FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

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DIVISION OF ADMINISTRATIVE HEARINGS

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Chief Financial Officer
Docketed by:

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TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

ROBERT DONOVAN CONSTRUCTION, INC.
_____/

Case No. 81484-05-WC
05-1732 PMR Closed

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order rendered on November 29, 2005, after a hearing conducted pursuant to Sections 120.57(1), and 120.569, Florida Statutes, by P. Michael Ruff, Administrative Law Judge, (hereinafter some times referred to as "ALJ"). Respondent, Department of Financial Services, Division of Workers' Compensation, filed exceptions on December 14, 2005. The Petitioner, Robert Donovan Enterprises, Inc., filed a response to the exceptions on December 27, 2005. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, the Respondent's Exceptions, and Petitioner's Response, have all been considered during the promulgation of this Final Order.

The Respondent asserts in its exceptions to Finding of Fact #12 and Conclusion of Law #26 of the Recommended Order that the ALJ twice mistakenly declared that the Petitioner could become the "statutory employer" of its subcontractor and the subcontractor's employees, citing to Section 440.10(1)(b), Florida Statutes and Lluch v. American Airlines, Inc., 899 So.2d 1146 (Fla. 3d DCA 2005) as authority for the position that the Petitioner does not technically become

the statutory employer of its subcontractors. The Respondent contends that "the conclusion is imprecise and risks confusion".

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". The term "statutory employer" in Conclusion of Law #26 of the Recommended Order appears merely to be used by the ALJ in properly assigning to the Petitioner the responsibility to ensure that its subcontractors have proper workers' compensation coverage for their employees. It does not appear that the ALJ has attempted to create a special employer status for the contractor beyond rendering the contractor responsible for securing coverage when the subcontractor fails to do so. However, to the extent, if any, that the ALJ suggests otherwise, the Respondent's First Exception is accepted.

In its Second Exception, the Respondent contends that the ALJ's Conclusion of Law #36 essentially absolves the Petitioner of its obligation to secure the payment of compensation for the employees of its subcontractor, Scott Williams, d/b/a Vinyl Masters. The Respondent correctly recites that the law creates a fictional employer/employee relationship between the contractor and the employees of the subcontractor, which in the instant case, imposes on the Petitioner the obligation to secure the payment of compensation for the employees of the subcontractor, Scott Williams, d/b/a Vinyl Masters, if that subcontractor has failed to do so. The Florida Legislature has further required that in order to ascertain that a subcontractor has obtained proper coverage for its employees, a contractor, such as the Petitioner, must require the subcontractor to provide evidence of such coverage.

Upon review, the Respondent's Second Exception to Conclusion of Law #36 fails to take into consideration the preceding Conclusions of Law ##31-35, wherein the ALJ analyses whether the Petitioner reasonably relied upon the certificates of insurance submitted by its subcontractors. In these preceding paragraphs, the ALJ, after weighing the testimony, found that it was not the intent of the Petitioner to allow any subcontractors to work on Petitioner's job site without workers' compensation coverage. The ALJ also concluded that not only was it reasonable for the Petitioner to believe that both its subcontractors had valid coverage, but based upon the testimony of Mr. Cowart of Auto-Owners Insurance, valid coverage *did* exist in favor of J & L, during the relevant time period in this case. (Petitioner's Exhibit B; Tr. Pgs. 60 – 64).

Additionally, the Respondent accepts to Conclusion of Law #36 on the basis of the ALJ's conclusion that "[t]here is nothing in the statutes cited by the Respondent that authorizes the Respondent to define two businesses as the employer of the same employees or that requires an employee to be covered by two employers ...." 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 also committed a violation of that statutory section, and is thus 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 that the ALJ suggests otherwise, Conclusion of Law #36 is rejected. Notwithstanding this determination, *under the particular facts of this case*, it has not been established by clear and convincing evidence that the Petitioner failed in its statutory obligation to require its subcontractors to provide reasonable evidence of workers' compensation coverage. In accordance with the above discussion, Respondent's Second Exception to Conclusion of Law #36 is rejected to the extent provided herein.

In its Third Exception, the Respondent excepts to Conclusion of Law #35 of the Recommended Order, wherein the ALJ concluded that the Petitioner had reasonably relied on the certificates of insurance produced by its two subcontractors as proof of insurance. The Respondent argues that: 1) the Division's determination of what constitutes adequate evidence of workers' compensation insurance should be deferred to based upon agency expertise, 2) the certificates of insurance at issue were inherently unreliable, and 3) the statements in the certificates constitute multiple hearsay. However, in effect, the Respondent is rearguing facts relative to the certificates of insurance previously weighed and considered by the ALJ.

The Department is without authority to reweigh the evidence. The appropriate weight to be given to the evidence is the exclusive province of the ALJ, and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996); Prysi v. Department of Health, 823 So.2d 823 (Fla. 1st DCA 2002) The majority of Respondent's exception to Conclusion of Law #35 merely recites and reargues evidence that the ALJ has already considered. In essence, the Respondent is

attempting to have different findings of fact and conclusions of law made based upon the same probative evidence that the ALJ has previously considered. See, Section 120.57(1)(l), Florida Statutes. Although the ALJ's findings that the Petitioner reasonably relied upon the certificates of insurance provided by its subcontractors may not be the best interpretation of the facts, it cannot be said that these findings are completely unsupported by competent substantial evidence. Accordingly, Respondent's Third Exception to Conclusion of Law #35 is rejected.

The Respondent in its Fourth Exception argues that "the two cases cited by the ALJ exposed the illogic of ruling as a matter of law that certificates of insurance are unequivocally bona fide evidence of coverage". The cases the Respondent is alluding to are Criterion Leasing Group v. Gulf Coast Plastering and Drywall, 582 So.2nd 799 (Fla. 1st DCA 1991) and La Croix Construction Company v. Bush, 471 So.2nd 134 (Fla. 1st DCA 1985). Criterion Leasing and La Croix both involve the theory of estoppel as well as other theories of law; however, it appears that the ALJ's use of these cases is focused on the appropriate weight to be given to the fact that the contractor received and relied upon certificates of insurance from its subcontractors, in determining whether the contractor satisfied the requirements of Section 440.10, Florida Statutes. The ALJ does not state that when elements of estoppel are present, that is always a complete and unequivocal defense for a contractor's failure to secure coverage for its subcontractor's employees. The conclusions of law at issue simply indicate that the ALJ considered the certificates, and the Petitioner's reliance on them, as one of several facts that demonstrated that the Petitioner reasonably believed that its subcontractors carried workers' compensation coverage.

However, to the extent, if any, that the ALJ intended to conclude that a contractor's reliance on a certificate of insurance, however unreasonable, is a valid defense to prosecution,

that reasoning is rejected. Accordingly, based upon the reasoning above, and to the express extent provided herein, Respondent's Fourth Exception is rejected.

In its Fifth Exception, the Respondent again excepts to Conclusion of Law #36 of the Recommended Order, arguing that the Department should revisit its ruling in Department of Financial Services, Division of Workers' Compensation v. AFS, Inc., DOAH Case No. 05-0958 (August 26, 2005), which was cited by the ALJ in that Conclusion. The Respondent contends that the ALJ utilized that Final Order to justify the imposition of an "irrebuttable presumption" [sic] to the effect that the presentation of a certificate of insurance from a subcontractor will automatically insulate the contractor from Division prosecution. However, it would appear that the ALJ merely cited AFS, Inc. as underlying support for his ultimate conclusion that Respondent Donovan acted reasonably in relying upon the certificates of insurance at issue. It does not appear that the ALJ used AFS, Inc. to create an irrebuttable evidentiary standard that would always apply to exonerate an employer who obtains a certificate of insurance from a subcontractor, however dubious. Instead, it appears that the case has only been cited as general support for the ALJ's Conclusions of Law and the Department's acceptance of them in the Final Order. Nor does the AFS, Inc. Final Order actually establish an "irrebuttable presumption" that the submission of a certificate of insurance by a subcontractor to an employer is irrefutable evidence that the employer has met his statutory obligations. As expressly stated in the AFS, Inc. Final Order, in the absence of some formal delineation by the Division of the specific obligations of a contractor in ascertaining proof of insurance, the Department could not impose a penalty based "*upon the facts presented in the instant case.*" (Emphasis provided.) [pg. 2, lines 1-8, AFS, Inc. Final Order]. The Final Order then recites the particular facts upon which the ALJ relied to reach his findings, and deems *these facts* to constitute competent substantial evidence for the

ALJ's Findings of Fact. Accordingly, for the reasons stated above, the Respondent's Exception of Conclusion of Law #36 is rejected.

The Respondent also excepts to Conclusion of Law #23 of the Recommended Order arguing that the ALJ improperly cited Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So.2d 932 (Fla. 1996) for the proposition that the Respondent must prove by clear and convincing evidence the justification for imposition of a Stop Work Order. The Respondent agrees that Osborne requires that the imposition of an administrative fine must be justified by clear and convincing evidence, (because it implicates a significant property right), but the Respondent opines that the mere issuance of a Stop Work Order should not carry that same evidentiary burden. The Respondent asserts that the issue of who has the burden of proof in a Stop Work Order should be "decided another day". However, the Court in Osborne, citing to Ferris v. Turlington, 510 So.2d 292 (Fla. 1987), stated that "in a case where the proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused." Certainly, the imposition of a Stop Work Order involves a "loss of livelihood", so it would appear logical that a burden higher than preponderance of the evidence should be met in such an instance. Given this analysis, and in the absence of other authority, it does not appear that the ALJ was incorrect in his reliance on Osborne regarding the proper burden of proof. Accordingly, Respondent's exception to Conclusion of Law #23 is rejected. However, this determination is limited to the context and facts of this Order.

Finally, the Respondent excepts to the Recommendation of the ALJ that the Stop Work Order and Amended Order of Penalty Assessment should be rescinded, and urges that a penalty of $76,945.90 should be imposed. Based upon the resolution of the Respondent's exceptions

above, there is an insufficient basis to disturb the Recommendation by the ALJ, and thus, the Respondent's Sixth Exception to the Recommendation is 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 to the extent 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 10, 2005 and the Amended Order of Penalty Assessment issued to Petitioner, Robert Donovan Construction, Inc., on March 30, 2005.

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 2 day of March, 2006.

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

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