CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

JAMES F. HOWARD
CONSTRUCTION, INC.

Case No. 12-125-1A-WC
DOAH #12-1622

FINAL ORDER

This cause came on for consideration of and final agency action on the Recommended Order (RO) filed on June 28, 2012 by Administrative Law Judge (ALJ) James H. Petersen III, after formal hearing conducted on April 4, 2012. The Department of Financial Services, Division of Workers' Compensation (Department) timely filed exceptions to the RO. The Recommended Order and exceptions thereto, the transcript of proceedings, the admitted exhibits, and applicable law have all been considered in the promulgation of this Final Order.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

1. The Department's first exception contends that the ALJ erred by finding in Paragraph 6 of the RO that the Department investigator, Angela Brown, was unable to verify Mr. Madron's statement that he had his own company. The transcript and exhibits show that Ms. Brown was able to access the Santa Rosa County Tax Collector's website, and that website contained a business tax receipt for "Robert L Madron General Repair". (Tr. 62, 64-65; Pet. Exh. 2, pg. 5). There was no evidence admitted to contradict or refute that evidence. It thus appears from a review of the entire record that the challenged finding of fact is not supported by competent substantial evidence.

Accordingly, this exception is accepted. The last sentence of Paragraph 6 is rejected and replaced with:

Ms. Brown was able to access the Santa Rosa County Tax Collector's website whereupon she found a business tax receipt for a "Robert L. Madron General Repair".

2. The Department's second exception is directed to Paragraph 7 of the RO wherein the ALJ found that both trash collection and equipment repair work performed by Mr. Madron were unsolicited by Mr. Howard. A review of the entire record shows that while the trash collection service performed by Mr. Madron was unsolicited by Mr. Howard, the equipment repair services were approved beforehand by Mr. Howard. (Tr. 186-188). Thus, the finding that Mr. Madron's equipment repair services were unsolicited by Mr. Howard is not supported by competent substantial evidence, and this exception is accepted. Paragraph 7 of the RO is amended to read:

Further, while Mr. Howard had paid Mr. Madron prior to Ms. Brown's visit for unsolicited trash collection services performed on the work site by Mr. Madron, Mr. Howard did hire Mr. Madron to repair some small equipment stored in Mr. Howard's off-site shop. However, Mr. Howard testified that he never employed Mr. Madron to perform any construction work, including hanging straps on houses.

3. The Department's third exception takes issue with Paragraph 8 of the RO where the ALJ found that Mr. Madron was unemployed as well as homeless. The Department contends that the evidence shows that Mr. Madron was the employee of a sole proprietorship, of which he was the owner, conducting operations in the construction industry. However, the evidence supports the ALJ's finding. First of all, there is no evidence in the record that either trash collection or small equipment repair constitutes work within the construction industry. Additionally, there is no evidence in the record to support the contention that "Robert L. Madron General Repair" was actually engaged in the construction industry or in any other business for that matter.

The only "evidence" that Mr. Madron was performing tasks within the construction industry was Ms. Brown's testimony that Mr. Madron stated to her that he was a subcontractor to Mr. Howard's company. However, Mr. Madron did not attend the hearing, thus leaving that statement within the hearsay category of testimony. The Department produced no other evidence to corroborate Ms. Brown's testimony in that regard, and Mr. Howard unequivocally denied that allegation at hearing. That unusable hearsay testimony does rise to the standard of clear and convincing evidence needed to support the Department's position. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1978); *Department of Banking and Finance v. Osborne Stern & Company*, 670 So.2d (Fla. 1996); *Hoover v. Agency for Health Care Administration*, 676 So.2d 1380 (Fla. 3rd DCA 1996); *Pou v. Department of Insurance and Treasurer*, 707 So.2d 941 (Fla. 3rd DCA 1998). At most, even if admissible over objection as an exception to the hearsay rule, that testimony created an evidentiary conflict which the ALJ was at liberty to resolve. *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). There is competent substantial evidence in the record to support the challenged finding. (Tr. 184-189) Accordingly, this exception is rejected.

4. The Department's fourth exception challenges the ALJ's finding in Paragraph 11 of the RO that the evidence failed to show that Mr. Madron was ever employed by the Respondent. Much the same as is the situation with the Department's third exception, the evidence fails to clearly and convincingly show that the Respondent ever hired Mr. Madron to work in the *construction industry,* where all employees must be covered and there are no maximum numbers that can be employed before coverage

becomes mandatory. Thus, even if the evidence had showed a bona-fide employment relationship between Mr. Madron and Respondent, it would still have to be shown that Mr. Madron was in an employment classification, such as the *construction industry*, that required his coverage. There was no such evidence presented. The Department presented no evidence that the Respondent withheld income tax or social security assessments from any payments to Mr. Madron or that it provided him with a C-4 income tax form, or any other clear indicia of employment, other than piecemeal work which could almost be characterized as a handout. Accordingly, this exception is rejected.

5. The Department challenges Paragraph 14 of the RO where the ALJ found that the evidence was insufficient to show that Messrs. Jones, Lyons, Shaughnessy or Weedeen were employed by Respondent on March 29, 2012. The Department contends, without citation to a legal basis for that contention, that said persons were co-employees of the Respondent and an employee leasing company (Pacesetter Personnel) at that time. Failure to cite to a legal basis for an exception relieves the agency from having to rule on the exception. Section 120.57(1)(k). Accordingly, this exception is not taken up and no change to the RO is effectuated.

6. The Department's sixth exception challenges the finding in Paragraph 16 of the Recommended Order that the only evidence the Department offered to prove that Mesrs. Jones, Lyons, Shaughnessy, and Weeden (the four in question) were Respondent's employees were its cancelled checks to those persons. The Department contends that Ms. Brown's hearsay testimony, corroborated by Mr. Howard's deposition testimony and his hearing testimony, established that said individuals were the

Respondent's co-employees on March 29, 2012. The exception further argues that it was proved that other individuals were also Respondent's employees. There are several flaws to the exception. Ms. Brown's hearsay testimony was not corroborated by the deposition testimony of Mr. Howard because the same was used for a limited and inconclusive attempt at impeachment; it did not corroborate Ms. Brown's hearsay testimony as to their employment status on March 29, 2012. (Tr. 197) Moreover, none of those persons nor anyone from the leasing agency provided any testimony on that subject. Mr. Howard's hearing testimony certainly did not corroborate Ms. Brown's hearsay testimony in this regard. If anything, his testimony contradicts hers. That the Department may have proven that other individuals were employed by Respondent does not establish the exception's contention that the four in question were so employed. The exception again posits that the four in question were co-employees of both Respondent and Pacesetter Personnel, again without any citation to a legal basis for that position. The Department cites to the testimony of Anita Proano for support, but Ms. Proano is a penalty calculator, not an investigator. Her testimony about the employment status of the four in question was not based on personal knowledge or even an examination of Pacesetter Personnel's records or any other source documents. (Tr. 151) She appears to have merely assumed that all checks were for payroll, and calculated a penalty accordingly. Additionally, on cross-examination she admitted that the four in question were employees of Pacesetter Personnel, just as Mr. Howard contended. (Tr. 167-170) Mr. Howard directly testified that the four in question were not Respondent's employees on March 29, 2102, but had been accepted for leasing purposes by Pacesetter on or before March 28, 2012. (Tr. 196-200). The Department

offered no testimony or documents from Pacesetter or any other source to contradict that testimony. Mr. Howard also offered un-refuted explanations for the checks in question. (Department's Exh. 8; Tr.194-203) All that the Department offered to prove the employment status of the four in question were the checks cited by the ALJ, and assumptions the Department made about them. Calculating a penalty does not serve to establish liability. Here, the Department failed to prove by clear and convincing evidence that Respondent was liable to provide workers' compensation coverage for the four employees in question. Accordingly, this exception is rejected.

7. The Department's seventh exception is directed to Paragraph 18 of the RO where the ALJ found that the Department had failed to present evidence contradicting Mr. Howard's testimony that Mr. Charles Lyons had an exemption from workers' compensation coverage. An examination of the record shows the exception to be well taken. A Department witness, Ms. Anita Proano, expressly testified that she searched the Department's database for such an exemption and that one was not present. (Tr.162). Thus, a review of the complete record shows that the ALJ's challenged finding is not supported by competent substantial evidence and the last two sentences of that paragraph are rejected.

8. The Department's eighth exception is similarly directed to Paragraph 19 of the RO where the ALJ found that Mr. Howard's testimony that Mr. Shaughnessy had a workers' compensation exemption was not contradicted by the Department. A review of the complete record shows that Ms. Proano conducted a search of the Department's database for an exemption for Mr. Shaughnessy and found none. (Tr. 162) Thus, the

challenged finding is not supported by competent substantial evidence and the exception thereto is accepted. The last sentence of Paragraph 19 is therefore rejected.

9. The Department's ninth exception is directed to Paragraph 33 of the RO wherein the ALJ concluded that the Department failed to prove that Robert Madron was an employee of the Respondent. This is the same exception that was raised to Paragraph 11 of the Findings of Fact. For the same reasons articulated in rejecting that exception, this exception is rejected.

10. The Department's tenth exception is directed to Paragraph 39 of the RO where the ALJ concluded that the Department had failed to prove by clear and convincing evidence that Messrs. Jones, Lyons, Shaughnessy and Weeden were Respondent's employees, thus subjecting Respondent to liability to provide workers' compensation coverage for them. This is similar to the exception made to Paragraph 16 of the RO. A review of the record shows no clear and convincing evidence to arrive at the conclusion desired by the Department. The Department would have been able to obtain either documentary or testimonial evidence from the leasing company, Pacesetter Personnel, as to the relevant status of those four gentlemen on March 28, 2012, but the Department produced no such evidence. Similarly, the Department could have taken testimony from the purported employees as to their understanding of their employment relationship with the Respondent. It did not do so. Instead it relied on the conjectural testimony of Mr. Mark and Ms. Proano as to *the purpose* of various checks made out to various individuals by the Respondent. Neither Mr. Mark nor Ms. Proano ever spoke with those four gentlemen, or the Respondent, or Pacesetter Personnel. (Tr. 32-53, 151) At hearing, Ms. Proano conceded that the four gentlemen in question were

Pacesetter employees. (Tr. 167-170) At hearing, Mr. Howard testified that the one check for $230 written to Mr. Weeden in January of 2012, upon which the Department determined Mr. Weeden to be Respondent's employee, was written to assist Mr. Weeden in qualifying for leasing from Pacesetter, but that Mr. Weeden was arrested and jailed before he ever performed any work for Respondent. (Tr. 194-195) That testimony was not contradicted. Mr. Howard also testified that he gave Mr. Jones, a relative, slightly over $3,500 between January and March of 2012 to come from Alabama to Pensacola after Mr. Jones lost his job in Alabama. But, Mr. Howard was never directly asked if Mr. Jones did any work for Respondent between January and March of 2012, so the purpose of the sum paid to Mr. Jones remains indeterminate. (Tr. 199-200) The only question directed to Mr. Howard about Mr. Shaughnessy was about the name of Mr. Shaughnessy's corporation. (Tr. 199) Likewise, additional questioning about Mr. Jones was solely related to the name of his corporation and whether he had a workers' compensation exemption. No direct questions about his employment relationship with Respondent were asked by the Department (Tr. 199-200) In short, the Department relied on Rule 69L-6.035 to prove its case with regard to the employee status of these four gentlemen. However, the *evidence* offered to prove up the contention that these four gentlemen were Respondent's employees at the time of the investigation is not clear and convincing. The case of *Hazealeferiou v. Labor Ready*, 947 So.2d 599 (Fla. 1st DCA 2007) is inapposite to this matter since there is no allegation that Pacesetter Personnel had not provided workers' compensation coverage for the four in question so as to place that burden back on Respondent's shoulders by default. That case does not establish a "co-ownership" of the leased employee as

argued by the Department. Rather, it establishes the positions of general employer and special employer, the latter being in a default relationship to the former for coverage purposes. Absent a default by the general employer, the special employer has no obligation to provide workers' compensation coverage for the leased employee. *Hazealeferiou*, at 603; Section 440.11(2), Fla. Stat. (2005). The ALJ's conclusion is supported by competent substantial evidence. Accordingly, this exception is rejected.

11. The Department's eleventh and last exception is initially directed to Paragraph 40 of the RO wherein the ALJ concluded that the Department "...failed to provide sufficient evidence to justify the Stop-Work order or its business records request...". The record shows that the Department's investigator was variously told by individuals at Respondent's job-site that they were Respondent's subcontractor, or were employed by Respondent but paid through Pacesetter. (Tr. 54-73) She further investigated the matter with Mr. Howard who told her that one of the men, Mr. Madron was indeed a subcontractor with a workers' compensation exemption. (Tr. 70) Mr. Howard later changed that story to say that he could find no verification of the information he had provided to her about Mr. Madron and that he had hired Mr. Madron because he was homeless and hungry. (Tr. 73) Ms. Brown continued her investigation and found that Pacesetter denied any extant relationship with Respondent (Tr. 70-71), but later stated that they had received some applications for Respondent on March 29, 2012, which was one day after her investigation started. (Tr. 57, 74) Under those circumstances, the Department was completely justified as a matter of law in issuing the Stop-Work Order and requesting business records in furtherance of its investigation.

Section 440.107, Fla. Stat. Therefore, this portion of the exception is accepted and Paragraph 40 is modified to state:

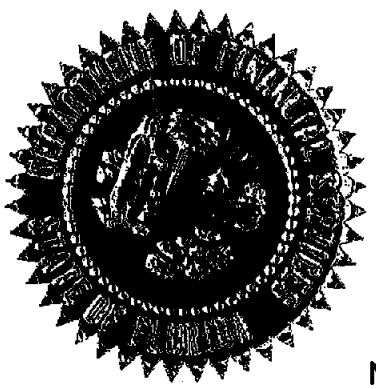
The evidence submitted at the final hearing was inadequate to support the Third Amended Order of Penalty Assessment.

This is as or more reasonable than the conclusion of law for which it substitutes.

The remainder of the eleventh exception either fails to take issue with any Finding of Fact or Conclusion of Law, or fails to specify which of those it disagrees with. Accordingly, no ruling is made thereon. Section 120.57(1) (k), Fla. Stat.

WHEREFORE, IT IS HEREBY ORDERED that, except as noted above, the Findings of Fact and Conclusions of Law found and announced in the Recommended Order are adopted as the Department's Findings of Fact and Conclusions of Law, and that the Stop Work Order and Third Amended Penalty Assessment issued in this cause are dismissed.

DONE AND ORDERED this 23rd day of September, 2013.



Robert K. Kneip, Chief of Staff

C.

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, facsimile transmission, or electronic mail.

Copies to:
ALJ Peterson
Robert O. Beasley
Alexander Brick