

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,  
DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs.

Case No. 19-5848

JAMES COLLIGAN FENCE, LLC,

Respondent.

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RECOMMENDED ORDER

On January 16, 2020, Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings (DOAH) conducted a hearing pursuant to section 120.57(1), Florida Statutes (2019), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Rean Knopke, Esquire  
Leon Melnicoff, Esquire  
Kami Alexis Sidener, Qualified Representative  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399

For Respondent: James Colligan, pro se  
637 Four Point Road  
Holt, Florida 32564

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent failed to provide workers' compensation insurance as required by section 440.107, Florida Statutes (2019), and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 1, 2019, the Department of Financial Services, Division of Workers' Compensation (Petitioner or the Division), filed a Stop-Work Order against James Colligan Fence, LLC (Respondent). Mr. Colligan, the sole agent for Respondent, requested a hearing. On October 29, 2019, the Division filed an Amended Order of Penalty Assessment, which alleged that Respondent failed to secure payment of workers' compensation within the meaning of section 440.107(2), and assessed a penalty of \$15,260.56. On November 4, 2019, the Division referred the matter to DOAH for the assignment of an administrative law judge.

On November 7, 2019, the case was noticed for hearing to commence January 16, 2020. Respondent was proceeding without the benefit of counsel, so the parties participated in a telephonic prehearing conference, in order to explain to Mr. Colligan the process that would govern the hearing, and to give him the opportunity to ask questions regarding that process. Mr. Colligan was encouraged to access the document "Representing Yourself Before the Division of Administrative Hearings," available on DOAH's website, which provides helpful information about appearing before DOAH for persons representing themselves.

The hearing commenced and concluded as scheduled. Sabrina Johnson, Kevin Sterling, and Lynne Murcia testified for the Division, and Petitioner's Exhibits 1 through 15 were admitted without objection. Respondent testified on his own behalf but presented no exhibits.

The parties were advised that the deadline for filing proposed recommended orders would be ten days from the filing of the Transcript. The Transcript was filed on January 30, 2020. Both Petitioner and Respondent

timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

All references to the Florida Statutes are to the 2019 codification.

#### FINDINGS OF FACT

1. The Division is the state agency charged with enforcing the requirement in section 440.107(3), that employers in Florida secure workers' compensation coverage for their employees.

2. Respondent is a company engaged in the construction industry. James Colligan is its sole employee. Respondent's office is 637 Four Point Road, Holt, Florida, 32564.

3. On or about October 1, 2019, Sabrina Johnson, a compliance investigator for the Division, observed someone installing vinyl fencing on an existing home located at 101 Pine Court, in Niceville, Florida. She approached and spoke to the lone worker, who identified himself as James Colligan. Ms. Johnson identified herself as a compliance investigator for the Division and asked for proof of workers' compensation insurance. Mr. Colligan advised her that he had an exemption.

4. Ms. Johnson consulted the Department of State, Division of Corporation's website to determine the identity of Respondent's officers, and found that Mr. Colligan was the sole officer. She then consulted Petitioner's Coverage and Compliance Automated System (CCAS) for proof of workers' compensation coverage, and for any exemptions associated with Respondent. Ms. Johnson's research revealed that Respondent did not have a workers' compensation policy or an employee leasing policy, and did not have a current exemption.

5. Mr. Colligan previously held an exemption, but it expired on July 20, 2018. He had applied for a renewal of the exemption on July 2, 2018, but his application was rejected as incomplete because the FEIN number on the

renewal application did not match the one on file. Mr. Colligan was notified by email on July 3, 2018, that his application was being returned to him as incomplete. He acknowledged at hearing that he had provided his email address to the Division, but stated he gets so many emails, he does not always read them. He did not recall ever seeing the email from the Division, and believed that his exemption had been renewed.

6. Mr. Colligan's testimony was sincere and credible. However, it is his responsibility to make sure that his exemption is up to date, and he did not do so.

7. Upon learning from Ms. Johnson that his exemption had expired, Mr. Colligan immediately applied for and received an exemption. However, the newly acquired exemption is prospective, and does not cover the period of noncompliance.

8. Investigator Johnson consulted with her supervisor, who provided authorization for the issuance of a Stop-Work Order. She issued a Stop-Work Order and personally served it on Mr. Colligan on October 1, 2019. At the same time, she issued and served a Request for Production of Business Records for Penalty Assessment Calculation. Mr. Colligan executed an Agreed Order of Conditional Release from Stop-Work Order, paid the minimum \$1,000 fine and, as noted above, submitted a new application for an exemption.

9. The records requested fall into five categories: 1) payroll documents, such as time sheets, time cards, attendance records, earning records, check stubs, and payroll summaries, as well as federal income tax documents and other documents that would provide the amount of remuneration paid or payable to each employee; 2) account documents, including all business check journals and statements, cleared checks for all open and/or closed business accounts, records of check and cash disbursements, cashier's checks, bank checks, and money orders; 3) disbursement records, meaning all records of each business disbursement including, but not limited to, check and cash

disbursements, indicating chronologically the disbursement date, to whom the money was paid, the amount, and the purpose for which the disbursement was made; 4) subcontractor records, identifying the identity of each subcontractor of the employer, the contractual relationship held, and any payments to those subcontractors; and 5) documentation of subcontractor's workers' compensation coverage.

10. Respondent worked as a subcontractor, but there was no evidence presented that he hired subcontractors, so records falling into the categories related to subcontractors likely do not exist. Respondent provided copies of bank statements, but these records did not contain earning records, income tax filings, check images, or other sufficient records from which the Division could determine payroll.

11. Lynne Murcia reviewed Respondent's records in her capacity as a penalty auditor for the Division. She testified credibly that income can be identified through direct wage payments to an employee, bonuses given, income distributions, loans that are not repaid, and the like. The bank statements provided by Respondent were simply insufficient for her to determine which items were reflective of payroll. Therefore, in accordance with section 440.107(7)(e) and Florida Administrative Code Rule 69L-6.028, she determined payroll in this case by imputing payroll for the work classification assigned to the identified work being performed.

12. On October 29, 2019, the Division issued an Amended Order of Penalty Assessment, which was served on Respondent on October 30, 2019. The penalty assessed for noncompliance with chapter 440 workers' compensation requirements was \$15,260.56.

13. The penalty calculation is based upon the classification codes listed in the Scopes® Manual, which have been adopted through the rulemaking process through rules 68L-6.021 and 69L-6.031. Classification codes are codes assigned to different occupations by the National Council on Compensation

Insurance, Inc. (NCCI), to assist in the calculation of workers' compensation insurance premiums.

14. Ms. Murcia used classification code 6400 for Mr. Colligan. The description for code 6400 is for "specialist contractors engaged in the erection of all types of metal fences, i.e., chain link, woven wire, wrought iron or barbed wire fences." There is no dispute that Code 6400 was the appropriate classification code for the type of work Respondent performed.

15. Using this classification code, Ms. Murcia used the corresponding approved manual rates for that classification and the period of noncompliance. Ms. Murcia multiplied the average weekly wage by 1.5, in accordance with section 440.107(7)(e). The period of noncompliance in this case ran from the expiration of Mr. Colligan's exemption (July 21, 2018), to the day that he applied for and received a new exemption (October 1, 2019).

16. The average weekly wage is established by the Department of Economic Opportunity. Because the period of noncompliance involved two different pay rates, Ms. Murcia provided a separate calculation for each calendar year. The imputed gross payroll for July 21, 2018 through December 31, 2018, was \$33,013.55, which she divided by 100 and then multiplied by the manual approved rate (\$9.73), times two, to reach the amount of penalty to be imposed for that calendar year. A similar calculation was performed for the period from January 1, 2019 through October 1, 2019, using the manual approved rate of \$8.01. All of the penalty calculations are in accordance with the Division's penalty calculation worksheet.

17. The Division proved by clear and convincing evidence that Respondent was engaged in the construction business for the period beginning July 21, 2018, and ending October 1, 2019, without prior workers' compensation coverage or a valid exemption. The Division also demonstrated by clear and convincing evidence that the documents submitted by Respondent, which may be all of the documentation that Respondent possessed, were not sufficient to establish Respondent's payroll, thus requiring the imputation of

payroll. Finally, the Division proved by clear and convincing evidence that the required penalty for the period of noncompliance is \$15,260.56.

#### CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

19. Chapter 440 is known as the “Workers’ Compensation Law.” § 440.01, Fla. Stat.

20. The Division is seeking a fine for failure to provide workers’ compensation coverage. Because a fine is considered a penal measure, the Division bears the burden of proof and must establish its case by clear and convincing evidence. *Dep’t of Banking and Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

21. Clear and convincing evidence is a stringent standard. It “requires more proof than a ‘preponderance of the evidence’ but less than ‘beyond and to the exclusion of a reasonable doubt.’” *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Supreme Court of Florida:

Clear 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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*In re Henson*, 913 So. 2d 579, 590 (Fla. 2005)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). The clear and convincing standard may be met when there is conflicting evidence, but not when the evidence presented is ambiguous. *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 989 (Fla. 1991).

22. To meet this burden, the Division must prove that Respondent was required to comply with the Workers' Compensation Law, that Respondent failed to comply with the requirements of the law, and that the penalty assessed by the Division is appropriate.

23. Section 440.02(17)(a) defines "employment" as "any service performed by an employee for the person employing him or her." It includes "all private employments in which four or more employees are employed by the same employer, or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." § 440.02(17)(b)2., Fla. Stat.

24. Every employer is required to secure the payment of workers' compensation coverage for the benefit if its employees, unless chapter 440 provides an exemption. In order to enforce this requirement, the Division is authorized to examine the records of an employer to determine whether it is in compliance, and if not, to assess 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 the periods for which it failed to secure payments of workers' compensation ... as reported to the Department of Economic Opportunity ... reported annually to the Legislature."

25. The records submitted by Respondent are not sufficient to establish its payroll during the period Mr. Colligan did not have an exemption. Imputing payroll appears to result in a payroll amount that may be far more than what Respondent may have earned as a company during that period. However, it is Respondent's responsibility to keep sufficient records of its payroll, and it did not do so.

26. In a case such as this one, where no valid exemption was in place during the relevant period and insufficient documentation exists to establish payroll, section 440.107(7)(e) requires that the Division impute payroll for penalty calculation purposes. The Division properly imputed payroll in accordance with the method identified in rule 69L-6.028(3):



(3) When an employer fails to provide business records sufficient to enable the Department to determine the employer's payroll for the time period requested in the business records request for purposes of calculating the penalty pursuant to paragraph 440.107(7)(d), F.S., the imputed weekly payroll for each current and former employee, corporate officer, sole proprietor or partner identified by the Department during its investigation will be the statewide average weekly wage as defined in subsection 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5.

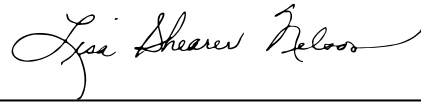
27. Petitioner properly utilized the procedures mandated by statute and rule to calculate the penalty Respondent owes as a result of its failure to comply with the coverage requirements of chapter 440, and failure to provide sufficient records to allow Petitioner to determine its payroll.

28. Petitioner has proven by clear and convincing evidence that it properly issued a Stop-Work Order and Order of Penalty Assessment for failure to maintain workers' compensation coverage, and properly calculated the penalty contained in the Amended Order of Penalty Assessment.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order finding that Respondent failed to comply with the requirements of section 440.107 and impose the penalty identified in the Amended Order of Penalty Assessment, with credit for the \$1,000 already paid.

DONE AND ENTERED this 19th day of February, 2020, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of February, 2020.

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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.