FILED
DEC 1 2016
Docketed by

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION

Petitioner,

v.

DOAH CASE NO.: 15-7356
DWC CASE NO.: 15-300-D5-WC

SOLER AND SON ROOFING,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order concludes that, when an employer fails to produce records to establish its payroll, the Department may not calculate a penalty against a non-compliant employer based on imputed payroll for the entire two-year look-back period if the ALJ finds an alternative period of non-compliance. The ALJ found a single day of non-compliance and recommended the statutory minimum penalty of $1,000.00. The Division of Workers' Compensation (Division) filed exceptions to the recommended order. Respondent submitted a response to the Division's exceptions. The Division's exceptions, to the extent they are well-taken, are incorporated in the discussion below.

The Department contends section 440.107(7)(e), Florida Statutes, and Rule 69L-6.028, *Florida Administrative Code*, require the Department to calculate a penalty based on imputed payroll for periods where an employer fails to produce business records sufficient to determine its payroll for penalty calculation purposes. The ALJ concluded the Department's position relies upon an impermissible interpretation of the statute and rule because, according to the ALJ, the

Filed December 2, 2016 3:56 PM Division of Administrative Hearings

Department seeks to impute a period of noncompliance, rather than the employer's payroll, as authorized by section 440.107(7), Florida Statutes.

The ALJ recognizes that *Twin City Roofing Construction Specialists, Inc. v. Dep't of Fin. Serv.*, 969 So. 2d 563 (Fla. 1st DCA 2007), supports the Department's interpretation, but contends this precedent should be limited to its facts. Twin City, like respondent here, provided workers' compensation for its employees through an employee leasing agreement. *Dep't of Fin. Servs. v. Twin City Roofing Construction Specialists, Inc.* Case No. 06-0024, at RO ¶ 5 & 8 (Fla. DOAH Aug. 30, 2006; DFS Nov. 22, 2006). Similar to the instant case, five of Twin City's workers were not covered by the employee leasing agreement. *Id.* at Rec. Ord. ¶ 8, 9, 12-14. Twin City, again, like respondent here, failed to provide sufficient business records for the period requested, and the Department calculated a penalty based on imputed payroll for all five unsecured employees for the entire look-back period. *Id.* at Rec. Ord. ¶ 16-18. The First District Court of Appeal not only affirmed the penalty, but expressly approved the Department's application of the penalty statute. "When, as here, an employer refuses to provide business records, the Division is required to impute the missing payroll for the period requested in order to assess the penalty. § 440.107(7)(e), Fla. Stat. (2005)." *Twin City*, 969 So. 2d at 566. The factual distinction between Twin City and the instant case is the ALJ's finding that the instant respondent's unsecured worker began his employment on the inspection date, and did not provide any services to respondent during the look-back period. The ALJ contends that imputing payroll for this employee for the entire look-back period is, in essence, imputing non-compliance, which the ALJ contends the statute does not contemplate.

Twin City, however, is not the only appellate decision upholding the Department's construction of section 440.107(7)(e), Florida Statutes. *See Lockhart Builders, Inc. v. Dep't of*

Fin. Serv., 15 So. 3d 767 (Fla. 1st DCA 2009). *Lockhart Builders*, as to the critical facts, is indistinguishable from the instant case. Lockhart Builders subcontracted a portion of a construction project to BY Construction (BY), who secured workers' compensation for its employees through an employee leasing agreement. *Dep't of Fin. Servs. v. Lockhart Builders, Inc.* Case No. 07-5059, at RO ¶ 4 - 5 (Fla. DOAH Mar. 31, 2008; DFS Sep. 16, 2009). A Department investigator arrived at the work site and observed three unsecured BY employees performing construction work. *Id.* at Rec. Ord. ¶ 7-9. Lockhart Builders was the "statutory employer" of BY's unsecured employees by operation of section 440.10(1)(b), Florida Statutes, and was subject to a penalty because the three employees in question worked for a single day without coverage. Lockhart Builders provided business records demonstrating the payroll of the three unsecured employees for the day in question, as well as each employee subject to BY's employee leasing agreement, but, despite a specific Department request, did not provide any records demonstrating Lockhart's own payroll during the look back period. *Id.* at Rec. Ord. ¶ 12, 13 & 17. The Department penalized Lockhart by imputing the statewide average weekly wage (AWW) to each of the three BY workers for the entirety of the look-back period subsequent to BY's incorporation date. *Id.* at Rec. Ord. ¶ 19 & 20. The ALJ in *Lockhart Builders* articulated essentially the same argument as the ALJ in the case at bar, and concluded the Department applied an impermissible construction of section 440.107(7)(e), Florida Statutes, and Rule 69L-6.028, *Florida Administrative* Code. *Id.* at Rec. Ord. ¶ 32-36, 38-41. The ALJ recommended the Department impose a penalty for a single day of non-compliance for the three workers, based on their actual wages for their one day of unsecured work. *Id.* at Rec. Ord. ¶ 43. The Department's final order, citing *Twin City*, rejected the ALJ's contrary conclusions of law, and imposed a penalty in excess of $70,000.00, based on nearly two years of imputed wages. *Id.* at Fin. Ord. p.

2-3. The First District Court of Appeal, citing *Twin City*, expressly approved the penalty assessment. *Lockhart Builders, Inc. v. Dep't of Fin. Serv.*, 15 So. 3d 767 (Fla. 1st DCA 2009). *Lockhart Builders* rejects the construction of the statute and rule the ALJ has advanced in the instant case.

The Department rejects the recommended order's conclusions of law that are not in accord with *Lockhart Builders* and *Twin City*. Specifically, recommended order paragraphs 24, 34, 36-38, 40, 42-44, and 46-47. Recommended order paragraphs 37, 38, and 42 – 46, citing *Universal Ins. Co. v. Warfel*, 82 So. 3d 47 (Fla. 2012), posit that section 440.107(7)(e), Florida Statutes, and Rule 69L-6.028(2), *Florida Administrative Code*, establish no more than "a vanishing presumption of earnings during the pre-DOAH phase when an employer fails to provide payroll business records." (Rec. Ord. ¶ 38). The ALJ contends the Department improperly treats section 440.107(7)(e) as an irrebuttable presumption "such that the sole effect of an employer's demand for a chapter 120 hearing is that an [ALJ] will check [the Department's] arithmetic." (Rec. Ord. ¶ 43). The ALJ's analysis on this point is flawed in two respects. First, section 440.107(7)(e), Florida Statutes, establishes a penalty, not an evidentiary presumption. Section 440.107(7)(e), therefore, is not analogous to the statute at issue in *Warfel*. Second, while the Department acknowledges that the final hearing at DOAH is *de novo*, that fact does not relieve the employer of the obligation to produce the requested records. *Lockhart Builders*. If an employer produces business records at the final hearing sufficient to establish payroll for the period for which such records were requested, the penalty may well require re-calculation.

The recommended order, in paragraph 40, also purports to invalidate the penalty in this case under the authority of section 120.57(1)(e)1., Florida Statutes, newly enacted by chapter

2016-116, section 4, Laws of Florida. The Department respectfully suggests the ALJ has overstepped his authority under the new law. As an initial matter, the ALJ opines that the Department's *interpretation* of Rule 69L-6.028(2), *Florida Administrative,* contravenes section 440.107(7), Florida Statutes, rendering the Department's interpretation of the rule an invalid exercise of legislative authority. The ALJ suggests the rule, under his construction, would be valid. A challenge to an existing rule on the ground it is an "invalid exercise of delegated legislative authority" as defined in section 120.52(8), Florida Statutes, is, in effect, a "facial" challenge. *Fairfield Cmtys. v. Land & Water Adj. Comm'n*, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988); *Humhosco, Inc. v. Dep't of Health and Rehab. Serv.*, 476 So. 2d 258 (Fla. 1st DCA 1985). A rule cannot be both valid and invalid on this ground. *Hasper v. Dep't of Admin.*, 459 So. 2d 398, 400 (Fla. 1st DCA 1984) (holding the fact that an agency may erroneously apply a rule in any given situation does not invalidate the rule; remedy for an erroneous application of a rule is a disputed fact hearing conducted pursuant to section 120.57(1), Florida Statutes). The ALJ, here, simply disagrees with the Department's interpretation of the rule. The interpretation of the Department's rule is a matter within the Department's substantive jurisdiction, and the Department, with appropriate explanation, may reject the ALJ's contrary view. § 120.57(1)(l), Fla. Stat.; *see generally, Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002). The Department has rejected the ALJ's erroneous construction for the reasons explained above. *See Lockhart Builders.*

The Department further notes that, under the new section 120.57(1)(e)1., Florida Statutes, an ALJ is not authorized to *sua sponte* raise a challenge to an existing rule for the first time in a recommended order. Section 120.57(1)(e)2., Florida Statutes, requires that a party substantially affected by agency action challenge the validity of the rule in a request for hearing, or plead the

invalidity of the rule as a defense. The new statute also specifies that section 120.56(3), Florida Statutes, applies to such proceedings, which means the party challenging the rule must prove the rule's invalidity by a preponderance of evidence. The ALJ's action here impermissibly deprived the Department of notice of a challenge to the rule and any opportunity to defend it, and relieved respondent of its evidentiary burden.

The ALJ's finding and conclusion in recommended order paragraphs 22 and 28 that Teresa Marquez "appears to have been a casual worker" for whom workers' compensation insurance was never required is rejected for lack of competent substantial evidence. "Casual employment", which is excluded from workers' compensation coverage requirements, is defined as "work that is anticipated to be completed in 10 working days or less, without regard to the number of persons employed, and at a total labor cost of less than $500." § 440.02(5); 440.02(15)(d)5., Fla. Stat. Because casual employment is excluded from the definition of employment, the burden is on respondent to prove casual employment as an affirmative defense. *See Armstrong v. Ormond in the Pines*, 734 So. 2d 596 (Fla. 1st DCA 1999), *quoting Mayo's Clinic v. Livingston*, 172 So. 2d 619, 620 (Fla. 2d DCA 1965) ("an exception to a statute must be proven by the one seeking to establish it"). Respondent presented no evidence that Teresa Marquez's employment lasted 10 days or less, or that she was compensated less than $500 in total. The Department respectfully rejects the ALJ's finding and conclusion that Mrs. Marquez was a casual employee.

In recommended order paragraphs 20, 21, and 34, the ALJ concludes the Department failed in its obligation to determine how many of respondent's employees were not covered by a policy of workers' compensation during the review period. These conclusions ignore the obligation of every employer to maintain and produce sufficient business records. § 440.107(5),

Fla. Stat.; Fla. Admin. Code R. 69L-6.015. To the extent these conclusions perpetuate the ALJ's flawed construction of section 440.107(7), Florida Statutes, they are rejected.

The ALJ's conclusion in paragraph 29 is rejected to the extent it states section 440.107(7)(a), Florida Statutes, requires the Department to release a stop-work order when an employer complies with the coverage requirements of chapter 440. The statute provides the Department "*may* issue an order of conditional release from a stop-work order . . . upon a finding that the employer has complied with the coverage requirements of this chapter, paid a penalty of $1,000 as a down payment, and agreed to remit periodic payments of the remaining penalty amount." § 440.107(7)(a), Fla. Stat. (emphasis supplied).

The ALJ's findings of fact are adopted, except for recommended order paragraphs 19-22, and 24. Paragraphs 19, 20, the final sentence of paragraph 21 reflect a legal conclusion inconsistent with the Department's conclusion set forth above. Paragraph 22 is discussed above. Paragraph 24 is rejected to the extent the ALJ finds the evidence of Mr. Lee's rate of pay "rebuts the statutory presumption of double the AWW." The conclusions of law are adopted, except paragraphs 28, 29, 34-38, 40, 42-44, 46-47, which are modified in accordance with the foregoing. The recommendation is rejected.

Accordingly, a penalty of $63,434.48 is imposed on respondent for failure to secure workers' compensation benefits. Respondent must, within 30 days, remit payment of the penalty, or enter into an agreed payment schedule with the Department to pay the penalty through installments.

DONE and ORDERED this 1st day of December, 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:

Soler and Son Roofing, respondent
c/o Idalmis Pedrero, President
11325 SW 158 CT
Miami, FL 33196

Daniel R. Vega, Esq., Attorney for respondent
Robert Paul Washington, Esq., Attorney for respondent
Taylor, Espino, Vega & Touron, P.A.
2555 Ponce De Leon Blvd., Suite 200
Coral Gables, FL 33134

Jonathan Anthony Martin, Esq., Attorney for the Division
Trevor S. Suter, Esq., Attorney for the Division
200 E. Gaines St.
Tallahassee, FL 32399-4223