



REPRESENTING  
**ALEX SINK**  
CHIEF FINANCIAL OFFICER  
STATE OF FLORIDA

**FILED FILED**

2009 FEB 25 FEB 23 2009  
A 10:16

Chief Financial Officer

Docketed by: 

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

IN THE MATTER OF:

MIKE HILL CONSTRUCTION, INC.  
\_\_\_\_\_ /

000582

### FINAL ORDER

This cause came on for consideration of, and final agency action on, the Recommended Order filed on December 15, 2008 by Administrative Law Judge (ALJ) Harry L. Hooper after a formal hearing conducted on October 21, 2008. The Department of Financial Services, Division of Workers' Compensation (division), timely filed exceptions to that Recommended Order. Mike Hill Construction, Inc., (Hill) did not file exceptions or a response to the division's exceptions. The Recommended Order, the transcript of proceedings, the admitted exhibits, the exceptions, 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 focuses on Paragraphs 12-15 of the Recommended Order, and contends that the ALJ erred by deciding matters not put at issue by Hill's petition for a hearing. The division misapprehends the law regarding its burden to prove its allegations. Unless the petition for an administrative hearing admits the fact allegations made by the division in its charging document, the division labors under the burden of having to prove, by clear and convincing evidence, its allegations at the final hearing. *Department of Banking and Finance, Division of Securities and Investor*

*Protection v. Osborne Stern, Inc.*, 670 So.2d 932 (Fla. 1996). This burden may be successfully carried through pre-hearing discovery, or by evidence adduced for the first time at the final hearing. The Respondent in these matters does not carry any such burden unless and until the division presents *prima facie* proof of its allegations, at which time the burden shifts to the Respondent to present evidence countering the division's *prima facie* case. Here, the division simply failed to prove certain of its allegations regarding the employment status of certain individuals. Indeed, the division's investigator, and sole eye-witness to the alleged unlawful behavior by the Respondent Hill, candidly admitted, under examination by the ALJ, that he did not have the documentary or other evidence needed to prove that either Fred Atkins or Darrell Miller were Hill's employees. Similarly, the division failed to present evidence establishing that Ashley's Top Shop was a subcontractor to Hill. (Tr. 45-50, 60-62). In his Recommended Order, the ALJ correctly discounted the portion of the penalty the division attributed to those entities. There is competent substantial evidence in the record to support the challenged Findings of Fact. Accordingly, the division's first exception is rejected.

The division's second exception is directed to the ALJ's calculation of the penalty amount specified in Paragraph 16 of the Recommended Order, contending that the minimum statutory penalty of \$1,000 should have been assessed rather than the \$660.72 found by the ALJ. The division is correct. Section 440.107(7)(d)1, Fla. Stat., prescribes a minimum penalty of \$1,000 for a failure to procure the mandated coverage. Thus, there is not, and cannot be, any competent substantial evidence in the record to support the challenged penalty amount. The division's exception is accepted.

Accordingly, after a review of the entire record, the figure \$660.72 is rejected, and the figure \$1,000 is substituted therefor in Paragraph 16 of the Recommended Order.

The division's third exception similarly takes issue with the penalty of \$660.72 recommended by the ALJ. For the reasons stated in the ruling on the division's second exception, above, the third exception is accepted, and the recommended penalty amount is amended to \$1,000.

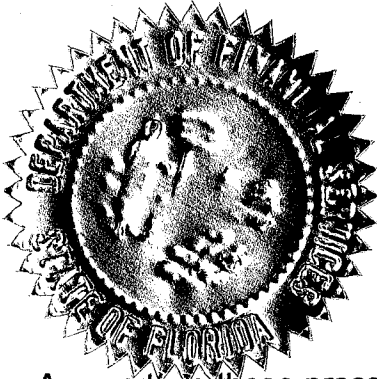
In view of the foregoing,

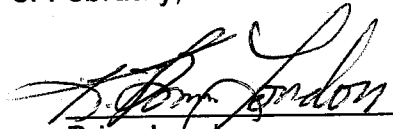
IT IS HEREBY ORDERED that, except as noted above, the Findings of Fact made by the Administrative Law Judge are adopted as the Department's Findings of Fact, and that the Conclusions of Law reached by the Administrative Law Judge are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is amended by the Department, and that Mike Hill Construction, Inc. is directed to pay the sum of \$1,000 to the Department within thirty days from the date hereof.

IT IS HEREBY FURTHER ORDERED that the Order of Penalty Assessment and the Stop Work Order entered by the Division of Workers' Compensation is amended as noted and affirmed as amended, and that Mike Hill Construction, Inc., 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 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.



  
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 Harry L. Hooper  
Douglas Dolan  
Justin Faulkner  
Mike Hill Construction, Inc.