

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-5117

CABLE WIZARD CORP.,

Respondent.

_____ /

RECOMMENDED ORDER

On December 3, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Mattie Birster, Esquire
Leon Melnicoff, Esquire
Department of Financial Services
Office of the General Counsel
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Daniel R. Vega, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's otherwise-untimely filing of a request for a hearing on a proposed penalty for failing to secure workers' compensation coverage is timely due to the doctrine of equitable tolling.

PRELIMINARY STATEMENT

By Stop-Work Order for a Specific Worksite served on October 26, 2017 (SWO), Petitioner ordered Respondent to stop work on a named worksite due to an alleged failure to secure the payment of workers' compensation for one or more subcontractors or employees of such contractors.

By Amended Order of Penalty Assessment served on March 2, 2018, Petitioner assessed a penalty against Respondent in the amount of \$63,202.87.

By Petition for Formal Administrative Hearing filed on March 29, 2018 (Petition), Respondent requested a hearing.

By Order to Show Cause issued on July 27, 2018, Petitioner noted that the Petition was untimely filed and gave Respondent an opportunity to show cause why Petitioner should not dismiss the Petition. By affidavit filed on August 14, 2018, Respondent's president attested that Petitioner's investigator had told the president that the filing deadline was 21 business days, not 21 calendar days.

On September 25, 2018, Petitioner transmitted the file to DOAH to conduct a formal hearing solely on the issue of whether the Petition was timely filed under the doctrine of equitable tolling.

At the hearing, Petitioner called no witnesses and offered into evidence 11 exhibits: Petitioner Exhibits 1 through 11. Respondent called two witnesses and offered into evidence one exhibit: Respondent Exhibit 3. All exhibits were admitted without objection.

The court reporter filed the transcript on December 17, 2018. The parties filed proposed recommended orders on January 2, 2019.

FINDINGS OF FACT

1. The parties do not dispute that an Amended Order of Penalty Assessment dated February 21, 2018 (APO), assesses a penalty of \$63,202.87 for Respondent's failure to secure workers' compensation coverage; Petitioner served the APO on Respondent on March 2, 2018; the APO provides Respondent with 21 "calendar" days from receipt within which to file a request for a hearing; Respondent filed the Petition on March 29; and March 29 is 29 calendar days and 19 business days after March 2.

2. Respondent engages in the business of digging ditches and installing conduit and pipes. On October 26, 2017, Jean Carlos Hernandez, Petitioner's investigator, visited a

worksite of Respondent. Determining that Respondent had failed to secure workers' compensation coverage, as required by law, Mr. Hernandez served the SWO, a Request for the Production of Business Records (RPBR), and an unrelated document upon Jorge Clark, Respondent's president and sole shareholder. Complicating this case, from the investigator's perspective, Mr. Hernandez also issued orders stopping work to three other corporations that were involved in the same work as Respondent.

3. The RPBR orders Respondent to email relevant business documents within ten "business" days of receipt of the request. The RPBR warns that a failure to email timely the requested business records will result in Petitioner's imputing Respondent's payroll for the purpose of calculating the penalty for failing to secure workers' compensation coverage.

4. In addition to "hereby" ordering Respondent to stop work, the SWO also states: "A penalty against the Employer is hereby ordered in an amount" equal to double the amount that the employer would have paid in premiums, but not less than \$1000, as based on a statutory formula that is summarized in the SWO. Despite the use of "hereby" for the penalty, the SWO imposes no penalty because Petitioner's calculation of the penalty takes place after the service of the SWO; this part of the SWO operates more as notice to the employer that Petitioner will assess a penalty and the formula for its calculation.

5. When he gave Mr. Clark the three completed forms, Mr. Hernandez explained that Mr. Clark could obtain relief from the order stopping work by paying \$1000 to Petitioner. Mr. Hernandez also told Mr. Clark that he had ten business days to provide the requested business records.

6. The next day, Mr. Clark delivered \$1000 to Petitioner and obtained a conditional release of the order stopping work. Mr. Clark demonstrated compliance with workers' compensation coverage by providing a letter confirming that Respondent had terminated the subcontractors who had been found on the worksite. During a brief conversation, Mr. Hernandez reminded Mr. Clark to submit the requested business records within ten business days, as reflected by the notes of Mr. Hernandez.

7. On the sixth business day after October 26, as is his practice, Mr. Hernandez called Mr. Clark and reminded him that this was the sixth business day of the ten business days that he had to produce the requested business records. On the tenth business day, Mr. Clark produced the requested business records, on which Petitioner relied, almost entirely, to calculate the penalty that it later assessed.

8. After Petitioner completed the calculation of the penalty, Mr. Hernandez called Mr. Clark and asked him to come into the office to pick up the APO. On March 2, 2018, Mr. Clark

visited Petitioner's office and obtained the APO from Mr. Hernandez.

9. The APO acknowledges the assessable penalty described in the SWO and assesses the above-described penalty. The APO incorporates a Penalty Calculation Worksheet, which reveals that \$239.12 of the assessed penalty is derived from imputed wages.

10. Mr. Hernandez and Mr. Clark spoke briefly in Petitioner's office on March 2. Mr. Hernandez testified that he advised Mr. Clark, as stated in the APO, that he had 21 "calendar" days to file a request for hearing and 20 business days to produce additional business records. Mr. Clark testified that Mr. Hernandez told him that he had 21 "business" days to file a request for hearing. Mr. Clark's testimony is credited.

11. During the hearing, Petitioner's counsel repeatedly asked Mr. Clark if he had read the provision of the APO that gave Respondent 21 calendar days within which to file a request for a hearing. The purpose of this questioning appears to have been to show that, given the straightforward nature of this filing deadline, Mr. Clark could not possibly have been misled or lulled by anything that Mr. Hernandez could say, even if he had misstated the filing deadline in business, rather than calendar, days.

12. The simpler the requirement, the harder it should be to prove that the subject of the requirement has been misled or

lulled into action or inaction resulting in noncompliance. In other words, as a practical matter, Respondent would have a much harder time proving that Mr. Clark had been misled or lulled if the APO consisted of nothing more than Respondent's name, the assessed penalty, and a boldfaced warning in large font: "YOU HAVE 21 CALENDAR DAYS FROM RECEIPT OF THIS ORDER TO FILE A REQUEST FOR A HEARING. NO AGENCY EMPLOYEE MAY EXTEND OR CHANGE THE DEADLINE. IF YOU MISS THE DEADLINE, YOU DO NOT GET A HEARING. NO EXCEPTIONS."

13. Implying that, if Mr. Clark had read the APO, he would have drawn a firm understanding that he had 21 calendar days to file a request for hearing, Petitioner implies that the APO is no less clear than the hypothetical document. But the forms that Mr. Hernandez gave Mr. Clark are not so clear in terms of filing deadlines. For a nonlawyer like Mr. Clark, the APO is complicated by the business- and calendar-day deadlines set forth in the SWO and APO, as well as the business-day deadline set forth in the RPBR, and contingencies attached to calendar-day deadlines that might confuse an attorney. These confusing features of the forms that Mr. Hernandez gave Mr. Clark make it harder to understand the forms, including the APO, and likelier that Mr. Clark would instead rely on what Mr. Hernandez told him about the applicable deadline, so as to lay the foundation for Mr. Clark to be misled or lulled by inaccurate information.

14. As Petitioner insists, the SWO provides a clear point of entry of 21 calendar days to file a request for hearing on the order stopping work, but it is not so clear whether the employer may also challenge, at that time, the yet-to-be-calculated penalty or, if it does not, whether the employer may challenge the penalty when it is later calculated. At this point, three things probably were evident to Mr. Clark: Respondent could not continue to work on the subject worksite; based on what Mr. Hernandez told him, Mr. Clark could obtain relief from the order stopping work by paying \$1000; and Respondent had not yet been fined. It is doubtful that Mr. Clark thought much about the calendar-day deadline in the SWO because of the absence of an actual consequence at the moment. As noted above, Mr. Clark promptly paid the \$1000, and Petitioner lifted the order stopping work, so Mr. Clark found that he could rely on Mr. Hernandez and his description of Respondent's rights and responsibilities. Also, a few days later, when Mr. Hernandez called him, Mr. Clark likely understood that the deadline in the RPBR ran in business days.

15. In March 2018, Mr. Clark learned of the amount of the penalty. According to his testimony, which is credited, Mr. Clark knew immediately that he could not accept such a large penalty without exercising his right to a hearing.

16. After Mr. Hernandez told Mr. Clark that he had 21 business days to file a request for hearing on the penalty, Mr. Clark calendared the deadline and visited his lawyer's office shortly prior to the expiration of a 21-business-day deadline--but after the expiration of a 21-calendar-day deadline--to have him prepare and file a request for hearing. As noted above, Mr. Clark had promptly attended to his responsibilities in connection with this matter on two prior occasions when he immediately delivered \$1000 to obtain relief from the order stopping work and when he timely submitted business records: Mr. Clark met every deadline about which Mr. Hernandez told him.

17. There are several reasons that Mr. Hernandez's testimony is not credited as to what he told Mr. Clark on March 2, but these findings about the March 2 conversation are not intended to suggest that Mr. Hernandez is lying about what he told Mr. Clark. It appears merely that Mr. Hernandez's memory and notes of what was a routine transaction for him are mistaken.

18. Mr. Hernandez's deposition was taken on November 15, 2018, which was less than three weeks prior to the hearing. The notice did not require him to produce any documents, and he had none with him. Although Mr. Hernandez mentioned several times that he had taken notes, he had not brought them to the deposition and seemingly had not reviewed them prior to the

deposition, so his deposition testimony is a good reflection of his independent memory of the March 2 conversation.

19. In three respects, the brief deposition undermines Mr. Hernandez's credibility as a witness. First, early in the deposition, Mr. Hernandez refused to answer routine questions about past employment and a routine question about the hours of a present part-time job.^{1/} It is unclear whether he was attempting to prevent any inquiry into his other employment or whether he was attempting to discourage a robust inquiry into the matter at issue in this case. Either way, his lack of cooperation struck an unsettling note.

20. Second, at the time of the deposition, Mr. Hernandez's recollection of the events was so vague as to establish that he has no present recollection of any encounter with Mr. Clark. Mr. Hernandez did not seem entirely sure that Mr. Clark had paid the \$1000 and Respondent had released the order stopping work. Dep. Tr., p. 23.^{2/} Three times, Mr. Hernandez did not recall that Mr. Clark had submitted requested business records. Dep. Tr., pp. 24, 27-28. Mr. Hernandez did not seem to recall that he called Mr. Clark on the sixth business day to remind him of the deadline to produce business records within ten business days, Dep. Tr., pp. 27-28, even though Mr. Hernandez's notes state that he made the call. Mr. Hernandez did not recall whether his

meeting on March 2 with Mr. Clark occurred in Mr. Hernandez's office or in the field. Dep. Tr., pp. 28-29.

21. Third, Mr. Clark had no independent recollection of the March 2 conversation during his deposition. When asked if he had any recollection of talking to Mr. Clark on that day, Mr. Hernandez answered, "I can't recall off the top of my head right now." Dep. Tr., p. 32. When asked, "so you don't know what he said to you, or what you said to him; correct?" Mr. Hernandez answered, "Off the top of my head, no." Dep. Tr., p. 32. Later, Mr. Hernandez added that he remembered giving Mr. Clark the APO and explaining it, but this seems to have been a statement of customary practice than a present recollection. Dep. Tr., pp. 34-35.

22. At the time of the March 2 meeting, Mr. Hernandez had been employed as an investigator for Petitioner a little over one year and had been working on his own for a little less than one year. Understandably, he is still acquiring knowledge that he requires to perform his job. For instance, during his deposition, Mr. Hernandez seemed confused when asked to define calendar days. He stated, "Calendar days include Mondays through Fridays, all days, including holidays." When asked about the deadline if the 21st day is a holiday, Mr. Hernandez testified that the holiday counted, so the required act had to be done by the deadline, even if it were a holiday or a weekend, even though

he had seemed earlier to exclude weekends from calendar days.
Dep. Tr., pp. 37-38.

23. It is difficult to understand why Mr. Hernandez would have mentioned during the March 2 meeting the business-day deadline for producing business records, as he testified. As noted above, more business records could reduce the assessed penalty by only about \$200. The modest amount of implied wages seems to suggest that Petitioner had found the already-produced business records to be nearly complete. There was thus no practical reason for Mr. Hernandez to mention the business-day deadline for producing more business records. Clearly, the focus of both men on March 2 was on the deadline for filing a request for a hearing on the assessed penalty. If, as Mr. Clark recalls, Mr. Hernandez only addressed this deadline, which makes sense, and Mr. Clark only heard "business" days, the most likely explanation is that Mr. Hernandez misspoke.

24. Mr. Hernandez made a note stating that he told Mr. Clark that he had 20 business days to produce more records and 21 calendar days to file a request for a hearing. Mr. Hernandez testified at the hearing that he routinely takes handwritten notes, at the time of the events described in the notes and later enters them into Petitioner's computer system, but he did not identify exactly when he made or entered the notes at issue in this case, except that that he departed from his

normal practice because he did not first make the crucial March 2 note in handwriting. In any event, the above-noted problems with Mr. Hernandez's testimony establish that this note, regardless of when prepared, is inaccurate.

25. Based on the foregoing, Mr. Hernandez inadvertently misled or lulled Mr. Clark into filing the Petition after the deadline set forth in the APO. Extending the deadline in accordance with equitable tolling, the otherwise-late filing is timely.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat. (2018).

27. By a preponderance of the evidence, § 120.57(1)(j), Respondent has the burden of proving that it timely filed its Petition under the doctrine of equitable tolling. Cf. Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907, 911 (Fla. 1st DCA 2011).

28. Since 1998, pursuant to chapter 98-200, section 4, at page 1831, Laws of Florida, section 120.569(2)(c) has provided:

A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

29. The doctrine of equitable tolling is stated in Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988), in which an investigator of the predecessor agency of Petitioner missed three consecutive days of work due to alcoholism. Relying on a rule allowing the termination of an employee for abandonment of his job, the employing agency advised the employee of its proposed determination of an abandonment and gave the employee 20 days within which to file a request for a hearing before another agency. Instead, the investigator took the notice to his union representative, who filed a contractual grievance. The employing agency set the hearing on the grievance for the day after the time ran for filing a request for an administrative hearing, and, at the grievance hearing, the grievance was dismissed as not cognizable under the labor agreement. The investigator requested the agency that heard abandonment cases to toll the deadline for filing a request for a hearing, but the agency determined that it lacked the authority to do so.

30. The court held that the investigator's hearing request was timely filed based on equitable tolling of the filing deadline. The court stated that equitable tolling arises when the petitioner "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." 523 So. 2d at 1134. The court found that the agency's

participation in the grievance process through the timeframe within which the employee could have filed a request for a formal hearing misled the employee, and the employee had also timely asserted his rights in the wrong forum.

31. When Mr. Hernandez misinformed Mr. Clark that he had 21 business days to file a request for hearing, Mr. Hernandez misled or lulled Respondent into filing its request for hearing late. Applying equitable tolling to the 21-calendar-day deadline, Respondent timely filed the Petition, and Petitioner must allow Respondent a formal hearing.

RECOMMENDATION

It is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order determining that the Petition was filed timely under the doctrine of equitable tolling.

DONE AND ENTERED this 15th day of January, 2019, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of January, 2019.

ENDNOTES

^{1/} Respondent's counsel did not press the matter when Mr. Hernandez refused to answer an innocuous question as to what he had done for a living prior to his employment as an investigator for Petitioner. Mr. Hernandez answered only, "I do not feel comfortable answering that question." When asked why, Mr. Hernandez demanded, "Is it relevant to the case?" Dep. Tr., p. 6. Other than later testifying that he had worked in the "security industry, restaurants, casino," Dep. Tr., p. 9, Mr. Hernandez never identified his prior jobs. Later in the deposition, again without a contemporaneous objection from Petitioner's counsel, Mr. Hernandez declined to answer another routine question. Asked for his schedule for his part-time security job, where he presently works weekends, Mr. Hernandez replied that it does not interfere with his state employment, adding, "This is going into personal. You just mentioned that you don't want to jump into something personal. It's a scheduled position. But you're asking those questions." Dep. Tr., pp. 11-12. Respondent's counsel moved on.

^{2/} Mr. Hernandez testified, "I believe so," when asked these questions.

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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.