

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-6102

MAC MAR, LLC,

Respondent.

_____ /

RECOMMENDED ORDER

On April 4, 2019, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing in Tallahassee and Altamonte Springs, Florida, by video teleconference, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

APPEARANCES

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

For Respondent: Cynthia Crider, Esquire
David Boggs, LLC
116 Running Creek Court
Shepherdsville, Kentucky 40165

STATEMENT OF THE ISSUE

The issue to determine in this matter is whether equitable tolling applies to excuse Respondent Mac Mar, LLC's, late-filed petition for administrative review.

PRELIMINARY STATEMENT

On March 6, 2018, Petitioner Department of Financial Services, Division of Workers' Compensation (the Department), served a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) on Respondent, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation insurance for its employees. On March 6, 2018, the Department issued an Agreed Order of Conditional Release from Stop-Work Order to Respondent. On June 27, 2018, the Department served an Amended Order of Penalty Assessment (Amended Order) on Respondent.

On July 25, 2018, Respondent filed a petition for hearing, disputing the allegations of the Stop-Work Order, as well as the fine imposed in the Amended Order. On August 7, 2018, the Department issued its Order to Show Cause, ordering Respondent to explain why its petition for hearing should not be dismissed as untimely filed. On August 28, 2018, Respondent filed its response to the Order to Show Cause with the Department.

On November 16, 2018, the Department referred the matter to the Division, which assigned this matter to the undersigned. The undersigned scheduled the final hearing in this matter for

January 21, 2019. On January 8, 2019, the parties filed a Joint Motion to Continue Final Hearing, which the undersigned granted. The undersigned thereafter entered an Order Rescheduling Hearing by Video Teleconference, setting the final hearing for April 4, 2019.

The final hearing proceeded as scheduled. The Department presented the testimony of Taylor Anderson, who previously served as an attorney for the Department. The undersigned admitted Exhibits 1 through 10, without objection. Respondent presented the testimony of Amanda Lairsey, the corporate representative and chief operating officer of Respondent.

After the conclusion of the final hearing, the Department filed an Agreed Motion for Extension of Time, requesting 15 days after the filing of the transcript to submit a proposed recommended order, which the undersigned granted. The one-volume Transcript of this final hearing was filed with the Division on April 30, 2019. Petitioner timely filed a Proposed Recommended Order that the undersigned considered in the preparation of this Recommended Order. Respondent, despite being represented by counsel, requesting the final hearing, and procuring the attendance of an out-of-state witness (Ms. Lairsey) at the final hearing, failed to file a proposed recommended order.

All statutory references are to the 2018 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the requirement of chapter 440, Florida Statutes, that employers in Florida secure workers' compensation insurance coverage for their employees. See § 440.107(3), Fla. Stat.

2. Respondent is a corporation located in Clermont, Florida, engaged in the roofing industry.

3. On March 5, 2018, Department Investigator Keith Howe conducted a workers' compensation compliance check at a residence located in Daytona Beach, Florida, where Petitioner was installing a new roof. The purpose of Mr. Howe's visit was to determine whether Petitioner had workers' compensation coverage for its employees, as required under chapter 440.

4. Mr. Howe made a preliminary determination that persons working at the residence were not covered by workers' compensation insurance.

5. After Mr. Howe's visit, on March 6, 2018, the Department issued and served on Respondent (via hand-delivery) a Stop-Work Order and Request for Production of Business Records for Penalty Assessment Calculation. The Stop-Work Order alleged that Respondent failed to secure the payment of workers' compensation insurance for those individuals at the Daytona Beach worksite, in violation of sections 440.10(1), 440.38(1), and 440.107(2).

6. On June 27, 2018, the Department served Respondent with the Amended Order via certified mail.

7. The Amended Order includes two deadlines. The deadline referenced on the first page of the Amended Order states:

Pursuant to Rule 69L-6.028, Florida Administrative Code, if the Division imputes the employer's payroll, the employer shall have twenty days after service of the first amended order of penalty assessment to provide business records sufficient for the Division to determine the employer's payroll for the period requested in the business records request for the calculation of the penalty. The employer's penalty will be recalculated pursuant to subsection 440.107(7)(d), F.S., only if the employer provides all such business records within the twenty days after service of the first amended order of penalty assessment. Otherwise, the first amended order of penalty assessment will remain in effect.

8. The Amended Order's other deadline is found in the "Notice of Rights" on the second page, and states:

You must file the petition for hearing so that it is received within twenty-one (21) calendar days of this agency action. The petition must be filed with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390.

FAILURE TO FILE A PETITION WITHIN THE TWENTY-ONE (21) DAYS OF RECEIPT OF THIS AGENCY ACTION CONSTITUTES A WAIVER OF YOUR RIGHT TO ADMINISTRATIVE REVIEW OF THE AGENCY ACTION.

9. Ms. Anderson, who previously served as an attorney for the Department, testified that the Department assigned her to a separate workers' compensation matter involving Respondent (case 18-069-D7). Ms. Anderson testified that she contacted Ms. Lairsey, Respondent's chief operating officer, on July 20, 2018, to discuss whether Respondent would agree to waive the 21-day deadline to file the petition in that matter. By that date more than 21 days had already passed from Respondent's receipt of the Amended Order.

10. Ms. Lairsey's testimony confirms this conversation. Ms. Lairsey testified that she returned Ms. Anderson's call, to discuss case 18-069-D7, as well as the instant case. At the time and date of this phone call, Respondent had not filed a petition for relief in the instant case, and the Department had therefore not assigned it to a Department attorney.

11. During this telephone conversation, both Ms. Anderson and Ms. Lairsey testified that they discussed the potential for settlement in case 18-069-D7, and that Ms. Lairsey asked Ms. Anderson if the Department would consider consolidating that case with the instant case.

12. Ms. Anderson testified that, during this telephone conversation, she was unaware of the instant case because Respondent had not yet filed a petition. After reviewing the Department's database, Ms. Anderson testified that she discovered

the Amended Order, but noted to Ms. Lairsey that Respondent had not yet filed a petition, and that if it did, the Department would consider it to be beyond the 21-day deadline, and thus late.

13. Ms. Lairsey's testimony is consistent with Ms. Anderson's testimony concerning the discussion of the presumed lateness of the yet-to-be-filed petition in the instant case. Ms. Lairsey testified:

So I understood that I was going to be late with the petition, or actually, I didn't realize—I don't remember—I didn't know until that time that I was going to be late, but I wanted to know if I could get an extension of time or somehow find out a way to respond with why it was going to be late because of all the documentation that I needed to create the response.

14. Ms. Anderson testified that she explained to Ms. Lairsey that because the Department would consider a petition in the instant case to be late-filed, it would issue an order to show cause, which "would give her a chance to respond to the Department and tell us why she believed her petition was late and to see if any of those reasons would amount to anything under the law where the Department could, in fact, look at the petition."

15. Ms. Lairsey testified that she believed that Ms. Anderson told her that a "response" would be accepted after the filing deadline. Ms. Lairsey also testified that she needed to obtain, review, and provide documentation concerning the

allegations in the Amended Order to provide the Department with an "honest answer."

16. Ms. Lairsey also testified that she did not understand the deadlines stated in the Amended Order, although she ultimately testified, "Yes. I knew that it was—this is the one that was the 21 days from filing[.]"^{1/}

17. Ms. Anderson testified that Respondent's deadline for filing a petition in the instant matter was July 18, 2018. The undersigned finds that the Department served the Amended Order by certified mail that was received on June 27, 2018, and that July 18, 2018, is 21 days after the service of the Amended Order.

18. The Department received Respondent's petition for hearing on July 25, 2018, which was seven days after the filing deadline.^{2/}

19. Thereafter, on August 7, 2018, the Division issued an Order to Show Cause, providing Respondent 21 days to show cause why the petition should not be dismissed as untimely, and to address whether any basis existed for the Department to equitably toll the 21-day deadline for filing the petition.

20. On August 28, 2018, Respondent responded to the Order to Show Cause. The response states, in part:

In this instance, there is sufficient evidence to support equitable tolling. Amanda Lairsey, Chief Operations Officer of MAC MAR, LLC, has been in continuous contact with the Division of Worker's Compensation

regarding matters that had arisen with MAC MAR, LLC. Specifically, Ms. Lairsey had been in communication with Taylor R. Anderson, Attorney for Workers Compensation. It is imperative that it be stressed in abundant clarity that MAC MAR, LLC does not believe that there was any responsibility or inaction or inappropriate action undertaken by Attorney Anderson. In Ms. Lairsey's experience, she had been extremely helpful and professional in helping MAC MAR, LLC resolve its issues for which she was representing the Division. No representative of the Division was appointed or communicated for MAC MAR, LLC for the present matter. When Ms. Lairsey received the amended Order of Penalty Assessment on June 27, 2018, she asked Attorney Anderson whether or not she could be the assigned representative for the Division in this matter and explained that MAC MAR, LLC would need additional time to provide adequate information to the Division. Attorney Anderson indicated that she could not be the representative. Attorney Anderson stated that Ms. Lairsey would need to respond to the Order and that, if she failed to do so timely, that MAC MAR, LLC would receive a letter (which is apparently the Order to Show Cause) and would have to explain why it was filed untimely. Although it is apparent now that Attorney Anderson was properly communicating the requirements, Ms. Lairsey understood the statement to mean that MAC MAR, LLC could respond, and if it failed to do so timely, an explanation would be sufficient.

Although it appears that it was not Attorney Anderson's intention to lull Ms. Lairsey into thinking she could respond even if it was untimely, that is the unfortunate effect of Ms. Lairsey's understanding of the communication from Ms. Anderson. Ms. Lairsey is not an attorney and did not appreciate the significance of the requirements of Equitable Tolling.

21. The undersigned finds that Ms. Lairsey's testimony at the final hearing contradicts Respondent's response to the Order to Show Cause. Ms. Lairsey testified that she understood that Respondent's petition in the instant matter was late. She testified that she did not understand the deadlines contained in the Amended Order, although Respondent apparently was able to timely file a petition in case 18-069-D7. And, Ms. Lairsey testified that she was aware that she would have an opportunity to respond to the Department's Order to Show Cause to explain why the Respondent was filing a late petition--not that she believed she had the opportunity to have the Department accept a late-filed petition.

22. Ms. Lairsey testified that she needed additional time to obtain, review, and provide documentation concerning the allegations in the Amended Order, in order to submit an accurate petition. However, the undersigned finds that Florida Administrative Code Rule 28-106.2015(5)(a) through (e) sets forth the substantive requirements for a petition for hearing. The subsections of this rule do not require a respondent to submit or identify documents or records relevant to the dispute.

23. The undersigned finds that neither the Department nor Ms. Anderson lulled Respondent into inaction. Rather, the evidence adduced at hearing demonstrated that Ms. Anderson adequately explained to Ms. Lairsey that any petition filed in

this matter was beyond the filing deadline, which Ms. Lairsey acknowledged she understood. Ms. Anderson explained that if Respondent filed a petition beyond the deadline, it would have an opportunity to respond to an Order to Show Cause, which it did.

24. The undersigned further finds that Respondent has provided no evidence that it was, in some extraordinary way, prevented from exercising its rights, or that it timely asserted its rights mistakenly in a wrong forum.

CONCLUSIONS OF LAW

25. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1).

26. Chapter 440 is known as the "Workers' Compensation Law." § 440.10, Fla. Stat.

27. The Department has the burden to show that Respondent received the Amended Order, and that Respondent's request for hearing was untimely. As the party seeking to invoke the doctrine of equitable tolling, Respondent has the burden of proof on that issue. The standard of proof for each of the parties is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

28. The filing of a request for hearing occurs when the Department receives the request for hearing. See Fla. Admin. Code R. 28-106.104(1).

29. The Department established, by a preponderance of the evidence, that it served Respondent with the Amended Order, by certified mail that was received on June 27, 2018. The Amended Order explicitly stated that Respondent had 21 days to file a petition for hearing, and it "explicitly advised that a failure to comply with the statutory time requirements . . . would constitute a waiver of Chapter 120 proceedings."

30. The Department further established, by a preponderance of the evidence, that it received Respondent's petition for hearing on July 25, 2018, which was seven days after the filing deadline.

31. The undersigned concludes that the Department has established, by a preponderance of the evidence, that Respondent's petition for hearing was untimely.

Equitable Tolling

32. In Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988), the Florida Supreme Court held that the doctrine of equitable tolling applies in administrative proceedings, stating:

Generally, the tolling doctrine has been applied when the plaintiff 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.

Thus, a party's failure to timely file a petition sometimes can be excused by application of the equitable tolling doctrine as a defense.

33. The undersigned concludes that Respondent failed to establish, by a preponderance of the evidence, that equitable tolling excuses its late-filed petition for hearing.

34. As found in paragraph 23 above, neither the Department nor Ms. Anderson lulled Respondent into inaction. Although Ms. Lairsey testified that she did not understand the deadlines in the Amended Order, she also testified that she understood that the petition in this matter would be late. The undersigned concludes that Respondent has failed to establish the application of the equitable tolling doctrine. See Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) (affirming dismissal of late-filed petition because Whiting's mistaken belief as to when the time period for filing a petition ended was insufficient to support equitable tolling); Jancyn Mfg. Corp. v. Dep't of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (refusing to apply the doctrine of equitable tolling when the late-filed petition was the result of the party's "own inattention.").

35. As found in paragraph 24 above, Respondent has provided no evidence that it was, in some extraordinary way, prevented from exercising its rights, or that it timely asserted its rights mistakenly in a wrong forum.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned RECOMMENDS that the Department dismiss Respondent's petition for hearing as untimely.

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



ROBERT J. TELFER III
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 31st day of May, 2019.

ENDNOTES

^{1/} The undersigned notes that Respondent was apparently able to understand the form language of the Department's Stop-Work Order, to timely file a petition in case 18-069-D7.

^{2/} Respondent's petition was dated July 18, 2019.

COPIES FURNISHED:

Mattie Birster, Esquire
Department of Financial Services
Office of the General Counsel
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Cynthia Crider, Esquire
David Boggs, LLC
116 Running Creek Court
Shepherdsville, Kentucky 40165
(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.