

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION,

Petitioner,

vs.

Case No. 19-0630

SMITH'S INTERIOR FINISHES, LLC,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge Lynne A. Quimby-Pennock conducted a hearing in this case by video teleconference on April 16, 2019, at sites in Tampa and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Byron K. Smith, Jr.  
Smith's Interior Finishes, LLC  
17829 Laura Lee Drive  
Shadyhills, Florida 34610

STATEMENT OF THE ISSUE

The issue is whether Respondent's request for an administrative hearing was timely filed by virtue of the doctrine of equitable tolling.

PRELIMINARY STATEMENT

On June 6, 2018, the Department of Financial Services, Division of Workers' Compensation (the Division or DWC), served Respondent with a "STOP-WORK ORDER" for its failure to obtain workers' compensation coverage that meets the requirements of chapter 440, Florida Statutes (2018). On November 10, 2018, the Division served Respondent, via certified mail, with an Amended Order of Penalty Assessment (Amended Assessment). This Amended Assessment informed Respondent that if Respondent wished to contest the \$35,769.16 penalty assessment, a request for a hearing must be filed within 21 calendar days. By letter (petition) filed with the Division on December 14, 2018, Respondent admitted it was "passed the 21 day deadline but was hoping to file a petition." On January 10, 2019, the DWC issued an Order to Show Cause requiring Respondent to show cause within 21 days why the petition should not be dismissed as being untimely, specifically addressing whether there was any basis for equitable tolling of the 21-day filing deadline to request a hearing.

Respondent filed a response on January 29, 2019. The DWC referred the matter to the Division of Administrative Hearings (DOAH) to conduct a hearing on the narrow issue of equitable tolling.

At the hearing, the Division presented two witnesses: DWC investigator James Acaba; and Bryan K. Smith, Jr. The Division's Exhibits 4 through 8 were accepted in evidence without objection. Mr. Smith testified on behalf of Respondent.

A one-volume Transcript of the hearing was filed on May 8, 2019. The Division timely filed a proposed recommended order, which has been considered in the preparation of this Recommended Order. To date, Respondent has not filed a post-hearing submission.

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

#### FINDINGS OF FACT

1. The Division is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees and corporate officers. § 440.107, Fla. Stat.

2. Respondent is a Florida limited liability company engaged in the construction business. Its offices are located at 2474 Ambassador Avenue, Spring Hill, Florida.

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

4. On June 6, 2018, James Acaba, a Division compliance inspector, conducted a compliance investigation at a job site in

Lutz, Florida. Mr. Acaba observed two individuals working at the job site: Respondent's owner, Mr. Smith; and Mr. Smith's step-son.

5. Mr. Smith claimed he had an exemption for himself. Mr. Acaba ascertained that Mr. Smith's exemption expired on January 19, 2017.

6. Mr. Acaba determined that: Mr. Smith's step-son was working for \$12.00 an hour; had been working for Respondent for about a week; and did not have workers compensation coverage.

7. On June 6, 2018, a Stop-Work Order and a Request for Production of Business Records for Penalty Assessment Calculation purposes were hand-served on Mr. Smith at the job site. The Stop-Work Order contained an Order of Penalty Assessment, which explained how a penalty is calculated, but gave no specific amount pending a review of Respondent's financial records. Mr. Smith was advised to provide the requested business records within 10 business days or by June 16, 2019.

8. Mr. Smith requested information on how to have the Stop-Work Order removed. Mr. Acaba explained to Mr. Smith several options available to him to have the Stop-Work Order released: obtain a workers' compensation policy; engage an employee leasing company; or terminate the step-son's employment. On June 14, 2018, Mr. Smith provided Mr. Acaba a letter reflecting Respondent's "reduction in (its) workforce." On June 15, 2018,

Mr. Smith secured the reinstatement of his exemption to work for Respondent. However, Mr. Smith did not provide the requested business records.

9. On November 10, 2018, the Division served an Amended Order of Penalty Assessment (Amended Order) at the address Mr. Smith provided during the June 6, 2018, job site encounter. This Amended Order provided the total penalty amount of \$35,769.16.

10. According to Mr. Smith, his girlfriend, Samantha Nigh, signed for the Amended Order on November 10, 2018, saw the large amount of the penalty assessment, and "decided not to show" it to Mr. Smith. Ms. Nigh did not testify during the hearing.

11. The Amended Order contained a Notice of Rights, which stated that, if Respondent wished to contest the penalty, a petition seeking a hearing had to be filed with the Division within twenty-one calendar days of the Amended Order. It also stated that the petition "must be filed with Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0300." The Amended Order included the following:

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

This meant that a petition had to be filed, and in the hands of the Agency Clerk no later than December 3, 2018. Although the actual due date was Saturday, December 1, 2018, Respondent could have filed the petition by the close of business on Monday, December 3, 2018. Florida Administrative Code Rule 18.106.103.

12. Mr. Smith did not provide the date on which he became aware of the Amended Order. However, once he was aware of it, Mr. Smith knew the 21-day period to file a petition had expired, and admitted at hearing "it was already too late."

13. On December 14, 2018, 33 days after the Division served the Amended Order, and 11 days after the actual due date, the Division received Respondent's hearing request. As a result of the late filing, the Division issued an Order to Show Cause (OTSC) on January 10, 2019. The OTSC required Respondent to show cause why the December 14, 2018, hearing request should not be dismissed as untimely.

14. In the written response to the OTSC, Mr. Smith asserted that his brother, Edward Unger, "was only on the job site for the one day," and Mr. Unger could "provide proof of employment elsewhere further (sic) showing he was not of our employment at the time." Additionally, the response provided that "due to [an] emergency family situation where Byron Smith, owner, had to take a minor leave of absence to be with a close family member who had emergency open heart coronary bypass surgery. . . , the days and

dates got scrambled with emotions clouding what needed to be done promptly." The Division construed this conversation as possibly excusing the late filing and forwarded the matter to DOAH to resolve that narrow issue.

15. During the hearing, Mr. Smith testified that his girlfriend, Ms. Nigh, prepared the OTSC response, but that his signature was on the document. Mr. Smith never clarified or corrected that Mr. Unger was his brother or step-son, and he merely reiterated the family problem and personal issues, without further detail or explanations, as his excuse. Lastly, Mr. Smith admitted that at the time Mr. Acaba observed the two working on June 6, 2018, he was breaking the rules, but "it was a huge penalty."

16. There is no credible evidence that Mr. Acaba gave Respondent's owner, Mr. Smith any information that would cause him to miss the deadline for filing the petition.

#### CONCLUSIONS OF LAW

17. The Division is responsible for enforcing the requirement that employers subject to chapter 440 secure the payment of workers' compensation by obtaining workers' compensation coverage for their employees "that meets the requirements of [chapter 440] and the Florida Insurance Code." § 440.107(1), Fla. Stat.

18. Respondent contends that it had specific reasons for its late request for a hearing. Respondent bears the burden of proving by a preponderance of evidence that the doctrine of equitable tolling applies.

19. The federal doctrine of "equitable tolling" was incorporated into Florida's administrative jurisprudence by the Florida Supreme Court in Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988). "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." Id. The doctrine has always been applied sparingly. It requires more than a showing of mere garden variety negligence or excusable neglect. One who fails to act diligently cannot invoke equitable principles to excuse lack of diligence. Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984). Based upon a review of the entire record and consideration of Machules in light of allegations made by Respondent, it is concluded that, as a matter of law, "equitable tolling" does not apply in this case. Mr. Smith failed to timely request the hearing. The Division did not mislead Mr. Smith through any actions or inactions.



20. There is no evidence that the Notice of Rights is confusing or unclear regarding when and where to file a petition for hearing.

21. Application of the equitable tolling doctrine is not warranted to excuse the untimely filing of Respondent's petition. Therefore, Respondent has waived its right to an administrative hearing.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that the Department of Financial Services, Division of Workers' Compensation, enter a final order dismissing Respondent's request for a hearing as untimely.

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



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LYNNE A. QUIMBY-PENNOCK  
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.

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.