



FLORIDA
DEPARTMENT OF
FINANCIAL
SERVICES

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Chief Financial Officer
Docketed by: *[Signature]*



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ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

THE MATTER OF:

KRASHCO, INC., d/b/a J. KRASH'S SPORTS BAR

Case No. 83978-05-WC50

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on a Recommended Order rendered on January 8, 2007, after a hearing conducted pursuant to Sections 120.57(1) and 120.569, Florida Statutes, by Administrative Law Judge P. Michael Ruff. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, and the Recommended Order, have all been considered during the promulgation of this Final Order.

RESPONSE TO PETITIONER'S EXCEPTIONS

1. Petitioner, the Department, first contends that Finding of Fact Paragraph 6 is erroneous. That finding reads, "The Department has a policy or statutory interpretation which it carries out, concerning its duties under Section 440.107(7)(a), Florida Statutes (2005), requiring that if an employer who is required to secure payment of worker's compensation benefits has failed to do so, that failure is deemed an immediate serious danger to public health safety or welfare and results in the issuance of a "Stop Work Order" by the Department."

Petitioner argues that the agency does not have a "policy or interpretation," because the plain meaning of the language in Section 440.107(7)(a), Florida Statutes, requires no agency policy or interpretation. This point is well taken. The statutory language, "such failure shall be deemed an immediate serious danger to the public health, safety, or welfare," could not be plainer.

Although it might be fairly said that the Department necessarily has a “policy” (though not an “interpretation”) that failure to secure payment of worker’s compensation is “an immediate serious danger to public health, safety, or welfare,” this “policy” was not created by the Department. It is a policy announced by the Legislature in Section 440.107, Florida Statutes.

The use of the word “policy” by the Administrative Law Judge is awkward because the term, “policy” has become a term of art in Florida Administrative Law as a result of its use in Section 120.52(15), Florida Statutes, which describes prohibited agency non-rule “policy”. However, no other language in the Recommended Order carries any implication that the Department must adopt its “policy” by rule. Therefore, it is fair to conclude that the Administrative Law Judge was not using the word, “policy” as that term is used in Section 120.52(15), Florida Statutes. However, to the extent, if any, the Administrative Law Judge is concluding that the plain language of the statute is a “policy” as that term is used in Section 120.52(15), Florida Statutes, that finding is rejected. Finding of Fact Paragraph 6 is thus clarified.

2. Petitioner next contends that the Administrative Law Judge’s Conclusion of Law Paragraph 46 is erroneous. That conclusion reads, “Investigator Krossman and the Department were justified in issuing the Stop Work Order on August 11, 2005, in accordance with Section 440.107(7)(a), Florida Statutes (2005). Under that statutory authority the Stop Work Order remained in effect until the Respondent, Krashco, Inc., might demonstrate compliance with the coverage requirement for workers’ compensation.” Petitioner asserts that Section 440.107(7), Florida Statutes, states that a Stop Work Order shall remain in effect *until the Department issues an order terminating the Stop Work Order* upon a finding that the employer has come into compliance with the coverage requirements and paid any penalty assessed under Section 440.107(7), Florida Statutes. Thus, Petitioner asserts that it is incorrect for the Administrative Law Judge to conclude that the Stop

Work Order terminates upon demonstration of compliance with the coverage requirement for worker's compensation alone. Petitioner is correct, in that the language of the Recommended Order cited above does not capture the specific requirements of the termination of a stop-work order (that the Department first issue an order terminating the Stop Work Order).

However, given that the Recommended Order specifically quotes the pertinent language of Section 440.107(7)(a) in Conclusion of Law Paragraph 44, it is unlikely that the Administrative Law Judge intended to contradict the statutory language cited. From the context, it can be reasonably inferred that "demonstrate compliance with the coverage requirement for workers' compensation" as used in the Conclusion of Law Paragraph 46 is merely a rough summarization of the requirements which are stated with particularity in Section 440.107(7)(a), Florida Statutes, quoted in the Conclusion of Law Paragraph 44. With this reading, the Administrative Law Judge's legal conclusion is just a paraphrasing of the applicable statute. However, to the extent, if any, that the Administrative Law Judge is concluding that the Stop Work Order ends before the Department issues an order terminating it, that conclusion is rejected. The Conclusion of Law Paragraph 46 is thus clarified as indicated herein.

3. Petitioner likewise contends that the Conclusion of Law Paragraph 54 is erroneous. That conclusion reads, "That determination can now be made. The preponderant, persuasive evidence supporting the above findings of fact establishes that the Respondent, Krashco, Inc. was in violation of the above-referenced workers' compensation coverage requirements, the Stop Work Order and is liable for the related penalty assessment for the period charged to, and including, December 15, 2005." Petitioner contends that it was an error for the Administrative Law Judge to conclude that Krashco, Inc. violated the Stop Work Order only through December 15, 2005 and impose liability only up to that date. However, the Conclusion of Law Paragraph 54 only attempts to

address noncompliance and liability through December 15, 2005. There is competent substantial evidence to support the Administrative Law Judge's conclusion. Thus, the issue of noncompliance and liability *after* December 15, 2005 will accordingly be addressed in the Petitioner's exceptions to the Conclusions of Law Paragraphs 55 and 56 discussed below. Accordingly, the exception is rejected.

4. Petitioner contends that the Conclusion of Law Paragraph 55 is erroneous. That conclusion reads, "The preponderant evidence shows that after that date, during the pendency of this de novo proceeding, that the Respondent sufficiently altered its operation and its manner of securing and paying for services and goods necessary to operation of the business so as to comply with the referenced legal authority." Petitioner asserts that the alterations to the business operation did not result in compliance with Section 440.107(7)(a), Florida Statutes, which requires total cessation of business. It would appear from this Conclusion of Law and attendant Finding of Fact Paragraph 21 that the Administrative Law Judge concluded that Respondent, Krashco, Inc. effectively relinquished operation to Crashco, Inc., thus terminating (in the Administrative Law Judge's view) Krashco, Inc.'s continuing violation. The record does indicate that after December 15, 2005, Krashco, Inc. did not issue any more checks to its "former employees" (Finding of Fact Paragraph 22). After that date, they were paid by Crashco, Inc.

However, Section 440.107(7)(b), Florida Statutes, provides that stop-work orders are in effect against any successor corporation that has one or more of the same principals. Under this standard, Crashco, Inc. is also subject to the Stop Work Order. Notwithstanding this fact, Crashco, Inc. was not a party to the present proceeding and its liability for violation of the Stop Work Order was not addressed by the Administrative Law Judge. However, the activities of Crashco, Inc. may certainly be the subject of future administrative action.

Petitioner likewise contends that Conclusion of Law Paragraph 56 is erroneous. That conclusion reads, "It has therefore been established that, as to the Amended Order, the proposed aggregate penalty of \$49,979.79 is appropriate. In addition to this, a portion of the penalty for violation of the Stop Work Order, represented by the Second Amended Order, for the period from September 19, 2005 through December 15, 2005, should be imposed for an additional amount of \$87,000.00 in penalty, a total of \$136,979.80. Additionally, an assessment for the lack of coverage for the period of September 19, 2005 through December 15, 2005, at 1.5 times the amount the Respondent would have paid in premium, based on the formula depicted in Subsection 440.107(7)(d)1, Florida Statutes (2005), should be imposed." Petitioner takes exception to the second and third parts of this Conclusion of Law. Petitioner asserts that an additional penalty should be imposed against Krashco, Inc. for the period of work from December 15, 2005 to April 28, 2006 and perhaps beyond that date.

There is competent substantial evidence in the record that as of December 21, 2005, Krashco, Inc. had effectively transferred legal ownership of the business to Crashco, Inc. Since Crashco, Inc. was not a party to this proceeding, its liability for violation of the Stop Work Order was not addressed in this proceeding. As stated above, the Stop Work Order at issue is, in effect, inherited by Crashco, Inc., as the successor corporation to Krashco, Inc. The transparent attempt by the principals of these two corporations to evade the Stop Work Order and potential administrative action is unavailing. The Stop Work Order continues in effect against Crashco, Inc., and that entity is subject to further administrative action as deemed appropriate by the Division. Therefore, the Administrative Law Judge's recommendation is technically accurate.

Finally, Petitioner notes that the \$136,979.80 penalty imposed by the Administrative Law Judge is apparently a typographical error. The Administrative Law Judge apparently rounded up to

the nearest dime, resulting in the penalty being one cent higher than the exact calculation. Given that the method of calculation is clearly supported by competent substantial evidence in the record and the adjustment of the penalty to the precise result of that calculation is to the benefit of the Respondent, the penalty will be adjusted (by one cent) to \$136,979.79.

Petitioner also takes exception to the imposition of an assessment for the lack of coverage for the period from September 19, 2005 through December 15, 2005 in the Administrative Law Judge's Conclusion of Law Paragraph 55. Petitioner contends this was an error because the Respondent was never charged with failure to secure workers' compensation coverage for that period, and there is no basis in the record to support such a penalty or provide the basis for its calculation. The exception is accepted. Resolution of the lack of coverage matter is still pending and was not properly before the Administrative Law Judge. Therefore, the recommendation for imposition of a penalty for failure to obtain workers' compensation coverage for the above-referenced period must be rejected.

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law made by the Administrative Law Judge are adopted as clarified and modified in this Order as the Department's Findings of Fact and Conclusions of Law. A true and correct copy of the Recommended Order is hereby incorporated by reference and attached hereto as Exhibit A.

IT IS HEREBY FURTHER ORDERED that the recommendation made by the Administrative Law Judge as modified and clarified is adopted by the Department, and that Krashco, Inc. is directed to pay the sum of \$136,979.79 to the Department within thirty days from the date hereof.

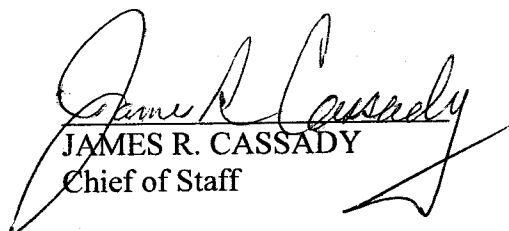
ACCORDINGLY, IT IS HEREBY FURTHER ORDERED that the Stop Work Order and Order of Penalty Assessment and the Second Amended Order of Penalty Assessment entered by the Division of Workers' Compensation are affirmed. The Stop Work Order shall remain in effect until

Respondent provides evidence satisfactory to the Division of Workers' Compensation of compliance 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, by having paid the penalty imposed herein. The Stop Work Order shall, pursuant to Section 440.107(5)(b), Florida Statutes, be in effect against any successor corporation or business entity that has one or more of the same principles or officers as Krashco, Inc.

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 9th day of April, 2007.


JAMES R. CASSADY
Chief of Staff

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