

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-6823

DONALD STEVEN PAUL, d/b/a D.P.
PAINTING OF LAKELAND,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge Hetal Desai, of the Division of Administrative Hearings, held a final hearing in this cause by video teleconference at sites in Tampa and Tallahassee, Florida, on February 21, 2018.

APPEARANCES

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

For Respondent: Donald Steven Paul
D.P. Painting of Lakeland
5436 9th Street Southeast
Post Office Box 13
Highland City, Florida 33846

STATEMENT OF THE ISSUES

Whether Respondent violated the provisions of chapter 440, Florida Statutes (2017), by failing to secure the payment of

workers' compensation coverage as alleged in the Stop-Work Order and Second Amended Order of Penalty Assessment and, if so, what penalty is appropriate.^{1/}

PRELIMINARY STATEMENT

On August 14, 2017, Petitioner, the Department of Financial Services, Division of Workers' Compensation (Department or DWC), served a Stop-Work Order (SWO) on Respondent Donald Steven Paul d/b/a/ D.P. Painting of Lakeland, due to an alleged failure to secure workers' compensation insurance coverage for its employees. The Department issued an Amended Order of Penalty Assessment on October 16, 2017.

On November 21, 2017, the Department issued Respondent a Second Amended Order of Penalty Assessment, and alleged therein that Respondent owed a total penalty of \$2,090.14.

Respondent disputed the allegations and penalty in the Second Amended Order of Penalty Assessment and on December 18, 2017, DWC referred the matter to the Division of Administrative Hearings (DOAH) for an administrative hearing and referral to an Administrative Law Judge.

A pre-hearing conference was held telephonically on February 19, 2018, and the parties discussed the process of the hearing and the admission of exhibits and testimony.

At the duly noticed final hearing on February 21, 2018, Petitioner presented the testimony of two witnesses: Richard

Murvin (Investigator Murvin), a DWC compliance officer; and Lynne Murcia (Auditor Murcia), a DWC penalty auditor. Department Exhibits 1 through 10 were admitted into evidence without objection.^{2/}

Respondent put on the testimony of Donald Steven Paul, the owner of Respondent; and Michelle Paul, Mr. Paul's ex-wife. Respondent did not offer any exhibits.

A Transcript of the final hearing was filed on April 3, 2018. The Department timely filed its Proposed Recommended Order (PRO) on April 16, 2018; Respondent did not file a PRO. The undersigned has considered the Department's PRO in preparing this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for the enforcement of the workers' compensation insurance coverage requirements established in chapter 440.

2. On September 14, 2017, Investigator Murvin conducted a random workers' compensation compliance check at a residential construction site at 8256 Lake James Drive in Lakeland, Florida.

3. During the course of the compliance check, Investigator Murvin observed two individuals--Donald Steven Paul, Jr. and Dean Wayne Paul--painting the home.

4. It is undisputed that Respondent had been subcontracted to perform painting services at this site; and that these two

individuals were, at the time of Investigator Murvin's visit, employed by Respondent.

5. After speaking to Donald and Dean Paul, Investigator Murvin used the Department's database to verify that Respondent did not have workers' compensation insurance coverage, nor did Donald or Dean Paul have an exemption from the coverage requirements.

6. Donald Paul admitted to Investigator Murvin at the hearing that he did not have workers' compensation coverage for himself or Dean Paul. Donald Paul explained that he believed that his incorporation with the state and securing of liability insurance provided compliance of all insurance requirements.

7. Based on the information provided by Dean and Donald Paul, and from the database, Investigator Murvin issued a SWO to Respondent on the same day as the site visit.

8. A Request for Production of Business Records was also issued to Respondent. In response to the request for documentation, Respondent provided bank statements that indicated the business began in August 1, 2016.

9. The bank statements also established that there was money being deposited and being paid out, but there was no indication what the money was for or how it was allocated. In other words, there was no way to discern whether the money paid

out of the bank account was for employee salaries or other business expenses.

10. In support of its Second Amended Order of Penalty Assessment, the Department prepared a penalty calculation worksheet showing a total penalty owed of \$2,090.14.

11. At the hearing, Respondent did not challenge the accuracy or method of calculating the assessed penalty, but only asserted that it believed it had the appropriate coverage and that the penalty was "too high."

12. Based on the evidence, it is clear Respondent provides construction services and has at least one employee; therefore, it was required to secure workers' compensation insurance.

13. The Department established by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation as required by chapter 440.

14. The Department has established through the records submitted and testimony of Auditor Murcia, the appropriate penalty for Respondent's failure to obtain workers' compensation coverage is \$2,090.14 for the audit period of August 1, 2016, to August 14, 2017.

CONCLUSIONS OF LAW

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

16. The Department is the agency of the State of Florida charged with the duty to (1) enforce workers' compensation coverage requirements; and (2) enforce record-keeping requirements to accurately determine payroll and correctly assign classification codes. § 440.107(3), Fla. Stat.

17. In addition to any other powers under chapter 440, the Department has the power to:

(a) Conduct investigations for the purpose of ensuring employer compliance.

(b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.

(c) Examine and copy business records.

* * *

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

(h) Enforce the terms of a stop-work order.

(i) Levy and pursue actions to recover penalties.

(j) Seek injunctions and other appropriate relief.

§ 440.107(3), Fla. Stat.

18. The Department has the burden of proof in this case and must show by clear and convincing evidence that Respondent violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. § 120.57(1)(j),

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

19. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

20. The Department has "broad powers to investigate employers, to halt any work where employers are not complying, and to assess penalties on those who do not comply." Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007).

21. Respondent does not contest the facts it was an employer. As an "employer," pursuant to sections 440.10 and 440.38, it was required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. See e.g., Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1185 (Fla. 4th DCA 2005); C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

22. Section 440.02(8) defines "construction industry" to mean "for-profit activities involving any building, clearing, filling, excavation, or a substantial improvement in the size or use of any structure or the appearance of any land." It is

undisputed that Respondent performed work in the "construction industry" during the period of non-compliance.

23. Although Donald Paul believed incorporating Respondent and obtaining liability insurance was sufficient to operate his business, he was mistaken. The workers' compensation statutes, however, do not allow for ignorance of the coverage requirements to serve as a defense or a mitigating factor. Section 440.107(7) (a) provides, in part, as follows:

[W]henever 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 has 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. (emphasis supplied).

The Department was required to issue a Stop-Work Order once it discovered Respondent had not secured proper workers' compensation coverage for its employees.

24. As for the penalty assessed against Respondent, section 440.107(7) (d) (1) provides, in part, that:

[I]n addition to any penalty, stop-work order, or injunction, the department 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. (emphasis supplied).

25. The "shall" language found in sections 440.107(7)(a) and 440.107(7)(d)1. prevents the undersigned from reducing the legislatively mandated penalty, and therefore, it matters not, for purposes of assessing the penalty, that Donald Paul believed Respondent was compliant, or that the amount of the penalty may have a detrimental effect on Respondent.

26. Accordingly, the \$2,090.14 penalty is lawful and shall be assessed against Respondent.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order finding that Respondent, Donald Steven Paul d/b/a/ D. P. Painting of Lakeland, violated the provisions of chapter 440 by failing to secure the payment of workers' compensation and assessing against Respondent a penalty in the amount of \$2,090.14.

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

Hetal Desai

HETAL DESAI
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 April, 2018.

ENDNOTES

^{1/} All references to Florida Statutes are to the version in effect in 2017, unless otherwise indicated.

^{2/} The last page of Exhibit 7, Bate-stamped 23, was not admitted into evidence.

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.