REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

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Chief Financial Officer
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DIVISION OF
ADMINISTRATIVE
HEARINGS

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IN THE MATTER OF:

Case No. 96464-08-WC

TLC STONEWORKS, LLC
_____/

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order issued herein by Administrative Law Judge Daniel Manry on October 24, 2008, after a formal hearing conducted pursuant to Section 120.57(1), Fla. Stat., on August 26, 2008. Exceptions were timely filed by the Department of Financial Services, Division of Workers' Compensation (Department).

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department's first exception is directed to the Finding of Fact in Paragraph Five of the Recommended Order wherein the ALJ found that Petitioner TLC Stoneworks, LLC (TLC) was a "sales agent, order processor and a collection and payment processor for Manasota ", Manasota being a residential building contractor. A review of the record shows competent, substantial evidence to support that finding. (Tr. 51-53.) Therefore, this exception must be, and is, rejected. Section 120.57(1) (l), Fla. Stat.

The Department's second exception is also directed to a Finding of Fact in Paragraph Five of the Recommended Order wherein the ALJ drew the inference that "Manasota collected a sum from the from the homeowner that was equal to or greater

than the price Manasota paid to Petitioner". While the challenged inference is a reasonable assumption based on common experience with residential building contractors, inferences, as contrasted with assumptions, must be based on and drawn from *evidence* in the record. *Thomason v. Miami Transit Co.*, 100 So.2d 620 (Fla. 1958); *Greyhound Corporation v. Ford*, 157 So.2d 427 (Fla. 2nd DCA 1963); *Busbee v. Quarrier*, 172 So.2d 17 (Fla. 1st DCA 1965); *Law Revision Council Note to 90.301, Fla. Stat.*; *Fenster v. Publix Supermarkets, Inc.*, 785 So.2d 737 (Fla. 4th DCA 2001). The law does not permit an inference to be based on common experience not admitted into evidence. The ALJ did not cite to the record evidence from which he drew the challenged inference, and an examination of the entire record fails to show any competent substantial evidence from which the challenged inference could reasonably be drawn. Therefore, the Department's second exception is accepted, and the challenged inference is rejected.

The Department's third exception is directed to the Finding of Fact in Paragraph Six of the Recommended Order, wherein the ALJ found that TLC and Granite Exclusive were both subcontractors to Manasota, Granite Exclusive being the installer of the granite countertops shipped to the installer or job site at the direction of TLC. (Tr. 51-53) The Department contends that the challenged finding is not only unsupported by competent substantial evidence, but is contradicted by record evidence in the form of departmental testimony and exhibits. The Department's contention is well taken.

An examination of the record shows no written contract between Manasota and Granite Exclusive, or even an allegation that one existed, and there is no testimony establishing or even suggesting the existence of an oral contract between those entities.

Indeed there is no record testimony showing that Manasota was even aware of Granite Exclusive's existence. TLC's own testimony shows that the un-named wholesaler that provided the granite countertops shipped them to whatever installer TLC, *not Manasota,* chose, (Tr. 51-52) and that thereafter TLC, not Manasota assumed certain responsibilities for installation supervision and collection of monies. (Tr. 51-53) TLC's own witness, Leslie Lockett (TLC's president), testified that TLC entered into written agreements with homeowners to provide them with assistance in selecting granite counter tops. (Tr. 51) TLC did not enter any such contract into evidence. No witness for TLC or the Department testified that Manasota had a contractual relationship with Granite Exclusive, and no such contract was offered into evidence.

The record testimony that goes most directly to the relationship between Manasota and TLC and, in turn, Granite Exclusive, is the admitted hearsay testimony of the Department's investigator, who testified that Manasota employee Frank Hartland stated to him that he (Hartland) knew nothing about Granite Exclusive, thought that TLC was performing the installation work in question, and was surprised to find out that TLC was "jobbing out the work". (Tr. 30). That hearsay testimony is corroborated by the contents of Department's Exhibit J, which includes a "Purchase and Installation Agreement" that on its face plainly calls for TLC to perform specified installation work for the price of $4025.00, including $1,890 worth of installation options to be performed by TLC. Exhibit J is signed by Tom Harvey, TLC's co-owner (Tr. 58), for TLC. The "Purchase and Installation Agreement" does not delimit TLC's participation to that of a mere purchaser, but requires it to perform specified installation services. Exhibit J does not reference Granite Exclusive, but does reference Manasota. No witness for TLC or

the Department testified that Manasota had a contractual relationship with Granite Exclusive, and no such contract was offered into evidence. Thus, the record is bereft of any substantial competent evidence showing any contractual relationship between Manasota and Granite Exclusive.

Exhibit J also contains an invoice dated July 22, 2008 from TLC to Manasota, signed by Leslie Lockett, TLC's co-owner and President (Tr. 46, 58), stating that the installation work had been completed, and asking for the final balance due on the same "Kitchen Granite Countertop Installation" referenced in the "Purchase and Installation Agreement" referenced above. Exhibit J also contains four other and similar "Purchase and Installation Agreement(s)" between TLC and Manasota, all of which on their face require TLC to perform granite counter top installation services at stated prices. None of these agreements mention Granite Exclusive.

Exhibit J was admitted without objection, and corroborates and supplements the hearsay testimony of the Department's investigator related above. Taken together, the investigator's hearsay testimony and Exhibit J can form the basis for a finding of fact that a contractual relationship existed between Manasota and TLC, and, more specifically, that TLC was Manasota's sub-contractor for granite counter top installation in residences that Manasota was building as the general contractor. Section 120.57(1)(c), Fla. Stat. In contrast, neither Leslie Lockett's direct testimony nor any other evidence established any contractual relationship between Manasota and Granite Exclusive. Accordingly, this portion of the Department's third exception is accepted.

A review of the entire record shows that there is no competent substantial evidence in the record to support the finding of fact that TLC and Granite Exclusive

were *both* subcontractors to Manasota. There is, however, competent substantial evidence to support a finding of fact that TLC was a granite top installation sub-contractor to Manasota. The Findings Of Fact contained in Paragraph Six of the Recommended Order are therefore rejected and the following substituted therfor:

Based on the testimony of the Department's investigator and the contents of Department's Exhibit J, and the testimony of Leslie Lockett, it is found that TLC was an installation subcontractor to Manasota, in addition to those services it provided to Manasota as set forth in Paragraph Five, above. However, there is no competent substantial evidence in the record upon which to find that Granite Exclusive was a subcontractor to Manasota. Rather, Granite Exclusive was a sub-subcontractor under TLC's contract with Manasota.

The Department also excepts to the Finding of Fact in Paragraph Six of the Recommended Order wherein the ALJ found that there was no clear and convincing evidence of a contract between TLC and the un-named wholesaler and Granite Exclusive. The Department's exception concentrates on establishing a contractual relationship between only two of those three parties, TLC and Granite Exclusive, to the exclusion of the un-named wholesaler. However, the Department's exception fails to establish a contractual relationship among all three parties referenced by the ALJ in Paragraph Six of the Recommended Order (TLC, the wholesaler, and Granite Exclusive). That failure requires that this portion of the Department's third exception be rejected.

What *is* established by clear and convincing evidence is the relationship between Manasota, TLC, and Granite Exclusive. TLC was a subcontractor to Manasota for the provision and installation of granite counter tops. TLC sub-subcontracted out the installation portion of its subcontract with Manasota to Granite Exclusive. Granite Exclusive was thus was a sub-subcontractor to TLC's contract with Manasota. See,

Section 713.031(29), Fla. Stat., which, in pertinent part, defines a sub-sub-contractor as "a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract." The use of that definition for workers' compensation purpose has been accepted by the courts. *Dodge v. William E. Arnold Company*, 373 So.2d 98 (Fla. 1st DCA 1979). TLC's contracts with Manasota (Department's Exhibit J) are clearly subcontracts that include the installation of granite counter tops, and Leslie Lockett's testimony and her letter of June 5, 2008 to Department investigator Ira Bender (Department's Exhibit I) clearly and convincingly establish that TLC sub-sub-contracted the installation work in its Manasota contracts out to Granite Exclusive.

The Department takes exception to Paragraphs Seven and Twenty-two of the Recommended Order as to the issue of which entity(ies) bore responsibility for assuring that Granite Exclusive's employees were covered by a workers' compensation policy. The record unquestionably establishes that Granite Exclusive had not secured workers' compensation coverage for its employees, and that TLC had made no demand on Granite Exclusive for proof of such coverage when it sublet the installation portion of its subcontract work to Granite Exclusive. Under such circumstances, Rule 69L-6.032 (9), F.A.C., becomes applicable. Said administrative rule provides that when a subcontractor sublets any portion of its subcontract work to another subcontractor, it becomes a contractor for compliance purposes, and must require its chosen subcontractor to provide the proof of workers' compensation coverage required by Section 440.10, (1)(c), Fla. Stat. The record clearly and convincingly shows that TLC did not require any such proof of coverage from Granite Exclusive, and thereby violated

Rule 69L-6.032(9), F.A.C. This rule is in general accord with the Department's exceptions as to Finding of Fact Seven and Conclusion of Law Twenty-two dealing with the responsibility for assuring workers' compensation coverage for Granite Exclusive's employees. Therefore, that exception is accepted, the ALJ's finding in that regard rejected, and the following substituted therefor:

7. Although Manasota is ultimately responsible for coverage in the event its subcontractor(s) fail to provide required coverage, Rule 69L-6.032(9), F.A.C. holds the subcontractor, here TLC, liable for failure to require its subcontractor, Granite Exclusive, to provide the proof of coverage required by Section 440.10(1)(c), Fla. Stat.

A review of the entire record shows no competent substantial evidence to support a finding that Manasota was responsible for requiring Granite Exclusive to provide proof of coverage for its employees. Rather, as demonstrated above, the competent substantial evidence on this question shows that TLC was responsible for requiring that showing from Granite Exclusive.

22. Manasota was a general contractor engaged in the residential construction business. It sub-contracted the provision and installation of granite counter tops in the residences it was building out to TLC. TLC, in turn, sub-subcontracted out the actual installation of those counter tops to Granite Exclusive. TLC had no employees on the job site, and none were involved in the installation work. Granite Exclusive had no workers' compensation coverage in effect for its employees, who were on the job site and who performed the actual installation work specified in TLC's contract with Manasota. Under those circumstances, compliance responsibility, as contrasted with ultimate coverage responsibility, lay with TLC. Rule 69L-6.032(9), F.A.C. TLC failed discharging in that responsibility. Accordingly, TLC, not Manasota violated that administrative rule.

This Conclusion of Law is as or more reasonable than that it replaces.

The Department next excepts to Finding of Fact Nine, wherein the ALJ found that TLC did not supervise the fabrication or installation of the counter tops. An examination of the pertinent testimony shows that the word "supervise" was not used by TLC's witness. Leslie Lockett testified that the fabricator and installer did the actual work, that

TLC was not involved in the installation, that TLC was present at the templating and installation of the counter tops "[T]o make sure that what the customer wants is communicated clearly", and to collect the money. (Tr. 52-53) There is no record testimony or any exhibit showing that TLC directed the work of Granite Exclusive. Thus, there is substantial competent evidence to support the challenged finding, so this exception is rejected.

The Department's last exception is directed to Finding of Fact Eighteen wherein the ALJ found that Leslie Lockett followed the instructions of a Department employee in applying for and receiving an exemption from the workers' compensation coverage requirements. An examination of Leslie Lockett's testimony (Tr. 50-58) shows a somewhat vague description of the encounter between Ms. Lockett and the unnamed Department employee, but ended with Ms. Locket's assertion that Ms. Lockett checked the box on the exemption form that she had been instructed to check by the Department's employee. That testimony was not impeached on cross-examination or rebutted by another witness. Because there is substantial competent evidence in the record to support the challenged finding, this exception is rejected.

In view of the above, the ALJ's Recommendation of dismissal is rejected. A review of the complete record shows by clear and convincing evidence that TLC violated Rule 69L-6.032(9), F.A.C. by failing to require Granite Exclusive to provide proof of workers' compensation coverage for its employees at the time TLC sublet a portion of its subcontract to Granite Exclusive. Accordingly, the Stop Work Order and the Amended Order of Penalty Assessment should be affirmed.

After review of the record, including the transcript of proceedings and admitted exhibits, and being otherwise fully apprised in all material premises,

IT IS HEREBY ORDERED that the Findings of Fact made by the Administrative Law Judge, except noted above, are adopted as the Department's Findings of Fact, and that the Conclusions of Law reached by the Administrative Law Judge, except as noted above, are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is rejected by the Department, and that Petitioner TLC Stoneworks LLC, is directed to pay the sum of $1,218.52 to the Department within thirty days from the date hereof.

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 Petitioners shall cease all business operations unless and until they provide 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, paid the civil penalty imposed herein.

DONE AND ORDERED this 14 day of January 2009.

Brian London
Deputy 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:
Doug Dolan
Thomas Harvey
ALJ Daniel Manry

STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES

In re: TLC Stoneworks, LLC, **DOAH Case No. 08-3545**

_____/

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION'S EXCEPTIONS TO RECOMMENDED ORDER

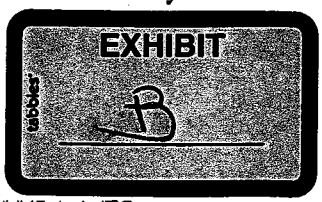
The Department of Financial Services, Division of Workers' Compensation (hereinafter "Department"), pursuant to section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, hereby files the following exceptions to the Recommended Order issued on October 24, 2008, by Administrative Law Judge ("ALJ") Daniel Manry.

The Department is granted narrow authority to reject or modify findings of fact in the Recommended Order.

> Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§ 120.57(1)(l), Fla. Stat. Case law supports this. The Department cannot reject findings of fact made by the ALJ if those findings of fact are supported by competent substantial evidence in the record. *Heifitz v. Department of Business Regulation*, 475 So. 2d 1277 (Fla. 1st DCA 1985); *see also Bay County School Board v. Bryan*, 679 So. 2d 1246 (Fla. 1st DCA 1996)(construing a provision substantially similar to section 120.57(1)(l), Florida Statutes); *Pillsbury v. Department of Health and Rehabilitative Services*, 744 So. 2d 1040 (Fla. 2d DCA 1999)(same).

The Department has broader authority to reject or modify the ALJ's conclusions of law and interpretations of administrative rules but only as to those



> conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule **is as or more reasonable** than that which was rejected or modified.

(Emphasis supplied.) § 120.57(1)(l), Fla. Stat., *see also Barfield v. Dep't of Health, Bd. Of Dentistry*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan and Fla. Dep't of Envt'l Prot.*, 784 So. 2d 1140 (Fla. 2d DCA 2001); *G.E.L. Corp. v. Dep't of Envt'l Prot.*, 875 So. 2d 1257 (Fla. 5th DCA 2004).

Throughout, "Petitioner" refers to TLC Stoneworks, LLC, which challenged the Department's assessed penalty in this case at the Division of Administrative Hearings. "Manasota" refers to Manasota Land Development and Construction Corporation, the contractor in this case.

Exceptions

1. Finding of Fact 5

Finding of Fact 5 is erroneous because it is unsupported by competent, substantial evidence. The ALJ found that "Petitioner was a sales agent, order processor, and a collection and payment processor for Manasota." This interpretation of the evidence ignores the contractual relationship and obligation of Petitioner to Manasota. Petitioner's contractual obligation to Manasota was to install stone countertops. Department's Exh. J. Although the process of installing countertops includes taking "the customer to select granite", assigning projects to fabricators, being "there both at templating and installation" and collecting money,

Petitioner's contracts with Manasota only address the costs of countertop installation and do not itemize clerical functions such as sales calls, order processing, or collection fees. Department's Exh. J; Tr. 51. 52, 53. As a result, there is no competent substantial evidence to support the ALJ's finding of fact.

Furthermore, the ALJ "draws a reasonable inference from the evidence that Manasota collected a sum from the homeowner that was equal to or greater than the price Manasota paid to the Petitioner." There is no competent, substantial evidence in the record to reasonably support such an inference. All contracts in evidence were between Petitioner and Manasota, with no evidence of the amount of money Manasota collected from the homeowner for the installation. Department's Exh. J. This "reasonable inference" is also irrelevant to the conclusions of law and should not be considered.

For the foregoing reasons, Finding of Fact 5 should be rejected.

2. **Finding of Fact 6.**

Finding of Fact 6 is erroneous for several reasons. First, the ALJ found that "Petitioner and installer are subcontractors of Manasota." This is erroneous because there is no evidence to indicate that a contractual relationship existed between Manasota and the installer. The uncontroverted testimony of the Department's investigator suggests the opposite: "they [Manasota] really did not know at that time anything about or Frank did not know anything about the Granite Exclusive. He thought that you folks [Petitioner] were the ones doing the work. Then he found out that you weren't doing the work and that you were doing the jobbing out of the work." Tr. 30. Manasota employs Frank Hartland, who signed a purchase and installation agreement with Petitioner on behalf of Manasota. Department's Exh. J. Frank Hartland also

provided a faxed copy of Leslie Lockett's Certificate of Election to be Exempt From Florida's Workers' Compensation Law to the Department's investigator. Department's Exh. J, D. Leslie Lockett is an employee of Petitioner. Tr. 46. Manasota contracted with Petitioner to install stone countertops and Petitioner "subsequently hired Granite Exclusive", but no evidence indicates that Manasota contracted with Granite Exclusive. Department's Exh. J, I; Tr. 40. Because there is no indication of a contract between Manasota and Granite Exclusive, there is no evidence to support the ALJ's finding that Granite Exclusive was a subcontractor of Manasota.

Secondly, Finding of Fact 6 is erroneous because the evidence does not support the ALJ's finding that the Department's "claim that a written or oral contract existed between Petitioner and the wholesaler and installer is not supported by clear and convincing evidence." Both the hearing transcript and documentary evidence contain references to just such a relationship between Petitioner and fabricators and installers. Department's Exh. I, Tr. 14. Petitioner sent a letter to the Department's investigator indicating "Although we have not received an invoice as yet, TLC Stoneworks LLC anticipates paying Granite Exclusive the amount listed below for fabrication of granite countertop fabrication [sic]." Department's Exh. I. The letter is signed by Petitioner's president, Tom Harvey. Id. The Department's investigator testified, uncontrovertedly, that Anil Akbalut, one of the individuals installing the countertop at the worksite, "was one of the officers with Granite Exclusive who was a subcontractor of TLC Stoneworks." Tr. 14. Petitioner's president, Tom Harvey, admitted that Petitioner hired Granite Exclusive. Tr. 40. During the hearing, Tom Harvey stated that "TLC subsequently hired Granite Exclusive. . ." Tr. 40. Petitioner clarified that it had hired Granite Exclusive after the general contractor hired Petitioner, making Granite Exclusive Petitioner's subcontractor. Tr. 40.

Based on Petitioner's testimony, a wholesaler is a different entity than a fabricator or installer, as Leslie Lockett testified that after granite has been selected by the customer, it is shipped from the wholesaler to the fabricator. Tr. 52. Any relationship between Petitioner and the wholesaler has never been at issue in this proceeding.

Further, Department's Exhibit I consists of Petitioner's business records which indicate payments to Granite Exclusive on pages 31, 32, 34, 35, 37-41, 43, 45 and 50. Based on the testimony of the Department's investigator, the testimony of Tom Harvey and the letter written by Petitioner illustrating its relationship with Granite Exclusive, it is clear that Granite Exclusive was a granite countertop installer. Tr. 14, 15. It is also clear that Granite Exclusive performed such installation on behalf of Petitioner. Department's Exh. I; Tr. 40. The aforementioned letter lists the job site, which corresponds to a job site on an installation agreement between Manasota and Petitioner as "2200 Agate Road, South Cove, FL." Department's Exh. I, J. Manasota's agreement with Petitioner, and Petitioner's subsequent payment to Granite Exclusive clearly illustrate the linear relationship between Manasota, Petitioner and Granite Exclusive. Department's Exh. I, J; Tr. 40. The series of payments made to Granite Exclusive proves the constant and continuous contractual relationship between Granite Exclusive and Petitioner. Department's Exhibit I, Tr. 14, 40.

Manasota was a contractor who hired Petitioner to install stone countertops. Department's Exh. J; Tr. 40. Petitioner was paid for the installation by Manasota. Department's Exh. J. Petitioner met with the customer, figured the quantity of stone needed, what the objectives were, wrote an agreement and took the customer to select granite. Tr. 51. Petitioner then subcontracted fabrication and installation to another subcontractor. Tr. 53. Petitioner paid

this subcontractor or subcontractors for fabrication and installation. Exh. I. When the Department's investigator arrived at the worksite on June 3, 2008, the Petitioner's subcontractor was Granite Exclusive. Tr. 15. No contractual relationship existed between Manasota and Granite Exclusive.

For the foregoing reasons, Finding of Fact 6 should be rejected.

3. Finding of Fact 7 and Conclusion of Law 22.

The ALJ found that "Manasota is responsible for providing workers' compensation coverage by operation of [section 440.10(1)(b), Florida Statutes]." In so doing, the ALJ characterized a conclusion of law as a finding of fact. A finding of fact is "a finding in a factual realm concerning which the agency may not rightfully claim by special insight, and was determinable by ordinary methods of proof." *Fonte v. Dept. of Environmental Reg.* 634 So.2d 663 (Fla. 2nd DCA 1994). Matters infused with overriding policy considerations are left to agency discretion. *Baptist Hospital, Inc. v. Dept. of Health and Rehab. Serv.* 500 So.2d 620 (Fla 1st DCA 1986). The ALJ's finding cannot be a finding of fact because it is impossible to make without considering the status of the parties pursuant to section 440.10(1)(b), Florida Statutes and the policy arguments surrounding the passage and enforcement of the statute. Whether Manasota is responsible for providing workers' compensation coverage by operation of statute is not in a factual realm and is not determinable by ordinary methods of proof, but can only be decided after referring to section 440.10(1), Florida Statutes, and is therefore not a finding of fact, even though it has been labeled so by the ALJ.

A brief recitation of the parties' relationships to one another demonstrates this point. Manasota was a contractor who hired Petitioner to install stone countertops. Department's Exh.

J; Tr. 40. Petitioner was paid for the installation by Manasota. Department's Exh. J. Petitioner met with the customer, figured the quantity of stone needed, what the objectives were, wrote an agreement and took the customer to select granite. Tr. 51. Petitioner then subcontracted fabrication and installation to another subcontractor. Tr. 53. Petitioner paid this subcontractor or subcontractors for fabrication and installation. Exh. I. When the Department's investigator arrived at the worksite on June 3, 2008, the Petitioner's subcontractor was Granite Exclusive. Tr. 15. No contractual relationship existed between Manasota and Granite Exclusive. The assumption of such a contractual relationship is a fundamental flaw in the ALJ's understanding of the relationship between the Manasota, Petitioner, and Granite Exclusive.

Even assuming that Finding of Fact 7 is correct, even if section 440.10(1)(b), Florida Statutes, obligated Manasota to secure the payment of workers' compensation for Petitioner, this provision would not absolve Petitioner of the obligation to secure the payment of workers' compensation on behalf of its employees pursuant to sections 440.02(15)(c)2. and 440.10(1)(a), Florida Statutes. Pursuant to section 440.02(15)(c)2., subcontractors who have not secured the payment of workers' compensation or possess a valid workers' compensation exemption are defined as employees of the contractor. Because Granite Exclusive was being paid by Petitioner as a subcontractor and because Granite Exclusive had not secured the payment of workers' compensation or possess a valid workers' compensation exemption, Granite Exclusive was an employee of Petitioner. Petitioner's contractual relationship with Granite Exclusive was no different than Manasota's relationship with Petitioner. Granite Exclusive had no contractual agreement with Manasota. It's only contractual relationship in this situation was to install stone countertops. Department's Exh. I; Tr. 40. Granite Exclusive effectively assumed the position of

the contractor in the Petitioner/Granite Exclusive relationship because of Manasota, Petitioner and Granite Exclusive, Petitioner was the only party in a contractual relationship with Granite Exclusive and thus became the contractor in the relationship.

In this situation, Petitioner admits that it paid Granite Exclusive to perform work on Petitioner's behalf. Department's Exh. I; Tr. 40. The Department's investigator found that Granite Exclusive had not secured the payment of workers' compensation and that at least one of its employees did not possess a valid exemption. Tr. 16. Pursuant to section 440.02(15)(c)2., Florida Statutes, because Granite Exclusive was being paid by Petitioner as a subcontractor and because Granite Exclusive had not secured the payment of workers' compensation or possess a valid workers' compensation exemption, Granite Exclusive was an employee of Petitioner. Section 440.10(1)(a), Florida Statutes, requires every employer to secure the payment of workers' compensation on behalf of its employees. Because Granite Exclusive was an employee of Petitioner, Petitioner was required to secure the payment of workers' compensation for the employees who worked on the project. For the foregoing reasons, Finding of Fact 7 should be rejected.

Conclusion of Law 22 is incomplete, as it presumes Finding of Fact 7 to be supported by competent and substantial evidence. Conclusion of Law 22 concludes that both Petitioner and the installer are employees of Manasota because neither had secured the payment of workers' compensation and not all employees of either had a current, valid notice of election to be exempt from workers' compensation. Whether or not Petitioner was an employee of Manasota is irrelevant for the purposes Petitioner's responsibility to secure the payment of workers' compensation on behalf of the installer and the resulting workers' compensation compliance

status of Petitioner. Even if Petitioner and installer were both employees of Manasota, Petitioner would still be required to secure the payment of workers' compensation due to the applicability to sections 440.10(1)(a) and 440.02(15)(c)2., Florida Statutes. This conclusion is as, or more reasonable, than the conclusion reached by the ALJ.

If Conclusion of Law 22 were upheld, the resulting decision would run counter to sections of 440.10(1)(a) and 440.02(15)(c)2., Florida Statutes, by eliminating the legislature's definition of an employee and the employer's ensuing liability for securing the payment of workers' compensation on the employee's behalf. Should the ALJ's interpretation of the relationship between Manasota, Petitioner and Granite Exclusive be upheld, the longstanding contractor and subcontractor relationship as established pursuant to chapter 440, Florida Statutes, would be eviscerated. As a result, many subcontractors would not be required to secure the payment of workers' compensation on behalf of themselves or their employees, since they would no longer be an "employer" for the purposes of workers' compensation. This would run directly counter to the legislature's intent of requiring all employers to secure the payment of workers' compensation so as to ensure that all employees will receive benefits if injured. Every subcontractor of every party would become the employee of the contractor and the ALJ would have converted vertical contractual relationships to horizontal contractual relationships, placing all subcontractors and subcontractors of subcontractors on the same level while simultaneously removing the obligation of subcontractors to secure the payment of workers' compensation as employers.

4. Finding of Fact 9.

In Finding of Fact 9, the ALJ found that Petitioner did not supervise the fabrication or installation of the countertop. This statement is directly controverted by the Petitioner's testimony and is therefore not supported by competent and substantial evidence. Petitioner stated "part of the sales program is that we [Petitioner] are there both at templating and installation", "representing the customer." Tr. 53. Because the ALJ's finding of fact is clearly contrary to the testimony, it is not supported by competent and substantial evidence and should not be considered. For the foregoing reason, Finding of Fact 9 should be rejected.

5. Finding of Fact 18.

The ALJ found that in the course of completing her application for an exemption from workers' compensation, Leslie Lockett followed the instructions from the agency employee who issued the certificate regarding classification of the scope of business or trade. This statement is not supported by competent and substantial evidence. Upon direct examination, Ms. Lockett testified that she explained Petitioner's scope of employment to the employee at the Sarasota office of the Division of Workers' Compensation. Tr. 54. Ms. Lockett herself testified that the employee did not know what classification code should have been assigned. Tr. 56. There is nothing in the record which indicates that any employee of the Division of Workers' Compensation advised Ms. Lockett on the classification of the scope of business or trade on her application for exemption from workers' compensation. In addition, Ms. Lockett's own testimony is contrary to this finding of fact. Tr. 56. Therefore, there is no indication that Ms. Lockett followed the instruction of an agency employee regarding classification of the scope of business or trade when she was applying for an exemption from workers' compensation.

Because there is no competent, substantial evidence to support this finding of fact, it should not be considered. Thus, Finding of Fact 18 should be rejected.

The Division thus requests that: 1) the first and third sentences of Finding of Fact 5 be stricken from the Recommended Order; 2) the first and third sentences of Finding of Fact 6 be stricken from the Recommended Order; 3) the last sentence of Finding of Fact 7 be stricken from the Recommended Order; 4) the last sentence of Finding of Fact 9 be stricken from the Recommended Order; 5) the first sentence of Finding of Fact18 be stricken from the Recommended Order; and 6) Conclusion of Law 22 be made consistent with these exceptions, specifically that: a) the Department properly interpreted sections 440.02(15)(b), 440.02(15)(c)(2), 440.02(16)(a), 440.02(17)(a)2., 440.10(1)(a), 440.107(d)(1), and 440.107(3)(g), Florida Statutes, and Rules 69L-6.021, 69L-6.030(6), Florida Administrative Code in issuing the Stop-Work Order and Order of Penalty Assessment to Petitioner, and assessing a penalty based on Petitioner assuming the role of an employer of the unsecured employees of Granite Exclusive.

The Department thus recommends that a Final Order consistent with these exceptions be issued wherein the Stop-Work Order and Amended Order of Penalty Assessment issued to Petitioner are affirmed.

These exceptions do not require the agency to reweigh the evidence utilized by the ALJ nor is it a reargument of the Division's case.

WHEREFORE, it is the Division's recommendation that the Stop-Work Order and Order of Penalty Assessment and Amended Order of Penalty Assessment should be affirmed based on the foregoing exceptions.

These Exceptions to Recommended Order are respectfully submitted, this 10 day of November, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the persons stated below, by the method stated below, on this 10 day of November, 2008.

Douglas D. Dolan

Copies served by U.S. Mail to:

Thomas Harvey
TLC Stoneworks, LLC
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Sarasota, Florida 34243