

FILED

10 FEB 26 PM 1:31

DIVISION OF
ADMINISTRATIVE
HEARINGS



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

FEB 22 2010

Docketed by 

IN THE MATTER OF:

RON'S CUSTOM SCREENING, INC.

Case No. 08-292-D7-09-WC

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 November 24, 2009, after a formal hearing conducted on September 18, 2009, pursuant to Section 120.57(1), Florida Statutes. Exceptions were timely filed by the Division of Workers' Compensation, and by Ron's Custom Screening, Inc.

RULINGS ON THE DIVISION'S EXCEPTIONS

The Division's first exemption is directed to Finding of Fact No.6. The Division contends that said finding is a Conclusion of Law rather than a Finding of Fact, and that it was interjected by the ALJ after the hearing, thus depriving the Division of an opportunity to refute the same. The exception is not well taken. The record clearly shows that the Division and the Respondent differed as to whether certain stipulated sums of cash payments to the Respondent's employees should be determined to be payroll or reimbursed business expenses. The only stipulation regarding those cash payments was to the total amount of those payments, not to their nature or their effect on the Respondent's liability. If determined to be payroll, the cash payments would increase the Respondent's liability and applicable penalty. If determined to be

reimbursements for business expenses they would not increase the Respondent's liability and applicable penalty. After hearing disputed fact testimony on that subject, the ALJ found that the Division's evidence did not clearly and convincingly prove those cash payments to be payroll. Contrary to the Division's assertions, that determination is a factual, not a legal, determination. Had it been a legal determination, there would have been no need for any disputatious testimony on the subject. It is the function of an ALJ to consider all the evidence presented and resolve all conflicts therein. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985). That is precisely what the ALJ did in this regard, although reasonable minds could differ with the ALJ's weighing of the facts, there is competent substantial evidence to support his finding. Moreover, even if determined to be a Conclusion of Law, there is substantial competent evidence to support that conclusion. Accordingly, this exception is rejected.

The Division's second exception takes issue with Finding of Fact No. 7, which the Division contends is irrelevant, constitutes a Conclusion of Law rather than a Finding of Fact, and interjects a fact issue after the close of the hearing. This exception is materially indistinguishable from the exception to Finding of Fact No.6. For the same reasons expressed therein, this exception is also rejected.

The Division takes exception to Finding of Fact No. 8, largely on the same basis it takes exception to Findings of Fact Nos. 6 and 7, except that it does not here claim the interjection of a fact issue after the closing of the hearing. This exception seems to overlook the *de novo nature* of formal administrative proceedings where the ALJ is not

restricted to the evidence presented to the Division beforehand. *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977). For the aforesaid reasons, this exception is also rejected.

The Division's fourth exception contends that Finding of Fact No. 9 is also a Conclusion of Law. Again, this exception is mistaken. The question resolved in each of the challenged Findings of Fact is whether certain cash payments to employees were for payroll or business expense reimbursement purposes. The ALJ took evidence on the question, and resolved the conflicts therein by deciding that the evidence did not clearly and convincingly show that those cash payments were for payroll. That is an ALJ's province. *Walker v. Board of Professional Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Dunham v. Highlands County School Board*, 652 So.2d 894 (Fla. 2nd DCA 1995). As there were only two possible categories for those cash payments to fall into, they defaulted into the business expense reimbursement category so that they were not appropriate for inclusion into penalty calculations. Those are all factual determinations that the ALJ made based on conflicting evidence, and where he was the sole arbiter of the credibility of that evidence. *Bejarano v. State, Department of Education, Division of Vocational Rehabilitation*, 901 So.2d 891 (Fla. 4th DCA 2005) Even noting the significant evidentiary conflicts, there is substantial competent evidence in the record to support the challenged finding. Accordingly, this exception is rejected.

The Division takes exception to Conclusion of Law No. 16, on the same basis that it takes exception to Finding of Fact No. 9. For the same reason stated in rejecting the exception to Finding of Fact No. 9, this exception is rejected.

RULINGS ON THE RESPONDENT'S EXCEPTIONS

The Respondent, Ron's Custom Screenings, Inc., takes exceptions to the Order, but does not clearly identify the disputed portion of the Recommended Order by page or paragraph, does not state the legal basis for the exceptions, and does not include specific and appropriate citations to the record. Therefore, the "exceptions" need not be ruled upon. Section 120.57(1)(k), Fla. Stat.

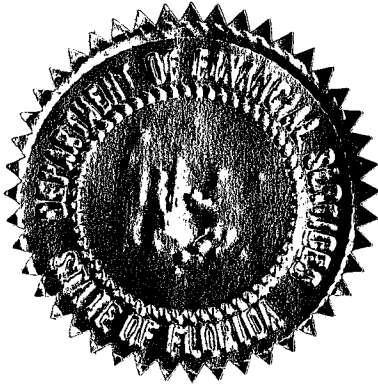
Having considered the testimony adduced at hearing, the admitted exhibits, the Division's exceptions, and applicable law,

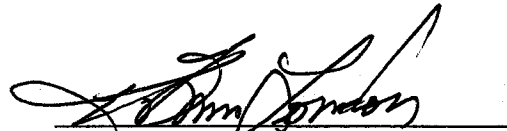
IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law set forth in the Recommended Order are adopted in full as the Department's Findings of Fact and Conclusions of Law in this matter, and that Ron's Custom Screenings, Inc., shall pay a fine in the amount of \$13,609.94 to the Division within thirty (30) days of this Final Order.

IT IS HEREBY FURTHER ORDERED that the Stop-Work Order and Order of Penalty Assessment issued by the Division of Workers' Compensation issued against Ron's Custom Screenings, Inc., as amended herein, is affirmed. Ron's Custom Screenings, 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 in the amount of \$13,609.94 to the Department.

DONE AND ORDERED this 22nd day of February, 2010.




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:

Ludwig J. Abruzzo
5425 Park Central Court
Naples, Fl. 34109

Kristian E. Dunn
Division of Workers' Compensation
200 E. Gaines Street
Tallahassee, Fl. 32399

ALJ Daniel Manry
1230 Apalachee Parkway
Tallahassee, Fl. 32399

Scenario B

Carlos Rodriguez	12/1/2005	600.00	345.60
Chuck Freeman	11/4/2005	3,400.00	58.65
Cynthia Trapp	11/25/2005-12/01/2005	930.00	8.93
Greg Noah	12/1/2005	500.00	288.00
Jose Rodriguez	12/1/2005	2,500.00	1,440.00
Melvin Reyes	12/1/2005	500.00	288.00
Carlos Gonzalez	12/22/2005	1,550.00	816.54
Carolyn Freeman	2/27/2006	1,818.00	15.81
Chuck Freeman	1/13/2006	148,400.00	2,226.00
Cindy Trapp	01/01/2006-12/28/2006	3,220.00	28.02
Greg Noah	12/22/2006	1,000.00	526.80
Joel Palomino	12/1/2006	1,800.00	948.24
Jose Rodriguez	10/27/2006	700.00	368.76
Unknown (Bonus)	12/22/2006	3,000.00	1,580.40
Carolyn Freeman	12/14/2007	184.00	1.32
Chuck Freeman	02/02/2007-10/26/2007	147,522.00	1,903.04
Henry Schwan	8/6/2007	500.00	207.83
Rick Radcliff	9/19/2007	2,000.00	831.30
Sue Freeman	3/15/2007	2,000.00	14.40
Toni Maas	7/25/2007	4,300.00	30.96
Carolyn Freeman	05/08/2008-10/03/2008	7,708.00	42.78
Chuck Freeman	01/01/2008-10/03/2008	60,360.00	579.45
Cynthia Trapp	06/13/2008-6/20/2008	1,200.00	6.66
Greg Nealy	6/13/2008	400.00	120.24
Greg Nash	6/20/2008	300.00	90.18
Jose Rodriguez	6/4/2008	1,250.00	375.75
Kayla Lynn	6/20/2008	1,700.00	9.44
Patrick Freeman	3/4/2008	1,200.00	360.72
Alberto Espinoza Chavez	10/27/2008	159.86	48.06
Michael Matesz	10/27/2008	159.86	48.06
			13,609.94