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FILED

APR 25 2005

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

Chief Financial Officer
Docketed by: *[Signature]*

04-3198

ECA
CLOS

IN THE MATTER OF:

RONNIE W. MARSTON, JR., D/B/A
MARSTON BUILDERS

Case No. 78041-05-WC

AP

000435

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order filed on March 23, 2005 by Administrative Law Judge (ALJ) Charles C. Adams after the conclusion of a formal administrative hearing conducted on January 31, 2005, in accord with and as provided by Section 120.57(1), Florida Statutes. At that hearing, the Division of Workers' Compensation (the division) was represented by Colin Roopnarine, Esq., and Ronnie Marston, Jr., (Marston), appeared pro se.

The division timely submitted Exceptions to the Recommended Order. Marston did not submit any Exceptions. The division's Exceptions argue that the ALJ erred in concluding, as a matter of law, (Paragraph 29 of the Recommended Order) that certain checks written directly from the company checking account to Ronnie Marston's ex-wife for such things as child-support, day care, insurance and registration, were not payments to an employee, and therefore should be deducted from the penalty assessment base. That conclusion formed the basis for the ALJ's recommendation that the division to modify the assessed penalty to a commensurately lesser amount.

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The division argues that said checks represent compensation to which Marston was entitled for services performed as a non-exempt employee (Finding of Fact, Paragraph Seven (7) of the Recommended Order) and that Marston, who was also the sole proprietor owner of the company, simply sent that money directly to his ex-wife via company check, without first sending it to his personal checking account for appropriate distribution. The amount of that compensation so delivered to Marston's ex-wife should be included within the penalty assessment as employee payments owed, if not delivered, to Marston, argues the division.

The division's argument has merit. To conclude that Marston was forwarding by company check to his ex-wife monies to which he was not entitled as a non-exempt sole proprietor/employee necessarily mandates the conclusion that Marston was embezzling from his own company. The record does not display any evidence showing that to have been his intent. Rather, the record shows that Marston, a non-exempt sole proprietor/employee, was by his own admission "mainly just a worker", paying himself a wage. (Tr. pgs. 32-33, 49-50) It appears that rather than embezzling company funds, Marston was simply using an owner's expedient of writing a company check directly to his ex-wife to transfer to her monies he had properly earned as a company employee. That expedient eliminated the delay involved in depositing the same money into his personal account, waiting for the company check(s) to clear, and then writing a check on that account to his ex-wife. That expedient, however, does not support the conclusion that those same monies were not employee compensation subject to both premium and penalty assessment computations. If that conclusion was accepted, employers could avoid paying proper workers' compensation premiums by writing

checks directly to employees' mortgage companies, automobile finance companies, and anyone else to whom their employees were indebted. That would soon result in the system's financial collapse.

The conclusion that the monies in question were employee compensation is supported by competent, substantial evidence, and is as or more reasonable than the ALJ's conclusion to the contrary. Accordingly, the Exception is accepted, and the conclusion of law announced in the last two sentences of Paragraph Twenty-nine (29) of the Recommended Order is rejected, and the following substituted:

"The company checks made payable to Lisa Marston represent wages paid to Ronnie Marston, Jr., and are properly included within the division's penalty assessment."

Based on his conclusion of law that the company checks payable to Lisa Marston were not payments to an employee, the ALJ recommended a commensurate reduction in the assessed penalty. However, having conducted a review of the complete record, and for the reasons stated above, the penalty assessment is not reduced as recommended by the ALJ, and remains at \$106,135.46, as stated in the Amended Order Of Penalty Assessment dated August 3, 2004. (Tr. pgs.32-33, 49-50)

After review of the record, including the transcript of proceedings, and being otherwise fully apprised in all material premises,

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 that, except as noted otherwise above, the Conclusions of Law reached by the Administrative Law Judge are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is modified by the Department to state that Respondent Marston is directed to pay the sum of \$106,135.46 to the Department within thirty days from the date hereof.

IT IS HEREBY FURTHER ORDERED that the Stop Work And Penalty Assessment Order entered by the Division of Worker's Compensation is affirmed, and that Ronnie Marston d/b/a Marston Builders shall cease all business operations in Florida unless and until it provides evidence satisfactory to the Division of Worker's Compensation of having now complied with the workers compensation law by securing the necessary worker's compensation coverage for covered employees and, pursuant to Section 440.107(7)(a), Florida Statutes, paid the civil penalty imposed herein.

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 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 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 25 day of April, 2005.


Tom Gallagher,
Chief Financial Officer