2-4-04

DEPARTMENT OF FINANCIAL SERVICES

FILED

APR 0 [illegible] 2004

Treasurer and Insurance Commissioner
Docketed by

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

AT 03-4014

IN THE MATTER OF:

CASE NO: 71818-03-WC

WFQ-Clos

RETROSPEC PAINTING &
RECONSTRUCTION, INC.
_____/

FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On September 22, 2003, a Stop Work and Penalty Assessment Order was issued by the Department of Financial Services, Division of Workers' Compensation (hereinafter referred to as the "Department"), directing Retrospec Painting & Reconstruction, Inc. (hereinafter referred to as the "Respondent") to comply with the Stop Work and Penalty Assessment Order issued on September 22, 2003. The Petitioner entered an Amended Stop Work and Penalty Assessment Order on September 30, 2003. The Respondent timely filed a request for a proceeding to contest the Stop Work and Penalty Assessment Order, as amended by the Amended Stop Work and Penalty Assessment Order, pursuant to Section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, on December 17, 2003.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on February 4, 2004. (Attached as Exhibit A). The Administrative Law Judge recommended that the Department enter a Final Order affirming the

Stop Work and Penalty Assessment Order issued on September 22, 2003, as amended by the Amended Stop Work and Penalty Assessment Order issued on September 30, 2003.

Any exceptions to the Recommended Order were to be filed within fifteen (15) days of the filing of the Recommended Order. Respondent filed exceptions to the Recommended Order on February 24, 2004, which was twenty (20) days after the filing of the Recommended Order. On March 5, 2004, the Petitioner filed a Response to the Respondent's Exceptions and Motion to Strike Respondents Exceptions. On March 22, 2004, the Department issued a Notice of Intent to Strike Respondent's Exceptions as being untimely. The Notice required the Respondent to respond within seven (7) days. On March 24, 2004, the Department received the Respondent's Response to the Notice of Intent to Strike Respondent's Exceptions.

RULING ON RESPONDENT'S RESPONSE TO THE DEPARTMENT'S NOTICE OF INTENT TO STRIKE PETITIONER'S EXCEPTIONS

As noted above, the Administrative Law Judge's Recommended Order was entered in this case on February 4, 2004. Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217(1), F.A.C., exceptions to findings of fact or conclusions of law contained in a DOAH recommended order must be filed with the reviewing agency within fifteen days of the entry of the recommended order. In the instant case, Respondent's Exceptions to the Recommended Order were not filed with the Department until February 24, 2004, twenty days after the Administrative Law Judge's Recommended Order was entered in this case (See Exhibit B attached hereto). A party waives his right to submit Exceptions to the Recommended Order in a proceeding, unless a basis exists for excusing the late filing on grounds of inadvertence, mistake, excusable neglect or other sufficient legal cause. See, e.g., Hamilton County Board of County Commissioners v. State of Florida Department of Environmental Protection, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991). Therefore, in response to a Motion to Strike Respondent's

Exceptions as untimely, the Department issued its Notice of Intent to Strike Exceptions on March 19, 2004. In the Notice of Intent to Strike Exceptions, the Respondent was directed to show cause why his Exceptions should not be stricken due to the belated filing with the Department Clerk.

The Department's Notice of Intent to Strike Exceptions asserted that the Respondent's Exceptions to the Recommended Order had been received, on February 24, 2004, after the due date. The record indicates that these Exceptions were postmarked on February 19, 2004, the date the Exceptions were due. For purposed of timeliness, it is the date of receipt by the Department Clerk that constitutes the "filing" date of Petitioner's Exceptions to the Recommended Order under Florida's Uniform Rules of Procedure, not the date the Exceptions were placed in the U.S. mail by Respondent. See Rule 28-106.217(3), Florida Administrative Code. Respondent has indicated that secretary calendared the Respondent's Exceptions to the Recommended Order to be served on February 19, 2004, due to the language in the Recommended Order. Respondent asserts that the Recommended Order states that "[a]ll parties have a right to submit written exception within 15 days." Respondent argues that this language is at odds with Rule 28-106.217(1), F.A.C., which states "[p]arties may file exceptions...." Essentially, Respondent contends that due to the Recommended Order's use of the word "submit" rather than "file," the Respondent's secretary assumed that the Exceptions to the Recommended Order could be mailed to the Department up until the 15th day after entry of the Recommended Order.

In view of the above, although Respondent's Response to the Department's Notice of Intent to Strike Exceptions does not demonstrate inadvertence, mistake or excusable neglect for excusing the belated filing of these Exceptions, the Department, in the interest of fairness will consider the Exceptions.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. The Respondent excepts to the Administrative Law Judge's Finding of Fact #5. The Respondent argues that this Finding of Fact is unsupported hearsay testimony. However, the record indicates that there is supporting testimony in which the Respondent stated that Mauro had workers at the worksite during this time. [Tr. 139] Consequently, this exception is rejected.

2. The Respondent excepts to Administrative Law Judge's Finding of Fact #9. The Respondent essentially argues that there is no evidence to infer that the unidentified workers at the worksite were there at the direction of and paid by Mauro. Again, the testimony of the Respondent clearly states that Mauro had painters at the worksite during this time period. [Tr. 139] As a result, there is competent substantial evidence to support this Finding of Fact. Accordingly, this exception is rejected.

3. Respondent further excepts, in part, to the Administrative Law Judge's Finding of Fact #17. Essentially, the Respondent argues that there is no evidence that the unidentified workers at this worksite were or were not exempt from worker's compensation requirements. However, it is not necessary for the Petitioner to prove that an exemption exists. Quite the opposite, "[i]n the absence of documentation to support exemptions held by any of the workers or otherwise establishing that the workers met the criteria to be considered 'independent contractors,' the workers must be considered 'employees.'" Department of Labor and Employment Security v. A.J. Interiors, Inc., DOAH No. 00-4177 (Recommended Order, Para. 21) (Adopted in Toto by Final Order on June 8, 2001). In the instant case, the Department requested the records in question, with respect to proof of applicable coverage or exemptions, and the record indicates none was produced. [Pet. Exhibits 2 & 3] Here, the Administrative Law

Judge's finding is correct on its face in that there was no evidence produced regarding exemptions for Mauro or the unidentified workers. As a result, this exception is rejected.

4. Respondent excepts to the Administrative Law Judge's Finding of Fact #18. As in Respondent's exception to paragraph 17, the Finding of Fact is correct on its face. There was testimony clearly stating that Petitioner checked for coverage or an exemption for Mauro and there was none. [Tr. 37-39, 44-49] Also, there was testimony that the Petitioner confirmed that that the Respondent had no minimum premium policy to cover a subcontractor that had no coverage. [Tr.40, 46-48] Again, per the testimony presented, no such coverage existed. Further, the Department cannot reweigh evidence. The weight given to the evidence is the province of the Administrative Law judge and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. *See*, *Brogan v. Carter*, 61 So.2d 822 (Fla. 1st DCA 1996). In this case, there is competent substantial evidence to support this Finding of Fact and, accordingly, Respondent's exception is rejected.

5. Respondent's nine remaining points and concluding remarks do not appear to be specific exceptions to the Administrative Law Judge's Conclusions of Law. Most of Respondent's observations are comments that reiterate statements made in Respondent's exceptions to the Finding of Facts. Moreover, Respondent's remarks appear to alternate between rearguing evidence and stating which Findings of Fact and Conclusions of Law Respondent agreed with. The weight given to the evidence is the province of the Administrative Law judge and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. *See*, *Brogan v. Carter*, 61 So.2d 822 (Fla. 1st DCA 1996). In this case, there is competent substantial evidence to support the Finding of Facts. Accordingly, Respondent's exceptions are rejected.

Upon careful consideration of the record, the submissions of the parties, and being otherwise fully advised in the premises, it is ORDERED:

1. The Findings of Fact of the Administrative Law Judge are adopted in full as the Department's Findings of Fact.

2. The Conclusions of Law are adopted in full as the Department's Conclusions of Law.

3. The Administrative Law Judge's recommendation that the Department enter a Final Order directing Respondent to comply with the Stop Work and Penalty Order issued on September 22, 2003, as amended by the Amended Stop Work and Penalty Assessment Order issued on September 30, 2003, is approved and accepted as being the appropriate disposition of this case.

ACCORDINGLY, it is ORDERED that the Respondent, RETROSPEC PAINTING & RECONSTRUCTION, INC., comply with the Stop Work and Penalty Order issued on September 22, 2003, as amended by the Amended Stop Work and Penalty Assessment Order issued on September 30, 2003, and remit a civil penalty in the amount of Fifteen Thousand, Seven Hundred Dollars ($15,700.00) to the Department of Financial Services, Division of Workers' Compensation, Bureau of Compliance, within 30 days of the date of this Final Order.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel,

acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

DONE and ORDERED this 9 day of April, 2004.

Tom Gallagher
Chief Financial Officer

COPIES FURNISHED TO:

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