

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-3500

CRAFTMASTER PLASTERING AND
STUCCO, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 6, 2017, by video teleconference 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 32399-4229

For Respondent: Rasheem Kinsey, pro se
Craftmaster Plastering and Stucco, Inc.
129 Nann Street
Enterprise, Alabama 36330

STATEMENT OF THE ISSUE

Whether Respondent, Craftmaster Plastering and Stucco, Inc., failed to comply with the coverage requirements of the

Workers' Compensation Law, chapter 440, Florida Statutes; and, if so, what penalty should be assessed pursuant to section 440.107, Florida Statutes (2016).

PRELIMINARY STATEMENT

On January 23, 2017, the Department issued a "Stop-Work Order" (Order) alleging that Respondent failed to comply with the coverage requirements of the Workers' Compensation Law on that date. The Order directed Respondent to cease business operations and pay a penalty equal to two times the amount Respondent would have paid in premium to secure workers' compensation insurance during periods within the preceding two years when it failed to do so, or \$1,000, whichever is greater, pursuant to section 440.107(7)(d). Along with the Order, Petitioner issued a Business Records Request (BRR) to Respondent.

Respondent timely requested an administrative hearing to dispute the Department's Order and the imposition of a penalty. On June 19, 2017, the Department forwarded Respondent's request to the Division of Administrative Hearings to hold a hearing on disputed issues of material fact. The hearing was initially scheduled for September 6, 2017, but was subsequently rescheduled, at the request of the parties, to October 6, 2017.

The final hearing convened as rescheduled. The Department presented the testimony of Michelle Loy, a Division

Investigative Supervisor; and Nathaniel Hatten, a Division Penalty Auditor. The Department's Exhibits A through G were admitted into evidence. Respondent presented the testimony of its President, Rasheem Kinsey, but offered no exhibits.

The proceeding was recorded but neither party ordered a transcript. Both parties timely filed Proposed Recommended Orders which have been considered by the undersigned in preparing this Recommended Order.

Unless otherwise indicated, all statutory references are to the 2016 edition of the Florida Statutes, which were in effect on the date of the alleged violations of the Workers' Compensation Law.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the requirement of the Workers' Compensation Law that employers secure the payment of workers' compensation coverage for their employees. § 440.107, Fla. Stat. (2017).

2. Respondent is a Florida for-profit corporation organized on or about January 1, 2015, which was engaged in the construction industry in Florida at all times relevant hereto.

3. According to the record evidence, Respondent was administratively dissolved on September 23, 2016. No evidence of reinstatement was introduced.

4. According to the Secretary of State's database, Rasheem Kinsey is Respondent's President, Mecca Kinsey is its Vice President, and Ulysses Kinsey is its Treasurer.

5. On January 23, 2017, Ms. Loy received a telephone call from Department Compliance Investigator, Carl Woodall, who was onsite at a restaurant undergoing renovations at the intersection of U.S. Highway 98 and Kraft Avenue in Panama City, Florida (the worksite). Mr. Woodall reported his findings to Ms. Loy from a random workers' compensation compliance check he had completed at the worksite. Based upon Mr. Woodall's verbal report, Ms. Loy instructed Mr. Woodall to issue the subject Order.

6. According to Ms. Loy, Mr. Woodall observed several workers at the worksite, interviewed them, and recorded notes on a field interview worksheet.

7. Ms. Loy had no personal knowledge of any of the workers at the worksite, did not observe the activities of anyone at the worksite, and did not interview anyone at the worksite.

8. Mr. Woodall did not testify at the final hearing.

9. The Department did not introduce Mr. Woodall's field interview worksheet into evidence.

10. Ms. Loy reviewed the Coverage and Compliance Automated System (CCAS), which is maintained by the Department, and

confirmed Respondent did not have a valid workers' compensation insurance policy.

11. Mr. Hatten was assigned to calculate the penalty to be imposed for Respondent's alleged failure to secure workers' compensation insurance coverage for its employees.

12. From Mr. Woodall's field interview worksheet, Mr. Hatten retrieved the names Rasheem Kinsey, Mecca Kinsey, Ulysees Kinsey, Brandon White, Mark Kim Wilson, Jerome Bradley, and Brandon Samuel Kinsey Smith, and entered those names on his penalty calculation worksheet as Respondent's uninsured employees for the penalty audit period.

13. In this case, the penalty audit period included the two years immediately preceding the date on which the Order was issued: January 23, 2015 through January 23, 2017.

14. Respondent did not comply with Petitioner's BRR; therefore, the Department did not have sufficient records to establish Respondent's payroll during the penalty audit period.

15. Mr. Hatten reviewed CCAS and confirmed that Mecca Kinsey, Ulysses Kinsey, and Rasheem Kinsey had valid workers' compensation exemptions effective from February 3, 4, and 5, 2015, respectively, through February 2, 3, and 4, 2017, respectively. Respondent's officers did not have exemptions from workers' compensation insurance requirements during the audit period between January 26, 2015, and February 2, 3, and 4,

2017, respectively. Mr. Hatten entered these timeframes on the penalty calculation worksheet as periods of non-compliance for the three corporate officers.

16. Mr. Hatten further found Respondent had a workers' compensation insurance policy effective February through July 2015. Mr. Hatten used this information to establish periods of non-compliance during the audit period.

17. Based upon Mr. Woodall's notes that he observed workers engaged in stucco application and repair at the worksite, Mr. Hatten assigned the classification code 5022, Masonry, for purposes of calculating the penalty. The classification code was derived from the Scopes Manual published by the National Council on Compensation Insurance (NCCI) and adopted by the Department by Florida Administrative Code Rule 69L-6.021.

18. Mr. Hatten next applied the workers' compensation insurance rates approved by the Department for workers' compensation coverage by classification code to each worker during each period of non-compliance.

19. Finally, because Respondent did not submit business records sufficient to establish its payroll during the audit period, Mr. Hatten assigned the statewide average weekly wage in order to calculate Respondent's payroll to each "employee" and its corporate officers for the periods of non-compliance.

20. Utilizing this imputed methodology, Mr. Hatten calculated a total penalty of \$94,544.92 to be imposed on Respondent for failure to secure workers' compensation insurance for its employees during the periods of non-compliance.

21. The Department served Respondent with an Amended Order of Penalty Assessment on February 23, 2017, imposing the penalty of \$94,544.92.

22. Mr. Kinsey testified on Respondent's behalf. Mr. Kinsey admitted that he, Ulysses Kinsey, and Mecca Kinsey were performing stucco work at the worksite on January 23, 2017. Mr. Kinsey denied that any of the other individuals, purportedly identified at the worksite by Mr. Woodall, were his employees.

23. As to the individuals named in the Amended Order of Penalty Assessment, Mr. Kinsey testified that Jerome Bradley was a cook at the restaurant; Mark Kim Wilson was painting at the worksite, and Mr. Kinsey assumed Mr. Wilson was hired by the restaurant owner, Jerry Steele; Brandon Samuel Kinsey Smith was Mr. Kinsey's cousin, and he had no idea who had hired Mr. Kinsey Smith or what he was doing at the worksite; and that he had never heard of Brandon White and could not identify Mr. White.

24. The Department offered no non-hearsay evidence to rebut Mr. Kinsey's testimony.

25. The record evidence is sufficient to support a finding that Rasheem Kinsey, Mecca Kinsey, and Ulysees Kinsey were

performing stucco work at the worksite on January 23, 2017, and were not covered by either workers' compensation insurance or a valid exemption therefrom, for the periods of non-compliance identified in the penalty calculation worksheet.

26. Mr. Hatton correctly applied the imputed methodology and correctly calculated a penalty of \$1,259.64, for Respondent's failure to obtain workers' compensation coverage for the three corporate officers.

27. The evidence is insufficient to support the remaining imputed penalty calculation applied to Respondent.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction of the subject matter of, and the parties to, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

29. Employers are required to secure payment of workers' compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

30. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat.

31. "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.

32. "Employee" is defined, in part, as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written." § 440.02(15)(a), Fla. Stat.

"Employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state." § 440.02(15)(b), Fla. Stat.

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 failed to establish by clear and convincing evidence that any of the individuals listed in the penalty calculation worksheet were Respondent's employees, except for Respondent's three named corporate officers.

36. Ms. Loy's testimony was pure hearsay and she had no personal knowledge of, and could not independently identify, anyone at the worksite. Furthermore, Ms. Loy did not observe what activities those workers were engaged in, and did not interview anyone at the worksite.

37. Likewise, Mr. Hatten's knowledge of both the individuals on the worksite, and the activities in which they were engaged, was based solely on Mr. Woodall's field interview worksheet, which was not introduced in evidence.

38. The Department's evidence was neither clear nor convincing that the individuals listed on the penalty calculation worksheet were Respondent's employees.

39. Even if the Department had met its burden to establish that the listed individuals were Respondent's employees, the record contains insufficient evidence to support that the workers were engaged in stucco work. The only evidence on that issue was Mr. Hatten's hearsay based on Mr. Woodall's notes, which were not offered in evidence.

40. Taken together, the evidence adduced at the final hearing did not produce a firm belief or conviction in the mind

of the undersigned that the individuals listed on the Department's penalty worksheet, with the exception of the three corporate officers, were Respondent's employees.

41. The Department carried its burden to establish that Respondent failed to secure workers' compensation insurance for its three corporate officers for the periods of non-compliance listed in the penalty calculation worksheet.

RECOMMENDATION

Having considered 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 finding that Respondent, Craftmaster Plastering and Stucco, Inc., failed to secure and maintain required workers' compensation insurance for its employees, and impose a penalty of \$1,259.64.

DONE AND ENTERED this 13th day of November, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2017.

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.