

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs.

Case No. 20-4535

DAVID COOPER'S CONSTRUCTION, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held in this case on December 11, 2020, via Zoom conference before Suzanne Van Wyk, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rean Knopke, Esquire
 Department of Financial Services
 200 East Gaines Street
 Tallahassee, Florida 32399

For Respondent David Cooper, pro se
 David Cooper's Construction, Inc.
 2449 Hayes Avenue
 Port St. Joe, Florida 32456

STATEMENT OF THE ISSUES

Whether David Cooper's Construction, Inc. ("Respondent"), failed to secure the payment of workers' compensation insurance coverage for its employees; and, if so, whether the Department of Financial Services, Division of Workers' Compensation ("Petitioner" or "Department"), correctly calculated the penalty to be assessed against Respondent.

PRELIMINARY STATEMENT

On August 12, 2016, the Department served Respondent with a Stop-Work Order and Order of Penalty Assessment, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation for its employees. Following the receipt of business records from Respondent, the Department issued a Second Amended Order of Penalty Assessment on December 29, 2016.

On September 28, 2020, Respondent requested a hearing to dispute the Stop-Work Order and Second Amended Order of Penalty Assessment.¹ On October 13, 2020, Petitioner referred this matter to the Division of Administrative Hearings ("Division") for assignment of an Administrative Law Judge to conduct a final hearing in the matter.

The case was assigned to the undersigned and the final hearing was scheduled for December 11, 2020. Prior to commencing the final hearing, the Department sought to amend its penalty assessment. The undersigned granted the Department's motions to amend, culminating in the Department's filing a Fourth Amended Order of Penalty Assessment on November 17, 2020.

At the final hearing, Petitioner presented the testimony of Carl Woodall, compliance investigator; and Lynne Murcia, penalty auditor. Petitioner's Exhibits 1 through 13 were admitted in evidence.

Respondent offered the testimony of its owner, David Cooper, and did not introduce any exhibits into evidence.

¹ The record is insufficient to explain the gap between the date of issuance of the Second Amended Order of Penalty Assessment and Respondent's hearing request. However, the Department did not contest the hearing request as untimely.

A one-volume Transcript of the proceedings was filed on December 18, 2020. Petitioner timely filed a Proposed Recommended Order, which has been considered by the undersigned in preparing this Recommended Order. Respondent did not make any post-hearing filing.

Unless otherwise indicated, all references to the Florida Statutes herein are to the 2016 version, which was in effect when the alleged violations occurred.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the statutory requirement that employers in Florida secure workers' compensation coverage for their employees. *See* § 440.107(3), Fla. Stat.
2. Respondent is a Florida corporation engaged in the business of residential construction in Port St. Joe, Florida.
3. At all times relevant hereto, Carl Woodall was a workers' compensation compliance investigator employed by the Department.
4. Employers may comply with the workers' compensation coverage requirement by obtaining a workers' compensation insurance policy or an employee leasing agreement. Corporate officers and members of limited liability companies can elect an exemption from workers' compensation coverage. *See* § 440.05, Fla. Stat.
5. On August 12, 2016, Mr. Woodall made an unannounced, random inspection of a worksite at 2912 Garrison Avenue in Port St. Joe, Florida. Mr. Woodall observed two men on the roof of an existing structure at that address who appeared to be framing an addition to the structure.
6. At Mr. Woodall's request, the two men identified themselves as David Cooper and Macon Stewart.

7. Mr. Cooper identified himself as Respondent's owner and stated that Mr. Stewart was working for him. Mr. Cooper informed Mr. Woodall that he paid Mr. Stewart by check at the rate of \$10 per hour.

8. While at the worksite, Mr. Woodall checked the Coverage and Compliance Automated System ("CCAS") database, which tracks workers' compensation insurance coverage and exemption data for employers in Florida.

9. Mr. Woodall's search of CCAS revealed that Respondent did not have a workers' compensation insurance policy to cover its employees nor an employee leasing agreement. The search also revealed that Mr. Stewart did not have an active workers' compensation exemption.

10. Mr. Woodall personally served Mr. Cooper with a Stop-Work Order ("SWO") and Order of Penalty Assessment on August 12, 2016.

11. Respondent complied with the SWO by making a \$1,000 down payment toward the penalty assessment (which had yet to be calculated) and agreeing not to allow Mr. Stewart to work for Respondent until such time as Mr. Stewart obtained an exemption.

12. The Order of Penalty Assessment includes a Request for Production of Business Records ("Request") which could be used to calculate the amount of the penalty. In response to the Request, Mr. Cooper provided the Department with billing statements, handwritten time sheets, and certificates of exemption for certain employees.

13. Lynne Murcia is a Department penalty auditor. She is tasked with reviewing business records provided by employers and calculating penalties for employers who have been notified they are in violation of workers' compensation coverage requirements. Ms. Murcia was assigned to calculate the penalty to be assessed against Respondent.

14. Ms. Murcia began by reviewing Respondent's business records for the audit period, which is the two-year period immediately preceding the date of

the SWO. *See* § 440.107(7)(d), Fla. Stat. The audit period in this case is from February 1, 2015, through January 31, 2017.

15. The Department's penalty is based on the employer's payroll to employees during any periods during the audit period in which the employer did not provide workers' compensation insurance coverage for its employees ("the period of non-compliance"). In this case, the period of non-compliance is the same as the audit period.

16. An employer's payroll is the amount of wages or other compensation made to employees during the period of non-compliance. *See* Fla. Admin. Code R. 69L-6.035. Transactions that are considered payroll include direct payment for services rendered, as well as outstanding loans, reimbursements, bonuses, and profit-sharing. *Id.*

17. Based upon the records received from Respondent, Ms. Murcia identified Respondent's employees during the period of non-compliance as Joseph Turner, Linda Cooper, and Macon Stewart.²

18. Compensation paid to those employees during the period of non-compliance was as follows: Joseph Turner, \$11,740; Linda Cooper, \$2,178; and Macon Stewart, \$60. Thus, Respondent's gross payroll for the period of non-compliance was \$13,978.

19. Next, Ms. Murcia consulted the Scopes Manual published by the National Council on Compensation Insurance ("NCCI") to assign a class code to each employee. The class codes correspond with the type of work performed by an employee and establish the manual rate for workers' compensation insurance for that type of work.

20. Based upon Mr. Woodall's observations of the work being performed at the worksite, Ms. Murcia assigned NCCI class code 5645, Carpentry, to Mr. Stewart.

² Ms. Murcia initially identified additional employees whose wages were included in the Second and Third Amended Orders of Penalty Assessment. For purposes of this Recommended Order, the relevant payroll is that identified in the Fourth Amended Order of Penalty Assessment.

21. Based on Ms. Cooper's description of her job duties, Ms. Murcia assigned NCCI class code 8810, Clerical, to Ms. Cooper.

22. Respondent's records did not identify the type of work performed by Mr. Turner.

23. When the business records do not identify the type of work performed by an employee, the Department must apply to the employee the highest manual rate associated with any employee's activities based on the investigator's personal observation of work activities. *See Fla. Admin. Code R. 69L-6.035(4)*.

24. Ms. Murcia assigned class code 5645, Carpentry, to Mr. Turner because that class code corresponds with a higher manual rate than 8810, Clerical.

25. Using the gross payroll to each employee, multiplied by the applicable manual rate, Respondent would have paid \$1,897.51 in workers' compensation insurance premiums to cover its employees during the period of non-compliance ("the avoided premium").

26. The statutory penalty to be assessed is twice the avoided premium. *See § 440.107(7)(d)1., Fla. Stat.* Ms. Murcia calculated the penalty to be assessed as \$3,795.

27. Ms. Murcia applied the correct approved manual rates and correctly utilized the methodology specified in section 440.107(7) and Florida Administrative Code Rules 69L-6.027 and 69L-6.035 to determine the penalty to be imposed.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. *See §§ 120.569 and 120.57(1), Fla. Stat. (2020)*.

29. Employers are required to secure payment of workers' compensation for their employees unless exempted or excluded. *See* §§ 440.10(1)(a) and 440.38(1), Fla. Stat.

30. "Employer" includes "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

31. "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any ... contract for hire ... whether express or implied, oral or written[.]" § 440.02(15)(a), Fla. Stat.

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

33. Employers must strictly comply with the Workers' Compensation statute. *See C&L Trucking v. Corbett*, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

34. 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 statute and that the Department correctly calculated the penalty assessment to be imposed. *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).

35. 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).

36. The Department proved by clear and convincing evidence that Respondent is an employer subject to the Workers' Compensation statute, and that Mr. Turner, Mr. Stewart, and Ms. Cooper were Respondent's employees, who are required to be covered by, or obtain an exemption from, workers' compensation insurance during the period of non-compliance.

37. The Department demonstrated by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation insurance for its employees during the audit period as required by Florida's Workers' Compensation statute.

38. The Department likewise demonstrated by clear and convincing evidence that it correctly calculated the penalty to be assessed against Respondent.

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, finding that David Cooper's Construction, Inc., violated the workers' compensation insurance statute and assessing a penalty of \$3,795.

DONE AND ENTERED this 26th day of January, 2021, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2021.

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.