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Chief Financial Officer
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REPRESENTING 2010 AUG 26 A 11: 14
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA
DIVISION OF
ADMINISTRATIVE
HEARINGS

IN THE MATTER OF

CASE NO: 10-018-D4-WC

PAT O'CONNELL PLASTERING, INC.,
_____ /

FINAL ORDER

THIS CAUSE came on before Alex Sink, as Chief Financial Officer, for consideration of and final agency action on a Recommended Order entered by Administrative Law Judge, Linda M. Rigot on June 15, 2010 (attached as Exhibit "A"). The formal hearing was conducted on May 4, 2010, pursuant to Section 120.57(1), Florida Statutes, in Tallahassee, Florida. The Department of Financial Services, Division of Workers' Compensation (the "Department") timely filed exceptions to the Recommended Order. Pat O'Connell Plastering, Inc., ("O'Connell") did not file exceptions. The Recommended Order, the transcript of proceedings, the admitted exhibits, the Department's exceptions, and applicable law have all been considered during the promulgation of this Final Order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

This Final Order first addresses the Department's FOURTH exception to Conclusion of Law, Paragraph 20, as this paragraph involves the primary issue discussed in this Final Order. The Department's exception is well made. The Administrative Law Judge ("ALJ") incorrectly applied Section 440.107(7)(d)1, Florida Statutes, to the facts of this matter.

The Recommended Order contains the following findings of fact: O'Connell was "actively involved in business operations in the State of Florida between December 7, 2009 and

January 14, 2010.” (See, Paragraph 11.) On January 14, 2010, a Department representative found O’Connell “at a home in Ormond Beach plastering a pool in back of that home.” (See, Paragraph 4) O’Connell issued a check for wages during the time it was obligated to obtain workers’ compensation coverage. (See, Paragraph 8) O’Connell did not have workers’ compensation coverage for its officer/employee or an exemption for such coverage between December 7, 2009 and January 14, 2010. (See, Paragraph 15) Based on these findings of fact, the ALJ concluded that, “there is no dispute that Respondent was required to provide workers’ compensation coverage unless its officer/employee had a valid exemption.” (See, Paragraph 18) The ALJ further found that, “Respondent failed to comply with the requirements of Florida’s workers’ compensation laws.” (See, Paragraph 19)

Section 440.107(7)(d)1, Florida Statutes, states that, “the department *shall* assess [a monetary penalty] against any employer who has failed to secure the payment of compensation as required by this chapter.” (Emphasis added.) Because O’Connell failed to comply with workers’ compensation coverage requirements, Section 440.107(7)(d)1 mandates that the Department assess a monetary penalty. In this case, the Department properly assessed the minimum penalty of \$1,000.

Furthermore, in reaching Conclusion of Law, Paragraph 20, the ALJ deviates from the essential requirements of the law. The ALJ construes certain facts to support a conclusion that the Department failed to meet its burden to prove the correctness of the penalty assessment it calculated. (See, Paragraphs 8, 9, and 10 wherein the ALJ examines whether O’Connell issued a check for wages earned during the period in question.) However, the findings of fact in Paragraphs 4, 8, 11, and 15 provide clear and convincing evidence that O’Connell’s business operated between December 7, 2009 and January 14, 2010 without the required coverage.

Therefore, O'Connell was obligated to secure workers' compensation coverage or an exemption from the same during that time. Consequently, the Department properly assessed the monetary penalty under Section 407.107(7)(d)1 against O'Connell for his failure to comply with the workers' compensation statute.

In addition, the ALJ failed to comply with the essential requirements of the law by imposing upon the Department the additional burden of proving that O'Connell willfully intended to violate the workers' compensation statute. (See, Paragraph 15, where the ALJ stated that, "O'Connell's failure to timely renew his exemption arose from neglect rather than from any willful intent to evade Florida's workers' compensation laws."). The Department correctly asserts that it is under a statutory duty to impose a monetary penalty for lack of coverage regardless of O'Connell's intent. Section 440.107 does not require the Department to prove the employer's intent at the time of the violation, nor, does Section 440.107 provide for mitigation from a monetary penalty.

Accordingly, the Department's exception is accepted, and Conclusion of Law, Paragraph 20, is rejected. Because of that rejection, the following Conclusion of Law is substituted for Paragraph 20 which is as or more reasonable than that which is rejected:

"The Department proved that a penalty assessment should be imposed against O'Connell and correctly calculated the applicable penalty for the failure to secure the payment of workers' compensation as required by Section 440.107(7)(d)1, Florida Statutes. The Department's Stop-Work Order and Order of Penalty Assessment of \$1,000 issued January 14, 2010 and Amended Order of Penalty Assessment issued January 19, 2010 is affirmed."

The Department's FIRST exception challenges Finding of Fact, Paragraph 9, of the Recommended Order. The ALJ found that "no evidence was offered as to what the check for

\$25 for labor written to O'Connell was for and whether it was for labor considered to be construction rather than non-construction labor ..." The Department contends that the finding of "no evidence" regarding what the check represented is not supported by competent, substantial evidence. While Paragraph 9 appears inconsistent with the Findings of Fact in Paragraphs 4, 8, and 15 as described above as well as O'Connell's testimony (TR, p. 61), the whole of the exhibits and testimony on record provide the requisite support for the ALJ's finding on this specific point. Therefore, the Department's exception to paragraph 9 is rejected. However, as explained above, in light of the ALJ's conclusion in Paragraph 19 that O'Connell failed to comply with the requirements of Florida's workers' compensation law, the purpose of the \$25 check is ultimately irrelevant to the ultimate issue of the amount of the monetary penalty the Department assessed under Section 440.107(7)(d)1.

The Department's SECOND exception concerns the Finding of Fact in Paragraph 11. The Department challenges the finding that, "the proposed penalty assessment is devoid of a factual basis." The Department's exception is well taken. Findings of fact may not be rejected or modified unless the Agency states with particularity in its final order that the findings were not based upon competent, substantial evidence or that the proceedings on which the findings are based did not comply with the essential requirements of law. §120.57(1)(l), Florida Statutes. A review of the entire record shows that there is no competent substantial evidence in the record to support the ALJ's last sentence of Paragraph 11. As stated above, Paragraphs 4, 8, and 15 of the Recommended Order as well as O'Connell's testimony (TR., p. 61) establish the factual basis for the proposed penalty assessment. Therefore, the last two sentences of Paragraph 11 of the Recommended Order are rejected and replaced with language stating that competent, substantial evidence establishes a factual basis for the proposed penalty assessment against O'Connell.

The Department's THIRD exception challenges Conclusion of Law, Paragraph 17, wherein the ALJ concluded that the Department failed in its burden to prove the appropriate amount of the penalty. Section 440.107(7)(d)1 states that the amount of the penalty is "equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period *or \$1,000, whichever is greater.*" (Emphasis added.) As the ALJ found in Finding of Facts, Paragraph 7, the Department calculated that O'Connell's gross payroll worked out to a penalty rate less than \$1,000. Therefore, the Department assessed the minimum penalty of \$1,000. This conclusion is supported by Conclusion of Law, Paragraph 19, which states that O'Connell "failed to comply with the requirements of Florida's workers' compensation laws." Therefore, the Department's exception to Conclusion of Law, Paragraph 17 is accepted. Accordingly, after a review of the entire record, Paragraph 17 of the Recommended Order is modified to read that the Department proved that the appropriate amount of a penalty of \$1,000. This substituted Conclusion of Law is as or more reasonable than that which was rejected.

The Department's FIFTH exception challenges Conclusion of Law, Paragraph 21, wherein the ALJ found that the Department failed to meet its burden to prove the correctness of its penalty assessment. The Department's argument is well made. The ALJ bases Paragraph 21 on issues regarding the purpose of O'Connell's \$25 check for wages. However, the ALJ also determined in Conclusion of Law, Paragraph 19, that O'Connell "failed to comply with the requirements of Florida's workers' compensation laws." Paragraph 19 is supported by the ALJ's Findings of Fact in Paragraphs 4, 8, and 15. Consequently, Section 440.107(7)(d)1 mandates that the Department assess against the employer a monetary penalty. As explained above

regarding the Department's THIRD exception, the competent, substantial facts establish a penalty of \$1,000.

Therefore, as with the reasons stated in the ruling on the Department's exception to Paragraph 20 above, the Department's FIFTH exception to Paragraph 21 is accepted. The following Conclusion of Law is therefore substituted which is as or more reasonable than the recommended paragraph:

"The Department correctly calculated the applicable penalty against O'Connell for the failure to secure the payment of workers' compensation as required by Section 440.107(7)(d)1, Florida Statutes. The Department's Stop-Work Order and Order of Penalty Assessment of \$1,000 issued January 14, 2010 and Amended Order of Penalty Assessment issued January 19, 2010 is affirmed."

RECOMMENDED PENALTY

The ALJ recommends that no fine be assessed against O'Connell. The Department requests the minimum \$1,000 penalty assessment per Section 440.107(7)(d)1, Florida Statutes.

Section 440.107(7)(d)1 establishes that a monetary penalty shall be assessed against any employer who has failed to secure the payment of compensation as required by Chapter 440, Florida Statutes. Section 440.107(7)(d)1 further states that \$1,000 is the minimum monetary payment for a violation, which, in conjunction with Conclusions of Law Paragraphs 18 and 19, supports the imposition of a penalty in this amount against O'Connell.

Based on the above analysis and a complete review of the record, it is concluded that the Administrative Law Judge's recommendation that the Stop-Work Order, Order of Penalty Assessment, and Amended Order of Penalty Assessment is REJECTED. The Stop-Work Order and the penalty assessment is reinstated to the full amount of \$1,000.00.

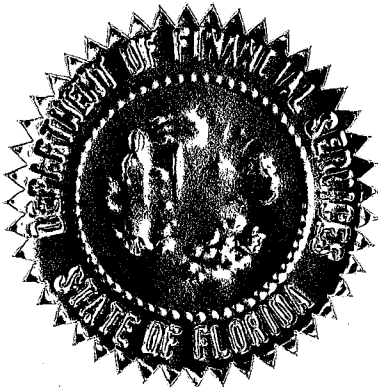
In view of the foregoing,

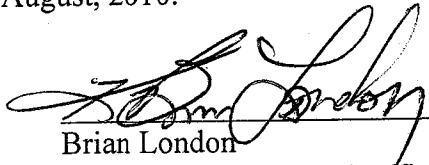
IT IS HEREBY ORDERED that the Findings of Fact and the Conclusions of Law reached by the Administrative Law Judge are ADOPTED as modified and incorporated herein by reference as the Department's Findings of Fact and Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Department's Stop-Work Order and Order of Penalty Assessment of \$1,000 issued January 14, 2010 and Amended Order of Penalty Assessment issued January 19, 2010 is affirmed., and that O'Connell shall cease all business operations unless and until it provides evidence satisfactory to the Division of Workers' Compensation of having complied with the workers' compensation law by securing the necessary workers' compensation insurance coverage for covered employees or obtaining an authorized exception to such coverage.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is REJECTED and a fine of \$1,000 is imposed pursuant to Section 440.107(7)(a), Florida Statutes.

DONE AND ORDERED this 24th day of August, 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:

ALJ Linda M. Rigot
Justin Faulkner
Holly Werkema
Patrick E. O'Connell