

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs.

Case No. 19-6006

EAST COAST SHUTTERS, INC.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge Suzanne Van Wyk, of the Division of Administrative Hearings, conducted the final hearing in this cause on April 30, 2020, by Zoom Conference at various locations in Florida.

APPEARANCES

For Petitioner: Barbara L. Davis, Esquire
Leon Melnicoff, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Rupert L. Jones, pro se
East Coast Shutters, Inc.
835 Creel Street
Melbourne, Florida 32935

STATEMENT OF THE ISSUE

Whether Respondent, East Coast Shutters, Inc. ("East Coast"), timely requested a hearing to contest the Second Amended Order of Penalty Assessment, issued by Petitioner, Department of Financial Services, Division of Workers' Compensation ("Division").

PRELIMINARY STATEMENT

This proceeding involves the Division's enforcement of the requirement in Florida's Workers' Compensation law that employers must secure payment of workers' compensation for their employees. On January 25, 2019, Division Investigator, Linda Offutt, served a Stop-Work Order and Order of Penalty Assessment ("SWO") on Respondent. Respondent did not file a petition to challenge the SWO.

On April 29, 2019, the Division issued an Amended Order of Penalty Assessment ("Amended Order"), which Ms. Offutt again personally served on Respondent. Respondent did not file a petition to challenge the Amended Order. On June 24, 2019, the Division issued a Second Amended Order of Penalty Assessment ("Second Amended Order"), which was hand-delivered by Ms. Offutt to Respondent.

On August 2, 2019, Respondent contested the Second Amended Order and requested a hearing. The Division concluded that the request was untimely and issued an Order to Show Cause why Respondent's Petition should not be dismissed. Respondent filed a response on October 13, 2019, alleging that the Second Amended Order "was not seen by Rupert Jones or Tresa Thomas (Office Manager) until Linda [Offutt] came to the office to start payment proceedings."

On November 12, 2019, the Division referred the matter to the Division of Administrative Hearings "to decide the issue of whether equitable tolling excuses [East Coast]'s late filed petition." The case was initially scheduled for final hearing on January 15, 2020; however, on January 9, 2020, Petitioner filed a Motion to Deem Matters Admitted and Relinquish Jurisdiction ("Motion") due to Respondent's failure to timely respond to discovery requests. Following a telephonic hearing on the Motion, the undersigned

denied the Motion, canceled the final hearing, and extended the time for Respondent to comply with outstanding discovery requests. Following a required status report from the parties, the undersigned rescheduled the hearing for April 27, 2020. The final hearing was rescheduled again for April 30, 2020, via Zoom Conference.

The final hearing was conducted as rescheduled. The Division presented the testimony of Ms. Offutt, and Cathy Núñez, a Division regulatory consultant and facilitator. Petitioner's Exhibits 1 through 9 were admitted into evidence.

Respondent introduced the testimony of its owner, Rupert L. Jones, and Heather Cox, a routing coordinator. Respondent's Exhibits 1 through 11 were admitted into evidence.

The proceedings were recorded and the one-volume Transcript was filed May 14, 2020. The Division timely filed a Proposed Recommended Order on May 22, 2020, which has been considered by the undersigned in preparation of this Recommended Order. Respondent filed an untimely Proposed Recommended Order on May 29, 2020, to which Petitioner did not file an objection. The undersigned has considered Respondent's Proposed Recommended Order in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is the state agency responsible for enforcing the statutory requirement that employers secure payment of workers' compensation insurance for the benefit of their employees. § 440.107(3), Fla. Stat. (2019).

2. Respondent is a contractor specializing in installation of doors, windows, and hurricane shutters. Rupert L. Jones is Respondent's owner and

registered agent. Respondent's business address is 835 Creel Street, Melbourne, Florida 32935.

3. Tresa Thomas was employed as Respondent's office manager and worked at the business address at all times relevant hereto.

4. Heather Cox was employed as Respondent's routing coordinator and worked at the business address at all times relevant hereto.

5. Ms. Offutt is a Division compliance investigator. She checks employers for compliance with Florida's workers' compensation law. If she determines that an employer is not in compliance, Ms. Offutt issues an SWO along with a penalty assessment for the asserted periods of non-compliance. The Division determines periods of non-compliance by examining business records obtained through a business records request.

6. Ms. Offutt met with Mr. Jones and Ms. Thomas at East Coast on January 23, 2019, to perform a compliance check. As a result of that check, the Division issued Respondent an SWO and Order of Penalty Assessment. Ms. Offutt personally served the SWO and Order of Penalty Assessment on Mr. Jones at East Coast.

7. The SWO included a Notice of Rights informing East Coast that it could request a hearing to contest the SWO within 21 days of receipt of the SWO. East Coast did not request a hearing.

8. Following review of East Coast's records by Cathy Núñez, the Division's regulatory consultant, the Division issued an Amended Order dated April 29, 2019, imposing a penalty of \$62,389.94. Ms. Offutt personally served the Amended Order to Mr. Jones at East Coast. The Amended Order included a Notice of Rights advising that East Coast had 21 days from receipt of the Amended Order to file a petition for a hearing challenging the assessment. The Notice of Rights also stated that failure to request a hearing during that period waived the right to challenge the assessment. East Coast did not request a hearing.

9. In response to the Amended Order, Mr. Jones provided additional records to Ms. Núñez. Review of those records resulted in issuance of a Second Amended Order, reducing the penalty assessment to \$45,274.90.

10. Ms. Offutt personally served the Second Amended Order to East Coast's business office on June 24, 2019. Neither Mr. Jones nor Ms. Thomas was in the office when Ms. Offutt arrived. On behalf of East Coast, Ms. Cox signed for, and received, the Second Amended Order, along with the Notice of Rights and Penalty Calculation Worksheet.

11. The Notice of Rights informed Respondent of its right to request a hearing to contest the penalty within 21 days of receipt of the Second Amended Order. The Notice of Rights also contained the following prominently-displayed language:

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

12. While at the East Coast office on June 24, 2019, Ms. Offutt also informed Ms. Cox that East Coast had a 21-day deadline to respond to the Second Amended Order.

13. On July 3, 2019, Ms. Offutt telephoned East Coast, spoke with Ms. Thomas, and reminded her of the deadline to respond to the Second Amended Order.

14. On July 3, 2019, Ms. Thomas sent an email to Ms. Núñez indicating she had questions regarding the Second Amended Order. The email indicates Ms. Thomas was very confused as she "thought [Ms. Núñez] had already closed this."

15. On July 10, 2019, Ms. Núñez called Ms. Thomas in response to the email and the two played "phone tag" that day, alternately leaving messages for one another. Ms. Núñez also sent an email to Ms. Thomas noting that she

had received her message and inviting an email exchange. Ms. Thomas and Ms. Núñez finally spoke via telephone on July 10th, but Ms. Thomas did not have the worksheets available to review with Ms. Núñez at that time.

16. On July 11, 2019, Ms. Núñez sent a second email to Ms. Thomas, attached copies of the worksheets and the Penalty Audit Summary Report, and requested that Ms. Thomas call her “at [her] earliest opportunity” so they could review the documents.

17. Ms. Thomas contacted Ms. Núñez via telephone on July 12, 2019, and the two reviewed the worksheets together. Ms. Thomas stated that she would have Mr. Jones contact Ms. Offutt to work out a payment plan.

18. The deadline for East Coast to file a petition to contest the Second Amended Order was July 15, 2019.

19. On August 5, 2019, East Coast filed a Petition for Hearing challenging the penalty imposed by the Second Amended Order. In the Petition, Mr. Jones alleged, as follows:

I am writing this letter in protest to the audit summary and am filing to petition for a hearing. I was told by Linda [Offutt] that the deadline had past [sic]. I was not given the paperwork that was dropped off to an office girl. I was in the field and the office manager was out sick so it was never given to anyone. This paper work explained the audit and talked about filing a petition.

20. At the final hearing, Ms. Cox testified that she remembered receiving paperwork from Ms. Offutt, but thought it was a Saturday because she was in the office alone. The record established that June 24, 2019, was a Monday.

21. Mr. Jones testified that he never received the Second Amended Order.

22. The record clearly establishes that Ms. Thomas was in possession of the Second Amended Order and communicated with Division employees about it prior to the July 15, 2019 deadline.

23. East Coast introduced no evidence tending to prove that either Ms. Offutt or Ms. Núñez, or any other employee of the Division,

misrepresented to its employees the deadline for filing a petition to challenge the penalty imposed by the Second Amended Order.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of and parties to this proceeding. §§ 120.569, 120.57(1), Fla. Stat. (2019).

25. A party wanting to challenge an agency decision must file its petition for a hearing within 21 days of receiving written notification of the decision. Failure to file a petition “within 21 days waives the right to request a hearing.” Fla. Admin. Code R. 28-106.111(2),(4); *Whiting v. Dep't of Law Enf.*, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003).

26. The Division has the burden to show that Respondent received the Second 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.

27. The filing of a request for hearing occurs when the agency clerk¹ receives the request for hearing. *See* Fla. Admin. Code R. 28-106.104(1).

28. The Division established, by a preponderance of the evidence, that it served Respondent with the Second Amended Order, by hand delivery, to an authorized employee at its business office on June 24, 2019. The Second 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 time requirements would constitute a waiver of the right to administrative review.

¹ In this case, the filing occurred on August 2, 2019, when the agency clerk of the Department of Financial Services received the Petition, rather than August 5, 2019, when the Petition was routed to, and stamped in by, the Division.

29. The Division further established, by a preponderance of the evidence, that it received Respondent's Petition for Hearing on August 2, 2019—18 days after the filing deadline.

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

Equitable Tolling

31. The Administrative Procedure Act requires agencies to dismiss untimely petitions, but further provides that this direction "does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition." § 120.569(2)(c), Fla. Stat.; *Madison Highlands, LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 471-72 (Fla. 5th DCA 2017).

32. A late request for an administrative hearing is not a jurisdictional defect. *Id.* (citing *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988); *Pro Tech Monitoring, Inc. v. Dep't of Corr.*, 72 So. 3d 277, 280 (Fla. 1st DCA 2011)); *see also, Williams v. Dep't of Corr.*, 156 So. 3d 563, 565 (Fla. 5th DCA 2015) ("The doctrine of equitable tolling can be applied to extend an administrative filing deadline.").

33. Under the doctrine of equitable tolling, a late-filed petition, such as the one in the instant case, should be accepted when a party "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," provided that the opposing party will suffer no prejudice. *Machules*, 523 So. 2d at 1134.

34. As found in paragraph 23 above, neither Ms. Offutt nor Ms. Núñez misled or lulled Respondent into inaction. To the contrary, the record established that Ms. Offutt advised Ms. Cox of the deadline when she served the Second Amended Order. Further, the record establishes that both Ms. Offutt and Ms. Núñez communicated with East Coast's office manager,

Ms. Thomas, to ensure she understood the penalty calculation worksheets and was aware that a deadline was approaching.

35. Respondent offered no evidence that it had been prevented in some extraordinary way from asserting its rights. Mr. Jones' allegation that he never received the Second Amended Order, if true, could only be due to internal miscommunications. Ms. Thomas clearly had the Second Amended Order prior to the deadline to request a hearing and indicated to Ms. Núñez that she would discuss it with Mr. Jones. No evidence was presented to demonstrate that such a breakdown in communication between office manager and business owner was extraordinary in any way.

36. Respondent has failed to establish the application of the equitable tolling doctrine. *See 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.").

37. Respondent has provided no evidence that it was lulled into inaction, prevented from exercising its rights in some extraordinary way, or that it timely asserted its rights mistakenly in a wrong forum.

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, dismiss the request for hearing of East Coast Shutters, Inc., as untimely.

DONE AND ENTERED this 12th day of June, 2020, in Tallahassee, Leon
County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of June, 2020.

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.