

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-5347

DAVE'S TRACTOR, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case by video teleconference on March 15, 2019, at sites in Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Steven R. Hart, Qualified Representative
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

Kyle Christopher, Esquire
Department of Financial Services
Hartman Building
2012 Capital Circle Southeast
Tallahassee, Florida 32399

For Respondent: Adrian Shawn Middleton, Esquire
Middleton & Middleton, P.A.
1469 Market Street
Tallahassee, Florida 32312-1726

STATEMENT OF THE ISSUE

The issue is whether the Amended Order of Penalty Assessment issued to Respondent, Dave's Tractor, LLC, on August 27, 2018, is correct.

PRELIMINARY STATEMENT

On June 30, 2018, following a routine compliance inspection of a job site, the Department of Financial Services, Division of Workers' Compensation (Department), issued Respondent a Stop-Work Order and Order of Penalty Assessment and Request for Business Records for Penalty Calculation. On August 27, 2018, the Department served Respondent with an Amended Order of Penalty Assessment reflecting a total penalty of \$165,654.10. Respondent timely requested a hearing and the matter was referred by the Department to the Division of Administrative Hearings to resolve the dispute.

At the hearing, the Department presented the testimony of one witness. Department Exhibits 1 through 13 were accepted in evidence. Respondent's managing member testified on the company's behalf. Respondent's Exhibits 1 and 2 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on April 18 and 26, 2019, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a limited liability company engaged in the construction business with offices at 434 Skinner Boulevard, Suite 105, Dunedin, Florida. It uses tractors and a grading process to prepare land prior to building construction for commercial clients. Its managing member is David Richardson.

2. 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.

3. To enforce this requirement, the Department conducts random inspections of job sites and investigates complaints concerning potential violations of workers' compensation rules.

4. On May 25, 2018, Christina Brigantty, a Department investigator, conducted a routine inspection of a job site at 3691 Tampa Road, Oldsmar, Florida. She observed two men working in a ditch, one man mixing cement, the other man driving a tractor.

5. Investigator Brigantty observed four individuals at the job site, including the two working in the ditch: Dylan Richardson; Ismael Demillon; Javier Mastica; and Jorge Duran. She was informed by the individuals that they worked for Richardson Trailers, LLC.

6. Investigator Brigantty called Mr. Ramsey, corporate officer for Respondent, who confirmed that Respondent hired Richardson Trailers, LLC, as a subcontractor. She later confirmed through discussions with Dylan Richardson and the Coverage and Compliance Automated System that Richardson Trailers, LLC, had no workers' compensation insurance on its employees. The parties have stipulated that at the time of the inspection, Respondent had not secured workers' compensation for any of the four individuals observed on the job site.

7. Investigator Brigantty received approval from her supervisor to issue Respondent a Stop-Work Order and Request for Business Records for Penalty Calculation (BRR). These papers were served on Respondent on June 30, 2018.

8. The BRR requested numerous types of business records for the period May 26, 2016, through May 25, 2018, including business tax receipts (occupational licenses), trade licenses or certifications, and competency cards held by Respondent or any of its principals; payroll documents (time sheets, time cards, attendance records, earnings records, check stubs, and payroll summaries for both individual employees and aggregate payrolls, and federal income tax documents reflecting the amount of remuneration paid or payable to each employee, including cash); and account documents including all business check journals and

statements, which would include cleared checks for all open and/or closed business accounts established by the employer.

9. Respondent failed to provide any business records in response to the BRR to determine Respondent's payroll for the audit review period. Therefore, the Department proceeded to compute a penalty based on imputed payroll in accordance with section 440.107(7)(e), Florida Statutes. This formula produced a penalty assessment of \$165,654.10.

10. On August 27, 2018, the Department served Respondent with an Amended Order of Penalty Assessment totaling \$165,654.10. Pursuant to Florida Administrative Code Rule 69L-6.028(4), the Department also gave Respondent 20 business days in which to provide business records that would confirm Respondent's actual payroll during the two-year review period. This meant the records were due by September 25, 2018.

11. A final hearing was scheduled initially for January 24, 2019. By agreement of the parties, on January 4, 2019, the case was rescheduled to March 15, 2019. One ground for granting a continuance was that the parties were "waiting on outstanding discovery that is being located and is necessary for an amicable resolution," presumably referring to items listed in the BRR.

12. The final hearing was conducted on March 15, 2019, or almost seven months after the Amended Order of Penalty

Assessment was issued. A week before the final hearing, Respondent began providing business records to the Department, including bank statements and checks on March 8, 2019, and a general ledger on March 13, 2019. Given the time constraints, they were not reviewed by the auditor until the day before the final hearing. The auditor conceded at hearing that these records would result in a "significantly lower" penalty, and they were sufficient to recalculate the penalty. Even so, at this late date, the Department refuses to recalculate the assessment.

13. Respondent's principal, Mr. Richardson, testified that he has "no way to pay" the penalty, it will force him out of business, and he will be required to terminate his employees. Mr. Richardson also testified that he requested the records from the bank on "numerous occasions," but the bank refused to provide them directly to the Department or referred him to other branch offices. However, bank records are not the only way an employer can demonstrate the amount of payroll. This also can be established by business taxes or other records described in the BRR. Mr. Richardson denied knowing that business taxes are an option if bank records are unavailable.

CONCLUSIONS OF LAW

14. Because the imposition of an administrative fine is penal in nature, the Department 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. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

15. Section 440.10(1)(a) provides that "every 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."

16. The only issue in this case is whether a penalty based on imputed payroll should be assessed against Respondent. See § 440.107(7)(e), Fla. Stat. The procedure for calculating a penalty is set forth in rule 69L-6.035. After that calculation is made, and an amended order of penalty assessment issued, an employer is given the opportunity to provide business records to demonstrate the actual payroll during the audit period. However, rule 69L-6.028(4) provides the following deadline for submission of those records:

(4) If the Department imputes the employer's payroll, the employer will have twenty business days after service of the first amended order of penalty assessment to provide business records sufficient for the Department to determine the employer's payroll for the period requested in the business records request for the calculation of the penalty or for the alternative time period(s) of non-compliance. The employer's penalty will be recalculated pursuant to paragraph 440.107(7)(d), F.S., only if the employer provides all such business records

within the twenty days after the service of the first amended order of penalty assessment. Otherwise, the first amended order of penalty assessment will remain in effect.

17. If the deadline in rule 69L-6.028(4) is not met, the payroll for the original penalty must remain imputed. Dep't of Fin. Servs. v. Doherty Home Repair, Inc., Case No. 17-3385 (Fla. DOAH Dec. 27, 2017; Fla. DFS Mar. 12, 2018) (if business records are not submitted in a timely manner, the Department has no legal obligation to consider them or recalculate the penalty).

18. There is no provision in the statute or rules that permits the late submission of business records. Even though sufficient records eventually were submitted by Respondent, long after the Amended Order of Penalty Assessment was issued, there is no legal requirement that the Department recalculate the penalty. Otherwise, the 20-day deadline would be meaningless, and an employer would have no incentive to produce its records until the Department was prepared to take final agency action.

19. This result is especially harsh here since the late-filed records, if considered, would significantly reduce the penalty and allow Respondent to remain in business. By way of argument, Respondent asserted that in other cases, with only one identified, the Department has accepted business records in settlement long after the 20-day deadline has expired. While this may be true, and something the Department may consider in

this case before issuing a final order, there is clear and convincing evidence to impose the penalty based on imputed payroll.

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 Respondent violated the workers' compensation laws by failing to secure and maintain required workers' compensation insurance for its employees, and imposing a penalty of \$165,654.10.

DONE AND ENTERED this 3rd day of May, 2019, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of May, 2019.

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.