08-3078

REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED
FEB 23 2009
Chief Financial Officer
Docketed by:

000583

IN THE MATTER OF:

JESUS SOSA
d/b/a JESUS SOSA CORP.,
a dissolved Florida Corporation
/

Case No. 95668-08-WC
DOAH Case No. 08-3078

FINAL ORDER

THIS CAUSE came on before the Department of Financial Services for consideration of and final agency action on the Recommended Order entered herein by Administrative Law Judge (ALJ) Lisa Shearer Nelson on December 10, 2008, after formal hearing held on October 14, 2008. The Division of Workers' Compensation, Department of Financial Services (Division) timely filed exceptions to the Recommended Order, and Respondent Jesus Sosa (Sosa) was granted an extension of time to file, and did timely file, responses thereto. The Recommended Order, the transcript of proceedings, admitted exhibits, the Division's exceptions, Sosa's responses thereto, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON THE DIVISION'S EXCEPTIONS

The Division's first exception is directed to the Findings of Fact in Paragraphs 21 through 38 of the Recommended Order and the Conclusions of Law in Paragraphs 48-50 of the Recommended Order. As best as can be determined, these exceptions argue that the ALJ erred in using inadequate business records Sosa produced to determine

the duration of Sosa's employment of various persons to calculate the applicable penalty. (A penalty calculation consists of two primary components; the job classification of the employee and the duration of his or her employment. The classification component is not here at issue, the ALJ having correctly determined that the dearth of information supplied by Sosa's business records required imputation of classifications.)

The Division argues that the ALJ should have ruled that Sosa's failure to produce all the business records mandated by Rule 69L-6.015, F.A.C. (promulgation of which is required by Section 440.107(5), Fla. Stat.), required an imputation of time to calculate the applicable penalty, regardless of what Sosa's inadequate records might otherwise indicate in those regards. Essentially, the Division argues that if an employer fails to produce *all* the business records it is required to produce by Rule 69L-6.015, F.A.C., to allow the Division to determine the actual duration of an individual's employment, imputation must automatically follow because the Division's acceptance of only *some* of the rule mandated records for penalty calculating purposes would allow unscrupulous employers to selectively produce only those records that would illegally minimize the true penalty prescribed by statute.

The ALJ clearly found that the business records produced by Sosa fell "woefully short" of the rule's requirements. (RO 46). Despite that finding, she proceeded to conduct her own analysis of those same records and concluded that they provided a "fairly consistent" and "fairly reliable basis from which to determine each man's length of employment", a critical factor in computing the applicable penalty. While the ALJ's reconstruction of numerous individuals' employment durations is painstaking, it misses the point of the Division's exception. Restricting itself to acceptance of whatever records

an employer chooses to maintain and produce, rather than requiring an employer to maintain and produce all the rule mandated records, will undoubtedly encourage unscrupulous employers to manipulate the Division by producing only those records that would illegally minimize the penalty prescribed by the governing statutes. The Legislature certainly could not have intended that the entire compliance mechanism of the workers' compensation system be subjected to compromise by unscrupulous employers bent on gaming the system by selective record maintenance and production, nor could it have intended for the Division to adopt a "close enough for government work" attitude towards the discharge of its statutorily mandated duties. Indeed, the substantial penalties specified by the statutes evidence a legislative preference for a no -nonsense enforcement of the law. While imputation may work a hardship on an employer who is merely negligent and not ill-motivated, that employer can avoid that hardship by not indulging in that negligence. Moreover, the hardships that would be visited upon the entire workers' compensation community by requiring the Division to use inadequate and selectively produced records to guess at appropriate penalties for non-compliant employers far exceeds the hardship that an employer's own negligence causes to him. Accordingly, this exception, which is infused with public policy considerations regarding the strict enforcement of legislation specifically designed to substantially punish non-compliant employers so as to increase employer compliance and ensure workers' compensation coverage for their employees, is accepted.

The Division's second exception is directed to Paragraphs 41, 48, 49, and 52 of the Conclusions of Law, wherein the ALJ quoted certain statutes in support of her conclusion that the Division wrongly interpreted the law to require imputation for three

years of non-compliance rather than for an identifiable period of non-compliance within a three year period. An examination of the entire record shows that the imputed time was not for three years, but for approximately 27 months, from February 16, 2006 when Sosa's corporation was formed, until April 30, 2008, when the Stop Work Order issued. Having reviewed the entire record, there is no record evidence showing that the period of non-compliance on which the Division's penalty was based was three years. Accordingly, this portion of the second exception is accepted.

The second exception also takes issue with the ALJ's quotation of certain statutes to support her conclusion that the Legislature did not intend for the workers' compensation system to become an economic burden on non-complying employers. The Division's exception is well-taken. Imposing substantial fines on non-complying employers is precisely what the Legislature intended in an effort to improve employers' compliance with coverage requirements for their employees. The economic burden that should be emphasized is the burden that falls on the on the taxpayer to the extent that the workers' compensation system is not financially self-supporting. The Legislature was certainly not concerned about the economic burden that its mandated penalties impose on non-complying employers who negligently or intentionally put their trusting employees at risk of serious injury or death for which they are unknowingly uninsured. Had the Legislature wished to create exceptions to its penalty statutes based on employer hardship cases, it could easily have done so. That it did not do so is strong evidence of an intent to impose those penalties uniformly and without exception so as to ensure coverage for all injured workers.

The ALJ's attempt to distinguish the holding in *Twin City Roofing Construction Specialists, Inc., v. State, Department of Financial Services*, 969 So.2d 563 (Fla. 1st DCA 2007) is not persuasive. There, the court expressly stated:

> 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). (e.s.)

Thus, employers are statutorily charged with *both* maintaining and producing business records specified by Department Rule 69L-6.015, F.A.C. Here, the employer, Sosa, failed in his statutory duty to *maintain* those specified records relative to the duration of employment of numerous individuals. Rule 69L-6.015, F.A.C., clearly specifies that an employer's business records must show every individual's employment on a daily and hourly basis, and it does not allow for exceptions or substitutions, or for the Division to make educated guesses or engage in assumptions about the duration of an individual's employment. Thus, a failure to maintain the required business records obtains the same result as an outright refusal to produce them; inadequate information for the Division to calculate an appropriate penalty. Therefore, when an employer fails to maintain the required business records imputation is just as appropriate as it would be in the face of an outright refusal to produce them. Section 440.107(7) (e), Fla. Stat. Accordingly, this portion of the Division's second exception is accepted.

The Division's third exception concerns the notion of "dual employment" and the ALJ's determination that Sosa should receive credit against the final penalty for workers' compensation premiums paid through Convergence, an employee leasing company utilized by Sosa. "Dual employment", in the instant context, occurs when an employer

contracts with an employee leasing company to, essentially, lease back the employees to the employer at a given price, in return for which the employee leasing company pays the employees directly and provides workers' compensation coverage for the leased employees. However, if the original employer makes additional payments to those same employees, that employer owes additional premiums to the workers' compensation insurance carrier because its premiums are based on gross payroll. Based on Sosa's testimony, the ALJ found that Sosa made such additional payments to those employees (RO 4), thus increasing the gross payroll, and, concomitantly, the premium due the carrier. However, Sosa increased the gross payroll without reporting those additional payments to the insurance carrier or to Convergence, which non-reporting caused him to be in non-compliance with Section 440.107(3), Fla. Stat. Therefore, rather than a "credit" being due to Sosa for coverage provided by Convergence, Sosa owes an additional penalty for that non-reported gross payroll increase.

Moreover, at hearing, Sosa freely admitted that he purposely did not include his true gross payroll in the figures reported to Convergence. (Tr. 124) That practice allowed him to lower the contract fee he would otherwise have had to pay Convergence for providing coverage for Sosa's leased-back employees. In other words, Sosa admitted to gaming the system through the lease-back subterfuge of not reporting his true gross payroll to either Convergence or the insurance carrier. The Division properly saw through this subterfuge of non-reporting of gross payroll, and properly imputed the correct penalty as required by Section 440.107(7) (e), Fla. Stat., when as here, an employer's records are insufficient to allow the Division to calculate the gross payroll. Accordingly, the Division's third exception is accepted.

In consideration of the foregoing, the following amendments are made to the Recommend Order:

In each of Paragraphs 21 through 35, inclusive, of the Findings of Fact, in each instance where the ALJ found a starting date of employment for each individual referenced in each of those paragraphs, each sentence starting with the words "For the purpose of imputing salary", is modified to read as follows:

> "If the legally inadequate business records produced by Sosa were to be used to determine (the employee's name) starting date, that date would be (date). However, because Sosa's business records were legally insufficient to allow the Division to calculate an appropriate penalty based on the duration of individual employments, imputation of time back to the formation of Sosa's corporation, February 17, 2006 is appropriate.

This modification is made because a review of the entire record does not contain competent, substantial evidence showing that Sosa's business records met the requirements of Rule 69L-6.015, F.A.C., so as to be used as competent, substantial evidence to support a Finding of Fact. Rather, as noted in the Division's exceptions, the record does contain competent, substantial evidence showing that Sosa's business records fell "woefully short" of that Rule's requirements, and were, therefore, legally incompetent to support a factual finding by the ALJ. To accept the ALJ's standards of "fairly consistent" and "fairly reliable" information gleaned from records that fall "woefully short" of the Rule's requirements is to re-write and eviscerate the Rule, so as to render it highly susceptible to varying degrees of subjective, and therefore inconsistent, application, and thereby thwart the goal of uniform enforcement of the workers' compensation laws, which uniform enforcement contributes to achievement of the

statutory goals of a self-executing system that ensures the prompt and cost effective delivery of payments to injured workers. Section 440.015, Fla. Stat.

A review of the complete record shows that the Findings of Fact made in Paragraphs 36 and 37 of the Recommended Order are not based on the competent, substantial evidence required by Rule 69L-6.015, F.A.C., but are instead based on the absence of such evidence, and the ALJ's substitution of her own standards for determining the duration of the respective individuals' employment. Accordingly, the last sentence of those paragraphs is rejected and the following substituted therefor:

> "Inasmuch as Sosa failed to maintain the records required to be maintained by Rule 69L-6.015, F.A.C., which, had they been produced, would have allowed the Division to calculate rather than impute a period of employment, there is no alternative but to impute the starting date to the date set forth in the request for business records, which is February 17, 2006, when his now defunct corporation was formed."

Consequently, the Conclusions of Law announced in Paragraphs 48, 49, and 50 of the Recommended Order are rejected. First of all, the ALJ, again, incorrectly states that the time imputation was for a three year period, when she found it factually established in the record that imputation period, based in the Division's request for business records from February 17, 2006 (the formation date of Sosa's corporation) until the Division's Stop Work order issued on April 30, 2008, was for a discrete 27 month period within three years from February 17, 2006, forward. Secondly, as aforestated, the Division is not required to accept partial and incomplete business records to attempt, by educated guesswork, surmise, assumption, and deduction, to establish the actual dates and duration of employments to reach a "fairly reliable" conclusion. Rather, the law places the burden on employers to maintain and produce

such records that readily display the required information to allow an actual determination of employment durations. If the employer fails in its statutory and rule duty to maintain and produce those required business records, imputation follows as a matter of law. Section 440.107(7) (d), Fla. Stat.; *Twin City Roofing Construction Specialists, Inc., v. State, Department of Financial Services*, 969 So.2d 563 (Fla. 1st DCA 2007).

Accordingly, Paragraphs 48, 49, and 50 of the Recommended Order are rejected and the following substituted therefor:

> Under the facts found above, imputation of time from the formation of Sosa's corporation, February 17, 2006, until April 30, 2008, is appropriate as a matter of law.

This Conclusion of Law is as or more reasonable than the rejected Conclusions of Law.

Paragraphs 50 and 51 of the Recommended Order are likewise rejected. Again, these Conclusions of Law require the Division to accept partial and incomplete business records, some from Sosa, others from Convergence, and by educated guesswork, surmise, assumption, and deduction, to piece together the chronology of Sosa's employment of sixteen individuals, some of whom are "identifiable" only by initials and similarly spelled names, and some of whose information is subject to conflict within the documents produced.

Accordingly, the following Conclusion of Law is substituted for Paragraphs 50 and 51 of the Recommended Order:

> When, as here, an employer fails in its statutory and rule duty to maintain and produce the business records required by Rule 69L-6.015, F.A.C., imputation follows as a matter of law. Section 440.107(7)(d), Fla. Stat.; *Twin City Roofing*

Construction Specialists, Inc., v. State, Department of Financial Services, 969 So.2d 563 (Fla. 1st DCA 2007).

This Conclusion of Law is as or more reasonable than that which was rejected.

After a review of the complete record and for all of the reasons hereinabove stated, the ALJ's Recommendation as to the appropriate penalty is rejected. A penalty in the amount of $909,541.76 is imposed against Sosa, in accordance with the Amended Stop Work Order issued on May 27, 2008.

Accordingly:

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

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 Respondent Sosa shall cease all business operations unless and until he/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 23 day of February 2009.

[redacted]

Brian London, Deputy Chief Financial Officer

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:
ALJ Lisa Shearer Nelson
Seth Schwartz, Esq.
Thomas H. Duffy, Esq.