



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

000641

FILED

SEP 12 2008

Chief Financial Officer
Docketed by: *[Signature]*

IN THE MATTER OF

OLENDER CONSTRUCTION CO., INC.

CASE NO. 86845-06-WC

2008 SEP 16 4:11:11 PM
DIVISION OF
ADMINISTRATIVE
HEARINGS
FILED

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order issued on March 14, 2008 and the Order On Remand And Amended Recommended Order issued on July 29, 2008, by Administrative Law Judge (ALJ) Diane Cleavinger after formal hearing conducted on August 23, 2007, pursuant to Section 120.57(1), Fla. Stat. The Department of Financial Services, Division of Workers' Compensation, (Department) timely filed exceptions. No responses to the exceptions were filed by Olender Construction Co., Inc. (Olender). The Recommended Order, transcript of the hearing, the exhibits introduced into evidence, the exceptions, and applicable law have all been considered in the promulgation of this Final Order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department first takes exception to the Finding of Fact contained in Paragraph 33 of the Recommended Order which found that the date of Olender's incorporation was an insufficient basis on which to demonstrate its non-compliance with Florida's workers' compensation law. The Department argues that said finding is not based on competent, substantial evidence, and that it is, in reality, a conclusion of law.

The first exception similarly challenges the Conclusions of Law stated in Paragraphs 42 and 60 of the Recommended Order.

A review of the record shows that the challenged Finding of Fact (Paragraph 33) is based exclusively on the deposition testimony of Danny Campbell, the project manager for the Alta Westgate apartment complex, who stated that Olender's framing services commenced no earlier than April 3, 2006.

While the Department produced no evidence that Olender was performing construction services in Florida that required workers' compensation coverage prior to that date, the challenged finding must be considered in light of other findings of fact. In Paragraph 29 of the Recommended Order the ALJ found that:

Olender supplied no records regarding workers' compensation coverage for the eight employees who were members of the punch-out crew, the three workers who were members of the paper crew or the 12 workers who were on the third floor.

In Paragraph 30 of the recommended Order the ALJ correctly recognized that:

When an employer fails to provide the requested business records that the statute requires it to maintain, the department is required to impute the employers' payroll using 'the statewide weekly average wage as defined in Section 440.12(2).'

Olender's established failure to produce the required business records brings it within the ambit of the holding in *Twin City Roofing Construction Specialists, Inc. v. State, Dept. of Financial Services*, 969 So.2d 563 (Fla. 1st DCA 2007). In that case the court reviewed the same fact scenario as is present here; an employer's failure to produce the required business records necessary to establish the duration of the employer's non-compliance, but also the presence of oral testimony indicating the commencement of the period of non-compliance, which testimony, if accepted, would indicate a period of non-compliance shorter than the period of time covered by the

Department's request to produce. If accepted, as urged on appeal by the employer in *Twin City, supra*, the oral testimony there would have shortened the period of non-compliance and thereby lessened the penalty. The First District Court rejected that argument, stating:

The legislature has recognized that in order to enforce compliance with the requirement to secure the payment of workers' compensation, companies would have to maintain business records and produce them to the Department upon request. Section 440.107(3), Fla. Stat. (2005). The Department, pursuant to section 440.107, Florida Statutes, has implemented its own rules requiring employers to keep detailed employment records and hand them over when requested. See, Fla. Admin. Code R. 69L-6.015. When, as here, an employer refuses to provide business records, the Division is required to impute the missing payroll *for the period requested* in order to assess the penalty. Section 440.107(7)(e), Fla. Stat. (2005). (e.s.)

Thus, the court held that upon the employer's failure to produce the required business records, the division is required to calculate the applicable penalty by imputing, as the period of non-compliance, the period of time specified in the request to produce, even in the face of oral testimony that could establish a shorter period of non-compliance. Plainly, the *Twin City* court held that it is the employer's failure to produce the requested records, in and of itself, that requires such an imputation to establish the duration of the employer's non-compliance, even to the exclusion of later received oral testimony that might establish a shorter period of non-compliance. Under the holding reached in the *Twin City* case, the ALJ erred as a matter of law here by accepting the oral testimony of Danny Campbell to establish the beginning of Olender's period of non-compliance. Because Campbell's testimony cannot be used, and because there is no other substantial, competent evidence in the record to support the ALJ's challenged finding, the Department's exception must be accepted.

The Department also takes exception to the standard of proof announced in Paragraph 60 of the Recommended Order. While the Department's exception is well-taken, entry of the Order on Remand and Amended Recommended Order by the ALJ on July 29, 2008 moots this exception.

Also relative to Paragraph 60, although not raised in any exception, it appears from the Findings of Fact announced in Paragraph 20, that the ALJ committed an inadvertent scrivener's error in duplicating his description of three employees as "the three members of the punch-crew" immediately after referring to "the eight employees of Olender that were members of the punch-crew". From Paragraph 20, it is evident that the "three members of the punch-crew" were actually three members of the paper crew. Correction of that scrivener's error will be included in the substitution of Paragraph 60 set forth below.

Acceptance of the Department's exception as to Paragraph 33 of the Recommended Order requires concomitant changes to Paragraphs 42 and 60 of the Recommended Order. The following paragraphs are substituted for each of those three paragraphs:

33. Under the holding announced in *Twin City Roofing Construction Specialists, Inc. v. State, Dept. of Financial Services*, 969 So.2d 563 (Fla. 1st DCA 2007), the testimony of Danny Campbell as to the April 3, 2006 starting date of Olender's work on the Alta Westgate project cannot be used to establish Olender's period of non-compliance with the workers' compensation laws. Therefore, there is no competent, substantial evidence in the record to support the ALJ's finding that was based on that testimony. Rather, as a matter of law, the period of time set forth in the Department's request to produce records must be used to impute the duration of Olender's period of non-compliance. Thus, the period of non-compliance in question commences on January 22, 2004, and runs until June 26, 2006.

42. The penalty assessed by the Department was based on its request to Olender to produce business records, to which Olender did not respond. That request dated back to Olender's time of incorporation, which was within the statutory three year

reach of the Department's request. Under *Twin City Roofing Construction Specialists, Inc. v. State, Dept. of Financial Services*, 969 So.2d 563 (Fla. 1st DCA 2007), the Department's imputation of time to coincide with its request to produce was proper. This Conclusion of Law is as or more reasonable than that reached by the ALJ.

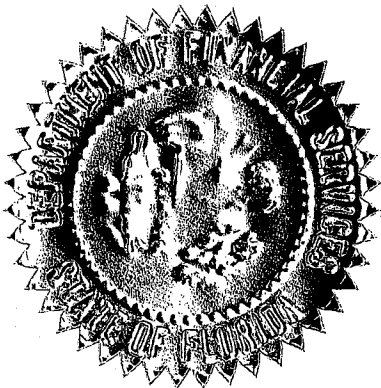
60. Based on the findings of fact in the Recommended Order, the Department has proven by clear and convincing evidence that it correctly calculated the imputed payroll for the eight employees of Olender that were members of the punch-out crew and the three employees that were members of the paper crew. The evidence did not support the Department's calculation with regard to any other individuals listed in the third Amended Penalty assessment. Therefore, the Department's previously announced total penalty calculation is incorrect, and is adjusted to reflect the findings in this Final Order. This Conclusion of Law is as or more reasonable than that reached by the ALJ.

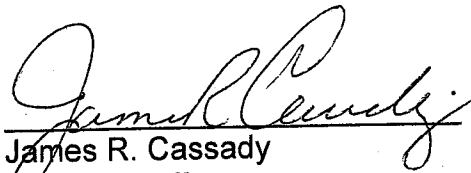
IN CONSIDERATION OF ALL OF THE FOREGOING:

IT IS HEREBY ORDERED that the ALJ's Findings of Fact and Conclusions of Law, except as noted above, are adopted as the Department's Findings of Fact and Conclusions of Law, and that Olender Construction Co., Inc. pay to the Department the penalty sum of \$620,347.43 re-calculated to reflect eleven (11) non-covered employees in accordance with the Recommended Order and the period of non-compliance set forth in Paragraph 33, above (see attached calculations), within thirty (30) days from the date hereof.

IT IS HEREBY FURTHER ORDERED that the Stop-Work Order issued entered by the Division of Workers' Compensation is affirmed and Olender Construction Co., 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 insurance coverage for covered employees and, pursuant to Section 440.107(7)(a), Florida Statutes, paying the civil penalty imposed herein.

DONE AND ORDERED this 12 day of September, 2008.




James R. Cassidy
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.

Copies to:
Jerry T. Springhart
Colin Roopnarine