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DIVISION OF ADMINISTRATIVE HEARINGS

REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

000737

FILED

JUN 29 2010

Chief Financial Officer
Docketed by: YBB

IN THE MATTER OF:

Case No. 09-048-1A-WC

COUNTYWIDE SIDING
AND WINDOWS, INC.
_____/

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order filed on April 2, 2010 in this cause by Administrative Law Judge (ALJ) Diane Cleavinger, after formal hearing held on January 7, 2010 pursuant to Section 120.57(1), Fla. Stat. The Division of Workers' Compensation (the division) timely filed exceptions to the Recommended Order. Respondent Countryside Siding and Windows, Inc. (Countryside) did not file exceptions. The transcript of proceedings, admitted exhibits, the division's exceptions, and applicable law have all been considered in the promulgation of this Final Order.

RULINGS ON THE DIVISION'S EXCEPTIONS

The division first takes exception to the last sentence in Finding of Fact No. 4, wherein the ALJ found that the evidence, while not specific, suggested that Countywide paid its leased employees bonuses and sometimes loaned them money. The division argues that this finding should be modified to state that the evidence clearly and convincingly established that Countywide paid bonuses to its leased employees and that said bonuses were properly included in the division's penalty calculations as payroll.

This exception is a clear invitation to re-weigh the evidence and find it clear and convincing where the ALJ did not. It is well established that agencies cannot re-weigh evidence so as to come to desired results. *See, e.g., Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999); *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Holmes v. Turlington*, 480 So.2d 150 (Fla. 1st DCA 1985).

This exception also contends that there was competent substantial evidence in the record to support a finding that the lease through which the employees in question were covered for workers' compensation purposes had been cancelled prior to issuance of the stop work order. However, an examination of the record shows that all such "evidence" was uncorroborated hearsay. The lease contract was never introduced into evidence. The letter purportedly cancelling that lease contract was never introduced into evidence. Ms. Creed's comment to the department's investigator, related at the hearing by the investigator and not Ms. Creed, that she had "just received a letter that day that ELS had terminated their coverage" (Tr. 14-15) was not only hearsay testimony by the investigator, but was based on Ms. Creed's purported statement to the investigator about that letter, which letter was not introduced into evidence. Ms. Creed gave no testimony about cancellation of the lease contract independent of the non-admitted letter. The investigator's testimony about what Ms. Creed purportedly said was undeniably offered to support the truth of the proposition it advanced. Thus, it was hearsay. *See*, Section 90.801(1)(c), Fla. Stat. No one from the leasing company testified at the hearing or in a deposition. Moreover, there was no testimony in the record indicating at what time "that day" cancellation was effective. If cancellation was

at the end of the day, coverage was still in effect when the stop work order was issued. The investigator's testimony that he "verified" cancellation by calling the leasing company and speaking to an unidentified person there was also hearsay, as was his testimony based on the CCAS database. No one that put the database together testified about that process or its reliability. None of that hearsay was corroborated. In short, the division produced no evidence upon which a finding of fact regarding cancellation of the employee leasing contract could be made.

Finally, as to this exception, the matter of whether an appropriate premium was being charged for coverage, based on bonus payments made directly to the leased employees by Countywide, resulting in an underreporting of payroll, was not, as the ALJ correctly observed, the subject of the hearing. Such an underreporting, if established, would be a matter between the leasing company, Countywide, and the insurance carrier. It would be of concern to the division only in the calculation of an appropriate penalty if lack of coverage had been proved, which it wasn't. Accordingly, this exception is rejected.

The division's next exception is directed to the Finding of Fact in Paragraph Six of the Recommended Order wherein the ALJ found that the lack of introduction of the lease contract left the record bereft of evidence establishing that payments made directly to certain employees by Countywide constituted payroll under the terms of that contract, for which workers' compensation had not been secured. The division, essentially, contends that it was Countywide's burden to prove that workers' compensation had been secured for such payments, and that it failed to do so by not introducing the lease contract into evidence.

First of all, it is not "payments" or "payroll" that are "secured" by workers' compensation premiums, but workers (employees), who are secured against injury by the workers' compensation policy under which premiums are paid to the carrier. Payroll, itself, is not "secured" by any workers' compensation insurance coverage. Payroll comes into play in calculating the appropriate premium to be paid to the carrier because premium is based on a number of factors, including payroll. Payroll also comes into play in penalty calculations because premium is based on payroll and penalty calculations are based on premium. However, as the ALJ observed, understatement of payroll was not a subject of this proceeding. Moreover, for the reasons set forth herein, no penalty is being imposed, so no penalty calculations are necessary.

As to the exception's contention that it was Countywide's burden to raise an affirmative defense about the content of the lease contract, and that it did not properly do so, that contention overlooks the fact that an affirmative defense comes into play only when it is needed to counter something else already in evidence. As the division never introduced the lease contract into evidence, there was nothing in evidence to counter. Thus, no affirmative defense needed to be raised.

Finally, contrary to the division's contentions in this same exception, there is no competent substantial evidence in the record showing that the lease contract had been cancelled prior issuance of the stop work order. See the preceding rejection of that contention. Accordingly, this exception is rejected.

The next exception, directed to the Findings of Fact in Paragraphs 7 and 9 of the Recommended Order, argues that the evidence supporting the division's contention that the lease contract had been cancelled prior to the issuance of the stop work order was

not hearsay. For the reasons explicated in the rejection of the first exception, this exception is rejected.

The division next takes exception to Paragraph 10 of the Findings of Fact. The lynchpin of its argument is that the evidence established that that the lease contract had been terminated prior to the issuance of the stop work order. As explained in the rejection of the first exception, the evidence did not establish that fact. Accordingly, this exception is rejected.

The next exception is directed to Findings of Fact in Paragraph 11 of the Recommended Order, wherein the ALJ made note of documentation not offered into evidence relative to the employment history of the workers in question. The record shows that the ALJ's observations are correct; such documentation was not offered into evidence. Moreover, the ALJ made no finding of fact and reached no conclusion of law based on the absent documentation. Accordingly, this exception is rejected.

The next exception targets Findings of Fact in Paragraph 14 of the Recommended Order. The division again contends the evidence showed that the leasing contract has been cancelled prior to issuance of the stop work order. As demonstrated earlier herein, the evidence did not establish that fact. The division again contends that there was an underreporting of payroll. Again, underreporting of payroll was not the subject of this proceeding, and would be material only to a penalty calculation if non-coverage had been shown, which it wasn't. Accordingly, this exception is rejected.

The last exception is directed to Paragraph 20 of the Recommended Order wherein the ALJ found insufficient evidence to conclude non-compliance with the

coverage requirements of the workers' compensation laws. The division argues that it had proved such non-compliance, by clear and convincing evidence, at the hearing. As shown above, the record does not support that argument. For the reasons aforestated, this exception is rejected.

Therefore, in consideration of all of the above:

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law stated in the Recommended Order are adopted in full as the Departments Findings of Fact and Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that Stop Work Order is cancelled, and the Third Amended Order of Penalty Assessment is dismissed.

DONE AND ORDERED this 29th day of June, 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 Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street Tallahassee, Florida, 32399-0390, and a copy of the same with the appropriate district court of appeal, within thirty (30) days of rendition of this Order. Filing may be accomplished via U.S. Mail, express overnight delivery, or hand delivery. Filing cannot be accomplished by facsimile transmission or electronic mail.