

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 17-3814

ELITE RESTORATION AND  
CONSTRUCTION, LLC,

Respondent.

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RECOMMENDED ORDER

An administrative hearing was conducted in this case on October 30, 2017, in Brooksville, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Brian Johnson, pro se  
Elite Restoration and Construction, LLC  
7185 West Village Drive  
Homosassa Springs, Florida 34446

STATEMENT OF THE ISSUES

The issue in this case is whether Elite Restoration and Construction, LLC (Respondent), violated the provisions of

chapter 440, Florida Statutes,<sup>1/</sup> by failing to secure the payment of workers' compensation, as alleged in the Stop-Work Order and Second Amended Order of Penalty Assessment; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On November 1, 2016, the Department of Financial Services, Division of Workers' Compensation (the Department), served Respondent with a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) and a Request for Production of Business Records for Penalty Assessment Calculation (Request for Production) for Respondent's alleged failure to secure workers' compensation for its employees as required by chapter 440. On April 20, 2017, the Department served Respondent with an Amended Order of Penalty Assessment (Amended Penalty), with a penalty of \$21,475.30.

On May 5, 2017, Respondent timely filed a petition for administrative hearing, and on July 7, 2017, the Department's referral of this case for hearing was received by the Division of Administrative Hearings (DOAH). The case was originally scheduled for a hearing to be held on September 6, 2017, but was continued and rescheduled for October 30, 2017.

On September 19, 2017, a 2nd Amended Order of Penalty Assessment, reducing the penalty to \$16,671.14, was served on Respondent. At the onset of the October 30, 2017, hearing, the

Department's Agreed Motion for Leave to Amend Order of Penalty Assessment was granted, amending the penalty to the amount set forth in the 2nd Amended Order of Penalty Assessment (2nd Amended Penalty).

At the final hearing, the Department presented the testimonies of Department Compliance Investigator Michael Robinson; Facilitator Pete Vallejo; Penalty Auditor Lynne Murcia; and Respondent's owner, Brian Johnson. The Department offered 14 exhibits, designated Petitioner's Exhibits P-1 through P-14, all of which were received into evidence. Respondent testified on his own behalf and offered six exhibits, which were received into evidence as Respondent's Exhibits R-1, R1-A, R-2, R2-A, R-3, and R-4.

The proceedings were transcribed and a transcript was ordered. The parties were given 30 days from the filing of the Transcript within which to submit proposed recommended orders. The Transcript, consisting of one volume, was filed on November 20, 2017. The parties timely filed their respective Proposed Recommended Orders, both of which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the statutory requirement that employers secure the

payment of workers' compensation for the benefit of their employees and corporate officers.

2. Respondent is an active Florida corporation that was formed on August 28, 2009, with a principal address of 7185 West Village Drive, Homosassa, Florida 34446. Respondent was engaged in business operations in the state of Florida during the entire period of November 2, 2014, to November 1, 2016.

3. Brian Johnson (Respondent's owner or Mr. Johnson) is Respondent's sole shareholder, owning 100 percent of the stock.

4. The Department's investigator, Michael Robinson, commenced a random worksite compliance investigation on November 1, 2016, at a gas station at 970 Atlantic Boulevard, Jacksonville, Florida 32225. He observed Respondent's owner, Mr. Johnson, and three others, Tim Neeld, Derrick Windier, and James Ingash, painting a metal canopy covering the gas pumps.

5. Mr. Johnson told the investigator that his company, Elite Restoration & Construction, LLC, was a subcontractor for Aluminum Plus of DeLand, Florida.

6. By searching the Division's Coverage and Compliance Automated System, the investigator determined that Brian Johnson obtained a workers' compensation exemption on October 12, 2016, or 20 days prior to the investigation, and further determined that an employee leasing contract previously held by Respondent terminated on January 15, 2015, which is more than nine months

prior to the investigation. Mr. Johnson confirmed that Respondent had an exemption for himself, effective October 12, 2016, but did not have any workers' compensation insurance for its employees.

7. On November 1, 2016, after consulting with a supervisor, the Department's investigator issued the Stop-Work Order, which was posted at Respondent's worksite and personally served upon Respondent's owner. On the same day, the investigator also personally served the Request for Production, which requested business records to determine Respondent's payroll during the two-year penalty period proscribed by section 440.107(7)(d)1., which in this case is from November 2, 2014, to November 1, 2016.

8. The Request for Production explicitly states that the requested records must be provided within 10 business days from receipt of the request.

9. Respondent obtained an Agreed Order of Conditional Release from the Stop-Work Order on November 8, 2016, by terminating the three workers observed during the compliance investigation who did not have workers' compensation coverage and paying the Department a \$1,000 down payment toward the penalty that would be calculated in this case.

10. Respondent produced business records for penalty calculation on November 17, 2016, and February 28, 2017, which

is beyond the 10-day time period required by the Request for Production.<sup>2/</sup>

11. The Department's penalty auditor, Lynne Murcia, used those records to calculate a \$21,475.30 penalty for failing to comply with the workers' compensation insurance requirements of chapter 440.

12. On April 20, 2017, when Respondent's owner came to the Department's Jacksonville office, he was personally served with the Amended Penalty and advised of his right to seek administrative review of the Stop-Work Order and Amended Penalty.

13. Mr. Johnson filed a petition for hearing on behalf of Respondent on May 5, 2017, stating that the penalty calculated was wrong because it included income earned in states other than Florida.

14. Respondent produced additional business records on May 17, August 21, and August 31, 2017, for the purpose of demonstrating that a portion of his company's payroll was derived from work completed at worksites outside of Florida, and arguing that the out-of-state payroll should not be included in the penalty calculation. The invoices showed \$182,056.78 in total income, consisting of \$77,268 from 14 jobs in Florida, and \$104,788.60 for 14 jobs outside of the State of Florida. Upon initial review, the Department's auditor declined to make any

adjustments because the invoices did not provide information showing earnings of specific employees for jobs outside of Florida.

15. Thereafter, Mr. Johnson produced additional records that allowed the Department's auditor to trace out-of-state employment to transactions in Respondent's general ledger. The Department's auditor reviewed Respondent's additional records and removed out-of-state payroll and per diem payments. In accordance with that review, the Department issued the 2nd Amended Penalty which reduced the penalty to \$16,671.14. The 2nd Amended Penalty also reduced the 2016 payroll attributed to Respondent's owner.

16. Respondent was an "employer" in the state of Florida, as that term is defined in section 440.02(16), from November 2, 2014, to November 1, 2016.

17. Respondent did not secure the payment of workers' compensation insurance coverage, nor have others secured the payment of workers' compensation insurance coverage for the employees listed on the penalty worksheet of the 2nd Amended Penalty during the periods of noncompliance listed on the penalty worksheet.

18. None of the employees listed on the penalty worksheet of the 2nd Amended Penalty had a valid Florida workers'

compensation coverage exemption during the periods of noncompliance listed on the penalty worksheet.

19. In the past, Respondent had an employee leasing contract with Southeast Personnel Leasing, Inc. That contract was terminated on January 15, 2015, due to the leasing company's concerns about out-of-state employment that would not be covered by the leasing company's workers' compensation insurance.

20. None of the employees listed on the penalty worksheet of the 2nd Amended Penalty were "independent contractors" as that term is defined in section 440.02(15)(d)1.

21. None of the employees listed on the penalty worksheet of the 2nd Amended Penalty were employees of a temporary labor company.

22. Employees on the penalty worksheet of the 2nd Amended Penalty are correctly classified under Class Code 5474, painting, as defined in the "Scopes Manual" published by the National Council on Compensation Insurance, Inc. (NCCI), and adopted in Florida Administrative Code Rule 69L-6.021(2)(jj).

23. The approved manual rates used in the penalty worksheet of the 2nd Amended Penalty, as defined by the NCCI Scopes Manual and adopted by the Office of Insurance Regulation, are the correct manual rates for the corresponding periods of noncompliance listed on the penalty worksheet.



24. In calculating the 2nd Amended Penalty, the Department's auditor used the worksheet required by rule 69L-6.027, along with Respondent's bank statements, check images, general ledger, and tax returns filed with the Internal Revenue Service. The auditor capped Respondent's owner's pay for that portion of 2014 falling within the penalty period because his salary and dividend totaling \$73,484 in 2014 exceeded the statewide average of \$862.51 per week or \$44,850.52 per year. She also adjusted the period of noncompliance for Mr. Johnson, pursuant to rule 69L-6.028(2), because he obtained an exemption from Florida's Workers' Compensation Law on October 12, 2016.

25. The auditor explained that she used Respondent's tax returns for 2014 and 2015 because she believed they were the most reliable indication of salaries and wages, officer compensation, and payroll for outside services and subcontractors. She further explained that she used Respondent's tax returns and general ledger as the most accurate sources for determining payroll for 2016. The auditor's explanation is reasonable and credited.

26. Mr. Johnson questioned the auditor's method of determining payroll and offered alternative methods using spreadsheets he created to identify what he called "member draws" and other summaries. The invoices provided by Respondent

to the Department, however, do not match the summaries; and Respondent's method of determining payroll, when compared to the method utilized by the Department, is not accurate or reliable.

27. The auditor's method reflected in the 2nd Amended Penalty appropriately applied approved manual rates corresponding to Class Code 5474, painting, to determine the evaded workers' compensation insurance premium. Then, the evaded premium was properly multiplied by two in accordance with section 440.107(7)(d)1.

#### CONCLUSIONS OF LAW

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

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

30. The Department is responsible for enforcing the requirement that employers coming within the provisions of chapter 440 obtain workers' compensation coverage for their employees "that meets the requirements of [chapter 440] and the Florida Insurance Code." § 440.107(2), Fla. Stat.

31. Section 440.107(3) provides that "[t]he department shall enforce workers' compensation coverage requirements," and "the department shall have the power to . . . (g) [i]ssue stop-

work orders, penalty assessment orders, and any other orders necessary for the administration of this section."

§ 440.107(3), Fla. Stat.

32. Because the Department is seeking to prove statutory violations and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

33. Chapter 440 broadly defines "employer" as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

34. Every employer is required to secure the payment of workers' compensation for the benefit of its employees, unless exempted or excluded under chapter 440. § 440.10, Fla. Stat.

35. "Employment," subject to Florida's Workers' Compensation Law, includes "[a]ll private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees<sup>[3/]</sup> are employed by the same employer." § 440.02(17)(a) and (b)2., Fla. Stat.

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

37. "Every employer who is required to provide workers' compensation coverage for employees engaged in work in this

state shall obtain a Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)(g) and 440.38(7), F.S."

Fla. Admin. Code R. 69L-6.019.

38. Under 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.

39. Strict compliance with the Workers' Compensation Law is required by the employer. See C & L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

40. Whenever the Department finds that an employer who is required to secure the payment of workers' compensation coverage has failed 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 or Order of Penalty Assessment on the employer. § 440.107, Fla. Stat.

41. The evidence presented in this case, in view of applicable law, clearly and convincingly demonstrated that Respondent was an employer that employed three employees without

workers' compensation insurance, and that the Department properly issued and served the Stop-Work Order, Amended Penalty, and 2nd Amended Penalty on Respondent.

42. Section 440.107(7)(d)1. provides that "the [D]epartment 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."

43. These statutory provisions mandate that the Department assess a penalty for noncompliance with chapter 440 and do not provide any authority for the Department to reduce the amount of the penalty.

44. Rule 69L-6.027 adopts a penalty calculation worksheet for the Department's penalty auditors to utilize "[f]or purposes of calculating penalties to be assessed against employers pursuant to section 440.107, Florida Statutes." Fla. Admin. Code R. 69L-6.027(1).

45. Rule 69L-6.035 defines payroll for calculating penalties. Remuneration includes, but is not limited to, wages,

salaries, loans, 1099 income, profit sharing, income distributions, dividends, and cash payments. Fla. Admin. Code R. 69L-6.035(1).

46. Considering evidence of Respondent's payroll for its employees during the applicable time frame and the applicable method for calculating penalties, it is found that the Department applied the proper methodology in computing the Amended Order of Penalty Assessment and 2nd Amended Order of Penalty Assessment pursuant to section 440.107(7)(d)1. and rules 69L-6.027 and 69L-6.035.

47. Therefore, under the evidence and law as outlined above, it is concluded that the Department proved by clear and convincing evidence that Respondent failed to secure workers' compensation coverage for its employees, and that the Department correctly calculated and issued the Stop-Work Order and 2nd Amended Order of Penalty Assessment of \$16,671.14 against Respondent.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order, consistent with this Recommended Order, upholding the Stop-Work Order and imposing the penalty set forth in the 2nd Amended Order of Penalty Assessment against Elite Restoration and Construction, LLC.

DONE AND ENTERED this 20th day of February, 2018, in  
Tallahassee, Leon County, Florida.



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JAMES H. PETERSON, III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of February, 2018.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all citations to the Florida Statutes are to current versions which have not substantively changed since the time of the allegations in this case.

<sup>2/</sup> While the Department seeks no penalty for Respondent's delay in producing records, Respondent's failure to produce sufficient records within 10 days disqualifies Respondent from the 25-percent reduction in penalty afforded by chapter 440.107(7)(d)1.b.

<sup>3/</sup> Florida law defines "employee" in 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. Also included in the definition of "employee" is "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous."  
§ 440.02(15)(b), Fla. Stat.

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.