



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

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SEP 15 2009

Chief Financial Officer
2009 SEP 16 PDD Accepted by: LSB

DIVISION OF
ADMINISTRATIVE
HEARINGS

07-5059

IN THE MATTER OF:

LOCKHART BUILDERS, INC.

Case No. 92390-07-WC

AMENDED FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order rendered by Administrative Law Judge Bram D.E. Canter on March 31, 2008, subsequent to a formal hearing held pursuant to Sections 120.569 and 120.57(1), Fla. Stat., on February 7, 2008.

The Department of Financial Services, Division of Workers' Compensation (the Department) timely filed exceptions to the Recommended Order. No exceptions were filed by Lockhart Builders, Inc. (Lockhart). The Recommended Order, the exceptions thereto, the testimony and documents entered into evidence, and applicable law were all considered during the promulgation of this Final Order.

RULING ON THE DEPARTMENT'S EXCEPTIONS

The cumulative thrust of the Department's exceptions is that the ALJ erred in his analysis, contained in Paragraphs 33 through 42 of the Recommended Order, holding that when the employer fails to produce required records to the Department the Department could not impute the duration of the employer's statutory non-compliance based on the entire period for which business records were requested, especially when there was record evidence adduced at the hearing that supported a lesser duration of non-compliance.

Although the ALJ's analysis in support of that Conclusion of Law is painstaking, it is erroneous. In commenting upon substantially the same fact situation, the court in *Twin City Roofing Construction Specialists, Inc. v. State, Dept. of Fin. Services*, 969 So.2d 563 (Fla. 1st DCA 2007) stated:

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. *Twin City, supra* at 566.

The Department's imputation of time is in accord with that holding. The record shows that B.Y. Construction Services, Inc., (the stucco subcontractor to Lockhart on the job in question) was established on December 6, 2005, and that the Department essentially modified its original records request to coincide with that date, and imputed from that date forward. (Tr. 48) That procedure is in accord with the court's holding in *Twin City Roofing Construction Specialists, Inc. v. State, Dept. of Fin. Services*, 969 So.2d 563 (Fla. 1st DCA 2007), quoted above.

Accordingly, the Department's exception is accepted. Paragraphs 33 through 42 of the Recommended Order are rejected, and the following substituted therefor:

33. However, where, as here, an employer fails or refuses to produce the required records that would enable the Department to determine the actual time period of the employer's non-compliance, Section 440.107(7)(e), Fla. Stat., requires the Department to impute the time of non-compliance based on the period of time requested by the Department.

34. The above substituted Conclusion of Law is as or more reasonable than the rejected Conclusions of Law.

Because the substituted Conclusion of Law necessarily reverts the amount of the fine back to the amount sought by the Department, the recommended penalty must concomitantly be changed. Accordingly, the ALJ's Recommendation to impose a fine

reflective of one day's non-compliance is increased to the imposition of a fine in the amount of \$70,272.51, as stated in the Second Amended Order of Penalty Assessment. (Exhibit 10; Tr. 48)

Finally, the Department takes exception to the last sentence of Paragraph 17 of the Findings of Fact, which found that the Department's proposed penalty did not include an assessment based *solely* on Lockhart's failure to produce business records. An examination of the record shows that Lockhart's subcontractor, BY Construction, did, indeed, produce business records identifying individual employees by name and job, (Tr. 21-23), and that Lockhart, itself, produced business records which enabled the Department to determine that three of BY Construction's employees were not covered at that time and for that job, thereby making them Lockhart's statutory employees. (Tr. 34-38). Thus, there is competent substantial evidence in the record to support the ALJ's factual finding that the Department's proposed penalty is not based *solely* on Lockhart's failure to produce records needed to determine the time of its non-compliance. Therefore, this exception is rejected.

Accordingly, IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law stated in the Recommended Order, except as addressed above, are adopted as the Department's Findings of Fact and Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Second Amended Order of Penalty Assessment and the Stop Work Order entered by the Division of Workers' Compensation is affirmed, and that Lockhart Builders, Inc., is ordered to continue making payments according to the Payment Agreement Schedule for Periodic Payment of Penalty. Any breach of the Payment Agreement Schedule for Periodic Payment of

Penalty will reinstate the Stop-Work Order, and the unpaid balance of the total penalty to be paid by Lockhart Builders, Inc. shall become immediately due.

DONE AND ORDERED this 15th day of September, 2009.



Brian London
Deputy Chief Financial Officer

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