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DIVISION OF ADMINISTRATIVE HEARINGS

REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED 000280

APR 22 2008

Chief Financial Officer
Docketed by: _____

IN THE MATTER OF:

Case No. 91838-07-WC

C.R. HIGDON DEVELOPER, LLC
_____/

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order filed on January 30, 2008, by Administrative Law Judge Harry L. Hooper (ALJ), pursuant to a formal hearing conducted on November 20, 2007, recommending dismissal of the Stop Work Order and Amended Order of Penalty issued against Respondent C.R. Higdon Developer, LLC (Higdon LLC). The Department of Financial Services (Department) timely filed exceptions to the Recommended Order, and Respondent Higdon LLC timely filed responses thereto. The Recommended Order (a copy of which is attached hereto as Exhibit A), the transcript of proceedings in the formal hearing, the exhibits introduced into evidence, the Department's exceptions, Higdon LLC's responses, and applicable law have all been considered during the promulgation of this final order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department's first exception is to Paragraph 9 of the Findings of Fact, where the ALJ found that Mr. Higdon did not respond to the Request For Business Records (request) on advice of counsel. The Department argues that the sole record evidence on that subject shows that Mr. Higdon didn't bother to read the request but took it

straight to his lawyer, and that there is no evidence relative to what advice his counsel may have subsequently given to Mr. Higdon regarding that request.

While the hearing testimony supports the exception in a literal sense, it is nonetheless a permissible inference that the failure to respond to the request was based on the advice Mr. Higdon received from counsel subsequent to his delivery of the request to his counsel; there would have been no reason to so deliver the request had Mr. Higdon not wanted the advice of his counsel as to how to respond. From the fact that there was no response, it is reasonable to infer that such was counsel's advice. Moreover, this portion of the exception is not determinative of any material aspect of this matter. Accordingly, this portion of the exception is rejected.

A second part of the exception to Paragraph 9 posits that because the request was issued to Higdon LLC, it is irrelevant that Mr. Higdon, individually, did not respond. This exception is inapposite to any material issue of fact. What is relevant is that no one responded to the request, thus requiring the statutory imputation process to be invoked. Moreover, relevancy is not a ground upon which to ground a decision to reject or modify a finding of fact. Only if a review of the entire record fails to adduce competent substantial evidence to support the challenged finding or if the proceedings on which that finding is based do not comply with the essential requirements of law may the finding be modified or rejected. [Section 120.57 (1)(l), Fla. Stat.] There is competent substantial evidence to support the challenged finding of non-response to the request. (Tr. 104) Accordingly, this portion of the exception is rejected.

A third and final part of the Department's first exception argues the presence of error in the statement that the Department's investigator "calculated a penalty by

imputing the statewide average weekly wage per employee." The exception argues that the statewide weekly average is determined by the Agency for Workforce Innovation, not by the Department's investigator. While that is true, the Department's investigator consults the average weekly wage table and then computes a *penalty* based on that statewide average figure. That is what the ALJ found, and a review of the record (Tr. 49-51, 54-56) supports that finding. Nowhere, as the Department contends, did the ALJ find that the Department determined the *average weekly wage*. Accordingly, the Department's entire first exception is rejected.

The Department's second exception contends that the class code assigned to Higdon LLC's activities at the site in question was erroneous, thereby causing an error in the recommended penalty. This exception is immaterial to the disposition of this matter because no penalty was recommended. Moreover, regardless of whether the usual business of Higdon was earthmoving and excavation or steel-working, there is competent substantial evidence to support the ALJ's finding that at the time and place in question, steel-working was the ongoing activity. (Tr. 15-16, 51-52, 67, 90-92) Accordingly, this exception is rejected.

The Department's third exception argues that the Conclusion of Law announced in Paragraph 22 of the Recommended Order (that Mr. Higdon personally contracted with J and T Home Improvements for the erection of a steel building on property owned by his corporation Barefoot Developers, and that he was, therefore, not an employer) is an irrelevant conclusion. The test for accepting or rejecting Conclusions of Law is not relevancy but legal correctness and record support. Moreover, the Department overstates the content of the Finding of Fact in Paragraph 5, on which it relies to argue

the irrelevancy of Paragraph 22. There, the ALJ did not *find* that the workmen on the job were Higdon's employees; he found that they *stated* that they were Higdon's employees, a hearsay statement that turned out to be unsupported by any other non-hearsay evidence, and was therefore insufficient to support any finding of fact on that point. [Section 120.57(1)(c), Fla. Stat.]

Finally, as to this exception, the record shows that Mr. Higdon's corporation, Barefoot Developers, owned the property in question, and that Mr. Higdon, personally, contracted directly with J and T Home Improvements for the construction of a large steel structure on that property. (Tr. 89-93) There was no evidence of a sub-contract involved in the relationship between Mr. Higdon or Higdon LLC, and J and T Home Improvements. (Tr. 89-93) Thus, neither Mr. Higdon, nor Higdon LLC, was the contractor; J and T Home Improvements was the contractor. (Tr. 89-93) Accordingly, this exception is rejected.

The Department's fourth exception argues the irrelevancy of Conclusion of Law 23. For the above-stated reasons relative to relevancy as a ground for excepting to a Conclusion of Law, this exception is rejected. Moreover, the purported irrelevancy is immaterial to the determination of any issue before the ALJ, and the Department's proffered substitute favors the position of the Petitioner, not the Respondent Department, as to the employer status of C. R. Higdon Developer LLC.

The Department's fifth exception argues that the Conclusions of Law reached in Paragraph 24 of the Recommended Order are erroneous on multiple grounds. The first ground urges that the ALJ erred in confusing Higdon LLC with Mr. Higdon, individually, relative to ownership of the real estate on which the construction was occurring.

However, a reading of Paragraph 24 shows that the ALJ fully recognized that Mr. Higdon "owned" the real estate through his solely owned corporation, Barefoot Developers. Thus, this portion of the exception is rejected.

The remainder of the exception merely argues that because Mr. Higdon chose to apply for the building permit through his corporation, Higdon LLC, that application form entry made Higdon LLC the contractor. That argument flies in the face of competent substantial and un-rebutted testimony that J and T Home Improvements was the contractor, and that Mr. Higdon personally signed the construction contract, not a sub-contract, with J and T Home Improvements. (Tr. 91-93) Accordingly, this exception is rejected.

In consideration of all of the above:

IT IS HEREBY ORDERED that the Findings of Fact and the Conclusions of Law set forth in the Recommended Order are adopted as the Department's Findings of Fact and Conclusions of Law, and that the Stop Work Order and Amended Order of Penalty Assessment issued in this cause are hereby dismissed.

DONE AND ORDERED this 22 day of April, 2008.

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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