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REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

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Chief Financial Officer
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DIVISION OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF:

BOUDREAU'S CONCRETE, INC

CASE NO. 86843-WC

DOAH #06-4891

FINAL ORDER

THIS CAUSE came on before Alex Sink, as Chief Financial Officer, for consideration of and final agency action on a Recommended Order (attached as Exhibit A) rendered on June 8, 2007, by Administrative Law Judge Eleanor M. Hunter, after a formal hearing held under section 120.57(1), Florida Statutes (F.S.). The Division of Workers' Compensation timely filed exceptions, to which the Petitioner, Boudreau's Concrete, Inc. (BCI), responded. The Recommended Order, the transcript of the hearing, the Pre-trial Stipulation, the exhibits admitted into evidence, the Respondent's exceptions, the Petitioner's responses thereto, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON THE RESPONDENT'S EXCEPTIONS

The Respondent's first and second exceptions are directed to Finding of Fact Thirteen of the Recommended Order wherein the Administrative Law Judge (ALJ) made the factual finding that the evidence presented to establish that the relationship between the Petitioner and certain workmen was that of employer and employee, rather than as between a contractor and independent contractors, was "inconclusive", and likened that relationship to one between the Petitioner and an employee leasing company. The Respondent's exceptions contend, inter alia, that the ALJ thus found that J.A.J. was a leasing company, an issue not brought up at the hearing but improperly determined by

the ALJ in the Recommended Order, after the record had closed, contrary to the teaching of Dep't of Financial Servs. v. Mistretta, 946 So.2d 79 (Fla. 1st DCA 2006) and Dep't of Financial Servs. v. Fugett, 946 So.2d 80 (Fla. 1st DCA 2006).

Upon a cursory review, Finding of Fact Thirteen does not support Respondent's exception. Simply likening the relationship between Boudreau's Concrete, Inc. and the seven workmen in question to the relationship between an employee leasing company and the employees it leases is not the same as making an express finding relative to the nature of the first relationship. The gravamen of Finding of Fact Thirteen, as written, is that the evidence presented to demonstrate that the seven men in question were the Petitioner's employees rather than independent contractors was inconclusive. However, while acknowledging that it the province of an ALJ to weigh the evidence presented, and that the assertion of independent contractor status is an affirmative defense that the asserter thereof bears the burden of proving at the hearing Department of Labor and Employment Security, Div. of Workers' Compensation v. Nelly, DOAH Case No. 00-1748; Moncrief Bail Bonds Inc., v. Department of Financial Services, DOAH Case No. 06-3297; and Department of Financial Services v. WMW Enterprises d/b/a Family Flooring, DOAH Case No. 05-2651, it appears that the controlling statutes pertaining to the instant issue were not relied upon when analyzing the legal status of the seven workmen in question.

Given the clear language of Sections 440.02 (15) (c) 2. and 3., and 440.10(1)(b), F.S., it is immaterial whether the seven men in question were either the Petitioner's direct employees or independent contractors. Unless those seven men were being paid by a subcontractor who had properly exempted itself from workers' compensation

coverage or were being paid by a subcontractor who had otherwise secured the payment of compensation coverage as a subcontractor as contemplated by Section 440.02(15) (c)2., F.S., those men, even if "independent contractors", were statutory employees and the Petitioner their statutory employer pursuant to Section 440.02(15)(c)3., F.S., because the record evidence indisputably shows that they were engaged in the construction industry. Because there is no record evidence showing that those seven men were, at the time in question, being paid by an exempted subcontractor or that any involved subcontractor had otherwise secured the payment of compensation coverage as a subcontractor, those seven men, as a matter of law, were the Respondent's employees. [Sections 440.02(15) (c) 2.and 3., F.S.] And, according to Section 440.10(1)(b), F.S., the Petitioner is liable for the compensation of these seven men. Thus, the debate about their status as "independent contractors" or "employees" is to be determined not by the successful or unsuccessful assertion of the independent contractor defense, but by the afore-cited statutes. A review of the entire record shows that Finding of Fact Thirteen is not supported by competent substantial evidence, and it is therefore rejected. The following paragraph is substituted in its stead:

> The record evidence shows that, at the relevant time, the seven men in question were engaged in the construction industry, and that none were being paid by an exempted subcontractor or by a subcontractor or who had otherwise secured the payment of compensation coverage as a subcontractor. Thus, those seven men, even if "independent contractors" were the Petitioner's statutory employees for compensation coverage and compliance purposes. Sections 440.02(15) (c) 2.and 3, F.S., Department of Financial Services v Blue Diamond Deco Stone, Inc. DOAH Case No. 06-4198

Although not the subject of an exception, Finding of Fact Twelve suffers from the same basic defect as Finding of Fact Thirteen; it assumes that the Petitioner's case

turned on establishing a contractor-subcontractor relationship between the Petitioner and J.A.J. Construction Services, Inc. (JAJ) (to whom the Petitioner wrote a check purportedly for the services of the seven men in question), rather than on the application of the afore-cited statutes. The evidence conclusively shows that J.A.J. was not an exempted subcontractor, and that it had not otherwise secured the payment of compensation coverage as a subcontractor to BCI. Therefore, the relationship between those seven men and the Petitioner is determined by the applicable statutes, and nothing else. Thus, those workers were BCI's statutory employees for coverage and compliance purposes. A review of the entire record shows that Finding of Fact Twelve is thus not supported by competent substantial evidence. It is therefore rejected.

In view of the above, the remainder of the Respondent's exceptions one and two are moot, and are therefore rejected.

The Respondent's third and fourth exceptions, although nominally directed to Conclusion of Law Nineteen of the Recommended Order, again focus on the inapposite question of whether J.A.J. was a subcontractor to BCI. That status would have been material in this cause only if it had also been established that J.A.J. was the employer of the seven men in question and had properly either exempted itself from workers' compensation coverage or otherwise secured the payment of compensation coverage as a subcontractor to BCI. A review of the entire record irrefutably shows that J.A.J. had not properly exempted itself from workers' compensation coverage and had not otherwise secured the payment of compensation coverage as a subcontractor to BCI. Thus, whether J.A.J. was a subcontractor to BCI is immaterial to the question of BCI's coverage and compliance status relative to the seven men in question. Statutorily,

those seven men were BCI's employees at the time in question. A review of the entire record shows that Conclusion of Law Nineteen is not supported by competent substantial evidence, and, indeed, is contradicted by Findings of Fact Ten, Fourteen, Fifteen, and Sixteen of the Recommended Order.

Additionally, it is well established that a Recommended Order must reflect that all substantial evidence was considered, and that contrary testimony and evidence was not ignored or overlooked. Gross v. Dep't of Health, 819 So.2d 997, 1004 (Fla. 1st DCA 2002); Chavarria v. Selugal Clothing, Inc., 840 So.2d 1071, 1079 (Fla. 1st DCA 2003). Here, it appears that an uncontradicted admission of a compliance violation by the Petitioner was either ignored or overlooked. In the Pre-trial Stipulation submitted by both parties in this cause the Petitioner BCI admitted that:

> "During the time period February 28, 2006, through March 3, 2006, inclusive, Boudreau's was not the named insured nor named on an endorsement to a worker's compensation policy listing Florida in section 3A."

That is an admission of a violation of Section 440.10(g), F.S., which requires Florida specific endorsements on any workers' compensation policy covering employees engaged in work in this state. The ALJ failed to address that admission in her Recommended Order. Although only indirectly addressed in the Petitioner's Fourth Exception, this oversight must be corrected.

Accordingly, and in consideration of the above relative to Conclusion of Law Nineteen, the same is rejected, and the following substituted therefor:

> The record evidence conclusively shows that neither BCI, nor J.A.J., nor anyone else had secured workers' compensation coverage for the seven men at the time in question, and that J.A.J. had neither exempted itself from workers' compensation coverage nor otherwise secured the payment of compensation coverage as a subcontractor to

BCI. No policy covering the seven men at the time in question was offered into evidence. Therefore, the seven men in question must be considered BCI's statutory employees for compensation and compliance purposes. [Sections 440.02(15) (c) 2.and 3., F.S.] Moreover, based on its pre-trial Stipulation, BCI was in violation of Section 440.10(g), F.S., relative to the absence of a Florida specific endorsement on any workers' compensation policy purported to cover the seven men in question.

In view of the disposition of Respondent's third and fourth exceptions, the Respondent's fifth exception is rendered moot, and is therefore rejected.

The remaining Findings of Fact and Conclusions of Law in the Recommended Order are not altered or amended.

In view of the above, including a review of the complete record, the ALJ's recommended disposition of this cause must be rejected, and the penalty amount proposed by the Respondent and unopposed as to amount by the Petitioner, is accepted and substituted for the ALJ's recommendation. (RO Preliminary Statement pg.2 ; Tr. 3-4; Respondent's Exhibit Ten)

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that Boudreau's Concrete, Inc., pay the sum of $ 1, 115.82 to the Department within thirty days from the date hereof.

IT IS HEREBY FURTHER ORDERED that the Amended Order of Penalty Assessment and the Stop Work Order entered by the Division of Workers' Compensation is affirmed, and that the Petitioner BCI 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.

DONE AND ORDERED this 6 day of September, 2007.

James R. Cassady
Chief of Staff

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.