

FILED

FEB 29 2016

Docketed by



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

CASE NO.: 13-253-D5-WC

vs.

ALELUYA ROOFING PLUS
CONSTRUCTION, INC.,

Respondent.

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds Aleluya Roofing Plus Construction, Inc. ("Respondent") failed to secure workers' compensation insurance as required by law during the periods of September 26, 2010, through October 3, 2010; February 21, 2013, through March 6, 2013; and July 25, 2013, through September 25, 2013; and is subject to a penalty of \$9,864.41. The Department filed exceptions to the recommended order, which are addressed below.

The Department's first exception concerns the finding in recommended order paragraph 12 that a "conflict in the evidence" prevented the Division from proving the non-compliance period of October 4, 2012, through October 17, 2012. The ALJ relied upon this finding in recommended order paragraph 14 to determine that the Department's penalty calculation should be reduced by \$2,510.88. This exception is rejected. The Department's Exhibit 6 appears to

provide competent substantial evidence not clearly addressed by the Department's witness, which could support an inference that respondent did not lack coverage in October 2012.

The Department's remaining exceptions relate to the ALJ's conclusion in recommended order paragraphs 22 through 24 that the Department cannot include the three employees encountered at the job site in the penalty calculation for any period other than July 24, 2013, through September 25, 2013, because the Department did not prove respondent employed them at any other time. The ALJ concluded section 440.107(7)(e), Florida Statutes, and Rule 69L-6.028(3)(b), *Florida Administrative Code*, do not permit the Department to impute payroll for periods of non-compliance within the review period, with regard to any employee whom the Department has not clearly and convincingly proven was employed during each distinct period of non-compliance.

The ALJ's interpretation of the statute and rule is clearly erroneous. Section 440.107(7)(d), Florida Statutes, provides:

In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during the *periods* for which it failed to secure the payment of workers' compensation . . .

(emphasis added). Therefore, the statute contemplates the potential for multiple periods of non-compliance during the review period. Rule 69L-6.028(2), *Florida Administrative Code*, defines "non-compliance" as an employer's failure to secure the payment of workers' compensation. Rule 69L-6.028(2), *Florida Administrative Code*, authorizes the Department to consult sources of information, in addition to any business records that may be provided, to establish periods of non-compliance different than the time period requested by the business records request.

When an employer fails to provide business records sufficient for the Department to determine the employer's payroll during the periods of non-compliance, section 440.107(7)(e), Florida Statutes, requires the Department to calculate a penalty by imputing the employer's payroll for each of its employees. Rule 69L-6.028(3)(a), *Florida Administrative Code*, further provides:

For each employee, other than corporate officers, identified by the department as an employee of such employer *at any time during the period of the employer's noncompliance*, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage multiplied by 1.5 . . .

(emphasis added). As a result, the Department is required to calculate a penalty against an employer who fails to provide sufficient business records by imputing the payroll for all employees identified by the Department at any time during the employer's periods of non-compliance.

The ALJ's interpretation of the statute and rule leads to an absurd result. Under the ALJ's interpretation, a non-compliant employer could simply provide one month of business records demonstrating that the employees observed by the Department were only employed on the date of the investigation, and the Department would be precluded from imputing payroll for each of those employees for the remaining periods of non-compliance. This result is contrary to the enforcement regime established by section 440.107, Florida Statutes, and interpreted by Rule 69L-6.028, *Florida Administrative Code*, which provides for imputed penalties against non-compliant employers who fail to provide sufficient business records. The ALJ's interpretation is rejected.

The findings of fact set forth in the recommended order are adopted, except for paragraph fifteen. The conclusions of law set forth in the recommended order are adopted, except paragraphs twenty-two, twenty-three, and twenty-four, which are substituted by the Department's more reasonable interpretation of section 440.107, Florida Statutes, and Rule 69L-6.028, *Florida Administrative Code*.

The Recommended Order is adopted, except paragraphs fifteen, twenty-two, twenty-three, twenty-four, and the ALJ's recommendation, which is modified for the reasons stated herein. Accordingly, a \$13,084.46 penalty is imposed against Aleluya Roofing Plus Construction, Inc., for its failure to secure workers' compensation coverage as provided in the Amended Order of Penalty Assessment.

DONE and ORDERED this 29th day of February, 2016.




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:

Mariem Josefina Paez, Esq., Attorney for Respondent
Leon Melnicoff, Esq., Attorney for the Department