

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 18-5810

NATIVE CUTS PROPERTY MANAGEMENT,  
LLC,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

On March 29, 2019, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a final hearing in this case in Leesburg, Florida.

APPEARANCES

For Petitioner: Mattie Birster, Esquire  
Office of the General Counsel  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether Respondent violated chapter 440, Florida Statutes (2017), by failing to secure payment of workers' compensation coverage, as alleged in the Stop-Work Order ("SWO") and Amended Order of Penalty Assessment ("Amended Penalty Assessment"); and,

if so, whether Petitioner correctly calculated the proposed penalty assessment against Respondent.

PRELIMINARY STATEMENT

On July 27, 2017, Petitioner, Department of Financial Services, Division of Workers' Compensation ("Petitioner" or "Department"), issued an SWO, alleging that Respondent, Native Cuts Property Management, LLC ("Respondent" or "Native Cuts"), failed to secure workers' compensation for its employees in violation of sections 440.10(1), 440.107(2), and 440.38(1). On July 31, 2017, the Department issued an Agreed Order of Conditional Release from Stop-Work Order. On February 7, 2018, the Department issued an Amended Penalty Assessment that ordered Respondent to pay a penalty of \$69,534.34, pursuant to section 440.107(7)(d).

Respondent disputed the Department's Amended Penalty Assessment and requested a final hearing. On November 2, 2018, Petitioner referred this matter to the Division for assignment to an administrative law judge, which was assigned to the undersigned. The undersigned issued a notice scheduling the final hearing for February 4, 2019. On January 23, 2019, Petitioner filed a Motion to Continue Final Hearing. The undersigned granted the motion to continue and rescheduled the final hearing for March 29, 2019.

The undersigned conducted the final hearing, as scheduled. At the hearing, the Department presented the testimony of three witnesses: Chuck Mays, a Department compliance investigator; Cathy Nunez, a Department regulatory consultant; and Lynne Murcia, a Department penalty auditor. The Department's Exhibits 1 through 24 were admitted into evidence. Respondent did not appear at the hearing or provide any exhibits.

The Department ordered a copy of the hearing transcript. The one-volume Transcript was filed with the Division on April 11, 2019. On April 22, 2019, Petitioner timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

Unless otherwise indicated, all references to statutes are to Florida Statutes (2017), which was the law in effect at the time of the alleged acts.

#### FINDINGS OF FACT

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

##### Background

1. The Department is the state agency responsible for enforcing the requirement of the Workers' Compensation Law that requires employers to secure the payment of workers'

compensation coverage for their employees and corporate officers. § 440.107, Fla. Stat.

2. The Department is also responsible for conducting random inspections of jobsites and investigating complaints concerning potential violations of workers' compensation rules.

3. At all times material to this matter, Native Cuts was a for-profit limited liability company engaged in business in the State of Florida. Native Cuts was organized as a business on January 19, 2010, and engaged in the business of construction and landscaping.

4. Earl Lee, Jr. and Virginia Brown are Respondent's managers. Earl Lee, Jr. is Respondent's registered agent, with a mailing address of 316 North Lake Avenue, Leesburg, Florida 34748.

#### Investigation

5. On July 27, 2017, the Department's investigator, Chuck Mays, conducted a random workers' compensation compliance inspection at 27746 Cypress Glen Court, Yalaha, Florida 34797. At that time, Mr. Mays observed three men performing work. Mr. Mays testified that one man was observed operating a Bobcat utility vehicle (small tractor) to transport dirt from the front to the back of the structure, which was under construction. The two other men were removing debris, e.g., cut tree limbs, from the jobsite.

6. Mr. Mays approached the man on the Bobcat and identified himself as an investigator. Mr. Mays began interviewing the Bobcat driver who reported that he and the other two workers at the jobsite were employees of Native Cuts, which the two men confirmed. Mr. Mays ultimately identified the three men at the jobsite as Rodolfo Ramirez, Mitchel Pike, and Dave Herrington.

7. Based on his observations, Mr. Mays determined that the three men were performing construction-related work.

8. Mr. Mays called Respondent's manager, Mr. Lee, who identified the three men working at the jobsite as his employees. Mr. Mays asked Mr. Lee about the rate of pay and the length of employment for the employees and Mr. Lee referred Mr. Mays to Virginia Brown to obtain the information. Ms. Brown confirmed the three employees, and a fourth employee who was not present at the jobsite.

9. Following the interviews on July 27, 2017, Mr. Mays researched the Division of Corporations system and established that Native Cuts was an active business. He then conducted a search of the Department's Coverage Compliance Automated System ("CCAS") and found Respondent did not have workers' compensation coverage for its employees.

10. Mr. Mays also conducted a further search of CCAS and discovered that Mr. Lee previously had an exemption, which expired on October 30, 2016.

11. Based on his investigation and after consultation with his supervisor, Mr. Mays issued SWO No. 17-246-D4, and posted it at the jobsite. On July 28, 2017, Mr. Mays met with Ms. Brown at her home and personally served the SWO and Request for Production of Business Records for Penalty Assessment Calculation ("Business Records Request").

12. The Business Records Request directed Respondent to produce business records for the time period of July 28, 2015, through July 27, 2017 ("Audit Period"), within 10 business days from the receipt of the Business Records Request.

13. On August 11, 2017, Respondent provided business records, including bank statements, checks, and receipts. The records were deemed sufficient to apply a 25-percent discount to Respondent for timely production of records.

#### Penalty Calculation

14. Generally, the Department uses business records to calculate the penalty assessment.

15. Lynne Murcia, a Department penalty auditor, was assigned to review the calculation of the penalty assessment for Respondent. To calculate the penalty assessment, the Department uses a two-year auditing period looking back from the date of

the SWO, July 27, 2017, also known as the look-back period. Penalties for workers' compensation insurance violations are based on doubling the amount of insurance premiums that would have been paid during the look-back period. § 440.107(7)(d), Fla. Stat.

16. Ms. Murcia testified as to the process of penalty calculation. Ms. Murcia reviewed the business records submitted by Respondent, as well as notes, worksheets, and summaries from the original auditor.<sup>1/</sup>

17. Based on her review of the records, Ms. Murcia identified the individuals who received payments from Respondent as employees during the Audit Period. Ms. Murcia deemed payments to each of the individuals as gross payroll for purposes of calculating the penalty.

18. 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 Florida Administrative Code Rule 69L-6.021. Classification codes are assigned to occupations by the NCCI to assist in the calculation of workers' compensation insurance premiums.

19. 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."

20. Based on Mr. Mays' observations at the jobsite, the Department assigned either NCCI classification ("class") code 0042, entitled "Landscaping, Gardening, & Drivers" or class code 9102, entitled "Lawn Maintenance-Commercial or Domestic & Drivers."

21. The class code 0042 "applies to work involving new landscaping installations whereas class code 9102 applies to work involving maintenance of existing landscaping and/or lawn maintenance." Mr. Mays testified that class code 0042 is considered construction work, whereas class code 9102 is considered nonconstruction work for workers' compensation purposes.

22. Generally, if a business provides proper payroll records to support a division, the appropriate code and correlating rate would apply based on the work performed. If the payroll records are not maintained to support the division of the work performed between class code 0042 and class code 9102, the highest rate of the two classifications is applied to the employee.

23. Ms. Murcia testified that class code 0042 and class code 9102 were applied to Native Cuts employees due to the mixed



work performed (Landscaping and Lawn Maintenance) by Respondent. However, class code 9102 was applied to most of the employees.

24. Utilizing the statutory formula for penalty calculation specified in section 440.107(7)(d)1. and rule 69L-6.027, the total penalty was calculated based on periods of non-compliance for employees based on the dates they received payments from Respondent and were not covered for workers' compensation.

25. Since Mr. Lee's exemption expired on October 30, 2016, the calculation for his work performed was limited to the period after the expiration of his exemption, November 1, 2016, through July 27, 2017.

26. Regarding records designated as cash payments, the Department determined that the Native Cuts' 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.

#### Penalty Calculation for Imputed Payroll

27. The Department determined the calculated penalty for Rudolfo Ramirez, David Harrington, and Mitchel Pike, the workers who were identified at the jobsite as employees on July 27, 2017. Mr. Lee was also included in the calculation of penalty for the imputed payroll.

28. The Department maintains that the business records submitted by Respondent were insufficient to determine Respondent's payroll for these employees during the investigation period, thus, the Department used the statutory formula to impute payroll to these employees.

29. The Department correctly assigned a class code of 0042 and calculated a penalty of \$149.20 against Respondent for failure to secure payment of workers' compensation insurance for each of these employees.

30. The Department also calculated the penalty for Ms. Brown, who was not at the jobsite but participated in the investigation on July 27, 2017.

31. The Department applied a classification code 9102 to Ms. Brown. However, the evidence presented at hearing demonstrated Ms. Brown maintained records for the business and was the person identified as maintaining the wage rate information for employees. The evidence of record does not support a finding that Ms. Brown provided any landscaping or construction services to Respondent. Ms. Brown's work, at best, could be described as clerical work.

32. The Department introduced no evidence of an appropriate NCCI class code for Ms. Brown. Thus, the Department did not prove by clear and convincing evidence that the imputed

payroll related to Ms. Brown should be included for purposes of calculating the penalty. The Department did not prove by clear and convincing evidence that the penalty in the amount of \$19.60 attributed to Ms. Brown should be included in the penalty assessment.

#### Penalty Calculation for Uninsured Labor

33. Ms. Murcia testified that the class code 0042 was applied to the general category of uninsured labor, as the work performed could not be determined from the payroll records. Thus, the highest rate, class code 0042, of the two classifications for work performed by Native Cuts, is applied to these individuals.

34. The Department correctly calculated a penalty of \$17,015.10 for these employees.

#### Penalty Calculation for Remaining Employees

35. In addition to the penalty calculated for the imputed payroll (excluding Ms. Brown) and uninsured labor, the Department applied the appropriate class code for the work performed and correctly calculated the penalty for Native Cut employees<sup>2/</sup> in the amount of \$52,350.10.

#### Total Penalty Calculation

36. Ms. Murcia calculated a total penalty of \$69,534.34 against Respondent for failure to secure payment of workers' compensation insurance for each of its employees during the

audit period. The amount of the penalty should be reduced by the amount attributed to Ms. Brown in the amount of \$19.60. Thus, the total penalty amount that should be assessed against Native Cuts is \$69,514.40.

37. Mr. Lee paid a \$1,000.00 down payment for the penalty assessed.

#### CONCLUSIONS OF LAW

38. 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.

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

40. "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.

41. "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.

42. "Employment" means "any service performed by an  
employee for the person employing him or her." § 440.02(17)(a),  
Fla. Stat.

43. 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).

44. 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 or

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).

45. The Department proved by clear and convincing evidence that Respondent is an employer subject to the Workers' Compensation statute.

46. 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." Native Cuts' activities included performing landscaping installation.

47. The Department established by clear and convincing evidence that Native Cuts was an "employer" in the construction industry for workers' compensation purposes during the audit period, and employed one or more employees during that period. § 440.02(16)(a) and (17)(b)2., Fla. Stat.

48. 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.

49. Thus, the Department's SWO was mandated by statute.

50. The Department proved by clear and convincing evidence that the employees listed in the Amended Penalty Assessment were Respondent's employees required to be covered by, or to obtain an exemption from, workers' compensation insurance during the Audit Period, and that such coverage was not secured for specified periods of noncompliance.

51. 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.

52. Regarding Ms. Brown, the evidence presented at hearing did not demonstrate by clear and convincing evidence the correct penalty calculation for Ms. Brown. Thus, the total penalty

should be reduced by the penalty attributed to Ms. Brown, \$19.60.

53. Regarding the remaining employees, the Department 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 Native Cuts as a result of its failure to comply with the coverage requirements of chapter 440.

54. The Department has proven by clear and convincing evidence that it calculated and issued the penalty of \$69,514.74 in the second Amended Order of Penalty Assessment.

55. Subtracting \$1,000.00 for the amount Respondent previously paid results in a penalty balance of \$68,514.74.

56. Accordingly, it is concluded that the appropriate penalty total is \$68,514.74 for Respondent's failure to secure workers' compensation coverage for its employees during the audit period.

57. Mr. Lee asserted in his request for a final hearing that he could not maintain workers' compensation insurance, as it would cause a financial hardship. The undersigned has no basis to doubt Mr. Lee's assertion regarding hardship. However, the Legislature has not provided a "hardship exemption" under chapter 440, and the undersigned lacks the authority to create an exception.



RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$68,514.74 against Native Cuts Property Management, LLC.

DONE AND ENTERED this 31st day of May, 2019, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2019.

ENDNOTES

<sup>1/</sup> The original auditor was no longer employed with the Department at the time of the final hearing.

<sup>2/</sup> The remaining employees included on the penalty calculation worksheet include Adam (no last name provided), Barbara Lee, Bobbie Zimmerman, Gustavo Hernandez, James Horville, James Wynn, Jennifer Fisher, Jeremy Gordon, John Porter, Justin Sampson, Kenneth Evans, Kenneth Hall, Konata Carolla, Matthew Beach, Paul Gaskins, Perry Clark, Scott Branlay, Scott Foreman, Shawn Wynn, Steven Shahan, Tim Watson, Ubaldo Lazos, William McNeil, Alberto Lazano Perez, Armando Hernandez, Barry Stegall, Belton Blake,

Bill Bryan, Brand Fulforo, Brian Lott, Brian Peterman, Chino Reyna, Christopher Anderson, Christopher Tucker, Clifford Robinson, Derek Rudolph, Edward George, Hans Powesie, Henoc Gonzalez, James McCravy, Jeff Beaver, James Wynn, Jeffrey Ray, Jez Stewart, Joe Toolie, Jontavius Hall, Justin Simpson, Justin Wilse, Kyle Bullard, Kyle Tucker, Leslie Head, Malek Evans, Mark McDonald, Marlin James, Vincent Trudo, Mike Stokes, Nathan Toth, Norberto Valez, Onris Anderson, Patrick Donovan, Pearl Higginbottom, Perry Jackson, Randall Lucas, Raymond Frazier, Richard Fair, Robert Connor, Robert Hart, Robert Kisner, Shuran Faniel, Sonnonaka Tousey, Wali Smith, Zerald Henderson, Austin Caldwell, Breon Samuels, Darick Hinerman, Dave Teachout, John Stucky, Johnny Goodfella, Julian Williams, Leighton Templin, Mike Ditanzo, Mitchel Pike, Phillip Baker, Tristan Jones, Xavier Danteler, and David Ocuca.

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.