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FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
COMMISSIONER ADAM H. PUTNAM

15-3566

**Please Respond To:**  
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June 9, 2016

Judge Lynne A. Quimby-Pennock  
c/o DOAH Clerk  
Division of Administrative Hearings  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

DIVISION OF  
ADMINISTRATIVE HEARINGS

2016 JUN 10 PM 12: 26

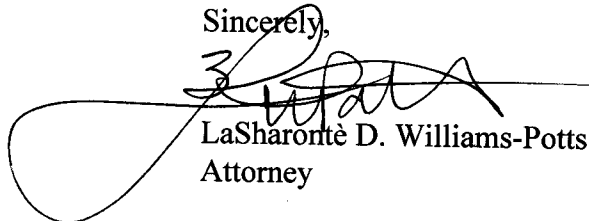
FILED

**Re: Agency Final Order**  
**JWD Trees, Inc. vs. Landscape Service Professionals, Inc.**  
**and The Gray Insurance Company**  
**Case No.: 15-3566**

Dear Judge Quimby-Pennock,

Enclosed is a copy of the Department's Final Order. Please feel free to contact our office if you have any questions or concerns.

Sincerely,

  
LaSharontè D. Williams-Potts  
Attorney

**STATE OF FLORIDA  
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**

JWD TREES, INC.,

Petitioner,

DOAH Case No.: 15-3566

vs.

LANDSCAPE SERVICE  
PROFESSIONALS, INC,

and

THE GRAY INSURANCE,  
AS SURETY,

Respondents.

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**FILED**  
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DIVISION OF  
ADMINISTRATIVE HEARINGS

**FINAL ORDER**

THIS CAUSE arising under the Florida Agricultural License and Bond Law, Sections 604.15 through 604.34, Florida Statutes, came before the Commissioner of the Florida Department of Agriculture and Consumer Services (“the Department”) for consideration and final agency action. The Commissioner of Agriculture and Consumer Services, as head of the Department, has jurisdiction over the subject matter and the parties.

**I. BACKGROUND**

This case commenced when JWD Trees, Inc. (hereinafter “JWD”) filed with the Department an agricultural products dealer’s complaint against Landscape Service Professional, Inc. (hereinafter “LSP”) and the Gray Insurance Company (hereinafter “Surety”) alleging that LSP failed to pay for 210 slash pine trees it purchased from JWD. The claim totaled \$42,567.80 and included the \$50.00 claim filing fee. On June 12, 2015, LSP filed its answer with the

Department and requested a formal hearing. The Department referred the case to the Division of Administrative Hearings (hereinafter "DOAH").

At the hearing, JWD presented the live testimony of J.W. Drott, III, Dennis Boddison, John Nemcovic, and C. Way Hoyt, who was accepted as an expert certified arborist. JWD presented Lynn Griffith's deposition testimony. JWD's Exhibits 1 through 5, 7 through 13, 15, 17 through 19, 21, 22, 25 through 32, 36, 37, 46, 48, 55, 57, and 58 were admitted into evidence. Respondents LSP and Surety presented the testimony of Sandra Benton, Steven Grant, Guy Michaud, Leo Urban, William Schall, and John Harris, who was accepted as an expert. Respondents' Exhibits 7, 10, 16, 18, 21a, and 40 were admitted into evidence.

## **II. POST HEARING PROCEDURAL HISTORY**

A four-volume final hearing transcript was filed on January 26, 2016. Both parties timely filed proposed recommended orders. On March 4, 2016, the ALJ entered the Recommended Order. On March 21, 2016, Respondent LSP filed Exceptions to the Recommended Order. JWD filed none; however, on March 31, 2016, it filed responses to LSP's exceptions.

The record consists of all notices, pleadings, stipulations, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings, exceptions, and the Recommended Order.

## **III. STANDARD OF REVIEW**

Section 120.57(1)(l), Fla. Stat., dictates the applicable standard regarding "findings of fact." The Department is therefore bound to accept the ALJ's findings of fact unless, after a thorough review of the record, there exists no competent substantial evidence to support the finding. *Id.* See also Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA

2009); Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Additionally, the Department cannot modify or substitute new Findings of Fact if competent substantial evidence supports the ALJ's findings. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); Gross v. Dep't of Health, 819 So. 2d 997, 1004 (Fla. 5th DCA 2002).

Findings of fact that are actually Conclusions of Law should be treated as Conclusions of Law despite any mislabeling. Battaglia Props. Ltd. v. Fla. Land and Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993); Kinney v. Dep't of State, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Unlike Findings of Fact, Conclusions of Law may be modified or rejected by the Department and differing interpretations applied. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009). In this case, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is more reasonable than that which was rejected or modified. s. 120.57(1)(l), Fla. Stat. (2015). Further, the Department may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action. Id.

#### IV. EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent LSP filed 14 exceptions to the Recommended Order. JWD responded to each. The Department's ruling on the exceptions is as follows:

**Exception 1. – Exception to Finding of Fact in paragraph 4 on page 4 of the Recommended Order**

*Respondent Insurance Company filed a denial letter of the claim and was represented at hearing by Landscape's counsel.*

JWD Trees, Inc. vs. Landscape Service Professionals, Inc.  
DOAH Case No.: 15-3566

Page 3 of 14

Respondents have not alleged that the findings outlined in paragraph 5 are not

Respondents argue that the ALJ should have included the fact that in its Answer, Respondent LSP asserted as an affirmative defense to payment non-viability of the agricultural products within the meaning of section 581.142(c)(1), Fla. Stat. This statute makes the sale of the products unlawful and within the purview of the Department. In support of their argument, Respondents allege that the ALJ has disregarded this same issue in the Statement of Issues in the Recommended Order and in other parts of this proceeding.

Respondents do not address the ALJ's finding specifically. Instead, it seems that they are attempting to reargue points already made at the formal hearing. After a review of the record, it does not appear that the findings in paragraph 4 were not based on competent, substantial evidence. As such, the Department overrules Exception 1.

**Exception 2. – Exception to Finding of Fact in paragraph 5 on page 4 of the Recommended Order**

*Southeastern Shade is a registered nursery and has been in the business of growing trees for approximately nine years. John Nemcovic and his wife, Shelley, own and operated Southeastern Shade. Southeastern Shade supplied the 278 pines that JWD brokered to Landscape.*

In their second exception, Respondents note that the ALJ failed to comment on Southeastern Shade's status as a licensed pesticide applicator at the time of the sale or any time prior to the sale. Respondents also note that the ALJ did not include the fact that John Nemcovic was not licensed with the Department as a dealer in agricultural products and that Southeastern Shade was without an active corporate status with the State of Florida at the time of the sale.

Respondents have not alleged that the findings outlined in paragraph 5 are not based on competent, substantial evidence. Instead, Respondents list facts that they believe

are relevant to making a recommended determination in this case. After a review of the record, it does not appear that the findings in paragraph 5 were not based on competent substantial evidence. As such, the Department overrules Exception 2.

**Exception 3. – Exception to Finding of Fact in paragraph 8 on page 5 of the Recommended Order**

*In September 2014, Ed Conk, Landscape's plant buyer, sought bids on a list of plants for the SWA job. The list included slash pine trees. According to the bid sheet, the slash pines were to be 16 feet, 18 feet, and 20 feet, in height, and in quantities of 176, 167, 118 respectively. There was nothing in the request for bids, or JWD's actual bid that addressed how long the slash pine trees were hardened off, or whether or how they had been root pruned.*

Respondents argue that the findings in paragraph 8 demonstrate the ALJ's belief that the viability standards set forth in section 581.142, Fla. Stat. were inapplicable in this case. Further, the ALJ's failure to consider and make a finding as to this issue constitutes a departure from the essential requirements of law.

Respondents fail to demonstrate that the findings in paragraph 8 were not based on competent, substantial evidence. The Department finds that they were, and therefore, in making these findings, the ALJ did not depart from the essential requirements of law. Exception 3 is overruled.

**Exception 4. – Exception to Finding of Fact in paragraph 12 on page 6 of the Recommended Order**

*Landscape's personnel documented receipt of the initial slash pines over a three-day period: November 11, 12, and 13, 2014. Once the slash pines were unloaded, they were "laid it on the ground and my water truck watered them down." The personnel also documented the planting of the slash pines; however, the exact location of JWD's trees in the SWA site map was not clearly established.*

Respondents' fourth exception is based on the belief that at the hearing, they presented competent, substantial evidence as to the exact location of the slash pine trees supplied by JWD. While this may be the case, the ALJ, as fact finder, is tasked with reviewing all of the evidence presented at the hearing. The ALJ must then make a recommendation as to what final agency action should be. *The findings that support this recommendation must be based on competent, substantial evidence.*

Here, the ALJ found, after review of the evidence presented, that the exact location of the trees was not clearly established. The Department finds that there is competent, substantial evidence to support this finding. Exception 4 is overruled.

**Exception 5. – Exception to Finding of Fact in paragraph 13 on page 6 of the Recommended Order**

*There was an irrigation system in place for watering the newly planted trees; however, it was not fully functional when the initial slash pines were planted. A water truck was used to water the trees. The SWA site had significant rainfall at times, and the ground was underwater during part of the pertinent period.*

Respondents take exception to the above finding and argue that there is no evidence that the entire SWA site was ever under water. Respondents further assert that they presented competent, substantial evidence that the slash pines in question were at no time underwater, nor affected in any way by excess water on the site.

The ALJ's finding simply states that the SWA site had rainfall at times and that the ground was underwater during parts of the pertinent period. After a review of the record, it does not appear that this finding was not based on competent, substantial evidence. The Department overrules this exception.

**Exception 6. – Exception to Finding of Fact in paragraph 14 on page 6 of the**

**Recommended Order**

*Several weeks after the slash pines were planted, some of the slash pines started to deteriorate.*

Respondents argue that this finding “downplays the rapidity and severity of the problem.” They reference testimony that the slash pines planted between November 11 and November 20, 2015, were dead or nearly dead less than a month later and that by January 8, 2016, an additional 96 were either dead or dying.

Based on the record provided, the Department rules that the finding in paragraph 14 was based on competent, substantial evidence. As such, Exception 6 is overruled.

**Exception 7. – Exception to Finding of Fact in paragraph 16 on page 7 of the**

**Recommended Order**

*In March, Lynn Griffith, an agricultural consultant, conducted an SWA site visit. Mr. Griffith noted that a majority of the pines were healthy, but there were some that were not doing well; that some had holes in them indicative of a pine beetle infestation. Upon receiving a written report from Mr. Griffith in mid-March, 2015, Mr. Drott provided the report to Mr. Conk.*

Respondents argue that the ALJ failed to note certain facts related to site visits by both parties and whether invitations were extended prior to those visits. Again, the Department may not reject the ALJ's findings unless there is no competent, substantial evidence from which the findings could reasonably be inferred. The Department believes that this standard has been met. As such, this exception is overruled.

**Exception 8. – Exception to Finding of Fact in paragraph 17 on page 7 of the**

**Recommended Order**



*In early April 2015, Landscape invited a Palm Beach County extension agent William Schall, the SWA project landscape architect Leo Urban, representatives of the prime contractor, Mr. Griffith, and selected Landscape employees to conduct a site visit at the SWA site. Mr. Drott was not invited to the inspection.*

Respondents present the same arguments in Exception 8 as it did in Exception 7. The Department overrules this exception for the same reasons.

**Exception 9. – Exception to Finding of Fact in paragraph 18 on page 8 of the**

**Recommended Order**

*Mr. Schall admitted that he did not know of other stress factors on the SWA site, and had only been told (by Landscape personnel) about how the trees were handled. Mr. Schall acknowledged that the SWA site was a prior pine tree area, and that pine beetles could be in the area. Further, he observed that at least one of the trees was planted too deep, which could add stress to newly planted trees.*

Respondents argue that the ALJ omitted the fact that Bill Schall, a commercial horticulture extension agent, determined the beetle infestation to be a secondary factor, and that the slash pines were already stressed from lack of an adequate root system. While this may be the case, Respondents' argument fails to demonstrate that the ALJ's findings in paragraph 18 are not based on competent, substantial evidence. The Department finds that they are. Exception 9 is therefore overruled.

**Exception 10. – Exception to Finding of Fact in paragraph 19 on page 8 of the**

**Recommended Order**

*Mr. Urban confirmed that there was an engineering problem at the SWA site, and the retention basin held water for longer periods of time than it should have.*

Respondents present the same arguments in Exception 10 as it did in Exception 5. The Department overrules this exception for the same reasons.

**Exception 11. – Exception to Finding of Fact in paragraph 21 on page 9 of the**

**Recommended Order**

*In April 2015, Mr. Drott received communication from Landscape indicating that the cause of the slash pine trees demise was attributed to the lack of hardening off or root issues. This was Mr. Drott's first notice that "hardening off" of the roots, and not the beetle infestation, was the cause of the slash pines' demise.*

Respondents take exception to paragraph 21 because they believe these findings insinuate that April of 2015 is when JWD was first notified that inadequate "hardening-off" of the roots caused the slash pines to die. Respondents further explain that JWD's vice-president, Dennis Boddison, visited the site in January of 2015 and took photographs. These photographs are part of the record.

The ALJ's findings in paragraph 21 relate to Mr. Drott specifically and his knowledge surrounding the death of the trees. The Department finds that there is competent, substantial evidence from which these finding could reasonably be inferred. As such, this exception is overruled.

**Exception 12. – Exception to Finding of Fact in paragraph 24 on page 10 of the**

**Recommended Order**

*Based on the totality of his review, Mr. Hoyt opined that a combination of factors contributed to the SWA slash pines to [sic] deterioration: excess watering, planting too deep, rough handling, and beetles. His testimony is found credible.*

Respondents argue that there is no competent, substantial evidence in the record to support the findings in paragraph 24. Respondents further contend that Mr. Hoyt was not a credible expert witness and that their expert provided competent, substantial evidence as to the true cause of death of the trees.

When determining whether to reject or modify findings of fact in an ALJ's recommended order, the Department is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions. Gross v. Dep't of Health, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). Given that the Department finds that there is competent substantial evidence from which these finding could reasonably be inferred, Exception 12 is overruled.

**Exception 13. – Exception to Finding of Fact in paragraph 26 on page 10 of the Recommended Order**

*Landscape personnel were unable to definitively identify the dead trees as being trees supplied by JWD. There were photographs introduced at the hearing that were initially marked as being from one supplier, then changed to another. There is a lack of clarity in identifying which supplier actually supplied the now demised trees.*

Respondents take exception to the finding that “*there is a lack of clarity in identifying which supplier actually supplied the now demised trees.*” However, the Department finds that there is competent substantial evidence in the record to support the ALJ's finding. For this reason, Exception 13 is overruled.

**Exception 14. – Exception to the ALJ's recommendations on pages 14 - 15 of the Recommended Order**

**Part A of Exception 14**

Respondents take exception to the ALJ's recommendation that it pay JWD for trucking and brokerage fees, which make up the total claim of \$42,617.80. Section 604.21(1)(a), Fla. Stat., states in part, “...Such complaint shall include all agricultural products defined in s. 604.15(1), as well as any additional charges necessary to effectuate the sale unless these

additional charges are already included in the total delivered price.”

JWD’s claim includes a charge for “freight” in the amount of \$6,125.00. The Department interprets “freight” to be an additional charge necessary to effectuate the sale of the trees and thus falls within section 604.15(1), Fla. Stat. As a matter of law, JWD’s award should include the charges for freight. The Department overrules Part A of Exception 14.

**Part B of Exception 14**

Respondents also take exception to the ALJ’s recommendation that it pay JWD reasonable costs and attorney’s fees. Section 120.595(b), Fla. Stat., gives the Department the authority to issue a final order awarding reasonable costs and attorney’s fees to the prevailing party in a section 120.57(1) hearing only where the ALJ has determined that the nonprevailing adverse party participated in the proceeding for an improper purpose. The Department agrees that the Recommended Order is devoid of such findings. However, the Department’s substantive jurisdiction under the Florida Agricultural License and Bond Law does not extend to legal issues regarding attorney’s fees under section 120.595, Fla. Stat., and therefore, the Department cannot reject this recommendation. See G.E.L. Corp. v. Dep’t of Env’tl. Prot., 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004); Dep’t of Children & Family Servs. v. D.H., 781 So. 2d 511 (Fla. 1st DCA 2001). For this reason, Part B of Exception 14 is overruled.

**V. FINDINGS OF FACT**

1. The Commissioner of Agriculture adopts the Findings of Fact set forth in the attached Recommended Order.

## VI. CONCLUSIONS OF LAW

2. The Commissioner of Agriculture adopts the conclusions of law set forth in the attached Recommended Order subject to the following changes.

3. Paragraph 32 on page 12 of the Recommended Order defines “dealer in agricultural products” and cites section 604.15(1), Fla. Stat. The Recommended Order also states that “Landscape is a dealer in agricultural products within the meaning of section 604.15(1).” However, the correct citation to both is section 604.15(2), Fla. Stat.

### **ORDERED AND ADJUDGED:**

1. Respondent LSP is indebted to Claimant, JWD Trees, LLC, in the amount of \$42,567.80.

2. Respondent LSP shall pay to Claimant, JDW, \$42,567.80 within thirty (30) days from the date of this Final Order. In the event Respondent LSP does not comply with this Final Order within thirty (30) days, Surety, the Gray Insurance Company, as Co-respondent, is hereby ordered to provide payment under the conditions and provisions of the agricultural dealer’s bond, to **ADAM H. PUTNAM, COMMISSIONER of Agriculture**. **Should responsibility of payment evolve to the Co-respondent, the Gray Insurance Company, it will be notified by the Department. This Final Order is effective on the date filed with the Clerk of the Department.**

3. Respondent LSP shall pay to Claimant, JWD reasonable costs and attorney’s fees.

**DONE and ORDERED** at Tallahassee, Leon County, Florida, this 6<sup>th</sup> day of

June, 2016.

ADAM H. PUTNAM  
COMMISSIONER OF AGRICULTURE



Michael A. Joyner  
Assistant Commissioner of Agriculture

**NOTICE OF RIGHT TO APPEAL**

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Filed with Agency Clerk this 6<sup>th</sup> day of June, 2016.



Agency Clerk

**Copies furnished to:**

Judge Lynne A. Quimb-Pennock, Administrative Law Judge, The Division of Administrative Hearings, The Desoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399

Sonia M. Diaz, Esq., Coleman, Hazzard, & Taylor, P.A., 2640 Golden Gate Parkway, Ste. 304, Naples, Florida 34105

JWD Trees, Inc. vs. Landscape Service Professionals, Inc.  
DOAH Case No.: 15-3566

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The Gray Insurance, Attn: Bond Claim Department, 3601 N I-10 Service Road, Metairie, LA  
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