FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF:

RAYLIN STEEL ERECTORS, INC.
_____/

Case No. 78712-05-WC

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order rendered on October 19, 2005, after a hearing conducted pursuant to Sections 120.57(1) and 120.569, Florida Statutes, by Administrative Law Judge Robert S. Cohen. Petitioner, Department of Financial Services, Division of Workers' Compensation, filed timely exceptions on November 5, 2005. The Respondent, Raylin Steel Erectors, Inc., did not file exceptions or a response to the Petitioner's exceptions. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, and the Petitioner's exceptions have all been considered in the rendering of this Final Order.

Rulings On Petitioner's Exceptions

The Petitioner asserts in its First Exception to Conclusions of Law #36 and #37 of the Recommended Order that the Conclusions were erroneous because the Administrative Law Judge should have applied the highest rated classification code to all penalty calculations. The Petitioner asserts that its witness, District Supervisor Robert Lambert, credibly testified that the proper method of calculating a penalty when an employer fails to maintain payroll records, by

separate payroll by classification, is to use the highest classification rating to calculate the entire penalty assessment. It is axiomatic that an agency's interpretation of its own rules is entitled to great deference and should be upheld unless the agency's interpretation is clearly erroneous. Miles v. Florida A&M University, 813 So.2d 242 (Fla.App. 1 Dist. 2002); D.T. v. Harter, 844 So.2d 717 (Fla.App. 2 Dist. 2003).

In further support of its contention that the highest rated classification code must be applied to all penalty calculations for the Respondent, the Petitioner cites to its Exhibit R, Rule IV E.2. of the NCCI Workers' Compensation Basic Manual, which states:

> "Some employees, who are not miscellaneous employees, may perform duties directly related to more than one classification properly assignable to an employer's policy. In such circumstances, an employee's remuneration may be divided between two or more classifications provided that:. . . the employer maintains proper payroll records which disclose the actual payroll by classification of each such individual employee. Such records must reflect the actual time spent working within each job classification and an average hourly wage comparable to the wage rates for such employees within the employer's industry. *An estimated or percentage allocation of payroll is not permitted.* If *original payroll records* do not disclose the actual payroll applicable to each classification, the entire payroll of the individual employee shall be assigned to the highest rated classification that represents any part of his or her work." (Emphasis provided.)

[Exhibit R]

Relying upon this language, the Petitioner concludes that because the ALJ made the finding of fact that Raylin did not itself maintain the requisite payroll records, the highest classification rating *must* be applied to the entire penalty assessment. Yet, in Petitioner's Second Exception, Petitioner correctly acknowledges that the applicable rule does not require that actual payroll records be available to the Division to determine the amount of penalty, if the Division is able to determine payroll by examining other records. Accordingly, if the Division is able to determine the employer's actual payroll to each employee by examining other records, it

logically follows that the highest classification rating need not necessarily be applied in computing the penalty assessment. Rule IV E. 2., of the NCCI Basic Manual must be read to mean that an employee's remuneration may be divided between two or more classifications *only* if the payroll records disclose the "actual payroll" by classification by each such individual employee, because only these records reflect the actual time the employee spent working within each job classification. In fact, that rule section expressly prohibits an estimated or percentage allocation of payroll.

In the instant case, the ALJ found that the Respondent's sub-contractors were actually paid 25 percent for steel erection, 50 percent for sheet metal work and trim out, and 25 percent for roofing, under their respective contracts. Based upon that fact, the ALJ concluded that the penalty should be calculated in accordance with this three-pronged payment allocation, as the ALJ reasoned that the multiple classification is not an "estimate" of the work each performed, but an "accurate reflection of how these sub-contractors *were actually paid* for the work performed". (Emphasis provided.) [Conclusion of Law # 37.] However, such an interpretation is at odds with the duly-adopted NCCI Basic Manual, which only permits an employee's remuneration to be divided between two or more classifications *if* the payroll records disclose the "*actual payroll* by classification *of each such individual employee.*" If the "original payroll records do not disclose the *actual payroll* applicable to each classification, the entire payroll *of the individual employee* shall be assigned to the highest rated classification that represents any part of his or her work." (Emphasis provided.) [Rule IV E.2., NCCI Basic Manual]

Thus, it would appear that the ALJ has confused Raylin's contractual payment to its sub-subcontractors with the "actual payroll... of each such individual employee." It is the payroll records of Raylin's sub-subcontractors (the remuneration actually paid by the sub-subcontractors

to their employees) that must be utilized in order to permit the allocation of an employee's remuneration between two or more job classifications. Because these payroll records were not timely submitted to the Division, an allocation based upon the three designated classifications is impermissible. Therefore, the highest classification rating must be utilized to compute the applicable penalty. Accordingly, to the extent indicated herein, Petitioner's First Exception is ACCEPTED.

However, it should be noted that in the case of the sub-subcontractor Edward Leggett, it was uncontroverted at hearing that *all* of the work performed by the employees of that sub-subcontractor consisted solely of roof patching work. [Finding of Fact #7, Conclusion of Law #36] Consequently, it is appropriate to utilize the roofing code rate, NCCI Code No. 5551, (which is set at $46.17 per hundred dollars of payroll) to compute the appropriate penalty. When the NCCI roofing code rate is applied to the assumed payroll of $4,000, it yields a penalty of $2,770.20.

The Petitioner further asserts in its Second Exception to Conclusions of Law #34 and #41 that these Conclusions are erroneous because the Administrative Law Judge determined that Rule 69L-6.028(4), Florida Administrative Code requires the Division to use *actual* payroll records to determine payroll for purposes of computing a penalty. The Petitioner argues that the Administrative Law Judge, in effect, rewrote the Division's rule by concluding that the $100 per day penalty applies if actual payroll records don't exist, and argues that the Division was able to accurately determine payroll by examining other records for determining a penalty assessment. However, it does not appear that the Administrative Law Judge is requiring that actual payroll records must be used; rather, the ALJ is opining as to how the penalty should be computed when the records produced are not sufficient to compute actual payroll. The ALJ observes that, in such

cases, the penalty to be assessed should be $100 per day for each calendar day of noncompliance occurring prior to October 1, 2003, in accordance with Section 440.107(5), Florida Statutes. (It should be noted that the ALJ did not actually apply this penalty in his Recommended Order, as he was merely speculating on what penalty *would* be owing if Southern Steel Erectors had not been covered by Respondent's workers' compensation policy.) However, for the reasons stated above, the Department may, indeed, determine the Respondent's payroll from other business records. Thus, to the extent that Petitioner's Second Exception requests a determination that the Division may ascertain whether other business records exist sufficient to compute an employer's payroll (instead of automatically assessing a penalty of $100 per day pursuant to Rule 69L-6.028(4), F.A.C.), Petitioner's Second Exception is ACCEPTED.

Finally, in its Third Exception, the Petitioner asserts that based upon the validity of its substantive exceptions, the ALJ's Recommendation should consequently be rejected, and the penalty assessment accordingly increased, as the ALJ erred in not utilizing the highest rated classification in computing the penalty. Based upon the acceptance of Petitioner's First and Second Exceptions, Petitioner's Third Exception to the Recommendation is ACCEPTED, to the extent modified herein.

THEREFORE, 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 also adopted, with the exception of Conclusions of Law ## 34, 37, and 41, which are rejected to the extent modified herein.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is rejected to the extent designated herein, and that the Division of Workers' Compensation shall compute a penalty in accordance with this Order, which Raylin

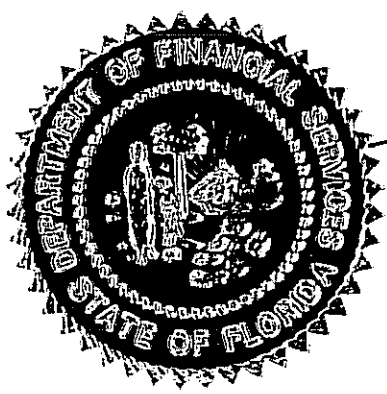
Steel Erectors, Inc. is directed to pay to the Department within thirty days from the date it receives the revised penalty computation.

ACCORDINGLY, IT IS HEREBY FURTHER ORDERED that the Second Amended Order of Penalty Assessment entered by the Division of Workers' Compensation is affirmed, as modified herein, and that Raylin Steel Erectors, Inc. shall cease all business operations unless and until it provides evidence satisfactory to the Division of Workers' Compensation of having now complied with the workers' compensation law by securing the necessary workers' compensation coverage for covered employees and, pursuant to Section 440.107(7)(a), Florida Statutes, paying 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 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 19th day of January, 2006.



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