

FILED

JUN 13 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.

JAGUAR DRYWALL OF PONTE VEDRA
BEACH, INC.,

Respondent.

DOAH CASE NO.: 16-2997
DWC CASE NO.: 16-009-D1-WC

FINAL ORDER

THIS CAUSE came for consideration and final agency action on the Recommended Order issued on February 28, 2017. The only issue in this case concerns whether dividend payments made to Larry Kirkland, respondent's president and sole shareholder (Kirkland), should be included in respondent's payroll for penalty calculation purposes. The administrative law judge (the ALJ) concluded that the dividend payments should be excluded from respondent's payroll because the Department failed to clearly and convincingly prove that the dividends were paid to Kirkland in his capacity as an employee. The Department timely filed exceptions, which are well-taken, because the ALJ's interpretation of Rule 69L-6.035, *Florida Administrative Code*, is clearly erroneous.

The ALJ properly found Kirkland was respondent's employee due to his status as respondent's president and sole shareholder (RO ¶ 17), and also because Kirkland performed services for remuneration as an off-site supervisor of respondent's construction industry activities (RO ¶ 19). § 440.02(15)(b), Fla. Stat. The ALJ also properly found payments made to Kirkland outside of respondent's employee leasing policy were not secured by a policy of workers' compensation (RO ¶ 7, 12). However, the ALJ erred in concluding that the dividend payments Kirkland received as respondent's president and sole shareholder were not payroll.

Corporate officers may elect to become exempt from the coverage requirements of Florida's Workers' Compensation Law, but they must affirmatively make that election (RO ¶ 2). §§ 440.02(15)(b)1., 440.05, Fla. Stat. In the absence of an exemption, the employer remains subject to the coverage requirements of chapter 440, Florida Statutes, must provide coverage for its nonexempt officers, and is subject to a penalty for any officer's unsecured payroll. §§ 440.02(15), 440.03, 440.05, 440.10, 440.107(7)(d)1., Fla. Stat. Kirkland was not exempt from the coverage requirements of chapter 440, Florida Statutes.

Payroll is defined as "[p]ayments made to employees by or on behalf of an employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distribution, or incentive plans." Fla. Admin. Code R. 69L-6.035(1)(e). Based on the ALJ's factual findings that Kirkland was respondent's president (RO ¶ 17), and that he performed services for respondent for remuneration (RO ¶ 19), Kirkland was, by definition respondent's employee, and dividend payments that he received must be included in respondent's payroll by operation of law. §§ 440.02(15), 440.03, 440.05, 440.10, 440.107(7)(d)1., Fla. Stat.; Fla. Admin. Code R. 69L-6.035(1)(e). Therefore, there is no competent substantial evidence to support the ALJ's finding in paragraph 21 that the Department failed to prove Kirkland received dividend

payments in his capacity as respondent's employee. The ALJ's conclusions to the contrary in paragraphs 32, 33, 34, and 41 are rejected.

The ALJ's incorrect interpretation of Rule 69L-6.035, *Florida Administrative Code*, relies in part on *Dep't of Fin. Serv. v. Ron's Custom Screen, Inc.*, Case No. 09-0959 (Fla. DOAH Nov. 24, 2009; Fla. DFS Feb. 22, 2010), wherein reimbursements to the employer's sole corporate officer were not included in the employer's payroll because the expenses were confirmed to be valid business expenses. *Ron's Custom Screen* is distinguishable from the instant matter in that Rule 69L-6.035(1)(f), *Florida Administrative Code*, expressly *excludes* valid expense reimbursements from an employer's payroll, whereas Rule 69L-6.035(1)(e), *Florida Administrative Code*, expressly *includes* dividends in the employer's payroll.

Without explanation, the ALJ concludes that inclusion of the term "dividend" renders Rule 69L-6.035(1)(e), *Florida Administrative Code*, ambiguous. However, the Department's inclusion of the term "dividend" in Rule 69L-6.035(1)(e), *Florida Administrative Code*, serves as a non-exclusive example of payments that must be included in an employer's payroll for penalty calculation purposes. The term "dividend" is unambiguous in the context of a payment received by an employee from a corporation. By way of example, under the Internal Revenue Code, "dividend" is defined as "any distribution or property made by a corporation to its shareholders— (1) out of its earnings and profits." 26 U.S.C. § 316. When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary. *Reform Party of Fla. v. Black*, 885 So. 2d 303 (Fla. 2004). Black's Law Dictionary defines the term "dividend" as "a portion of a company's earnings or profits distributed pro rata to its shareholders." Black's Law Dictionary (10th ed. 2014). The common meaning of "dividend" includes "an individual share of something distributed," "a resultant return or reward," and "a number to be divided." Dividend Definition,

Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/notice> (last visited May 5, 2017). There can be no doubt as to the meaning of the term “dividend” in Rule 69L-6.035(1)(e), *Florida Administrative Code*, which plainly refers to financial distributions by a corporation to its shareholders as a non-exclusive example of the types of remuneration that must be included as an employer’s payroll for penalty calculation purposes. This plain language interpretation of Rule 69L-6.035(1)(e), *Florida Administrative Code*, is within the Department’s substantive jurisdiction and is more reasonable than the ALJ’s interpretation, which is rejected.

The Department’s exception to the ALJ’s conclusion in paragraph 40 is well-taken because the interpretation of Rule 69L-6.035, *Florida Administrative Code*, is a matter within the Department’s substantive jurisdiction. §§ 120.57(1)(l), 440.107(3), Fla. Stat. The Legislature designed the Workers’ Compensation Law to be an efficient and self-executing system for the payment of benefits to injured workers. § 440.015, Fla. Stat. Employer compliance with the Workers’ Compensation Law is encouraged through penalties for noncompliance based on an employer’s payroll. § 440.107, Fla. Stat. Pursuant to its delegated statutory authority, the Department has defined the term “payroll” in Rule 69L-6.035, *Florida Administrative Code*, to include dividend payments made to nonexempt officers. §§ 440.107, 440.591, Fla. Stat.

After review of the record, including testimony and admitted exhibits, and being otherwise fully apprised in all material premises, the ALJ’s findings of fact are adopted, except for paragraph 21; the conclusions of law are adopted, except paragraphs 32, 33, 34, 37, 40, and 41; and the recommendation is modified in accordance with the foregoing.

Accordingly, an \$8,021.12 penalty is imposed against Jaguar Drywall of Ponte Vedra Beach, Inc., for its failure to secure workers’ compensation coverage as provided in the 3rd

Amended Order of Penalty Assessment. Respondent shall also comply with the Agreed Order of Conditional Release from Stop-Work Order.

DONE and ORDERED this 13th day of June, 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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