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Chief Financial Officer
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REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

DEPARTMENT OF
ADMINISTRATIVE
SERVICES

IN THE MATTER OF:

000033

RAINBOW ROOFING SERVICES, INC.

Case No. 87484-06-WC

FINAL ORDER

THIS CAUSE came on before Alex Sink, as Chief Financial Officer, for consideration of and final agency action on the Recommended Order (attached as Exhibit A) entered by Administrative Law Judge ("ALJ") Linda M. Rigot on October 23, 2007, after a formal hearing conducted pursuant to section 120.57(1), Florida Statutes, on August 24, 2007. Exceptions were filed by Respondent, The Department of Financial Services, Division of Workers' Compensation ("Department"), on November 5, 2007.

RULINGS ON EXCEPTIONS

1. Respondent filed an exception to the Findings of Fact numbers 15 and 16, alleging that the ALJ incorrectly determined the penalty to be assessed for Petitioner, Rainbow Roofing Services, Inc., regarding Petitioner's violation of the Stop Work Order. The ALJ determined that the penalty to be assessed for the violation of the Stop Work Order was \$21,000. Respondent alleges that the proper penalty to be assessed for this violation is \$41,000. The Agency cannot reject findings of fact made by the ALJ if those findings of fact are supported by competent, substantial evidence in the record. Section 120.57(1)(l), Florida Statutes.

A Stop Work Order was issued on June 20, 2007. That Stop Work Order is to remain in effect until the Division issues an order releasing the Stop Work Order. As of

the date of the Final Hearing, the Division had not issued an order releasing the Stop Work Order. Pursuant to Section 440.107(7)(c), Florida Statutes, the Petitioner is to be assessed a penalty of \$1,000 per day for each day of work conducted in violation of the Stop Work Order.

The ALJ found that Petitioner worked in violation of the Stop Work Order from July 7, 2006, through August 3, 2006. The ALJ determined this to be twenty working days. Additionally, the ALJ found that Petitioner worked in violation of the Order on September 19, 2006, making it a total of 21 days the Petitioner worked in violation of the Order.

In reaching her decision found in Findings of Fact numbers 14 through 16, the ALJ relied on the forms entitled "Verification of Wages & Affirmation of Non-Injury" contained in Exhibit 7A of the deposition of Mr. Shawn Snider, submitted as Exhibit 24 at the final hearing. The four "Verification of Wages & Affirmation of Non-Injury" forms found in Composite Exhibit 7A only substantiate that the employees worked 20 days in violation of the Stop Work Order. According to the Findings of Fact numbers 14 and 15, the ALJ based her finding of penalty associated with working in violation of the Stop Work Order solely on the these forms, as well as the testimony that the Employer was seen working one additional day not mentioned in the forms.

However, the ALJ's analysis is inaccurate. There is not competent, substantial evidence in the Record to support the ALJ's conclusion. Composite Exhibit 7A was meant to reflect Turn Around reports submitted by the employer. (Deposition TR. p. 59) Included in Composite exhibit 7A were "Verification of Wages & Affirmation of Non-Injury" forms stapled to a number of the Turn Around reports. (Deposition TR. p. 63.) In

his deposition, Mr. Snider indicated that each of the Turn Around reports did not include a "Verification of Wages & Affirmation of Non-Injury" form because the employer did not provide that form with each Turn Around report he submitted. A review of Composite exhibit 7A corroborates Mr. Snider's testimony in that there are Turn Around reports for weeks where there is no "Verification of Wages & Affirmation of Non-Injury" form included. Therefore, there is no basis to solely rely on these forms to make a determination of the actual number of days employees worked in violation of the Stop Work Order.

Further, Exhibit 5 of the deposition of Mr. Snider provides evidence that Petitioner worked in violation of the Stop Work Order for at least 40 days. Exhibit 5 contains the client payrolls from the Valleon Group. These documents substantiate that the Petitioner worked in violation of the Stop Work Order from July 7, 2006, through August 31, 2006, a period of 40 days. Mr. Snider's testimony further corroborates that the finding that the Employer worked in violation of the Stop Work order for the 40 days between July 7, 2006, and August 31, 2006. (Deposition TR. pps. 52-55) That, in addition to September 19, 2006, leads to a total of 41 days the Petitioner worked in violation of the Stop Work Order.

Based upon the foregoing, there is no competent substantial evidence to support the contention that the Petitioner worked in violation of the Stop Work Order for a period of 21 days. As a result, the exception is granted. Finding of Fact, paragraph number 14, is rejected. In its stead, the following is substituted:

14. The payroll forms submitted into evidence are sufficient proof that Petitioner worked in violation of the Stop Work Order from July 7, 2006 through August 31, 2006.

Based upon the analysis above, Finding of Fact number 15 also requires modification. The modification is as follows:

15. The payroll documentation submitted demonstrates that the leased employees received wages for working 40 days. In addition, since one employee was observed working by Investigator Mark on September 19, 2006, the Department has proven that Petitioner engaged in business operations for 41 days while the Stop Work Order was in effect.

Furthermore, based upon the analysis above, Finding of Fact number 16 must be modified. The paragraph is accepted but for the last sentence which states, "His calculations must be again adjusted since the Department only proved that Rainbow Roofing engaged in business operations for 21 days while the Stop Work Order was in effect, not the 41 days assumed by investigator Mark." This last sentence is stricken.

2. Respondent also filed an exception to Conclusion of Law number 26, which states,

26. The documentation relied on by the Department was inconclusive except for 20 days, and investigator Mark observed Rainbow Roofing working on one additional day. The Department, therefore, has only proven 21 days, rather than the 41 days on which its 3rd Amended Order of Penalty Assessment was based, and the amount assessed in that 3rd Amended Order, \$525,760.08, should be reduced by \$20,000.

For the reasons stated above, that Conclusion of Law is rejected as it is not supported by competent substantial evidence. In its stead, the following will be substituted:

26. The Department has proven that Petitioner worked a period of 41 days in violation of the Stop Work Order. Therefore, the penalty and amount assessed in the 3rd Amended Order of Penalty Assessment is correct and the penalty in this matter is \$525,760.08.

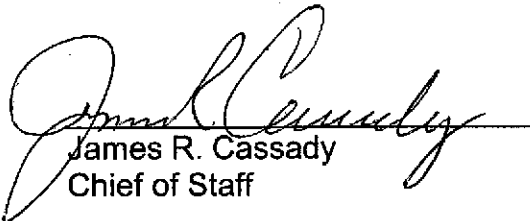
IT IS HEREBY ORDERED AND ADJUDGED that the Findings of Fact and Conclusions of Law in the Recommended Order, as modified herein, are adopted as the Department's Findings of Fact and Conclusions of Law, and

IT IS THEREFORE ORDERED AND ADJUDGED that, based upon the modification of the Administrative Law Judge's Findings of Fact and Conclusions of Law, the recommendation of the Administrative Law Judge is rejected.

IT IS FURTHER ORDERED AND ADJUDGED that Petitioner, Rainbow Roofing Services, is assessed a penalty in the amount of \$525,760.08.

IT IS THEREFORE FURTHER ORDERED that the Respondent shall pay the sum of \$525,760.08 to the Department within thirty days from the date hereof, that the 3rd Order of Penalty Assessment and the Stop Work Order entered by the Division of Workers' Compensation are affirmed, and that the Respondent 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 17 day of ^{January, 2008} ~~December 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.

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