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CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DIVISION OF
ADMINISTRATIVE
HEARINGS

CASE NO. 11-148-D3
(DOAH NO. 12-1582)

IN THE MATTER OF:

ALL PHASE CONSTRUCTION AND
DEVELOPMENT, LLC

FINAL ORDER

THIS CAUSE came on for consideration and for final agency action on the Recommended Order issued on October 9, 2012, attached hereto as Exhibit A.

PROCEEDINGS BELOW

A formal hearing was conducted pursuant to Section 120.57(1), Florida Statutes by Administrative Law Judge R. Bruce McKibben on September 6, 2012 via video teleconference. Respondent All Phase Construction and Development, LLC was represented by its sole managing member, David M. Robey, Jr., *pro se*. Petitioner Department of Financial Services was represented by attorney Jamila G. Gooden, Assistant General Counsel.

After the formal hearing both sides filed proposed recommended orders. The Administrative Law Judge issued his Recommended Order on October 9, 2012, allowing the parties 15 days to submit exceptions to the Recommended Order. Petitioner Department of Financial Service filed its exceptions on October 24, 2012.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

Petitioner's Exception 1: The Petitioner Department of Financial Services takes exception to the third sentence in paragraph 12 of the Findings of Fact wherein the Administrative Law Judge has given credit to the National Council on Compensation

Insurance, Inc. for supplying the factual information relied upon by a witness for the Department of Financial Services when calculating and imputing three full years of past wages for Mr. Mobley and Ms. Little.

Upon close review, the official transcript and documentary evidence both clearly identify an informational bulletin published in December 2010 by the Department of Financial Services as the correct source of the financial information used by the Department's witness. (Petitioner's Exhibit 8.)

Accordingly, Petitioners Exception 1 is accepted. The third sentence in paragraph 12 of the Findings of Fact is hereby modified to read: "Absent their actual salaries, Mr. Rimert used the average weekly wage set forth in the Informational Bulletin issued December 17, 2010 by the Department of Financial Services (Petitioner's Exhibit 8)

Petitioner's Exception 2: The Petitioner Department of Financial Services takes exception to paragraph 13 of the Findings of Fact wherein the Administrative Law Judge contends that "(o)ne portion of Mr. Rimert's calculations (of average weekly wages) is amiss."

Upon close review of the entire record, and particularly the official transcript at (Tr. 62-65), and applicable documentary evidence, it is clear that there is no competent substantial evidence in the record to support the Administrative Law Judge's Findings of Fact in Paragraph 13. The ALJ has simply overlooked the fact that Respondent All Phases' admitted its refusal (Tr. 82-83, 94-96) to provide the Department with sufficient business records to determine the weekly hours its employees worked and the full remuneration paid therefor required the Department to impute those figures as required

by Section 440.107(7), Fla. Stat., and Rule 69L-6.028, F.A.C. Thereafter, the imputed figure properly serves as the basis for calculating the applicable penalty.

Accordingly, Petitioner's Exception 2 is accepted. Paragraph 13 of the Findings of Fact is rejected in its entirety. Nothing needs to be substituted for Paragraph 13 because Paragraph 13 is completely erroneous and therefore irrelevant to the resolution of this matter.

Petitioner's Exception 3: The Petitioner Department of Financial Services also takes exception to all of Paragraphs 15 and 16 of the Findings of Fact wherein the Administrative Law Judge found that Respondent All Phase Construction and Development, LLC carried sufficient workers' compensation insurance coverage for all of its employees during calendar year 2010.

Upon close review of the complete record, including the official transcript and all documentary evidence, it is clear that there is no competent substantial evidence in the record to support the Administrative Law Judge's Findings of Fact in Paragraphs 15 and 16 of the Recommended Order regarding the period of time Respondent All Phase Construction and Development, LLC actually carried workers' compensation coverage for Mr. Robey and Ms. Little. Just as with Exception 2, above, the Respondent's admitted an intentional refusal to provide the Department of Financial Services with sufficient business records for it to make a determination as to coverage during the calendar year 2010 required a statutorily-mandated imputation that Respondent did not provide the required coverage for that year.

Accordingly, Petitioner's Exception 3 is accepted as to Paragraphs 15 and 16.

Paragraphs 15 and 16 are hereby rejected and replaced by the following new

Paragraph 15:

"The Department established by clear and convincing proof that All Phase Construction and Development, LLC and its sole owner David M. Robey, Jr. knowingly and intentionally refused to produce sufficient business records to the Department to allow it to make the required coverage determinations. That refusal required the imputation of such information as required by Section 440.107, Fla. Stat. and Rule 69L-6.028, F.A.C. That required imputation established by clear and convincing evidence that All Phase Construction and Development, LLC and its sole owner David M. Robey, Jr. failed to provide workers' compensation insurance coverage for Mr. Robey and Ms. Little for the entire three (3) year period beginning on June 10, 2008 and ending on June 9, 2011. (See Petitioner's Exhibit 6.) Thus, the total statutory penalty owed by All Phase Construction and Development, LLC and its sole owner David M. Robey, Jr. is \$34,141.15. (See Petitioner's Exhibit 6.)"

Petitioner's Exception 4: The Petitioner takes exception to Paragraph 22 in the Conclusions of Law wherein the Administrative Law Judge concluded that "...the Department acknowledges that All Phase had workers' compensation coverage during the period January 1, 2010 through December 31, 2010."

Upon a complete review of the record, including the official transcript and documentary evidence, it is clear that there is no competent substantial evidence in the record to support the Administrative Law Judge's Conclusion that All Phase Construction and Development, LLC or any other entity ever provided workers' compensation coverage for All Phase employees for any part of calendar year 2010. Again, Respondent's refusal to provide the Department with sufficient business records to enable it to make such coverage determination required the imputation of lack of coverage. Section 440.107, Fla. Stat., Rule 69L-6.028, F.A.C.

Accordingly, Petitioner's Exception 4 is accepted. Paragraph 22 is hereby modified to read:

“Through required imputation, the Department has proven by clear and convincing evidence that All Phase Construction and Development, LLC and its sole owner David M. Robey, Jr. failed to provide workers’ compensation insurance coverage for each of its employees during the three (3) year period beginning June 10, 2008 through June 9, 2011.”

Additionally, although not noted in the Petitioner’s exceptions, the Administrative Law Judge committed a mathematical error in Paragraph 15, as he failed to add the accepted \$5,906.24 penalty for the period July through December 2009 in his calculations. Although also not noted in the Petitioner’s exceptions, in Paragraph 20 of the Conclusions of Law, the Administrative Law Judge used the word “may” when describing the Department’s statutory duties when enforcing controlling statutes governing workers’ compensation insurance coverage and governing failure of an employer to obtain workers’ compensation insurance coverage for all its non-exempt employees. However, Section 440.107(3) Florida Statutes (2012) states in pertinent part:

(3) The department *shall* enforce workers’ compensation coverage requirements, including the requirement that the employer secure the payment of workers’ compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classifications. (e.s.)

The Legislature’s express usage of the mandatory term “shall” is controlling over the ALJ’s apparent permissive interpretation of that term as “may”. The Department interprets the term as requiring a mandatory application of the coverage statutes, and concludes that a mandatory interpretation of that term is more reasonable than is connoted by the use of the word “may” in Paragraph 20 of the ALJ’s Conclusions of Law. Therefore the word “shall” is hereby substituted for the word “may in Paragraph 20 of the Conclusions of Law.

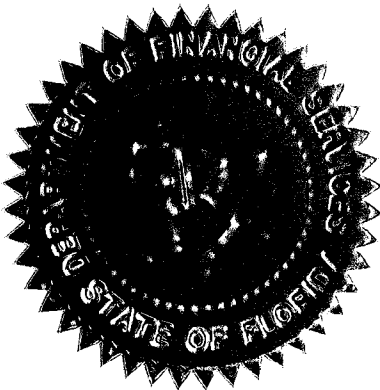
After a complete review of the entire record below, including all admitted exhibits, the official transcript of proceedings, the Petitioner Department's exceptions to the Recommended Order, and applicable law,

IT IS HEREBY ORDERED that the ALJ'S Findings of Fact and Conclusions of Law, except as rejected or modified, herein are adopted, and

IT IS HEREBY FURTHER ORDERED that the Administrative Law Judge's recommendation that a Final Order be entered assessing a penalty in the amount of \$18,369.23 is rejected and that a penalty of Thirty-Four Thousand, One Hundred Forty-One Dollars and Fifteen Cents (\$34,141.15) is assessed against All Phase Construction and Development, LLC and its principals including David M. Robey, Jr. and each and every successor in interest, which amount shall be due and payable within 30 days of the date of this Final Order.

IT IS FURTHER ORDERED that All Phase Construction and Development, LLC and all its principals including David M. Robey, Jr. shall be ineligible to own or operate a business in the State of Florida until the statutory penalty assessed by this Final Order has been paid in full.

DONE and ORDERED on this 21ST day of December, 2012.



A handwritten signature in black ink, appearing to read "R. C. Kneip". The signature is written in a cursive style and is positioned above a horizontal line.

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of the Order pursuant to Section 168.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Appeal proceedings must be initiated by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, Room 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390, and filing a copy of the petition or notice of appeal with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies to:
ALJ R. Bruce McKibben
Jamila G. Gooden
David M. Robey