

**FILED**

APR - 6 2016

Docketed by                     

*JA*



CHIEF FINANCIAL OFFICER  
JEFF ATWATER  
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL  
SERVICES, DIVISION OF WORKERS'  
COMPENSATION

Petitioner,

v.

DOAH CASE NO.: 15-3839  
DWC CASE NO.: 14-580-D4-WC

NOBLES QUALITY SERVICES, LLC,

Respondent.

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FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds Nobles Quality Services, LLC (respondent), failed to secure workers' compensation insurance as required by law, but concludes the Department incorrectly determined the period of non-compliance, leading to a miscalculated penalty. The administrative law judge (ALJ) recommends the Department recalculate the penalty based upon the ALJ's alternative period of non-compliance. The Division of Workers' Compensation (Division) filed exceptions to the recommended order, which are addressed below.

The Division's exceptions challenge multiple findings of fact and conclusions of law, but all flow from the ALJ's finding in recommended order paragraph 11, that "the payroll records provided by Respondent to the Department establish October 25, 2013, through October 22, 2014, as Respondent's period of non-compliance." The Division's exceptions are well-taken,

because this finding is not supported by competent substantial evidence. It appears the ALJ derived this period of non-compliance by mis-applying Rule 69L-6.028(2), *Florida Administrative Code*, to fix the initial date of respondent's period of non-compliance to the earliest date for which respondent's business records establish payroll. The ALJ's application of the rule is inconsistent with the rule's plain language, and with section 440.107, Florida Statutes.

Section 440.107(7)(d), Florida Statutes (2014)<sup>1</sup>, 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 2 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 required by this chapter *within the preceding 2-year period*.

(emphasis supplied). The statute unequivocally establishes a two-year "look-back" window concerning an employer's compliance with workers' compensation coverage requirements. Rule 69L-6.028, *Florida Administrative Code*, allows for a penalty period of less than two years if the Department ascertains that the employer was actually in compliance with coverage requirements for some portion of the two year look-back window. October 25, 2013, through October 22, 2014, which the ALJ found to be respondent's sole period of non-compliance, actually represents only the dates for which respondent produced business records sufficient for the Department to calculate a penalty. The ALJ's misreading of Rule 69L-6.028(2), *Florida Administrative Code*, erroneously imposed on the Department the burden to prove respondent generated payroll prior to October 25, 2013. When, as here, an employer is found to be non-compliant at the time of issuance of the stop-work order (RO ¶ 9), and produces business records that are sufficient to establish payroll for only a portion of the look-back window (RO ¶¶ 10, 11), section

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<sup>1</sup> Statutory references are to the 2014 Florida Statutes, unless otherwise indicated.

440.107(7)(e), Florida Statutes, and the rule mandate a penalty based on imputed payroll for the remainder of the look-back window.<sup>2</sup> That portion of recommended order paragraph 11 eliminating the period January 1, 2013, to October 24, 2013, from respondent's period of non-compliance, is rejected.

The ALJ's rejected finding in recommended order paragraph 11 impacts other findings of fact. In recommended order paragraph 13, the ALJ, relying on the erroneous non-compliance period, reduced that portion of the penalty calculation attributed to William Boling by \$21,940.16. The undisputed evidence establishes, however, and the ALJ found as fact, that respondent employed Mr. Boling at the time the stop-work order was issued (T. 18; RO ¶ 4, 13); that respondent failed to secure workers' compensation coverage for Mr. Boling during portions of the look-back window (T. 18-30; Exh. 1; RO ¶ 8); and that respondent failed to provide sufficient business records for portions of the look-back window (T. 48; Exh. 7; RO ¶ 10, 11). In recommended order paragraph 16, the ALJ similarly struck \$21,940.16 from the penalty calculation related to James Clogston. The record establishes without dispute, and the ALJ found, that respondent employed James Clogston when the stop-work order issued (T. 18; Exh. 2; RO ¶ 4, 13); that respondent failed to secure workers' compensation for Mr. Clogston during portions of the look-back window (T. 49; Exh 1; RO ¶ 8); and that respondent failed to provide sufficient business records for portions of the look-back window (T. 48; Exh. 7; RO ¶ 10, 11). The ALJ findings in paragraphs 13 and 16, therefore, are rejected for lack of competent substantial evidence. Recommended order paragraph 32 also incorporates the erroneous non-compliance period, and, to the extent it does, is likewise rejected for the same reasons. Finally,

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<sup>2</sup> Although the undisputed evidence established October 23, 2012, through October 21, 2013, and October 16, 2014, through October 22, 2014, as the periods for which respondent failed to provide sufficient business records (T. 48; Exh. 6), this final order will limit the imputed penalty to the January 1, 2013, through October 21, 2013, and October 16, 2014, through October 22, 2014, periods noticed in the 2<sup>nd</sup> Amended Order of Penalty Assessment. (Exh. 7).

recommended paragraph 34 and the ALJ's "recommendation" rely on the incorrect non-compliance period to recommend reducing respondent's penalty by \$43,850.32. These paragraphs are rejected for the reasons explained above.

The Division's request that the final order restore the penalty as noticed in the 2<sup>nd</sup> Amended Order of Penalty Assessment is rejected. The ALJ, in recommended order paragraph 34(b), struck \$13,106.38 from the portion of penalty calculation allocated to Harold Nobles. Although the ALJ did so in order to effectuate the erroneous period of non-compliance, the result was correct. Harold Nobles was not shown to be a corporate officer of respondent at the time the stop-work order issued, which would support imputation under Rule 69L-6.028(3)(b), *Florida Administrative Code*, nor was he either observed working at the job-site or identified in respondent's business records as receiving payments during the look-back period. In short, there is no factual basis in this record to include Harold Nobles in the penalty calculation. The penalty, therefore, is reduced by \$13,106.38.

Finally, in recommended order paragraph 33, the ALJ concluded the Department actually understated the penalty in one respect. The ALJ determined the Department should have, but did not, calculate an imputed penalty with regard to William Boling for the period March 18, 2014, through October 22, 2014. This determination appears to be correct. \$16,341.78 is added to the penalty, based upon wages imputed to William Boling for this period.

The Recommended Order, as modified above, is approved and adopted.

Accordingly, a \$64,410.76 penalty is imposed against Nobles Quality Services, LLC, for its failure to secure workers' compensation coverage. Nobles Quality Services, LLC, must remit payment of the penalty to the Department, or execute a payment agreement with the Department to pay the penalty by installments.

DONE and ORDERED this 6<sup>th</sup> day of April, 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](mailto:Julie.Jones@myfloridacfo.com).

Copies furnished to:

Matthew Nobles, Representative of Respondent  
Christopher Ivey Miller, Esq., Attorney for the Division