

FILED

MAR 25 2016

Chief Financial Officer
Docketed by: TRG



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

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DIVISION OF
ADMINISTRATIVE
HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION,

Petitioner,

v.

CASE NO. 14-357-1A-OPA
DOAH CASE NO. 15-1613

HOLLYWOOD CONSTRUCTION OF NORTHWEST
FLORIDA, LLC

Respondent.

FINAL ORDER

THIS CAUSE came for consideration and final agency action. The Recommended Order finds respondent submitted business records sufficient to demonstrate certain expenses should not be treated as payroll in calculating a penalty under section 440.107, Florida Statutes, for failure to maintain workers' compensation coverage. The administrative law judge (ALJ), therefore, concluded the Department's intended penalty of \$21,853.80 was erroneous and must be recalculated.

The Department filed several exceptions to the recommended order. Taken together, the exceptions contend the Administrative Law Judge ("ALJ") misinterpreted and/or mis-applied Rule 69L-6.035(1), *Florida Administrative Code*, to conclude that respondent's business records sufficiently demonstrated expenditures identified as "travel reimbursement" and "sales/estimating expense" were valid business expenses rather than employee remuneration. Without adopting the ALJ's implicit conclusion in recommended order paragraphs 33, 35, 50, and 51 that the subject rule requires the Department to exclude from payroll any expenditure an employer ledger identifies as a "business expense," the exceptions are rejected as to the "travel

reimbursements” in this case. Those expenditures, like the disbursements for “purchases/materials,” “purchases/job costs,” “auto/truck”, and “maintenance/repairs” will be excluded from the penalty calculation.

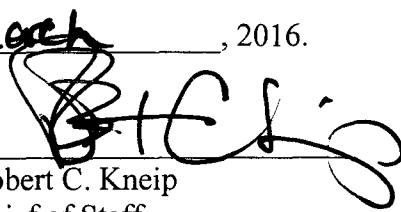
The Department’s exception to the ALJ’s treatment of respondent’s disbursements to Barry Hutchinson for “sales/estimating expense” is well-taken. Regular cash payments to Mr. Hutchinson are the only disbursements in respondent’s ledger identified as “sales/estimating expense.” (R. 146-47). It is undisputed that respondent, within the meaning of chapter 440, Florida Statutes “employed” Mr. Hutchinson as an “estimator” on projects respondent undertook. (R. 86-87). Mr. Hutchinson also sometimes worked as a supervisor on job sites. *Id.* The record of the final hearing requires the finding that Mr. Hutchinson performed the “sales/estimating” function for respondent during 2013 and 2014, but that he was paid through the employee leasing agreement only for a limited amount of hourly work in 2013, and none in 2014. (R. 146-47, 151-61, 182-83, 247, 262-65). Although respondent may not have considered Mr. Hutchinson an “employee” for the work he performed as an estimator, the competent substantial evidence supports only a finding that the cash payments to Mr. Hutchinson for “sales/estimating” were remuneration for services rendered. *See* § 440.02(15)(a), Fla. Stat. These payments must be included in respondent’s payroll, notwithstanding their “expense” label in respondent’s general ledger. To the extent recommended order paragraph 35 finds as fact that “sales/estimating exp” must be excluded from the penalty calculation, it is rejected as not supported by competent substantial evidence. To the extent recommended order paragraphs 50 and 51 conclude that Rule 69L-6.035(1), *Florida Administrative Code*, precludes these payments from being included as payroll in the penalty calculation, they are rejected as a misinterpretation of the rule.

After review of the complete record, the Recommended Order, as modified above, is adopted. Accordingly, the Department finds the employer did not fully comply with the

statutory obligation to secure workers' compensation insurance for the two-year period from August 7, 2012, through August 6, 2014. The Department has recalculated the attendant penalty in accordance with the ALJ's recommendation, as modified above. The amended penalty imposed is \$9,485.24. Respondent must either pay the full penalty to the Department for deposit into the Workers' Compensation Administration Trust Fund, or enter into a payment agreement with the Department to pay the penalty in installments.

DONE and ORDERED this 25th day of March, 2016.




Robert C. Kneip
Chief of Staff

NOTICE OF RIGHT TO APPEAL

A party 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:

Hollywood Construction of NW Florida, LLC, Respondent
Trevor S. Suter, Attorney for Petitioner
Garnett W. Chisenhall, Administrative Law Judge