

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 17-4241

BOSS LADY CONCREATE CO., LLC,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

On September 25, 2017, Administrative Law Judge Yolonda Green of the Division of Administrative Hearings ("DOAH"), conducted a final hearing in this case, by video teleconference with sites in Pensacola and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christina Pumphrey, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Mary Atwood, pro se  
Boss Lady Concreate Co., LLC<sup>1/</sup>  
5801 Clearwater Drive  
Pensacola, Florida 32505

STATEMENT OF THE ISSUE

Whether Petitioner properly issued the Stop-Work Order ("SWO") for Respondent's failure to comply with Petitioner's Request for Production of Business Records ("Request to Produce").

PRELIMINARY STATEMENT

On June 5, 2017, Petitioner, Department of Financial Services, Division of Workers' Compensation ("Department" or "Petitioner"), issued a SWO, alleging that Respondent, Boss Lady Concrete Co., LLC. ("Boss Lady Co." or "Respondent"), failed to produce required business records within 10 business days in violation of section 440.107(7)(a), Florida Statutes (2016). The SWO directed Respondent to cease business operations until the Department issues an order releasing the SWO for all worksites.

Respondent disputed the Department's authority to issue the SWO and requested a formal hearing. On July 26, 2017, Petitioner referred this matter to DOAH for assignment to an administrative law judge. The undersigned issued a notice scheduling the formal hearing for September 25, 2017.

On September 20, 2017, the Department filed a Motion to Deem Matters Admitted and to Relinquish Jurisdiction ("Motion to Relinquish"). Given the short time frame before the formal hearing, the Motion to Relinquish was taken under advisement

until the date of the hearing. During preliminary matters, the parties presented argument regarding Petitioner's Motion to Relinquish. After hearing argument from both parties, the undersigned denied Petitioner's Motion to Relinquish. Petitioner made an ore tenus Motion to Continue, which was denied.

On September 25, 2017, the undersigned conducted the final hearing, as scheduled. The hearing was called to order at 10:00 a.m., Eastern Standard Time ("EST"). After preliminary matters, Petitioner's counsel requested a brief recess to allow her primary witness additional time to appear at the hearing. At approximately 10:45 a.m. EST, Petitioner was given a second recess to allow the witness to appear. The hearing reconvened after the recess with the witness present.

At the hearing, the Department presented the testimony of Chris Byrnes, a Department investigator, and Department's Exhibits 1 through 5 were admitted without objection. Respondent presented the testimony of two witnesses: Mary Atwood, owner and manager of Boss Lady Co.; and Ricky Atwood, husband of Mary Atwood. Respondent offered no exhibits.

The one-volume Transcript of the final hearing was filed with DOAH on October 16, 2017. On October 4, 2017, Respondent filed a post-hearing statement, which the undersigned accepts as Respondent's Proposed Recommended Order ("PRO"). On October 23,

2017, Petitioner timely filed a PRO. Both post-hearing submittals have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to statutes are to Florida Statutes (2016), which is the law in effect at the time of the alleged acts.

#### FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the requirement of the Workers' Compensation law that requires employers to secure the payment of workers' compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. Respondent is a Florida limited liability company, organized on September 18, 2014, engaged in business in Florida. Mary Atwood is the listed manager and owner of Boss Lady Co.

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

4. Mrs. Atwood testified that she obtained a license to engage in construction as a minority female business owner.

5. The record contains a handwritten list of jobs provided by Mrs. Atwood to represent the work performed by Respondent, which included color sealer (application), partial color sealer (removal), privacy fence repair, and privacy fence (installation).

6. On May 18, 2017, Mr. Byrnes observed a truck parked in front of a property with a magnetic sign indicating, Boss Lady Concreate Company. The sign indicated the company worked on patios, driveways, foundation, flat work, and privacy fences. He then stopped at the property to perform a random check.

7. During the random check, Mr. Byrnes encountered two men when he approached the property. The first man, Joshua Brown, was operating a pressure washer. Mr. Byrnes told Mr. Brown his name and the purpose of his visit. Mr. Brown told Mr. Byrnes that his boss, Mary, was in the back of the house. Mr. Brown stated that it was his first day working for Mrs. Atwood and that he was expecting to receive beer money for the day.

8. The second man, Kenneth Archibald, stated that he works for Mrs. Atwood off and on and had done so for some time. He stated he was generally paid eight or nine dollars per hour and that he expected to be paid his general wage for that day's work.

9. Mrs. Atwood denied that Mr. Archibald and Mr. Brown were her employees and stated that they were just helping her out for the day.

10. However, Mrs. Atwood transported the two men to the property for the purpose of pressure washing the driveway. While Mrs. Atwood continued to deny that she intended to pay the gentleman for the work performed, she testified that the men

wanted beer money and she was "going to give them a couple of dollars for beer." No one was paid for anything that day.

11. Neither of the two men alleged to have been working for Mrs. Atwood testified at the hearing. Mrs. Atwood's testimony is the only direct evidence presented at hearing of the payment arrangement for the two men at the property location.

12. Mr. Byrnes checked the Department's Coverage and Compliance Automated System ("CCAS") database to determine whether Mrs. Atwood had secured the payment of workers' compensation insurance coverage or had obtained an exemption from the requirements of chapter 440. CCAS is a database that Department investigators routinely consult during their investigations to check for compliance, exemptions, and other workers' compensation related items. CCAS revealed that Mrs. Atwood had an exemption for herself for construction, effective October 5, 2016. There was no evidence that Respondent had workers' compensation coverage for any employees.

13. Based on his jobsite interviews with the alleged employees and Mrs. Atwood, and his CCAS computer search, Mr. Byrnes concluded that Mrs. Atwood had two employees working in the construction industry and that she had failed to obtain

workers' compensation coverage for those employees in violation of chapter 440. As a result, Mr. Byrnes issued a SWO that he personally served on Mrs. Atwood on May 18, 2017.

14. Also on May 18, 2017, Mr. Byrnes served Mrs. Atwood with a Request for Production, asking for payroll records, accounting records, disbursements, contracts for work, subcontractors' documents, and documentation of subcontractors' workers' compensation coverage for the period from February 13, 2017, through May 18, 2017. The request for payroll records included income tax documents.

15. Mrs. Atwood provided Mr. Byrnes with a list of jobs performed, including the amount paid for work performed, in response to the Request for Production. Mrs. Atwood testified that she produced the only records she had in her possession because she did not have payroll records, bank records, or billing records. Mrs. Atwood also testified that Boss Lady Co. filed taxes, yet it did not provide tax records because Mr. Byrnes allegedly did not request the records.

16. The undersigned is not persuaded by Mrs. Atwood's testimony regarding failure to produce the income tax records.

17. The evidence supports a finding that Boss Lady Co. had tax records for the covered time period which were not produced to the Department.

18. The evidence produced at hearing clearly and convincingly demonstrated that Mrs. Atwood was covered by an exemption (related to the construction industry) from workers' compensation insurance exemption.

19. There is direct evidence that Mr. Byrnes saw Mr. Brown operating the pressure washer, and that, at the very least, Mrs. Atwood intended to pay him a couple of dollars for beer. Thus, the undersigned finds that Mr. Brown was working for Respondent on May 18, 2017.

20. However, there was no direct evidence that Mr. Archibald was observed performing any work. The only evidence as to whether Mr. Archibald worked for Respondent or how he was paid was hearsay statements of Mr. Archibald as restated by Mr. Byrnes. Mr. Archibald was not available at hearing to corroborate Mr. Byrnes testimony. Mrs. Atwood testified that Mr. Archibald was merely plugging in the pressure washer. The Department did not demonstrate by clear and convincing evidence that Mr. Archibald was performing work for Respondent on May 18, 2017.

21. Mr. Byrnes testified that the work he observed on May 18, 2017 (pressure washing) was non-construction work. Although the work performed on that day may not be classified as non-construction work, the evidence demonstrates that Boss Lady Co. is an employer with one or more employees engaged in



the construction industry. Thus, Boss Lady Co. was required to maintain workers' compensation coverage for its employees.

22. The Department has demonstrated that issuance of the SWO was proper, pursuant to chapter 440.

23. The Department has demonstrated by clear and convincing evidence that Respondent was in violation of chapter 440 by failing to produce tax records in response to the Request to Produce.

#### CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

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

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

27. "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.

28. "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.

29. 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. See Dep't of Banking and Fin., Div. of Sec. and Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

30. 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 of 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).

31. The undersigned has found that the Department proved by clear and convincing evidence that Respondent employed Mr. Brown. The Department did not prove by clear and convincing

evidence that Respondent employed Mr. Archibald on May 18, 2017. The Department did prove that Respondent was a business in the construction industry. Therefore, Respondent was required to obtain workers' compensation insurance coverage for Mr. Brown.

32. Section 440.02(8) defines "construction industry" as "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land." Section 440.02(8) further provides "[t]he division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section."

Respondent's business activities as described by Mrs. Atwood of concrete color sealer and installer of privacy fences constituted construction under the Department's statutorily authorized rules. Fla. Admin. Code R. 69L-6.021(2)(x) and (yyy).

33. Section 440.107(7)(a) provides 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 by this chapter as failed to secure the payment of workers' compensation required by this chapter . . . 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.

Thus, the Department's SWO was mandated by statute.

34. The Department demonstrated by clear and convincing evidence that it correctly issued the SWO to Respondent.

35. The Department demonstrated by clear and convincing evidence that Respondent failed to comply with the Request to Produce by failing to produce tax records.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department entered a final order finding:

(a) the Department properly issued the Stop-Work Order against Boss Lady Concreate Co., LLC; and

(b) Boss Lady Concreate Co., LLC, failed to comply with the SWO by failing to provide tax records as requested by the Department's Request to Produce.

DONE AND ENTERED this 16th day of November, 2017, in  
Tallahassee, Leon County, Florida.



---

YOLONDA Y. GREEN  
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 16th day of November, 2017.

ENDNOTE

<sup>1/</sup> Respondent's business is registered with the Division of  
Corporations as Boss Lady Concreate Co., LLC.

COPIES FURNISHED:

Mary Atwood  
Boss Lady Concreate Co. LLC  
5801 Clearwater Drive  
Pensacola, Florida 32505

Christina Pumphrey, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229  
(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.