

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 18-4759

BALDEO ENTERPRISES, INC.,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A final hearing was conducted in this case on November 13, 2018, by video teleconference with sites in Lauderdale Lakes and Tallahassee, Florida, before Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Steven Hart, Qualified Representative  
Dustin William Metz, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: Davain Baldeo  
Baldeo Enterprises, Inc.  
15 Northwest 5th Avenue  
Hallandale, Florida 33009

STATEMENT OF THE ISSUES

The primary issue to be decided in this proceeding is whether Respondent's backdated, retroactive workers' compensation policy complied with the requirements of chapter 440, Florida Statutes. If not, was the penalty properly assessed.

PRELIMINARY STATEMENT

On March 16, 2018, Petitioner, Department of Financial Services, Division of Workers' Compensation ("Department"), served a Request for Production of Business Records on Baldeo Enterprises, Inc. ("Respondent".)<sup>1/</sup>

On April 19, 2018, Respondent also received a Request for Production of Business Records for Penalty Assessment Calculation ("BRR".)

On August 7, 2018, the Department served Respondent with an Order of Penalty Assessment ("OPA") reflecting a total penalty of \$1,000.00.<sup>2/</sup>

Taking exception to the assessment and conclusions reached by the Department, Respondent requested an administrative hearing. On August 17, 2018, the Department referred the matter to DOAH for a final hearing, where the case was assigned to the undersigned.

A final hearing was initially scheduled for October 23, 2018. However, on October 17, 2018, the parties filed an Agreed

Motion to Continue Final Hearing, which was granted. The final hearing was reset and held on November 13, 2018.

During the final hearing, Petitioner presented the testimony of Compliance Investigator Emily Metzenheim and Penalty Auditor Christopher Collins. Petitioner offered Exhibits 1 through 14, all of which were accepted into evidence without objection.

Respondent presented the testimony of Davian Baldeo and offered four exhibits that were accepted into evidence without objection.

The hearing Transcript was filed with DOAH on December 4, 2018. Petitioner filed its Proposed Recommended Order on December 13, 2018, which was reviewed and considered by the undersigned. Respondent did not file a proposed recommended order. The 2018 version of the Florida Statutes applies, unless otherwise noted.

#### FINDINGS OF FACT

The undersigned makes the following findings of fact:

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees.

§ 440.107, Fla. Stat.; Pet. Exs. 1, 2, 3.

2. Respondent is a corporation in the State of Florida and was formed on March 6, 1996. Pet. Ex. 4.

3. Respondent operates a preschool located at 15 Northwest 5th Avenue, Hallandale, Florida 33309, known as Hallandale Academy. Pet. Ex. 13 at 4:11-25, 5:1-5.

4. Respondent obtained a workers' compensation policy AWC1098385 through Associated Industries Insurance Company, an insurance carrier authorized to write workers' compensation policies in the State of Florida. Respondent's workers' compensation policy was effective from February 5, 2018, to March 11, 2018. Pet. Exs. 9 and 14.

5. On or about February 28, 2018, Respondent received notification of cancellation of its policy from its insurance carrier. § 440.42(3), Fla. Stat.; Pet. Ex. 9.

6. Respondent's workers' compensation policy was cancelled by Associated Industries Insurance Company on March 11, 2018, at 12:01 a.m. due to nonpayment of the premium. Pet. Exs. 8, 9, 10, and 11.

7. On or about March 11, 2018, Associated Industries Insurance Company notified the Department of the cancelled policy. § 440.185(6), Fla. Stat.; Pet. Ex. 14.

8. On March 16, 2018, Workers' Compensation Compliance Investigators Faline Moeses ("Moeses") and Emily Metzenheim ("Metzenheim") conducted a routine workers' compensation compliance investigation of Respondent's preschool. Pet. Ex. 8.

9. Moeses confirmed that Respondent had no workers' compensation coverage through the Department's internal database, Coverage and Compliance Automated System ("CCAS".)<sup>3/</sup> Pet. Exs. 8 and 14.

10. Moeses confirmed that her findings in CCAS matched the information found on the National Council on Compensation Insurance ("NCCI") website.<sup>4/</sup> Pet. Ex. 8.

11. Both CCAS and NCCI confirmed that Respondent did not have an active workers' compensation insurance policy on March 16, 2018, when Moeses visited. Pet. Ex. 8.

12. On March 16, 2018, while at Respondent's place of business, Moeses called Respondent's insurance carrier, Associated Industries Insurance Company, and received additional confirmation that Respondent's workers' compensation insurance policy had been cancelled and was not in effect due to nonpayment of premium. Pet. Exs. 8 and 9.

13. Moeses contacted Respondent's corporate officer, Davain Baldeo ("Mr. Baldeo"), by phone. He identified himself as the owner of Baldeo Enterprises, Inc. Pet. Ex. 8.

14. Moeses provided information to Mr. Baldeo about the purpose of the investigation. Pet. Ex. 8. Moeses requested to meet with Mr. Baldeo in person to discuss the investigation.

15. Mr. Baldeo refused the request to meet and asked that Moeses cease speaking with his employees and send all communications by mail.<sup>5/</sup> Pet. Exs. 8.

16. On March 19, 2018, a Request for Production of Business Records was sent via certified mail to Respondent. Pet. Exs. 1 and 8.

17. The Request for Production of Business Records requested several categories of business records from Respondent for the period of December 15, 2017, through March 16, 2018. See Petitioner's Exhibit 1 for a detailed description of the records requested.

18. Respondent submitted sufficient business records to the Department in response to the Request for Production of Business Records, to allow it to complete its investigation. Pet. Ex. 5. The records submitted by Respondent confirmed that Respondent employed four or more regular and customary employees during the period of December 15, 2017, through March 16, 2018. Pet. Exs. 5 and 8.

19. On March 19, 2018, Associated Industries Insurance Company, reinstated Respondent's workers' compensation policy and it backdated the policy to March 11, 2018. Pet. Exs. 8, 9, 10, and 11.

20. On April 6, 2018, the Request for Production of Business Records was converted into a BRR based on the lapse in

Respondent's workers' compensation insurance coverage between March 11 and March 19, 2018. Pet. Ex. 2.

21. On April 19, 2018, the BRR was served on Respondent. Pet. Ex. 8.

22. Respondent did not provide any additional documents in response to the BRR. Pet. Ex. 8.

23. Department Auditor Christopher Collins was assigned to calculate a penalty for Respondent's noncompliance with Florida's Workers' Compensation Law. Pet. Ex. 8.

24. Respondent's business records were sufficient for the Department to determine Respondent's payroll for the audit review period. The Department assessed a penalty against Respondent for its noncompliance with chapter 440, Florida Statutes. Pet. Ex. 3 and 5.

25. The Department served Respondent with an Order of Penalty Assessment totaling \$1,000.00. Pet. Exs. 3 and 11.

26. Respondent's period of noncompliance was March 11 through March 18, 2018, as Respondent failed to secure workers' compensation insurance coverage for this period. Pet. Exs. 8, 9, 10, and 11.

27. Based on Respondent's records, the Department determined Respondent's gross payroll during the period of noncompliance was \$3,423.99. Pet. Ex. 11.

28. Respondent's unsecured gross payroll was then divided by 100 so that it could be multiplied by the approved manual rate in order to determine the premium due. Pet. Ex. 11.

29. The approved manual rates are drafted by NCCI and then approved by the Florida Office of Insurance Regulation. § 627.091(4), Fla. Stat. The approved manual rates represent the risk factor associated with each NCCI class code and are critical to calculating a premium. Pet. Ex. 7.

30. The calculations reveal that Respondent would have paid \$62.32 in workers' compensation premium for its unsecured gross payroll, had coverage been in place, and not lapsed during the period of March 11 through March 18, 2018. Pet. Ex. 11.

31. The Department demonstrated by clear and convincing evidence that Respondent violated Florida's Workers' Compensation Law by employing four or more employees without securing the payment of workers' compensation from March 11 through March 18, 2018, or a proper exemption. This violation required the issuance of the BRR and OPA to Respondent.

32. Petitioner provided clear and convincing evidence that its penalty calculation was correct.

#### CONCLUSIONS OF LAW

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



34. Because administrative fines are penal in nature, Petitioner is required to prove by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation and that it calculated the appropriate amount of penalty owed by Respondent. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

35. Section 440.10(1)(a) provides that "[e]very employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees . . . of the compensation payable under ss. 440.13, 440.15, and 440.16."

36. Florida law defines "employer" in part as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

37. "Employment" includes "(a)ll private employments in which four or more employees are employed by the same employer . . ." § 440.02(17)(b)2., Fla. Stat.

38. Respondent's business records and the evidence established that Respondent employed four or more employees in the childcare industry, a non-construction industry. Pet. Exs. 5 and 8.

39. Childcare services are governed by NCCI class code, 8869. Pet. Ex. 6; Fla. Admin. Code. R. 69L-6.021(2)(aa).

40. "Employee" means 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.

41. The employees listed on the penalty worksheet of the Order of Penalty Assessment received remuneration from Respondent for services performed for Respondent. Pet. Ex. 5.

42. As an employer of four or more employees, Respondent was required to secure the payment of workers' compensation insurance coverage for its employees. § 440.02(17)(b)2. and § 440.03, Fla. Stat. Respondent does not dispute that it was required to secure the payment of workers' compensation.

43. The primary legal issue to be decided in this case is whether Respondent complied with the coverage requirements of chapter 440 when, after Respondent's policy lapsed, it obtained a back-dated policy for the period of March 11 through March 18, 2018.

44. "Securing the payment of workers' compensation" means obtaining coverage that meets the requirements of chapter 440, and the Florida Insurance Code. § 440.107(2), Fla. Stat.

45. Section 440.38(1) establishes five methods for employers in the state of Florida to comply with the requirement to secure the payment of workers' compensation for their employees.

46. Respondent elected to secure workers' compensation through section 440.38(1)(a), which provides that an employer may secure workers' compensation "[b]y insuring and keeping insured the payment of such compensation with any stock company or mutual

company or association or exchange, authorized to do business in the state."

47. By failing to "keep insured" the payment of workers' compensation with an authorized carrier between March 11 through March 18, 2018, Respondent failed to meet its obligation to secure the payment of workers' compensation in accordance with chapter 440, and was out of compliance for that period.

48. The undersigned concludes that "keeping insured" is a specific statutory compliance term and means to remain continuously insured with worker's compensation coverage.

49. Section 440.38(1)(a), as applied to the facts of this case, demonstrates the concept that coverage and compliance are often understood and applied as distinctly different concepts under Florida's Workers' Compensation Law.

50. Although the "back-dated" policy provided coverage for Respondent's employees during the period of noncompliance, such coverage did not comply with the requirement in section 440.38(1)(a), namely that Respondent insure and keep insured the payment of workers' compensation.<sup>6/</sup>

51. In short, the cancelled policy, even though later reinstated and backdated, nonetheless, resulted in a lapse in coverage and a lapse in compliance with section 440.38(1).

52. As the framework to understand this significant legal issue, retroactive or backdated coverage has consistently been

held not to comply with an employer's obligation to secure the payment of workers' compensation. This issue was addressed in Dep't of Fin. Servs. v. Custom Granite Kitchen and Baths, LLC, Case. No. 13-0799 (Fla. DOAH July 23, 2013; Fla. DFS Oct. 17, 2013). In that case, retroactive coverage secured for Custom Granite Kitchen and Baths, LLC, after the determination on July 20, 2012, that there was no coverage in effect, did not undo the wrong, or meet the employer's responsibilities under Florida's Workers' Compensation Law.

53. There are other DOAH cases illustrating that backdated policies do not comply with the coverage requirements of chapter 440. See generally U.S. Builders, L.P. v. Dep't of Fin. Servs., Case No. 07-4428 (Fla. DOAH Jan. 14, 2009; Fla. DFS Feb. 23, 2009) ("back-dated" coverage not material because Florida law does not recognize retroactive compliance with workers' compensation requirements); Dep't of Fin. Servs. v. H.R. Elec., Case No. 04-2965 (Fla. DOAH Jun. 8, 2006; Fla. DFS Aug. 22, 2006) (retroactive coverage obtained after issuance of Stop-work Order does not satisfy employer's obligation); Dep't of Labor & Emp. Sec. v. E. Pers. Servs., Inc., Case No. 99-2048 (Fla. DOAH Oct. 12, 1999; Fla. DLES Nov. 30, 1999) (obtaining coverage after compliance investigator visits site and determines no coverage in effect is no defense to Stop-work Order or penalty assessment.)

54. Florida law requires that insurers notify employers at least ten days prior to cancellation of a workers' compensation insurance policy. § 440.42(3), Fla. Stat. Respondent received timely notification of cancellation from its insurance carrier. Pet. Ex. 9.

55. Additionally, insurers are required to notify the Department of all expired or cancelled policies. § 440.185(6), Fla. Stat. Associated Industries Insurance Company timely notified both Respondent and the Department of the cancelled policy. Pet. Ex. 9 and 14.

56. Respondent's testimony that it provided payment information to the carrier for processing the payment of the subject premium before the effective date of cancellation of its policy is unpersuasive and inconsistent with prior testimony given by Respondent under oath.<sup>7/</sup> Pet. Ex. 13 at 12:15-21.

57. Moreover, Respondent's assertion is contradicted by the information contained in both CCAS and obtained from NCCI, and is suspiciously uncorroborated by any documentary evidence provided by Respondent. Pet. Ex. 14.

58. Likewise, a negative inference is found against the accuracy of this payment claim since Respondent failed to produce any records or evidence to verify the alleged payment of the insurance premium, particularly when such documentation or

evidence was uniquely accessible by Respondent. See generally Martinez v. State, 478 So. 2d 871 (Fla. 1985).

59. Respondent's self-serving statement that it made payment or provided payment information to its insurance carrier for processing before the effective date of cancellation of its policy is, therefore, rejected. § 120.57(1)(c), Fla. Stat.

60. The Department properly utilized the procedures mandated by section 440.107(7)(d)1. and Florida Administrative Code Rule 69L-6.035, to calculate the penalty owed by Respondent as a result of Respondent's failure to comply with the coverage requirements of chapter 440.

61. The minimum statutory penalty based on employer's payroll is \$1,000.00.

62. The Department has proven by clear and convincing evidence that it properly issued an OPA to Respondent, and that the penalty assessment of \$1,000.00 was properly calculated.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order imposing and assessing the proposed Order of Penalty Assessment against Respondent.

DONE AND ENTERED this 7th day of January, 2019, in  
Tallahassee, Leon County, Florida.



---

ROBERT L. KILBRIDE  
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 7th day of January, 2019.

ENDNOTES

<sup>1/</sup> This request followed a routine workers' compensation compliance inspection at 15 Northwest 5th Avenue, Hallandale, Florida.

<sup>2/</sup> Because Respondent's net penalty was below the statutory minimum, a minimum \$1,000.00 penalty was assessed, as permitted by law.

<sup>3/</sup> Insurance carriers in the State of Florida are required to submit all workers' compensation insurance information, including cancelled, active, and non-renewed policies; payroll; class codes; and insurance carrier information to the Department. § 440.185(6), Fla. Stat. This information is housed internally in CCAS.

<sup>4/</sup> NCCI is a nationally recognized source for workers' compensation insurance information. NCCI collects industry data and then analyzes that data to provide insurance rates and loss cost recommendations for insurance providers, including the Florida Office of Insurance Regulation to establish the approved manual rates. § 627.091(4), Fla. Stat.

<sup>5/</sup> Notably, there was no claim by Mr. Baldeo that day that he had made payment or that payment was being processed by the insurance company.

<sup>6/</sup> Insurance carriers will backdate lapsed policies, but only when the employer produces evidence that no injury occurred during the lapse in coverage. An insurance carrier is unlikely to provide retroactive coverage to an employer whose employees suffered compensable, work-related injuries during a lapse in coverage. This is one compelling reason why there must be continuous coverage without any lapses.

<sup>7/</sup> If this defense had been accurate and viable, the undersigned would have expected Respondent to have raised this potentially "game changing" fact during the investigation. It did not.

COPIES FURNISHED:

Davain Baldeo  
Baldeo Enterprises, Inc.  
15 Northwest 5th Avenue  
Hallandale, Florida 33009  
(eServed)

Dustin William Metz, Esquire  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4222  
(eServed)

Steven Hart, Qualified Representative  
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.