

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-1300

JOHN MCCARY GENERAL CONTRACTOR,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

On May 31, 2018, Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings conducted the final hearing in this case by video teleconference at locations in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Jonathan Anthony Martin, Esquire
Florida Department of Financial Services
Legal Services Division
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: John McCary
John McCary General Contractors, Inc.
9808 North Armenia Avenue
Tampa, Florida 33612

STATEMENT OF THE ISSUES

A. Did Respondent, John McCary General Contractor, Inc. (McCary), fail to secure workers' compensation insurance for employees as required by chapter 440, Florida Statutes (2016)?^{1/}

B. If so, what is the appropriate penalty?

PRELIMINARY STATEMENT

The Third Amended Order of Penalty Assessment of Petitioner, Department of Financial Services, Division of Workers' Compensation (Division), asserts that between May 1, 2016, and November 18, 2016, McCary paid a gross payroll of \$1,280,648.01 for employees for whom McCary had not provided workers' compensation insurance coverage.^{2/} The Division determined that the premium for providing the uninsured employees coverage would be \$134,658.53. It further determined that McCary should pay a penalty of \$269,317.06 for failing to provide the required coverage.

Kent Howe, compliance investigator, and Lynne Murcia, penalty auditor, testified on behalf of the Division. Division Exhibits 1 through 15 were admitted into evidence. McCary presented brief testimony from its owner, John McCary. McCary's Exhibit 1 was admitted.

At the hearing's conclusion, John McCary, McCary's principal and representative in this proceeding, stated: "So, I don't object to any of it [the Division's assertions and evidence]."

I agree with what you have found here. What I'm asking for is some form of partnering; we'll call it leniency in the penalty assessment."

The parties timely filed proposed recommended orders. McCary's Proposed Recommended Order stated that it could not afford to pay the penalty. McCary's Proposed Recommended Order proposed only that the penalty be halved and that McCary be permitted to make monthly payments of \$1,402.70. The proposed recommended orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is the state agency responsible for enforcing the statutory requirement that employers secure workers' compensation insurance for the benefit of their employees. § 440.107(3), Fla. Stat.

2. McCary is a roofing contractor owned and operated by John McCary. It is in the construction industry.

3. On November 18, 2016, Mr. Howe, a compliance investigator for the Division, visited a house where McCary was tearing off the roof. Mr. Howe recorded the names of each employee. He conducted an investigation that included speaking to Mr. McCary, re-interviewing the employees, checking with the employee leasing company that McCary used, and checking the Davison database of insured individuals. Mr. Howe could not find

a record of workers' compensation coverage for at least one employee. This triggered further investigation that resulted in Mr. Howe issuing a Stop-Work Order to McCary on November 18, 2016, for failure to secure workers' compensation insurance in violation of sections 440.10(1), 440.38(1) and 440.107(2).

4. After that, the Division followed its usual practice of requesting documents, reviewing its databases, soliciting information and explanations from the employer, and analyzing the information and documents obtained.

5. Division Exhibit 9 shows that the Division asked McCary for business records on November 21, 2016, and that McCary did not provide them until December 12, 2016.

6. The Division's investigation and analysis resulted in the evidence admitted in this proceeding. The evidence proved the allegations of the Division's Third Amended Order of Penalty Assessment, including its attached Penalty Calculation Worksheet.

7. McCary did not comply with workers' compensation insurance coverage requirements for the period May 1 through November 18, 2016.

8. During that period, McCary employed Arcenio Rosado, Domingo Esteves, Javier Restrepo, Jose Alfredo Fuentes, Carlos Toledo, Edwin Valle, Kelly Alvarez, Kyle Shiro, Claudia Florez, and Nelson Geovany Melgar Rodenzo and that they performed work for it. McCary would have paid \$4,744.06 in insurance premiums

to provide workers' compensation coverage for these employees during that period.

9. During that period, McCary also used the services of two subcontractors, Star Debris Removal and E C Roofing, LLC. These subcontractors did not have workers' compensation insurance for their employees during the May 1 through November 18, 2016, period. Premiums to provide coverage to the employees of the two subcontractors who worked on McCary's projects would have totaled \$100,771.09.

10. From May 1 to November 18, 2016, McCary made cash payments of \$195,856.02 that its documents could not confirm to be for a valid business expense. Florida Administrative Code Rule 69L-6.035(1)(k) requires that 80 percent of that amount be deemed wages or salaries paid employees when calculating the premiums used to determine the ultimate penalty. Eighty percent of McCary's unaccounted-for cash payments is \$156,684.82. That amount is legally deemed to be a payroll expense. McCary would have paid \$29,143.38 to provide coverage for the employees represented by the cash payments.

11. Altogether, McCary would have paid \$134,658.53 to provide workers' compensation coverage to the uncovered employees represented by the actual and deemed payroll during the May 1 to November 18, 2016, period.

CONCLUSIONS OF LAW

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

13. The Division must prove its allegations by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., Inc., 670 So. 2d 932 (Fla. 1996).

14. Employers in Florida must secure workers' compensation insurance coverage for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

15. McCary was an employer in the construction industry during the relevant period. §§ 440.02(8), 440.02(16)(a), and 440.02(23), Fla. Stat.

16. McCary was an employer in the construction industry with employees working between May 1 and November 18, 2016. McCary was required to secure workers' compensation coverage for its employees during that period. § 440.10(1)(a), Fla. Stat.

17. If a contractor sublets any part of its work, all employees of the subcontractor are deemed employees of the contractor. The contractor is responsible for providing payment of workers' compensation coverage for all employees except the employees for whom the subcontractor has provided coverage. §§ 440.10(1)(b) and 440.10(1)(c), Fla. Stat. The Division properly applied this provision to McCary's engagement of Star

Debris Removal and E C Roofing, LLC, which did not have workers' compensation insurance coverage for their employees.

18. An employer's failure to secure required workers' compensation coverage justifies the Division imposing a Stop-Work Order requiring the employer to cease all business operations. § 440.107(7)(a), Fla. Stat. The Division properly imposed a Stop-Work Order on McCary.

19. The Division must also assess "a penalty equal to 2 times the amount the employer would have paid in premiums 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." § 440.107(7)(d)1., Fla. Stat.

20. The Division used the correct approved manual rates when calculating the proposed penalty. It then properly calculated the evaded premium and multiplied it by two as section 440.107(7)(d)1. requires.

21. "Payroll" includes 80 percent of all cash transactions found in an employer's business records, unless the employer's business records and receipts demonstrate any of those cash transactions to be a valid business expense. Fla. Admin. Code. R. 69L-6.035(1)(k). The penalty worksheet is required to represent this figure as "uninsured labor." The Division

correctly applied this provision to McCary's business records in calculating the proposed penalty.

22. The Division proved by clear and convincing evidence that it properly issued the Stop-Work Order to McCary.

23. The Division also proved by clear and convincing evidence that it correctly calculated and issued the \$269,317.06 penalty.

24. The Division's proposal acknowledges that McCary is entitled to a \$1,000 credit for a payment made after Mr. Howe's initial inquiry. § 440.107(7)(d)1.a., Fla. Stat.

25. McCary does not qualify for the 25-percent mitigation opportunity section 440.107(7)(d)1.b. affords because it did not provide business records to the department within ten business days after receipt of the written request to produce business records.

RECOMMENDATION

Based on 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 John McCary General Contractor, Inc., failed to secure payment of required workers' compensation insurance coverage from May 1 to November 18, 2016, in violation of section 440.107,

Florida Statutes, and imposing a penalty of \$269,317.06, reduced by \$1,000.00.

DONE AND ENTERED this 17th day of July, 2018, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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 17th day of July, 2018.

ENDNOTES

^{1/} All citations to the Florida Statutes are to the 2016 codification unless otherwise noted.

^{2/} At the outset of the final hearing, the undersigned granted the Division's Agreed Motion to Amend Order of Penalty Assessment and accepted the Third Amended Order of Penalty Assessment.

COPIES FURNISHED:

Jonathan Anthony Martin, Esquire
Florida Department of Financial Services
Legal Services Division
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

John McCary
John McCary General Contractors, Inc.
9808 North Armenia Avenue
Tampa, Florida 33612

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.