

FILED

DEC 19 2016

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.: 16-1986  
DWC CASE NO.: 15-675-D4-WC

DONALD KEHR, d/b/a JNK FRAMING,  
INC., A DISSOLVED FLORIDA  
CORPORATION,

Respondent.

---

FINAL ORDER

THIS CAUSE came on for entry of a final order. The recommended order concludes that, without evidence indicating employees observed by the Department at a non-compliant employer's worksite were employed during the periods it failed to produce business records sufficient to calculate its payroll for the period requested, the Department is prohibited from calculating a penalty based on imputed payroll for the entire two-year look-back period. The ALJ recommended the Department impose an administrative penalty in the amount of \$1,000.00. The Division of Workers' Compensation (Division) filed exceptions to the recommended order. 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 Department seeks to impute a period of noncompliance, rather than the employer's payroll, as authorized by section 440.107(7), Florida Statutes.

*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 of Rule 69L-6.028, *Florida Administrative Code*. Twin City, 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. *Dep't of Fin. Servs. v. Twin City Roofing Construction Specialists, Inc.* Case No. 06-0024 (Fla. DOAH Aug. 30, 2006; DFS Nov. 22, 2006) at RO ¶ 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 workers began 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 these employees 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). In *Lockhart Builders*, a Department investigator arrived at the employer's work site and observed three unsecured employees performing construction work.<sup>1</sup> *Dep't of Fin. Servs. 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*, 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

---

<sup>1</sup> 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.

approved the penalty assessment. *Lockhart Builders, Inc. v. Dep't of Fin. Serv.*, 15 So. 3d 767 (Fla. 1st DCA 2009). *Lockhart Builders*, simply stated, rejects the construction of the statute and rule the ALJ has advanced in the instant case.

The interpretation of Rule 69L-6.028, *Florida Administrative Code*, 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)(1), Fla. Stat.; *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002). The Department rejects the ALJ's erroneous conclusion for the reason explained above – an appellate court has already endorsed the Department's interpretation. *Lockhart Builders*, 15 So. 3d 767. Accordingly, recommended order paragraphs 51-55 are rejected, as is paragraph 41.

The ALJ's conclusion in paragraph 47 is rejected to the extent it concludes the Department must release a stop-work order when an employer complies with the coverage requirements of chapter 440, Florida Statutes. The pertinent 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.*” (emphasis supplied). § 440.107(7)(a), Fla. Stat.

The Recommendation is rejected to the extent the ALJ concludes \$1,000.00 is the appropriate penalty in this case. Section 440.107(7)(e), Florida Statutes, directs a penalty in the amount of \$61,424.04 in this case. *Lockhart Builders*, 15 So. 3d 767; *Twin City*, 969 So. 2d 563.

The recommended order is approved and adopted with the modifications set forth above.

Accordingly, a \$61,424.04 penalty is imposed against Donald Kehr, d/b/a JNK Framing, 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 19 day of December, 2016.



A handwritten signature in blue ink, appearing to read "R. Kneip".

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:

Donald Kehr, d/b/a JNK Framing, Inc., respondent  
5160 S. Ridgewood Ave.  
Port Orange, FL 32127

Joaquin Alvarez, Esq., Attorney for the Division  
200 E. Gaines St.  
Tallahassee, FL 32399-4229