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Docketed by BP



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.

DOAH CASE NO.: 15-3479  
DWC CASE NO.: 15-100-1A-WC

LONNIE VLASNIK d/b/a VLASNIK CARPENTRY  
AND CONSTRUCTION, INC., and VLASNIK  
CARPENTRY AND CONSTRUCTION, INC.

Respondent.

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FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds respondent performed construction work without obtaining workers' compensation insurance as required by chapter 440, Florida Statutes, but that the Department did not produce clear and convincing evidence that respondent's payroll during the period of noncompliance was sufficient to support the Department's intended penalty of \$8,240.60. The administrative law judge (ALJ) recommended the Department assess a \$1,000.00 penalty against respondent. The Department filed exceptions to the recommended order.

The Department first objects to the finding in recommended order paragraph 25, that "Mr. Vlasnik did not use the ATM withdrawals to pay [r]espondent's employees for work performed since the dissolved corporation had no employees." The exception is well taken. The finding is not supported by competent substantial evidence, and is inconsistent with other findings and conclusions in the recommended order. It is undisputed that Mr. Vlasnik was

performing construction work at a residence, and identified his own company, Vlasnik Carpentry and Construction, Inc., as his employer. Although it may have been unlawful for the administratively dissolved corporation to be so engaged<sup>1</sup>, Mr. Vlasnik was, nonetheless, an “employee,” for worker’s compensation purposes, which is defined in section 440.02(15)(a), Florida Statutes, to include persons “lawfully or unlawfully employed.” Recommended order paragraph 25 is rejected.

The Department’s second exception identifies recommended order paragraph 42, wherein the ALJ found only a small number of the numerous cash withdrawals from an account held by Vlasnik Carpentry and Construction, Inc., were payments made for work performed by Mr. Vlasnik, such that they provided evidentiary support for the penalty calculation. The ALJ, in recommended order paragraph 20, appears to have credited Mr. Vlasnik’s testimony that the unidentified cash withdrawals were used to defray personal household and medical expenses. He reasoned, in paragraph 42, that only certain transactions at Lowes and Home Depot “potentially relate[] to the field of carpentry,” and he ultimately found, in recommended order paragraph 44, that the Department’s evidence of payroll to support an \$8,240.60 penalty was not clear and convincing. Paragraph 44, rather than paragraph 42, is where the disagreement lies.

The Department is rightly concerned that the ALJ’s consideration of the withdrawals from the account in question was too limited. Rule 69L-6.035(1)(b), *Florida Administrative Code*, provides:

For purposes of determining payroll for calculating a penalty pursuant to section 440.107(7)(d)1., F.S., the Department shall when applicable include any one or more of the following as remuneration to employees based upon evidence received in its investigation

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<sup>1</sup> See, § 607.1421(3), Fla. Stat.

(b) Payments, including cash payments, made to employees by or on behalf of the employer.

Generally, where a business entity disburses cash to an employee, the rule requires the payment to be considered remuneration. It is immaterial to what purpose the recipient of the cash payment put the funds. Mr. Vlasnik here conceded he was doing business as his dissolved corporation. In response to the Department's request for business records, Vlasnik produced the dissolved corporation's bank statements. He testified he made ATM withdrawals from the corporation's account to pay for personal expenses. Mr. Vlasnik was, as discussed above, an employee of the dissolved corporation for workers' compensation purposes. It appears the ALJ may have declined to apply Rule 69L-6.035(1)(b), based on his rejected finding that the dissolved corporation had no employees. To the extent he considered the rule, he incorrectly excluded from "payroll" those ATM withdrawals from the corporate account used for Mr. Vlasnik's personal expenses.

Although the ALJ's flawed interpretation of Rule 69L-6.035(1)(b), *Florida Administrative Code*, largely undermines his ultimate finding that the Department did not prove respondent's payroll for workers' compensation purposes by clear and convincing evidence, the Department cannot simply determine the evidentiary burden has been met. *See generally, Beckett v. Dep't of Fin. Serv.*, 982 So. 2d 94, 102 (Fla. 1<sup>st</sup> DCA 2008). The Department can, however, decline to accept the ALJ's interpretation of the rule and seek appellate review of the affected finding. *Id.* at 102-03. The ALJ's construction of Rule 69L-6.035(1)(b), is rejected. The Department does not concur in, but cannot reject, the finding that the evidence is insufficient to calculate a penalty based on respondent's payroll. The Department reserves the right to appeal the final order on this issue.


The Department's third exception concerns recommended order paragraph 44 to the extent the ALJ concludes \$1,000.00 is a fair penalty in this case. The foregoing discussion of the proper calculation of respondent's penalty renders this exception moot.

The recommended order is approved and adopted in part, as set forth above.

Accordingly, respondent is found to have performed construction work without having secured workers' compensation coverage for its failure to secure workers' compensation coverage in violation of section 440.10, Florida Statutes, such that the Department appropriately served respondent a Stop Work Order on March 23, 2015. A \$1000 penalty is hereby imposed upon respondent for the violation.

DONE and ORDERED this 10<sup>th</sup> day of March, 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:

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Trevor S. Suter, Esq., Attorney for the Division