the 2nd Amended Order of Penalty Assessment. The undersigned concludes that it did.

61. The Department correctly used the tax and business records that were provided by Respondent to properly calculate payroll for the individuals listed on the penalty worksheet for the portion of the audit period January 23, 2014, through December 31, 2014.

62. The Gross Payroll attributed to the "2014-Tax Records: Subcontractors" was properly pro-rated, calculated, and assessed.

63. In this case, Respondent did not provide sufficient or persuasive business records to establish who its subcontractors were and whether those subcontractors had secured payment of workers' compensation insurance. § 440.10(1)(c), Fla. Stat., and Fla. Admin. Code R. 69L-6.032.

64. Payroll attributed to Mr. Doherty was properly calculated using the AWW for the time that records were provided and, by imputation, for the period that records were not provided.

65. Payroll for the four employees who were found on the jobsite on the day the Stop-Work Order was issued was properly calculated by imputation since Respondent did not timely provide adequate business records to permit the Department to determine Respondent's actual payroll.

66. Even though the employer submitted voluminous and additional business, payroll, and tax records after the 2nd Amended Order of Penalty Assessment was issued, the records were untimely. The Department had no legal obligation to consider them or recalculate the penalty.

67. More specifically, there is no provision in the statute or rule(s) that permits the late submission of business records after the issuance of a 2nd Amended Order of Penalty Assessment.

68. Specifically, rule 69L-6.028 is clear that if the employer does not provide the requested business records sufficient to determine the employer's payroll within ten days of receipt of the request, the Department may impute the employer's payroll.

69. Once the Department imputes the employer's payroll, the employer has 20 days after the issuance of the first amended order of penalty assessment to provide business records sufficient to determine the employer's actual payroll for the period in the initial business records request. Fla. Admin. Code R. 69L-6.028(4).

70. The rule requires the Department to recalculate the penalty when and if this is done.

71. In this case, the parties stipulated that a first Amended Order of Penalty Assessment was received by Respondent on March 10, 2016.^{7/}

72. By stipulation, the 2nd Amended Order of Penalty Assessment was received by Respondent on July 5, 2016.

73. As previously noted, there is no provision allowing the submission of additional business records after the second amended order of penalty assessment is issued. The Department was not required to recalculate the imputed payroll again. Simply put, the time limit to submit additional documents expired on March 30, 2016, well before the issuance of the 2nd Amended Order of Penalty Assessment.

74. Rule 69L-6.028(4) establishes a "bright line" period during which submission of additional business records must be accepted and considered. If that deadline is not met, the Department is not required, or even permitted, to recalculate the penalty.

75. As a result, there is no provision of law which lends credence to Respondent's argument that the documents it submitted after the 2nd Amended Order of Penalty Assessment should have been considered and the penalty recalculated.

76. The Department has proven by clear and convincing evidence that it correctly issued the Stop-Work Order pursuant to section 440.17(7) (a) and that the penalty amount of \$244,964.44 assessed by the 2nd Amended Order of Penalty Assessment was properly calculated.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Department of Financial Services, Division of Workers' Compensation, enter a final order finding that Respondent, Doherty Home Repair, Inc., violated the workers' compensation laws by failing to secure and maintain required workers' compensation insurance for its employees, and impose a penalty of \$244,964.44.

DONE AND ENTERED this 27th day of December, 2017, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of December, 2017.

ENDNOTES

1/ Department's Exhibit 12 was "[a]ll exhibits relied on by Respondent." However, none were offered by Respondent.

2/ Respondent provided no credible evidence, police reports, or other documents to support this burglary and theft claim.

3/ The Department's penalty auditor properly searched this name and several reasonable iterations of this name(s), and found that no workers' compensation coverage existed for that person or company.

4/ It should be noted that the \$503,674.36 was a prorated amount to ensure that no payroll expenses were included for any period of time outside the audit period.

5/ The 2nd Amended Order of Penalty Assessment indicated that the full period of noncompliance was January 23, 2014, through January 21, 2016.

6/ Regardless, as explained below, these business records and timesheets were untimely, and the Department was not required to recalculate the penalty using these untimely and incomplete records.

7/ As the evidence developed, Respondent's 20 days to provide additional business records ran from that date and expired on or about March 30, 2016.

COPIES FURNISHED:

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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.