

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 17-6979

VINYL SIDING CONTRACTOR SERVICE,
LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 20, 2018, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge, via video teleconference at sites in Pensacola and Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael Joseph Gordon, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Thomas Melvin, pro se
Vinyl Siding Contractor Service, LLC
50 Stanford Road
Pensacola, Florida 32506

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the Respondent, Vinyl Siding Contractor Service, LLC ("Vinyl Siding"), failed to

abide by the coverage requirements of the Workers' Compensation Law, chapter 440, Florida Statutes, by not obtaining workers' compensation insurance for its employees; and, if so, whether the Petitioner properly assessed a penalty against the Respondent pursuant to section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to the Workers' Compensation Law, chapter 440, the Department of Financial Services, Division of Workers' Compensation ("Department"), seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees.

On January 4, 2017, the Department issued a "Stop-Work Order" alleging that Vinyl Siding failed to abide by the coverage requirements of the Workers' Compensation Law on that date. The order directed Vinyl Siding to cease business operations and pay a penalty equal to two times the amount Vinyl Siding would have paid in premium to secure workers' compensation 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). The Department also requested business records from Vinyl Siding in order to determine the exact amount of the penalty.

Vinyl Siding provided business records to the Department and the Department issued an "Amended Order of Penalty

Assessment."^{1/} Vinyl Siding provided additional business records and, on May 1, 2017, the Department issued a "2nd Amended Order of Penalty Assessment" that ordered Vinyl Siding to pay a penalty of \$13,357.20, pursuant to section 440.107(7)(d).

Thomas Melvin, the manager and sole proprietor of Vinyl Siding, disputed the Department's penalty calculation and requested an administrative hearing. On June 26, 2017, Vinyl Siding filed a letter with the Department requesting a hearing. On December 28, 2017, the Department forwarded Vinyl Siding's request to the Division of Administrative Hearings ("DOAH"). The hearing was scheduled for February 20, 2018, on which date it was convened and completed.

At the hearing, the Department presented the testimony of its investigator, Jesse Holman; its lead auditor, Lawrence Pickle; and its operations and management consultant, Kevin Sterling. The Department's Exhibits A through H were admitted into evidence. The undersigned also read and considered the deposition testimony of Mr. Melvin and of Vinyl Siding employee Curtis Braswell. At the hearing, Vinyl Siding presented the testimony of Mr. Braswell's wife, Julie Braswell. Vinyl Siding offered no exhibits.

The one-volume Transcript of the final hearing was filed at DOAH on February 28, 2018. The Department timely filed a

Proposed Recommended Order on March 8, 2018. Vinyl Siding made no post-hearing written submission.

Unless otherwise stated, all statutory references are to the 2017 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following Findings of Fact are made:

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 and corporate officers. § 440.107, Fla. Stat.

2. Vinyl Siding is a Florida corporation. The Division of Corporations' "Sunbiz" website indicates that Vinyl Siding was first incorporated on December 30, 2003, and remained active as of the date of the hearing. Vinyl Siding's principal office is at 50 Stanford Road, Pensacola, Florida 32506.

3. Vinyl Siding is solely owned and operated by Thomas Melvin. Mr. Melvin is the manager and sole officer of the corporation. Vinyl Siding was actively engaged in performing carpentry during the audit period from June 4, 2016, through January 4, 2017.

4. Jesse Holman is a compensation compliance investigator for the Department. During the period relevant to this proceeding, Mr. Holman was assigned to an area that included Santa Rosa and Okaloosa Counties. Mr. Holman's job entailed conducting random compliance investigations and investigating referrals made to his office by members of the public. Mr. Holman testified that as an investigator, he would enter worksites and observe the workers and the types of work they were doing.

5. Mr. Holman testified that he first came into contact with Vinyl Siding in early June 2016, in the Milton area. Mr. Holman checked on Mr. Melvin and his only employee, Curtis Braswell, and found they both had active exemptions from workers' compensation coverage requirements. Mr. Holman testified that he noticed Mr. Braswell's exemption was due to expire the next day and cautioned him on the need to renew it.

6. On January 4, 2017, Mr. Holman visited a worksite at 2350 Genevieve Way in Crestview. A new house was under construction and Vinyl Siding was at work on it. Mr. Holman remembered Mr. Melvin and Mr. Braswell and asked them about their exemptions. Each man replied that his exemption was current.

7. Mr. Holman returned to his vehicle to perform computer research on Vinyl Siding. He consulted the Sunbiz website for

information about the company and its officers. His search confirmed that Vinyl Siding was an active Florida corporation and that Thomas Melvin was listed as its registered agent and as manager of the corporation. No other corporate officers were listed.

8. Mr. Holman also checked the Department's Coverage and Compliance Automated System ("CCAS") database to determine whether Vinyl Siding 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 Vinyl Siding had no active workers' compensation insurance coverage for its employees and that no insurance had ever been reported to the state for Vinyl Siding. There was no evidence that Vinyl Siding used an employee leasing service. Mr. Melvin had an active exemption as an officer of the corporation pursuant to section 440.05 and Florida Administrative Code Rule 69L-6.012, effective July 24, 2016, through July 24, 2018. Mr. Braswell's exemption had expired on June 3, 2016.

9. Based on his Sunbiz and CCAS computer searches, Mr. Holman concluded that as of January 4, 2017, Vinyl Siding had an exemption for Mr. Melvin but had failed to procure

workers' compensation coverage or an exemption for Mr. Braswell, in violation of chapter 440. Mr. Holman consequently issued a Stop-Work Order that he personally served on Mr. Melvin at the job site on January 4, 2017.

10. Also on January 4, 2017, Mr. Holman served Vinyl Siding with a Request for Production of Business Records for Penalty Assessment Calculation, asking for documents pertaining to the identification of the employer, the employer's payroll, business accounts, disbursements, workers' compensation insurance coverage records, professional employer organization records, temporary labor service records, documentation of exemptions, documents relating to subcontractors, documents of subcontractors' workers' compensation insurance coverage, and other business records, to enable the Department to determine the appropriate penalty owed by Vinyl Siding.

11. Mr. Holman testified that he later met twice with Mr. Melvin. After Mr. Melvin turned in some business records, Mr. Holman met with Mr. Melvin and served him with the Amended Order of Penalty Assessment. Mr. Melvin subsequently submitted additional business records, which led Mr. Holman to recalculate the penalty and issue the 2nd Amended Order of Penalty Assessment, which Mr. Holman personally served on Mr. Melvin on May 1, 2017.

12. Mr. Braswell testified that he had been aware that his exemption was about to expire and was going to drive to the Department's offices to renew it. His wife, Julie Braswell, told him that she would save him the gas money by renewing his exemption online. Ms. Braswell timely submitted the renewal application on May 26, 2016, but the Department returned it as "incomplete" because under the heading "scope of employment," Ms. Braswell checked "contractor" rather than Mr. Braswell's actual scope of employment, "carpenter."

13. Operations and management consultant Kevin Sterling is part of the Department's team that oversees the daily activities of the exemption unit. He oversees the "denial team" that undertakes a second review of any application that is initially deemed incomplete or ineligible. Mr. Sterling testified that Mr. Braswell's application was deemed incomplete because the scope of employment, "contractor," requires a license from the Department of Business and Professional Regulation. No evidence was submitted that Mr. Braswell had such a license.

14. Mr. Sterling testified that in filling out the online form, an applicant first selects the category "non-construction" or "construction." If the applicant selects "construction," a drop-down box appears and the applicant selects the correct category. Ms. Braswell inadvertently checked the wrong box on the form.

15. Ms. Braswell testified that she received a written notice in the mail about two weeks after she submitted the application. The notice informed her that the application was incomplete but gave her no information as to why the application was incomplete. She resubmitted the application, but failed to correct the category error. The Department's website informed her that the application was complete. She and her husband believed they had taken care of the exemption renewal.

16. Both Curtis and Julie Braswell testified that they received no further written correspondence from the Department. Ms. Braswell did not include an email address on the application, so no email was sent to inform her that the application had not been corrected and the exemption had not been renewed.

17. Ms. Braswell testified that she had given the Department her email address when she applied for Mr. Braswell's previous exemption and that she had received email confirmation from the Department as to payment of the application fee when she sent in the first renewal application in May 2016. Mr. Sterling testified that the application software looks first to the email address provided in the application itself. If there is no email address provided, then a hard copy of the relevant document is generated and mailed to the applicant. The

Braswells' failure to receive the hard copy of the second notice of incompleteness was not explained at the hearing.

18. Mr. Sterling testified that the Department's 23 examiners process around 16,000 applications per month. Businesses constantly change addresses. Employees move from company to company. Because of the mass of applications and the mobility of the regulated population, the Department exclusively uses the data on the most recent application. Mr. Sterling stated that there is simply no time to look up and attempt to reach an old email address if the applicant fails to include one on the current application.

19. Lead auditor Lawrence Pickle performed the calculation of the assessed penalty. Mr. Pickle testified as to the process of penalty calculation. Penalties for workers' compensation insurance violations are generally based on doubling the amount of evaded insurance premiums over the two-year period preceding the Stop-Work Order. § 440.107(7)(d), Fla. Stat. In this case, the period was shorter than two years because Mr. Braswell's exemption did not expire until June 3, 2016. Therefore, the penalty was calculated from June 4, 2016, through January 4, 2017, the date of the Stop-Work Order.

20. In the penalty assessment calculation, the Department consulted the classification codes and definitions set forth in the SCOPES of Basic Manual Classifications ("Scopes Manual")

published by the National Council on Compensation Insurance ("NCCI"). The Scopes Manual has been adopted by reference in rule 69L-6.021. Classification codes are four-digit codes assigned to occupations by the NCCI to assist in the calculation of workers' compensation insurance premiums. Rule 69L-6.028(3)(d) provides that "[t]he imputed weekly payroll for each employee . . . shall be assigned to the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of that employee's activities."

21. Mr. Pickle applied NCCI Class Code 5645, titled "Carpentry--Construction of Detached One or Two Family Dwellings." The corresponding rule provision is rule 69L-6.021(2)(yy). Mr. Pickle used the approved manual rates corresponding to Class Code 5645 for the periods of non-compliance to initially calculate the penalty.

22. Vinyl Siding timely provided the Department with business records that listed the company's payroll, cash receipts, and cash withdrawals. The Department determined that the company's business records and receipts did not validate the payroll and expenses that corresponded with the company's cash withdrawals. Pursuant to rule 69L-6.035(1)(k), the Department included 80 percent of cash withdrawals as wages or salaries to employees.

23. On May 1, 2017, the Department served the 2nd Amended Order of Penalty Assessment on Vinyl Siding, assessing a penalty of \$13,257.20.

24. The evidence produced at the hearing established that Mr. Pickle utilized the correct class codes, wage information, and manual rates in his calculation of the 2nd Amended Order of Penalty Assessment.

25. The Department has demonstrated by clear and convincing evidence that Vinyl Siding was in violation of the workers' compensation coverage requirements of chapter 440. Mr. Braswell was an employee of Vinyl Siding on January 4, 2017, performing services in the construction industry without valid workers' compensation insurance coverage or an exemption. The Department has also demonstrated by clear and convincing evidence that the penalty was correctly calculated through the use of the approved manual rates and the penalty calculation worksheet adopted by the Department in rule 69L-6.027.

26. Vinyl Siding could point to no exemption, insurance policy, or employee leasing arrangement that would operate to lessen or extinguish the assessed penalty. Through an unfortunate sequence of events, Mr. Braswell allowed his exemption to lapse on June 3, 2016, though he became aware of that lapse only when Mr. Holman informed him at the job site on January 4, 2017.

27. Mr. Melvin testified that he does not use a computer. Mr. Braswell stated that he does not know how to turn on a computer. Ms. Braswell made an unfortunate slip of the finger in selecting a scope of employment for her husband.

28. Vinyl Siding appears to be a victim of progress, i.e., the Department's online-only exemption application process. The company is not wealthy and its principals made a good-faith attempt to comply with the requirements of chapter 440. Vinyl Siding presents a singularly sympathetic example of why the workers' compensation insurance enforcement process should include some element of agency discretion to reduce or eliminate the financial penalty under defined circumstances. However, as matters stand, equitable considerations have no effect on the operation of chapter 440 or the imposition of the penalty assessed pursuant thereto.

CONCLUSIONS OF LAW

29. 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.

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

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

"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.

Remuneration includes not only monetary payment, but any "valuable consideration . . . intended by both employer and employee." § 440.02(15) (d)6., 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 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).

35. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

36. 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." Vinyl Siding's activities in performing carpentry work on a residential dwelling constituted construction under the Department's statutorily authorized rules. Fla. Admin. Code R. 69L-6.021(2)(yy).

37. The Department established by clear and convincing evidence that Vinyl Siding was an "employer" for workers' compensation purposes because it was engaged in the construction industry during the period of June 4, 2016, through January 4, 2017, and employed one or more employees during that period. §§ 440.02(16)(a) and (17)(b)2., Fla. Stat.

38. 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 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.

Thus, the Department's Stop-Work Order was mandated by statute.

39. As to the computation and assessment of penalties, section 440.107(7) provides, in relevant part:

(d)1. In 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.

40. Mr. Pickle properly utilized the penalty worksheet mandated by rule 69L-6.027 and the procedure set forth in section 440.107(7)(d)1. to calculate the penalty owed by Vinyl Siding as a result of its failure to comply with the coverage requirements of chapter 440.

41. The Department has proven by clear and convincing evidence that it correctly calculated and issued the penalty of \$13,357.20 in the 2nd Amended Order of Penalty Assessment.

42. Mr. Melvin and the Braswells were credible and sympathetic witnesses. The undersigned did not doubt their testimony as to the circumstances surrounding Mr. Braswell's

failure to successfully renew his exemption. However, the Legislature has not seen fit to provide a "hardship exemption" to the requirements of chapter 440, and the undersigned lacks the authority to create an equitable exception. See Dep't of Ins. & Treasurer v. Bankers Ins. Co., 694 So. 2d 70, 71 (Fla. 1st DCA 1997) ("[A]gencies are creatures of statute. Their legitimate regulatory realm is no more and no less than what the Legislature prescribes by law.").

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$13,357.20 against Vinyl Siding Contractor Service, LLC.

DONE AND ENTERED this 16th day of March, 2018, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2018.

ENDNOTE

^{1/} The Amended Order of Penalty Assessment was not made part of
the record.

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.