FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

FILED
JAN 25 2006
Chief Financial Officer
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DIVISION OF ADMINISTRATIVE HEARINGS

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

HERNANDEZ ENTERPRISES, INC.
_____/

Case No. 75492-05-WC

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order rendered on October 3, 2005, after a hearing conducted pursuant to Sections 120.57(1), and 120.569, Florida Statutes, by Administrative Law Judge Harry L. Hooper. Petitioner, Department of Financial Services, Division of Workers' Compensation, filed exceptions on October 18, 2005. The Respondent, Hernandez Enterprises, Inc., filed a response to the exceptions on October 28, 2005. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, the Petitioner's exceptions, and Respondent's Response, have all been considered during the promulgation of this Final Order.

The Petitioner asserted in its exceptions to Conclusion of Law #44 of the Recommended Order that the Conclusion was erroneous because the Department had not defined two businesses as employers, but rather penalized two different businesses for not securing the payment of workers' compensation coverage for the same employees of GIO & Sons and U & M Contractors, Inc. The Petitioner asserted that it was careful to prove that the Respondent became

the "statutory employer" of GIO & Sons and U & M Contractors, Inc.'s employees by operation of Section 440.10, Florida Statutes.

However, a complete review of the record in this case finds that Conclusion of Law #44 is appropriate. Section 440.10(1)(b), Florida Statutes provides that, "In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment." Section 440.10(1)(c), Florida Statutes states, in pertinent part that, "A contractor shall require a subcontractor to provide evidence of workers' compensation insurance..." In this case, the Petitioner has not cited authority in the Florida Administrative Code that would permit the Petitioner, under the particular facts of this case, to impose a fine on a contractor, where the contractor credibly demanded and received proof of insurance, but the subcontractor had failed to secure coverage. In the instant case, the Administrative Law Judge found that the certificates of insurance, on their face, did not place the Respondent on adequate notice that the insurance policies underlying the certificates did not comply with Chapter 440, Florida Statutes.

However, one point addressed in the Recommended Order must be addressed. In Conclusion of Law #44, the Administrative Law Judge opines that "[t]here is nothing in the statutes cited by the Division that authorizes the Division to define two businesses as the employer of the same employees or that requires an employee to be covered by two employers". It is unclear what the Administrative Law Judge means to convey in this quoted language. Section 440.10(1)(b), Florida Statutes expressly provides that employees of a subcontractor

engaged in contract work for the contractor are "deemed to be employed, in one and the same business or establishment" and renders the contractor liable for obtaining the payment of compensation to all such employees, "except to employees of a subcontractor who has secured such payment". Thus, the core issue is not whether both the contractor and subcontractor can be simultaneously considered the employer of the same employees, but whether they have each met their individual statutory obligations. Chapter 440, Florida Statutes requires a subcontractor to secure workers compensation coverage for its employees. If the subcontractor fails to secure such coverage, a violation of Section 440.10, Florida Statutes occurs, for which the subcontractor may be disciplined. In turn, if the contractor fails to credibly "require a subcontractor to provide evidence of workers compensation coverage . . .," the contractor has committed a violation of that statutory section and is subject to fines and penalties pursuant to Chapter 440, Florida Statutes. Consequently, it is very possible that a contractor and a subcontractor may both receive fines and penalties under the same set of facts. To the extent, if any, that the Administrative Law Judge suggests otherwise, that language in Conclusion of Law # 44 is rejected. Notwithstanding this conclusion, under the particular facts of this case, it has not been established that the contractor failed in its statutory obligation to require the subcontractor to provide evidence of workers' compensation coverage.

In accordance with the above discussion, Petitioner's exception to Conclusion of Law #44 is rejected.

The Petitioner excepts to Conclusions of Law #40 – 42, 46 and 47 and again argues that the Respondent had a statutory duty under Section 440.10, Florida Statutes to ensure that its subcontractors had secured the workers' compensation coverage for its employees. The Petitioner argues that the Administrative Law Judge's reliance on Criterion Leasing Group v.

Gulf Coast Plastering & Drywall, 582 So.2d 799 (Fla. 1st DCA 1991) and LaCroix Construction Company v. Bush, 471 So.2d 134 (Fla. 1st DCA 1985) is erroneous, and that the Petitioner's interpretation of Section 440.10(1)(c), Florida Statutes should be afforded great deference. That interpretation being that the burden is on a general contractor or a subcontractor who hires another subcontractor, to ascertain the veracity of the certificate of insurance, despite the fact that a certificate of insurance was provided. It is admittedly problematic that a contractor may comply with their statutory requirement to secure compensation for uninsured employees of a subcontractor merely by viewing, at an early stage in the construction process, a certificate of insurance. This is especially true when the certificate of insurance may be dubious proof within the factual context of a particular case. Thus, there is a significant potential for abuse in such situations. However, without some formal delineation of the specific obligations of a contractor in ascertaining proof of insurance from a subcontractor, the Department cannot impose a penalty upon the facts presented in the instant case.

The majority of Petitioner's exceptions recite testimony which the Administrative Law Judge has already considered. In essence, Petitioner is seeking different findings of fact based upon the same testimony that the Administrative Law Judge has previously considered.

Section 120.57(1)(1), Florida Statutes, provides that rejection or modification of conclusions of law or findings of fact cannot be made unless such findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of the law. The findings of fact and conclusions made by the Administrative Law Judge were based upon the testimony of the witnesses and consideration of all facts presented during the hearing. The Petitioner has failed to show any erroneous findings of fact based upon the testimony in the record; instead, Petitioner is asserting

a different interpretation than that of the Administrative Law Judge, which is not a basis for vacating the Administrative Law Judge's findings of fact or conclusions of law.

As stated, if Petitioner's argument were adopted, it would place a continuing and undelineated burden on the Respondent to follow-up with the issuers of certificates of insurance to make sure that they are valid. In this particular case, Mr. Michael Sapourn, one of the expert witnesses, testified that the theory behind ACORD certificates of insurance is that they provide a uniform document upon which business people may rely. Mr. Sapourn's testimony was accepted as credible by the Administrative Law Judge. As noted above, the Conclusions of Law of the Administrative Law Judge were based upon the testimony of the witnesses and consideration of all the facts presented. In accordance with the above discussions, the Petitioner's exceptions to Conclusions of Law #40-42, 46 and 47 are rejected.

ACCORDINGLY, IT IS HEREBY ORDERED that the Findings of Fact made by the Administrative Law Judge are adopted as the Department's Findings of Fact, and the Conclusions of Law of the Administrative Law Judge are adopted as clarified and/or modified herein.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department, and that the Division of Workers' Compensation rescind the Stop Work Order issued February 26, 2004 and the Amended Order of Penalty Assessment issued to Respondent, Hernandez Enterprises, Inc., March 19, 2004, and that the Division of Workers' Compensation refund to Hernandez Enterprises, Inc. the amount of $46,694.03, which was paid to release the Stop Work Order of February 26, 2004.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Fla. R. App.P. 9.110. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same and the appropriate filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 25 day of January, 2006.

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

Copies Furnished To:

Honorable Harry L. Hooper
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

H. Leon Holbrook, Esquire
Holbrook, Akel, Cold, Stiefel & Ray, P.A.
One Independent Drive, Suite 2301
Jacksonville, FL 32202

Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, FL 32399-0333