

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2880754
DURAMADE WINDOWS & DOORS INC
5733 MYERLAKE CIR
CLEARWATER FL 33760-2804

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-14981R**

ORDER

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated November 11, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 2011**.



TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2880754
DURAMADE WINDOWS & DOORS INC
5733 MYERLAKE CIR
CLEARWATER FL 33760-2804



**PROTEST OF LIABILITY
DOCKET NO. 2011-14981R**

RESPONDENT:

State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated November 11, 2010.

After due notice to the parties, a telephone hearing was held on March 22, 2011. The Petitioner was represented by its attorney. The president of Duramade Windows & Doors Inc. testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether the Petitioner's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

Whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

Findings of Fact:

1. Tropical Roofing, Inc. was a corporation which operated a business that replaced roofs on mobile homes. A contractor's license was required to perform the work and Tropical Roofing, Inc. was a licensed roofing contractor. Gary Delia was an officer of the corporation in both 2008 and 2009.
2. During the fourth calendar quarter 2008 Tropical Roofing, Inc. reported a total of 145 employees to the Department of Revenue with approximately 70 employees performing services in each

month of the quarter. At the end of the fourth quarter 2008 Tropical Roofing, Inc. notified the Department of Revenue that it ceased operations on December 31, 2008.

3. The Petitioner, Duramade Windows and Doors, Inc. is a corporation which operates a business that sells and installs replacement windows for residences and also sells and installs solar products such as water heaters. Duramade Windows and Doors, Inc. began its business on January 1, 2009. Gary Delia was an officer of Duramade Windows and Doors, Inc. in both 2008 and 2009.
4. Duramade Windows and Doors, Inc. operates its business from the same office and warehouse as Tropical Roofing, Inc. previously operated its business. However, Duramade Windows and Doors, Inc. is not a licensed roofing contractor and has never performed roofing work.
5. Duramade Windows and Doors, Inc registered with the Department of Revenue for payment of unemployment compensation tax effective January 1, 2009, as a new business. The Petitioner indicated on the *Application to Collect and/or Report Tax in Florida* that it had 75 employees. At the end of the first calendar quarter 2009 the Petitioner filed the required tax report with the Department of Revenue.
6. Through a computer program the Department of Revenue determined that 66 of the employees reported by Tropical Roofing, Inc. for the fourth quarter 2008 were reported as employees of Duramade Windows and Doors, Inc. during the first quarter 2009. Upon further investigation the Department of Revenue discovered that there was common ownership, management, or control of Tropical Roofing, Inc. and Duramade Windows and Doors, Inc.
7. On November 11, 2010, the Department of Revenue notified the Petitioner that it appeared that the Petitioner had acquired the workforce of Tropical Roofing, Inc. and that at the time of the transfer there was common ownership, management, or control and that the tax rate of Tropical Roofing, Inc. was transferred to the Petitioner. The Petitioner filed a timely protest.

Conclusions of Law:

1. Section 443.131(3), Florida Statutes, (2006) provides:
 - (g) *Transfer of unemployment experience upon transfer or acquisition of a business.--* Notwithstanding any other provision of law, upon transfer or acquisition of a business, the following conditions apply to the assignment of rates and to transfers of unemployment experience:
 - 1.a. If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom the business is so transferred. The rates of both employers shall be recalculated and made effective as of the beginning of the calendar quarter immediately following the date of the transfer of the trade or business unless the transfer occurred on the first day of a calendar quarter, in which case the rate shall be recalculated as of that date.
2. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
3. Rule 60BB-2.031(3), Florida Administrative Code, provides in pertinent part that for the purpose of implementing Section 443.131(3)(g), F.S.:
 - (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
 - (b) "Common ownership" exists when a person has ownership in two or more businesses.
 - (c) A person in "management" includes any officer or director of a corporation, owner of a sole

- proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.
- (d) “Common management” exists when a person concurrently occupies management positions in two or more businesses.
 - (e) A person in “control” of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.
 - (f) “Common control” exists when a person or group of persons has control of two or more businesses.
 - (g) The phrase “transfer or acquisition” encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.
 - (h) The phrase “trade or business or a portion thereof” includes but is not limited to assets, customers, management, organization and workforce.
4. The evidence reveals that on January 1, 2009, there was common ownership, management, or control of Tropical Roofing, Inc. and Duramade Windows and Doors, Inc.
 5. The fourth quarter 2008 unemployment compensation tax report for Tropical Roofing, Inc. and the first quarter 2009 unemployment compensation tax report for Duramade Windows and Doors, Inc. reveal that Duramade Windows and Doors acquired substantially all of the workforce of Tropical Roofing, Inc. on or about January 1, 2009.
 6. Although the business activity of Duramade Windows and Doors, Inc. is not the same as the previous business activity of Tropical Roofing, Inc. it is concluded that Duramade Widows and Doors, Inc. acquired a portion of the trade or business of Tropical Roofing, Inc. because Duramade Windows and Doors, Inc. acquired the workforce of Tropical Roofing, Inc. Thus, the law requires that the unemployment experience of Tropical Roofing, Inc. be transferred to Duramade Windows and Doors, Inc.

Recommendation: It is recommended that the determination dated November 11, 2010, be AFFIRMED.

Respectfully submitted on April 20, 2011.



R. O. SMITH, Special Deputy
Office of Appeals