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DEC 23 2015

Docketed by mm



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

15 DEC 30 PM 2:25

IN THE MATTER OF:

AMERICAN PRO DIVING CENTER, INC.

CASE NO.: 14-414-D3-OPA

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds the Department failed to meet its burden to prove by clear and convincing evidence that American Pro Diving Center, Inc. (“Respondent”) failed to secure workers’ compensation insurance as required by law, and concludes the Department should dismiss the Amended Order of Penalty Assessment. The Department of Financial Services, Division of Workers’ Compensation (the “Division”), filed exceptions to the recommended order. Respondent filed responses to the Division’s exceptions.

Rulings on Exceptions and Responses

The Division submitted three exceptions regarding two findings of fact and a mixed question of fact and law.

An agency is prohibited from rejecting an Administrative Law Judge’s (the “ALJ”) findings of fact unless, from a review of the entire record, the agency determines the findings of fact were not based upon competent substantial evidence. § 120.57(1)(l), Fla. Stat. (2015). The weighing of evidence is solely a matter for the ALJ. *Rogers v. Dep’t of Health*, 920 So. 2d 27 (Fla. 1st DCA 2006). An agency lacks substantive jurisdiction to reject or modify an ALJ’s

conclusions of law regarding the admissibility of evidence. *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2002).

The Division's first exception concerns a mixed question of fact and law contained in recommended order paragraph 13, which finds that an e-mail from Respondent's prior counsel to the Division's investigator amounted to nothing more than settlement discussions and negotiations, and consequently, was inadmissible to prove liability. The Division argues that, because no controversy existed when the e-mail was sent to the Division, section 90.408, Florida Statutes, does not apply, and the e-mail should properly be considered an admission by counsel. To the extent this is a factual issue, the record supports the ALJ's finding. To the extent the evidentiary ruling construes section 90.408, Florida Statutes, it is a legal conclusion which the Department may not reject. It does not appear the ALJ abused his discretion. *See Rease v. Anheuser-Busch, Inc.*, 644 So. 2d 1383, 1389 (Fla. 1st DCA 1994) (quoting Charles W. Ehrhardt, *Florida Evidence* § 408.1).

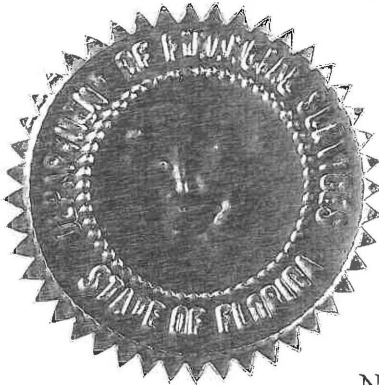
The Division's second exception concerns the second sentence of recommended order paragraph 14, which utilizes hearsay testimony to supplement and explain the first sentence of paragraph 14. Hearsay evidence is admissible to supplement and explain other evidence. § 120.57(1)(c), Fla. Stat. (2015). This exception is rejected because the finding of fact is ultimately based on direct testimony from Respondent's president.

The Division's final exception largely depends on acceptance of the first exception, and so must likewise be rejected. The third exception, in any event, would not affect the outcome of the proceeding.

The Recommended Order is adopted in full.

Accordingly, the Amended Order of Penalty Assessment is dismissed.

DONE and ORDERED this 23rd day of December, 2015.



M. A. Parker for

Robert C. Kneip
Chief of Staff

NOTICE OF RIGHT TO APPEAL

A party adversely affected by this final order may seek judicial review as provided in section 120.68, Florida Statutes, and Florida Rule of Appellate Procedure 9.190. Judicial review is initiated by filing a notice of appeal with the Agency Clerk, and a copy of the notice of appeal, accompanied by the filing fee, with the appropriate district court of appeal. The notice of appeal must conform to the requirements of Florida Rule of Appellate Procedure 9.110(d), and must be filed (i.e., received by the Agency Clerk) within thirty days of rendition of this final order.

Filing with the Department's Agency Clerk may be accomplished via U.S. Mail, express overnight delivery, hand delivery, facsimile transmission, or electronic mail. The address for overnight delivery or hand delivery is Julie Jones, DFS Agency Clerk, Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390. The facsimile number is (850) 488-0697. The email address is Julie.Jones@myfloridacfo.com.

Copies furnished to:

Kristian E. Dunn, Attorney for Respondent
Alexander Brick, Attorney for the Division
James H. Peterson, III, Administrative Law Judge



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

MEMORANDUM

TO: Robert C. Kneip
Chief of Staff

FROM: Jeff Atwater
Chief Financial Officer

DATE: June 12, 2014

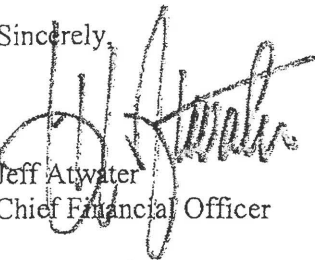
SUBJECT: Delegation of Authority

I hereby authorize Drew Parker, General Counsel, in your absence or when you're not available, to approve and sign the capitol complex and non-complex access card applications, to sign contracts, enter Final Orders, including Consent Orders, issue licenses on my behalf in my capacity as Chief Financial Officer, and to sign all documents in all proceedings arising in connection with the activities of the Department of Financial Services, effective June 9, 2014.

This authorization shall be in full force and effect until such time as I revoke it in writing.

All previous delegations for PK Jameson are hereby revoked.

Sincerely,



Jeff Atwater
Chief Financial Officer

cc: Drew Parker
John Hale