

FILED

JAN 05 2017

Chief Financial Officer
Docketed by: TRG



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION

Petitioner,

v.

DOAH CASE NO.: 16-1863
DWC CASE NO.: 15-647-D4-WC

FANTASTIC CONST. OF DAYTONA,
INC., A FLORIDA CORPORATION,

Respondent.

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order finds the Department did not produce clear and convincing evidence to support portions of the intended penalty of \$9,629.36. The administrative law judge (ALJ) recommended the Department impose an administrative penalty against respondent in the amount of \$3,332.11. The Department, while largely concurring the ALJ's findings and conclusions, must reject the ALJ's handling of the penalty associated with respondent's employee Scott Barenfanger.

The ALJ concluded the Department was prohibited from calculating a penalty based on payroll imputed to Mr. Barenfanger for November and December 2013, months for which respondent failed to business records sufficient to establish payroll, because there was no evidence that he was employed by respondent prior to November 18, 2015. This was error. Section 440.107(7)(e), Florida Statutes, requires the Department to impute payroll for Mr. Barenfanger for that period. *See Lockhart Builders, Inc. v. Dep't of Fin. Serv.*, 15 So. 3d 767

(Fla. 1st DCA 2009); *Twin City Roofing Construction Specialists, Inc. v. Dep't of Fin. Serv.*, 969 So. 2d 563 (Fla. 1st DCA 2007).

In *Lockhart Builders*, a Department investigator arrived at the employer's work site and observed three unsecured employees performing construction work.¹ *Dep't of Fin. Serv. v. Lockhart Builders, Inc.* Case No. 07-5059, RO ¶ 7-9 (Fla. DOAH Mar. 31, 2008; DFS Sep. 16, 2009). Lockhart Builders became 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 the subcontractor's employee leasing agreement, but did not provide any records demonstrating Lockhart's payroll during the look-back period. *Id.* at RO ¶ 12, 13 & 17. The Department penalized Lockhart by imputing the statewide average weekly wage (AWW) to each of the three workers for the entirety of the look-back period subsequent to the subcontractor's incorporation date. *Id.* at RO ¶ 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 RO ¶ 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 RO ¶ 43. The Department's final order, citing *Twin City Roofing Construction Specialists, Inc. v. Dep't of Fin. Serv.*, 969 So. 2d 563 (Fla. 1st DCA 2007), 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 FO p. 2-3.

¹ The unsecured employees were subcontractors who did not have workers' compensation coverage, and by operation of section 440.10(1)(b), Florida Statutes, Lockhart Builders became their statutory employer.

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). In accordance with this analysis, recommended order paragraphs 53, 64, 67, 73, 87, and 90-91 are rejected, as is the recommendation.

The ALJ found that the Department improperly considered as payroll payments made to individuals who were not respondent's employees. Competent substantial evidence supports the ALJ's findings that David Locte, Don Langly, RW Kicklighter, Let Malereal, CTC, Doug, Ken's Heating and Air, Ren W Raly, Ronnie Whaley, Barry Smith, and Neal Noonan were not employees and should be removed from the penalty calculation. As a result, the 2nd Amended Order of Penalty Assessment is reduced by \$2,725.30.

The ALJ further found that the penalties attributable to Foster Coleman and James Shores were incorrectly calculated. Competent substantial evidence supports the ALJ's findings, and the penalty attributable to Foster Coleman is reduced by \$420.02, and the penalty attributable to James Shores is reduced by \$130.46.

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

Accordingly, a \$6,353.40 penalty is imposed against Fantastic Const. of Daytona, Inc., for its failure to secure workers' compensation coverage. 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 5th day of January, 2017.




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.

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