

FILED

JUN 7 2016

Docketed by *M*



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs.

DOAH CASE NO.: 15-6062
DFS CASE NO.: 14-327-D5-WC

KP ROOFING MASTERS, LLC,

Respondent.

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds KP Roofing Masters, LLC (respondent), failed to secure workers' compensation insurance as required by law, but concludes the Department incorrectly considered certain workers employed by one of respondent's subcontractors as respondent's statutory employees. The administrative law judge (ALJ) recommended that the Department reduce the penalty accordingly. The Division of Workers' Compensation (Division) filed exceptions to the recommended order.

The ALJ, in recommended order paragraph 45, concluded the Division overstated the statutory penalty to be imposed against respondent by \$8,434.86 by including in the penalty calculation payroll attributable to workers employed by subcontractor Emerald Building Solutions, LLC (Emerald) during the period January 1, 2014, through April 8, 2014. The ALJ concluded this was error because respondent requested and received from Emerald a Certificate of Liability Insurance which indicated Emerald had workers' compensation coverage through an

employee leasing company as of January 1, 2014. Although the certificate was not accurate, the ALJ concluded respondent satisfied Rule 69L-6.032(3), *Florida Administrative Code*, by obtaining the certificate from Emerald upon or before the Department requested it, and had no responsibility under statute or rule to validate its accuracy. The ALJ, however, erred in her reading of Rule 69L-6.032.

Section 440.10(1)(c), Florida Statutes, provides, for a contractor to rely on a subcontractor's workers' compensation coverage for specific workers on a job site, that the "contractor shall require a subcontractor to provide evidence of workers' compensation insurance." Rule 69L-6.032, *Florida Administrative Code*, in pertinent part, provides:

(1) In order for a contractor who is not securing the payment of compensation pursuant to Section 440.38(1)(a), F.S. to satisfy its obligation to obtain evidence of workers' compensation insurance or a Certificate of Election to Be Exempt from a subcontractor pursuant to Section 440.10(1)(c), F.S., such contractor shall obtain and provide to the Department, when requested, the evidence specified in subsections (2), (3), (4) or (5) herein.

...

(3) If a subcontractor is a client company of an employee leasing company . . . the evidence of workers' compensation insurance from a subcontractor shall be a Certificate of Liability Insurance *and a list of the employees leased to the subcontractor obtained from the professional employer organization or employee leasing company as of the date the subcontractor commenced work for the contractor on each project.*

(emphasis supplied). The ALJ, in recommended order paragraph 23, found as fact that "[R]ule 69L-6.032(3) specifies that the evidence [a subcontractor possesses workers' compensation insurance] shall be a Certificate of Liability Insurance." The ALJ, in recommended order paragraph 42, focused on paragraph (1) of the rule, and concluded that respondent was required to do no more than, upon the Department's request, obtain from Emerald the insurance certificate.

The construction of a statute or rule is a conclusion of law, not a finding of fact. *See generally, State v. Sigler*, 967 So. 2d 835 (Fla. 2007). Even if, however, the second sentence of recommended order paragraph 23 is treated as finding of fact, it is not supported by competent substantial evidence (i.e. the rule itself). Although the ALJ's reading of rule paragraph (1) makes grammatical sense in isolation, paragraph (3) unequivocally requires a contractor to obtain both a certificate of liability and a list of employees leased through the employee leasing company as of the date the subcontractor begins work. The ALJ's construction of the rule, moreover, does not support its intent. The rule's primary purpose is to ensure subcontracted employees are covered by insurance when they perform work, not that contractors provide documents to the Department upon request. Here, it is undisputed that Emerald secured workers' compensation through an employee leasing company; that respondent obtained only the certificate, with no list of covered employees; and that the certificate was not issued until July 18, 2014, long after Emerald began performing work for respondent.¹ Had respondent complied with the rule as construed by the Department, respondent likely would have avoided, with regard to Emerald, precisely the coverage failure that occurred in this case. Had respondent required Emerald to supply a list of covered leased employees obtained from the leasing company as of the date Emerald began work, it is far more likely the insurance certificate would have been discovered to be inaccurate.

The ALJ's construction of Rule 69L-6.032 is rejected for the reasons explained above. This modification affects the second sentence of recommended order paragraphs 23 and 29, all

¹ Rule 69L-6.032(3)(g), *Florida Administrative Code*, requires the Certificate of Liability Insurance to be issued prior to the date a subcontractor commences the sublet work.

of recommended order paragraphs 42 through 45,² and the Recommendation. With these modifications, the recommended order is approved and adopted.

Accordingly, a \$68,525.42 penalty is imposed against KP Roofing Masters, LLC, for its failure to secure workers' compensation coverage as provided in the 4th Amended Order of Penalty Assessment. Respondent 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 7th day of June, 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.

² With regard to recommended order paragraph 43, the Department acknowledges that penalty auditor Ruzzo's testimony referenced only respondent's failure to timely obtain the Emerald certificate, and did not address the absence of a list of leased employees as a basis for including the disputed Emerald payroll in the penalty calculation. The Department, however, is not bound by an employee's inaccurate or incomplete explanation of a statute or rule. *See generally, Associated Indus. Ins. Co. Inc., v. Dep't of Labor & Emp. Sec.*, 923 So. 2d 1252 (Fla. 1st DCA 2006); *Dolphin Outdoor Adver., v. Dep't of Transp.*, 582 So. 2d 709 (Fla. 1st DCA 1991).

Copies furnished to:

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