STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FICURMA, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-3779
	)	
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 10, 2011, in Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donovan A. Roper, Esquire
Roper & Roper, P.A.
116 North Park Avenue
Apopka, Florida 32703

For Respondent: Samuel Dean Bunton, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUES

The issues in this case are as follows:

(1) Whether a refund request submitted by Petitioner, FICURMA, Inc. (Petitioner or FICURMA), to Respondent, Department of Financial Services, Division of Workers' Compensation (Respondent or Department), on January 21, 2010, requesting a refund of assessments paid during 2005 and 2006, is barred pursuant to section 215.26(2), Florida Statutes (2009),[1/] because the refund request was not submitted within three years after the assessment payments were made.

(2) Whether the doctrine of equitable estoppel can be raised to allow a refund that would otherwise be time-barred by section 215.26(2), and, if so, whether the facts show the sort of rare circumstances that would justify application of that doctrine against a state agency.

PRELIMINARY STATEMENT

The Department notified FICURMA in November 2004 that it was required to pay assessments for the Special Disability Trust Fund (SDTF) and for the Workers' Compensation Administrative Trust Fund (WCATF). FICURMA paid those quarterly assessments, beginning in 2005, until sometime in 2009, when the Department determined that FICURMA was not subject to those assessments after all.

In 2009, when the Department informed FICURMA that it no longer had to pay the SDTF and WCATF assessments, the Department discussed with FICURMA how to go about requesting refunds of the assessments, and the Department later sent FICURMA the forms for applying for refunds pursuant to section 215.26. The Department informed FICURMA that section 215.26(2) could pose a problem with respect to refund requests of payments made more than three years ago and, therefore, suggested that FICURMA submit separate refund requests for its payments made within the last three years and for payments made more than three years ago. FICURMA did so and, also, broke down its refund requests by the separate assessment types. Accordingly, FICURMA completed and submitted four different refund requests dated January 20, 2010, filed with the Department on January 21, 2010: one for SDTF assessments paid in 2005 and 2006; one for WCATF assessments paid in 2005 and 2006; one for SDTF assessments paid in 2007-2009; and one for WCATF assessments paid in 2007-2009.

The Department processed the refund requests and approved and authorized warrants, which were issued to refund the SDTF and the WCATF assessments paid in 2007-2009, totaling $394,574.74. However, by letter dated May 12, 2010, the Department issued a Notice of Intent to Deny Applications for Refund for the SDTF and WCATF assessments paid in 2005 and 2006, a total of $351,772.02. The Department's notice asserted that

the refunds were barred by section 215.26(2), because the refund requests were not made within three years of the payments. The notice included a clear point of entry to request an administrative hearing.

FICURMA timely filed its petition for an administrative hearing involving disputed issues of material fact. The Department transmitted the petition to the Division of Administrative Hearings (DOAH) and requested DOAH to assign an Administrative Law Judge to conduct the hearing requested by Petitioner.

The final hearing was initially scheduled for September 22, 2010. On September 1, 2010, the Department filed a motion to relinquish jurisdiction claiming that the issues presented in the petition were not disputed issues of material fact. Petitioner opposed the motion. By Order dated September 10, 2010, the undersigned denied the Department's motion. Thereafter, two unopposed motions for continuance were filed, the first by Petitioner and the next by Respondent. Both were granted, and the final hearing was ultimately rescheduled for March 10, 2011.

The parties filed separate unilateral prehearing statements, but represented that a comparison of the separate statements showed many actual joint stipulations. Upon request, the parties presented a cross-reference summary of those

paragraphs which are identical and, thus, could be treated as joint stipulations. The parties' joint stipulations are incorporated in the Findings of Fact below to the extent relevant.

At the final hearing, the parties offered their Joint Exhibits 1 through 24, which were received into evidence. Petitioner presented the testimony of Benjamin Donatelli, executive director of FICURMA; and David Hershel, managing attorney for the Department's Workers' Compensation General Issues Section, Division of Legal Services. Petitioner's Exhibits 25 through 38 were received into evidence, subject to some corrections made on the record to Exhibits 26 through 28 and 29 through 31.[2/] Respondent presented the testimony of Eric Lloyd, program administrator of the Division of Workers' Compensation, Office of Medical Services, since June 2009 and a former manager of the SDTF. Respondent's Exhibits 1 through 6 were received into evidence.

The one-volume Transcript of the final hearing was filed on March 25, 2011. The parties initially requested 30 days after the transcript was filed in which to file their proposed recommended orders. Petitioner's subsequent two unopposed motions for extension of that deadline were granted, and the deadline was extended to May 31, 2011. Both parties timely filed Proposed Recommended Orders, which have been considered by

the undersigned in the preparation of this Recommended Order. Additional filings by Petitioner, however, have not been considered.[3/]

FINDINGS OF FACT

1. The Department is the agency that has been statutorily designated as the administrator of the SDTF (§ 440.49, Fla. Stat.) and as the administrator of the WCATF (§ 440.51).

2. The Department's administration of these two funds includes making the requisite assessments to the entities required to pay the assessments and ensuring payment by the assessable entities for deposit into the state Treasury. §§ 440.49, 440.51.

3. As the state agency with the responsibility for the collection of these assessments, the Department is charged with the authority to accept applications for refunds pursuant to section 215.26, for overpayments of assessments, for payment of assessments when none are due, or for payments of assessments made in error. The Department is responsible for making determinations on applications for refunds of SDTF and WCATF assessments.

4. "FICURMA" stands for Florida Independent Colleges and Universities Risk Management Association. FICURMA, Inc., is an independent educational institution self-insurance fund that was established in December 2003, pursuant to the authority of

section 624.4623, Florida Statutes (2003). FICURMA was approved as a Florida workers' compensation self-insurer meeting the requirements of section 624.4623, effective December 10, 2003. FICURMA's members self-insure their workers' compensation claims under chapter 440.

5. On November 16, 2004, Evelyn Vlasak, the assessments coordinator for the SDTF and WCATF assessments, wrote to Ben Donatelli, FICURMA's executive director, to advise that the assessments unit of the Department's Division of Workers' Compensation (Division) received notice that FICURMA had been approved to write workers' compensation insurance in Florida, effective December 10, 2003. Therefore, Ms. Vlasak informed FICURMA that it was required to register with the Division; it was required to pay assessments to the WCATF and SDTF, calculated on the basis of premiums paid to FICURMA by its members; and it was required to submit quarterly premium reports to the Division. Ms. Vlasak enclosed quarterly report forms for FICURMA to catch up on its premium reports for the last quarter of 2003 and the first three quarters of 2004. Ms. Vlasak also enclosed Bulletin DFS-03-002, dated June 26, 2003, which attached two Orders Setting Assessment Rates, one for the WCATF for calendar year 2004, and the other for the SDTF for fiscal year 2003-2004. The two orders, issued by E. Tanner Holloman, then-director of the Division, included a Notice of Rights.

This notice advised of the right to administrative review of the agency action pursuant to sections 120.569 and 120.57, Florida Statutes, by filing a petition for hearing within 21 days of receipt of the orders. In bold, the Notice of Rights concluded with the following warning: "FAILURE TO FILE A PETITION WITHIN THE TWENTY-ONE (21) DAYS CONSTITUTES A WAIVER OF YOUR RIGHT TO ADMINISTRATIVE REVIEW OF THIS ACTION."

6. Mr. Donatelli testified that Ms. Vlasak's letter came as a surprise, because he and the others involved in lobbying for the passage of section 624.4623 and setting up FICURMA, pursuant to the new law, believed that FICURMA was not subject to SDTF and WCATF assessments. Mr. Donatelli said that he called Ms. Vlasak to ask why FICURMA had to pay when according to their interpretation of the statute authorizing FICURMA to be created, FICURMA was not subject to the assessment requirements.

7. Mr. Donatelli said that in response to his question, Ms. Vlasak stated that it was her interpretation of the statute that FICURMA was required to pay assessments. She stated that she would have that confirmed by "Legal," but that FICURMA should be prepared to start paying in order to avoid penalties for late payment.

8. Mr. Donatelli testified that "obviously with her response, then we started to think hard about reading [section 624.4623] again, and we did, and didn't see any reason that we

needed to pay this." But he also testified that when Ms. Vlasak said she would confirm her interpretation with the legal department, he began calculating what the assessments might cost, because they had not been collecting funds to cover the assessments from its members, since they did not know they had to pay the assessments.

9. The next communication received by FICURMA from Ms. Vlasak came by way of a December 20, 2004, memorandum to all carriers and self-insurance funds, providing information to assist with computation of premiums to be reported for the fourth quarter 2004 SDTF and WCATF assessments. At around the same time, FICURMA received Bulletin DFS 04-044B. This bulletin attached copies of the two Orders Setting Assessment Rates signed by Tom Gallagher, then-Chief Financial Officer. One order was for the WCATF for calendar year 2005 and the other order was for the SDTF for fiscal year 2004-2005. As with the previous bulletin attaching two orders for the prior year, this mailing included a Notice of Rights, which provided a clear point of entry to contest the action by filing a petition for administrative hearing within 21 days of receipt.

10. Mr. Donatelli acknowledged that the two Holloman orders and the two Gallagher orders all ordered FICURMA to pay the SDTF and WCATF assessments. Mr. Donatelli testified that after reviewing the second set of orders received, FICURMA did

not believe it had any alternative but to pay the assessments. However, because there was a reference to some "legal stuff," he "asked the legals" to take a second look, because this was not an insignificant payment. In fact, the calculation of assessments to catch up for the prior quarters of missed payments was more than $104,000.

11. When asked why, if he believed FICURMA was not assessable, Mr. Donatelli did not direct "the legals" to file a petition for an administrative hearing on FICURMA's behalf to contest the assessment rate orders, Mr. Donatelli's response was: "Basically, it was our respect of the opinion of the Office Of Insurance Regulations [sic: Division of Workers' Compensation] that said that we had to pay that. I mean--we were basically trying to--being good citizens."

12. Accordingly, FICURMA chose to not challenge the assessments, or otherwise object to paying the assessments. Instead, FICURMA transmitted payment on December 26, 2004, for SDTF and WCATF assessments calculated to be due for the fourth quarter of 2003 and the first three quarters of 2004, totaling $104,282.11. Neither this payment, nor subsequent FICURMA assessment payments were made "under protest."

13. Mr. Donatelli's question to Ms. Vlasak sometime in late 2004--whether FICURMA was assessable under either section 440.49 (for the SDTF) or section 440.51 (for the

WCATF)--was never put in writing. However, FICURMA's general counsel wrote to Ms. Vlasak on January 7, 2005, to raise a different assessment question: "whether [FICURMA] is assessed and therefore required to pay into the [SDTF] as it was established within the past year and as such none of the group's claims would be eligible for reimbursement from the Fund." This question, limited to the SDTF assessments, was not based on the status of FICURMA as an entity authorized by section 624.4623 but, rather, was based on the fact that the SDTF had been closed for certain new claims before FICURMA was established. After no response was received, FICURMA's general counsel wrote a second time on February 14, 2005, attaching another copy of the January 7, 2005, letter. Neither of these letters asked about Mr. Donatelli's prior telephonic inquiry regarding whether FICURMA was assessable at all because of its status as an entity formed under section 624.4623.

14. Ms. Vlasak responded in writing after the second written inquiry by FICURMA's general counsel that addressed the propriety of the SDTF assessments. Ms. Vlasak stated the Department's position that assessments were to continue to all assessable entities, even though the SDTF was being prospectively abolished. Ms. Vlasak concluded, therefore, that FICURMA "is not exempt" from the SDTF assessments. Ms. Vlasak's letter dated February 16, 200[5],[4/] responded only to the written

inquiry in the January 7, 2005, letter and February 14, 2005, reminder letter and, thus, addressed only the limited question about SDTF assessments.

15. Thereafter, until 2009, FICURMA had no further telephonic or written communications with the Division about FICURMA's assessability. Instead, FICURMA fell into the pattern of making quarterly premium reports and assessment payments, pursuant to notice by the Department. In total, FICURMA's payments received by the Department in 2005 and 2006 add up to $288,607.32 in SDTF assessments and $63,164.70 in WCATF assessments. The breakdown of assessment payments credited by quarter is as follows:

2003, Q 4 (received 1-11-05) SDTF: $7,652.36 WCATF: $2,962.75	2004, Q 1 (received 1-11-05) SDTF: $22,957.34 WCATF: $ 7,618.49
2004, Q 2 (received 1-11-05) SDTF: $23,685.39 WCATF: $ 7,860.20	2004, Q 3 (received 1-11-05) SDTF: $23,685.39 WCATF: $ 7,860.19
2004, Q 4 (received 2-10-05) SDTF: $25,543.10 WCATF: $ 8,476.00	2005, Q 1 (received 5-2-05) SDTF: $29,258.54 WCATF: $ 4,854.45
2005, Q 2 (received 7-29-05) SDTF: $29,258.54 WCATF: $ 4,854.45	2005, Q 3 (received 11-1-05) SDTF: $29,350.54 WCATF: $ 4,854.85

2005, Q 4 (received 2-2-06) SDTF: $27,193.93 WCATF: $ 4,527.53	2006, Q 1 (received 5-1-06) SDTF: $23,340.73 WCATF: $ 3,098.33
2006, Q 2 (received 7-26-06) SDTF: $23,340.73 WCATF: $ 3,098.33	2006, Q 3 (received 10-27-06) SDTF: $23,340.73 WCATF: $ 3,098.33

16. In 2007, 2008, and part of 2009, FICURMA continued these quarterly payments pursuant to notice by the Department, paying quarterly assessments to the SDTF totaling $363,441.86 and to the WCATF totaling $31,132.88.

17. In the 2009 legislative session, the adoption of a new law authorizing another type of self-insurance fund contained language that caused Ms. Vlasak to question whether certain other self-insurance funds authorized under different statutes were assessable under sections 440.49 and 440.51.

18. The 2009 law, codified in section 624.4626, Florida Statutes (2009), specifically provided that a "self-insurance fund that meets the requirements of this section is subject to the assessments set forth in ss. 440.49(9), 440.51(1), and 624.4621(7), but is not subject to any other provision of s. 624.4621 and is not required to file any report with the department under s. 440.38(2)(b) which is uniquely required of

group self-insurer funds qualified under s. 624.4621." (Emphasis added).

19. In contrast, section 624.4623, the statute under which FICURMA was formed, contained the following language: "An independent education institution self-insurance fund that meets the requirements of this section is not subject to s. 624.4621 and is not required to file any report with the department under s. 440.38(2)(b) which is uniquely required of group self-insurer funds qualified under s. 624.4621." (Emphasis added).

20. Ms. Vlasak asked the Division's legal office to analyze the legal question and give advice. Meanwhile, Ms. Vlasak and her supervisor, Mr. Lloyd, agreed that the standard quarterly assessment notices would not be sent to FICURMA, so that the Department could consider the question of its assessability after receiving advice from its legal office. By not sending the notices, the clock would not start on the deadlines for FICURMA to pay the assessments without imposition of a statutory penalty for late payment.

21. FICURMA, however, had been well-conditioned to expect those quarterly notices and became concerned when the expected notices did not arrive. Mr. Donatelli and his assistant, Joanne Hansen, called Ms. Vlasak several times to ask why nothing had been received yet. They ultimately spoke with Ms. Vlasak, who advised that the Department was reviewing whether FICURMA was

assessable, and it did not have to worry about not receiving the notices because payments would not be due until after the notices were received.

22. On October 1, 2009, the Department's legal staff issued a Memorandum of Opinion regarding independent education institution self-insurance funds (like FICURMA), authorized by section 624.4623. This opinion analyzed section 624.4623, as well as the statutory terms used to identify which entities are subject to assessments in section 440.49 (for the SDTF) and section 440.51 (for the WCATF). Based on that analysis, the opinion concluded that self-insurance funds qualifying under section 624.4623 (like FICURMA), are not subject to SDTF or WCATF assessments. Although the analysis was prompted by a different self-insurance fund statute adopted in 2009, the conclusion reached as to section 624.4623 entities would apply to the entire time period since the adoption of section 624.4623 in 2003.

23. The Department witnesses testified unequivocally that the legal opinion was advisory only, and it was up to the administration to make the policy decision to follow the advice given. However, it is difficult to discern any "policy" choice to be made, since the plain import of the opinion was that the statutes were not susceptible to any different interpretation

other than that section 624.4623 entities were not subject to SDTF or WCATF assessments.

24. Nonetheless, the legal opinion was reviewed, and, ultimately, the Department agreed with the advice. On November 14, 2009, Ms. Vlasak and Mr. Lloyd called Mr. Donatelli to advise that FICURMA was not required to pay SDTF or WCATF assessments anymore. In addition, they discussed how FICURMA could go about requesting refunds of assessments previously paid. However, they alerted FICURMA to the fact that section 215.26 could present a problem with respect to requests for refunds of payments made more than three years ago. At the time of this conversation, all of the assessments paid in 2005 and 2006 had been made more than three years ago, while the payments made in 2007-2009 were within the three-year window.

25. On January 12, 2010, Ms. Vlasak wrote to FICURMA, sending the forms for applying for refunds. In the letter, she reiterated the potential problem for refund requests of payments made more than three years ago. Accordingly, she recommended that FICURMA submit separate requests for payments made within the last three years versus those made more than three years ago, as the former would be able to go through more easily.

26. FICURMA completed four separate refund application forms: one for SDTF payments made in 2005 and 2006; one for WCATF payments made in 2005 and 2006; one for SDTF payments made

in 2007-2009; and one for WCATF payments made in 2007-2009. The refund forms state that the refund requests are submitted pursuant to section 215.26; FICURMA did not fill in the blank that is required to be filled in if the refund requests were being submitted under any other statute besides section 215.26. The applications were dated January 20, 2010, and were received by the Department on January 21, 2010.

27. The Department approved the refund applications for payments made in 2007-2009 and caused warrants to be issued to FICURMA to refund $363,441.86 for SDTF assessments and $31,132.88 for WCATF assessments. By authorizing refunds of assessments paid in 2007, 2008, and 2009, the Department has acknowledged that FICURMA should never have been assessed under sections 440.49 and 440.51 and should never have been served annually with the Orders Setting Assessment Rates or quarterly with assessment notices. The Department acknowledged FICURMA's entitlement to refunds despite FICURMA's failure to challenge the assessments in 2007, 2008, and 2009 pursuant to the Notice of Rights provided annually.

28. However, as warned, on May 12, 2010, the Department issued a Notice of Intent to Deny Applications for refund of the 2005 and 2006 payments to the SDTF and the WCATF. The sole reason for the denial was that section 215.26(2) required that refund applications be filed within three years after the right

to the refund accrued "or else the right is barred." The Department noted--as stated on the refund application form--that the three-year period normally commences when the payments are made.

29. No evidence was presented regarding what are considered "normal" circumstances or what sort of not-normal circumstances would have to be shown to establish that the three-year period in section 215.26(2) would commence at some other point in time, rather than when payments are made.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

31. At issue in this case is whether Petitioner's applications for refunds of assessments that Petitioner was never required to pay should be approved or denied. As the applicant, Petitioner is asserting the affirmative of the issue and, therefore, bears the burden of proof. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) (burden of proof is generally on the party asserting the affirmative of the issue). The parties are in agreement with this allocation of the burden of proof.

32. FICURMA has not argued that section 215.26 is inapplicable to this case. In pertinent part, that statute provides:

> (1) The Chief Financial Officer may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:
>
> (a) An overpayment of any tax, license, or account due;
>
> (b) A payment where no tax, license, or account is due; and
>
> (c) Any payment made into the State Treasury in error;
>
> and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.
>
> (2) Application for refunds as provided by this section must be filed with the Chief Financial Officer, except as otherwise provided in this subsection, within 3 years after the right to the refund has accrued or else the right is barred. . . . The Chief Financial Officer may delegate the authority to accept an application for refund to any state agency, or the judicial branch, vested by law with the responsibility for the collection of any tax, license, or account due. The application for refund must be on a form approved by the Chief Financial Officer and must be supplemented with additional proof the Chief Financial Officer deems necessary to establish the claim; provided, the claim is not otherwise barred under the laws of this state. Upon receipt

> of an application for refund, the judicial branch or the state agency to which the funds were paid shall make a determination of the amount due. If an application for refund is denied, in whole or in part, the judicial branch or such state agency shall notify the applicant stating the reasons therefor. Upon approval of an application for refund, the judicial branch or such state agency shall furnish the Chief Financial Officer with a properly executed voucher authorizing payment.

33. FICURMA admits that its refund requests for assessments received in 2005 and 2006 were not made within three years after those payments were made.[5/] However, FICURMA contends that the Department should be equitably estopped from denying those refunds. FICURMA bears the burden of proving the elements of equitable estoppel by clear and convincing evidence. See, e.g., Hoffman v. Fla. Dep't of Mgmt. Servs., 964 So. 2d 163, 166 (Fla. 1st DCA 2007).

34. As a threshold matter, the Department argues that because section 215.26 is a non-claim statute, and not merely a statute of limitations, equitable estoppel cannot apply. The Department relies on State ex. rel. Victor Chemical Works v. Gay, 74 So. 2d 560, 562 (Fla. 1954), in which the Florida Supreme Court determined that section 215.26 "is not, strictly speaking, a statute of limitations but is more in the nature of a statute of nonclaim." As such, the Court held:

> A refund is a matter of grace and if the statute of non-claim is not complied with,

> the statute becomes an effective bar in law and in equity.

The Court quoted with approval the following from an earlier Florida Supreme Court case discussing non-claim statutes:

> [T]he Court is powerless to change the words and clear meaning of the nonclaim statute . . . The contention then that equity and good conscience require that the appellant not lose his claim, while very appealing, does not authorize us to change the statute . . . .

Id. at 563.

35. The Victor Chemical Works case did not involve a claim of equitable estoppel; the "equity" argument raised there was that the claimant's refund request should not be barred because taxes were paid under a statute later held to be unconstitutional in a lawsuit brought by a different taxpayer. The claimant argued that the time period in section 215.26 should run from when the statute was declared unconstitutional and not from the time the claimant paid the taxes, because the claimant did not know then that it had a right to a refund.

36. Equitable estoppel was squarely raised in Hardy, Hardy & Assoc., Inc. v. State, Dep't of Revenue, 308 So. 2d 187 (Fla. 1st DCA 1975). In that case, the court described a disagreement between the appellant taxpayer and the Comptroller's Office regarding whether the appellant was required to pay intangible taxes. The Comptroller's Office advised the taxpayer to pay the

tax bill in order to avoid payment of interest penalties. The appellant paid the taxes in question in 1968 and 1969, but later filed suit in circuit court to resolve the dispute over whether the taxes were lawful and to obtain a refund of taxes it claimed were unlawfully paid. The litigation languished for years. In 1973, the Department of Revenue filed an answer and raised as an affirmative defense that the taxpayer had not requested a refund pursuant to section 215.26, hence the claim for refund of taxes paid four and five years earlier was barred. The trial court entered a final judgment determining that the taxes were illegal, but that the taxpayer's refund claim was barred because the taxpayer did not timely request a refund. On appeal, the First District Court of Appeal reversed:

> The trial court applied the holding of the Supreme Court of Florida in State ex rel. Tampa Electric Company v. Gay, 40 So.2d 225 (Fla. 1949)[applying section 215.26 to bar refunds of taxes paid more than one year before refund requests were filed] as controlling on the question. . . . We take a different slant on the facts of the case sub judice, and without flying in the face of the Tampa Electric case supra, we determine that the conduct of the employees or agents of the State of Florida, as contained in the filed letters between the taxpayer and the State Agencies amounted to a complete estoppel for the State or any of its agencies, to claim as an affirmative defense the lack of a formal or timely application for refund.

Id. at 189.

37. The Hardy decision is binding appellate law, at least within the First District,[6/] on the question of whether equitable estoppel can apply to permit a refund that would otherwise be time-barred under section 215.26(2). Therefore, the elements of equitable estoppel will be examined.

38. The elements of equitable estoppel, which must be proven by clear and convincing evidence, are: (1) a representation as to a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. State Dep't of Rev. v. Anderson, 403 So. 2d 397, 400 (Fla. 1981); Associated Indus. Ins. Co. v. State, Dep't of Labor and Emp. Sec., 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006). In addition, equitable estoppel may only be successfully invoked against a governmental agency in rare and exceptional circumstances, as shown by two additional elements: (4) conduct by the government that goes beyond mere negligence and that will cause serious injustice; and (5) proof that application of estoppel will not unduly harm the public interest. Id.

39. As the court acknowledged in Associated Industries, supra, "Equitable estoppel has been most frequently invoked against government agencies in cases in which the government has either made affirmative representations or knowingly acquiesced

in plaintiff's conduct." Id. Among other cases cited as authority for this statement was the First District's earlier decision in Hardy, supra.

40. In this case, Petitioner met its burden of proving by clear and convincing evidence that the Department made "affirmative representations." The Department represented its position that all self-insurers were subject to assessments and demonstrated its leap to the conclusion that FICURMA was an assessable self-insurer by sending FICURMA letters requiring registration, orders establishing the assessment rates, and notices that FICURMA was required to submit reports, calculate assessments, and pay them, subject to penalty.

41. However, the Department's affirmative representations that FICURMA was an assessable self-insurer, as well as the Department's subsequent retreat from those affirmative representations to conclude that FICURMA was not an assessable self-insurer, were representations of law, not of fact.

42. This is most evident from the analysis done when the Department focused on the actual legal question of whether an entity, such as FICURMA, formed under section 624.4623, was a "self-insurer" as that term is used in sections 440.49 and 440.51, the assessment statutes. The analysis is a straightforward statutory interpretation of the terms used in

the assessment statutes and the definitions provided for those terms.

43. The Department's prior position, though not analytical, was a legal position, nonetheless. Certainly the Department should not have concluded that all "self-insurers," as that term is commonly understood, were subject to assessments under sections 440.49 and 440.51. Certainly, the Department should have considered the specific, narrower meaning codified in the statutory definition of "self-insurer" in section 440.02(24) in formulating its legal position. Once the Department analyzed its position, it acted reasonably quickly[7/] to announce its retreat from its prior position and to assist FICURMA with refund requests to the extent permitted by section 215.26(3). While it would have been far preferable if this analysis occurred sooner, the Department at least deserves credit for undertaking the analysis when it did in 2009 and then volunteering its change of position to FICURMA.

44. FICURMA's proof also fails with respect to "reliance," the second estoppel element. As described in Associated Industries, the estoppel element of reliance includes an examination of whether the party asserting estoppels had the right to rely on the representations made. Associated Indus., 923 So. 2d at 1256. In this case, the Department's representations were conditional in that each time FICURMA was

served with the Department's Orders Establishing Assessment Rates and notices directing payment of assessments, FICURMA was given a Notice of Rights, offering it the right to petition for an administrative hearing to challenge the Department's action.

45. In this regard, Hardy is distinguishable. There is no hint in the Hardy opinion that the taxpayer was ever given notice of the right to administratively challenge its "tax bill" or that the taxpayer was ever given notice that its failure to file such a challenge within a specific window of time would result in waiver of the right to challenge the agency action. There was no hint that the taxpayer there waived multiple clear points of entry; indeed, that case predated the modern Administrative Procedure Act (APA). In contrast, FICURMA was given multiple clear points of entry to challenge the intended agency action to require payment of the assessments in 2005 and 2006. Thus, the Department's representations that FICURMA was subject to SDTF and WCATF assessments and was required to pay were expressly subject to the caveat that if FICURMA disagreed, it had 21 days in which to file a petition for an administrative hearing. FICURMA had the right to challenge the Department's conditional representations, but FICURMA did not have the right to rely on those conditional representations without challenging them.

46. Thus, even if Hardy stands for the proposition, at least in the first appellate district, that equitable estoppel may in a rare case defeat the bar that would otherwise apply from failure to timely apply for a refund pursuant to section 215.256; FICURMA has failed to show that the circumstances here constitute such a rare case. On this particular point, this case is more like Associated Industries, where the court noted that one reason why the appellant's reliance on claimed representations did not satisfy the reliance element of equitable estoppel was because the appellant never sought to confirm (or challenge) the agency's representations by using the modern APA's "impressive arsenal of varied and abundant remedies for administrative error." Associated Indus., 923 So. 2d at 1258, quoting State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 590 (Fla. 1st DCA 1977).

47. FICURMA did prove, clearly and convincingly, that it changed its position to its detriment, as required for the third element of estoppel. Surely, FICURMA acted to its detriment by paying SDTF assessments and WCATF assessments when FICURMA never had the legal obligation to do so under a proper analysis of the assessment statutes and FICURMA's authorizing statute. Just as plainly, FICURMA's 2005 and 2006 payments cannot be recouped, because of the erroneous representations made by the Department. Though FICURMA's right to rely on the Department's

misrepresentations of law has not been established, FICURMA's change of position to its detriment cannot be seriously questioned.

48. For similar reasons, the undersigned is compelled to conclude that the Department's actions go beyond mere negligence and do result in serious injustice. It is beyond negligent for a state agency to superficially apply its statutes without any examination or analysis of the statutory definitions of terms used in those statutes. The Department does a serious injustice, as the administrator of trust funds whose costs are supposed to be borne by specific entities, by cavalierly ignoring the legislative directives as to which specific entities are to bear those costs via assessments. FICURMA, as an entity that was supposed to be excluded from those assessments, but was not because of the Department's actions, is the bearer of that serious injustice.

49. Finally, the undersigned rejects the Department's suggestion that the public interest would not be served by correcting the serious injustice wrought by the Department's prior position that ignored the statutes the Department was supposed to faithfully administer. The Department waxes poetic about the strong public interest served by the SDTF and the WCATF, but in so doing, the Department completely misses the point. The SDTF and the WCATF are creatures of statute. The

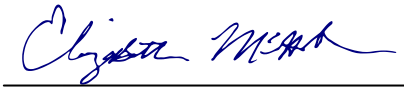
Legislature directed the Department to levy assessments on specific entities to bear the costs of these two trust funds. It is contrary to the public interest of these two funds, as defined by the Legislature, for the Department to impose assessments on entities that the Legislature chose to exclude from bearing the costs of the trust funds.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that Respondent, Department of Financial Services, Division of Workers' Compensation, enter a final order denying the requests for refunds of SDTF and WCATF assessments paid by Petitioner, FICURMA, Inc., in 2005 and 2006, because Petitioner's requests are time-barred by section 215.26(2) and because Petitioner has not met its burden of proving that equitable estoppel should be applied against Respondent.

DONE AND ENTERED this 8th day of July, 2011, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of July, 2011.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version, the law in effect when FICURMA filed its refund requests. There were no material changes to section 215.26 over the years in which FICURMA was paying assessments.

[2/] The parties stipulated that Petitioner's Exhibits 26 through 28 were part of a single mailing from the Department to FICURMA and that a Notice of Rights identical to the last page of Joint Exhibit 20 was included with this mailing, but was inadvertently omitted from the tendered exhibits. Similarly, the parties stipulated that Petitioner's Exhibits 29 through 31 were part of a single mailing from the Department to FICURMA and that a Notice of Rights identical to the last page of Joint Exhibit 20 was included with this mailing, but was inadvertently omitted from the tendered exhibits. Therefore, the parties stipulated that the undersigned should find that these two mailings each included a Notice of Rights in the form shown in Joint Exhibit 20.

[3/] On May 31, 2011, Petitioner filed a Request for Judicial Notice of FICURMA's Articles of Incorporation and Bylaws, which were attached. This request is denied, although it is noted that the Articles of Incorporation are already in the record as part of Petitioner's Exhibit 33. FICURMA's corporate bylaws would not be appropriate for official recognition, even if the request were timely. Petitioner's request is a belated attempt to add a new exhibit long after the evidentiary record in this proceeding has closed. The general rule is that the record should not be reopened after the final hearing to receive additional evidence. Collier Med. Ctr. v. Dep't of HRS, 462 So. 2d 83, 86 (Fla. 1st DCA 1985). Further, this rule may not be circumvented by using the device of official recognition, because under the Administrative Procedure Act, matters officially recognized become part of the record from which findings of fact may be made. See § 120.57(1)(j), Fla. Stat. (2010)("Findings of fact . . . shall be based exclusively on the evidence of record and on matters officially recognized"); cf. Lawnwood Med. Ctr., Inc. v. Ag. for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1st DCA 1996). Petitioner claimed no

compelling, extraordinary circumstances to support its belated request to reopen the record for official recognition of material that should have been presented before or at the final hearing.

In addition, on June 14, 2011, Petitioner filed exceptions to Respondent's Proposed Recommended Order, relying on Florida Administrative Code Rule 28-106.217. However, that rule authorizes parties to file exceptions to recommended orders, to be filed with the agency with final order authority, and not with DOAH; this rule does not authorize parties to file exceptions with DOAH to proposed recommended orders. The undersigned entered an order, sua sponte, striking that filing as an unauthorized pleading that would not be reviewed or considered.

[4/] The parties stipulated that Ms. Vlasak's response letter contained a typographical error in the date, in that it was dated February 16, 2004, but the actual date of the letter was February 16, 2005, as is obvious from the context.

[5/] Section 215.26(2) provides that application for refund must be made "within 3 years after the right to the refund has accrued or else the right is barred." FICURMA did not argue that its right to refund accrued at any time other than the time it made its payments such that the three-year period began to run from the date of each quarterly payment. In a dissenting opinion in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560, 567 (Fla. 1954), Justice Hobson, joined by Justice Drew, opined that if the legislature intended that the time period (then one year, instead of three years) begins to run from the date of payment, it could have said so, suggesting some other meaning was intended for when "the right to the refund has accrued," such as when the claimant knows it has the right to a refund. Nonetheless, that argument did not carry the day in that case. More recent decisions interpreting section 215.26 follow the holding of Victor Chemical Works that the right to a refund accrues on the date of payment. See, e.g., Dep't of Rev. v. Nemeth, 733 So. 2d 970, 972 (Fla. 1999) ("Under Victor Chemical, the right to the refund accrued on the date the Nemeths paid the tax.").

[6/] The Fourth District Court of Appeal, in Continental Fla. Partners, Ltd. v. Dep't of Revenue, 732 So. 2d 470 (Fla. 4th DCA 1999), affirmed, per curiam, a Department of Revenue final order on the authority of State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954), and certified conflict with Hardy,

Hardy & Assoc., Inc. v. State, Dep't of Revenue, 308 So. 2d 187 (Fla. 1st DCA 1975). While no facts are stated, it seems likely that the conflict certified was whether equitable estoppel was available to permit a refund of a claim that otherwise would be time-barred pursuant to section 215.26(2). However, the certified conflict was not resolved by the Florida Supreme Court.

[7/] FICURMA seems to take the position that the legal opinion by Division attorneys, issued on October 7, 2009, either was self-executing or should have been instantly adopted by the Department and communicated to FICURMA, so that FICURMA could have immediately filed refund requests. However, no evidence was presented that the Department was acting in bad faith or purposely dragged its heels in accepting and acting on the legal advice given in the October 7, 2009, memorandum. While as noted in the Findings of Fact above, there did not appear to be any real "policy decision" to be made, it would not be unreasonable for the Department to take the time to assess the legal memorandum and to confer with its attorneys, before accepting the legal advice as correct. Thus, it cannot be concluded that the Department took an unreasonably long time before calling FICURMA on November 14, 2009, to announce the Department's changed position. FICURMA would have had to file its refund requests by October 27, 2009, in order to be entitled to refunds of the next most recent assessment payments, $26,439.06, made and received on October 27, 2006.

COPIES FURNISHED:

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Samuel Dean Bunton, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

Donovan A. Roper, Esquire
Roper and Roper, P.A.
116 North Park Avenue
Apopka, Florida 32703

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.