

FILED

JUN 21 2017

Chief Financial Officer
Docketed by: TRB



CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

v.

DOAH CASE NO.: 16-5109
DWC CASE NO.: 16-269-1A-WC

BEST FRAMING USA, INC.,

Respondent.

FINAL ORDER

THIS CAUSE came for consideration and final agency action on the Recommended Order. The Recommended Order concludes that Best Framing USA, Inc. (respondent), is subject to an \$891,418.46 penalty for materially understating or concealing its payroll. Respondent submitted late-filed exceptions to the Recommended Order, which are rejected for the reasons stated below.

Respondent submitted four numbered exceptions, the first of which argues that section 440.107(2), Florida Statutes, is ambiguous because the term "material" is not defined. In the context of fraud, it has long been recognized that "[a] misrepresentation or omission is material 'if it has a natural tendency to influence, or is capable of influencing, the decision maker to whom it is addressed.'" *U.S. v. Slaton*, 801 F.3d 1308, 1314 (11th Cir. 2015) (quoting *U.S. v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009)); see also *Neder v. U.S.*, 527 U.S. 1, 16 (1999). The administrative law judge (ALJ) made detailed findings, supported by competent substantial

evidence, that respondent “disclose[d] only a small portion of what the employees actually earned” (RO ¶ 7); that the “vastly larger” payroll amounts written from Account 9199 were not reported to the carrier (RO ¶ 11, 17); that the Department identified 45 employees (RO ¶ 12), whereas respondent only reported four employees to the carrier (RO ¶ 13); that those four employees received payroll “far greater than what was reported to the carrier” (RO ¶ 17); that despite increasing its payroll estimate in the Second Audit Year, the estimate was still “well below” respondent’s actual payroll (RO ¶ 13, 16); that respondent failed to report approximately \$1,280,000.00 in payroll attributed to D R Horton (RO ¶ 15); failed to report approximately \$1,864,000.00 in payroll attributed to Henry Homes (RO ¶ 15); and most significantly, “Best Framing’s premium for the First Audit Year was \$6,575; it should have been \$298,550 based on its actual payroll. For the Second Audit Year, the premium of \$17,767 should have been \$209,231.” Respondent’s underreporting was intentional (RO ¶ 28). Respondent does not challenge these factual findings, which are supported by competent substantial evidence, and entirely refute respondent’s argument that the ALJ made no findings as to materiality. Neither the Department nor the Division of Administrative Hearings possess jurisdiction to consider respondent’s argument that use of the term “material” renders section 440.107(2), Florida Statutes, unconstitutionally vague. *See Key Haven Associated Enters. v. Bd. of Trs. of the Int. Imp. Trust Fund*, 427 So. 2d 153 (Fla. 1982).

Respondent’s second exception equates coverage with compliance, which are distinct concepts under chapter 440, Florida Statutes. The clear intent of the Workers’ Compensation Law is to ensure that employers are accountable not only for purchasing workers’ compensation insurance, but for securing coverage that is commensurate with their claims exposure. § 440.107, Fla. Stat. “Securing” coverage means not only purchasing insurance, but also paying a premium

based on an accurate assessment of risk. *Id.* The failure of the carrier to cancel respondent's coverage does not absolve respondent of its duty to accurately report payroll to its carrier for the correct calculation of premium.

Respondent's third exception posits that the Department lacks the authority to determine whether an employer has materially understated or concealed payroll until after an audit is performed under section 440.381(6)(b), Florida Statutes. The statute, however, contains no such limitation. Section 440.381(6)(b), Florida Statutes, provides "[i]f the department determines that an employer has materially understated or concealed payroll . . . the carrier shall commence a physical onsite audit . . ." *Id.* If the carrier fails to perform an audit, then the Department shall contract with a third party to conduct an audit. *Id.* Section 440.107(2), Florida Statutes, further provides that "if *at any time* an employer materially understates or conceals payroll . . . such an employer *shall be deemed* to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section." (emphasis supplied). Section 440.107(7)(a), Florida Statutes, provides

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare to justify service by the department of a stop-work order on the employer . . .

(emphasis supplied). The Department was well-within its statutory authority to determine that respondent materially understated or concealed its payroll. § 440.107(2), 440.107(7)(a), 440.381(6)(b), Fla. Stat. Chapter 440, Florida Statutes, plainly authorizes the Department to determine employer understatement or concealment of payroll at any time. The determination of respondent's conduct does not require the Department to interpret compliance with the terms of a private insurance contract.

Respondent contends that the Department cannot possibly determine that an employer understated or concealed payroll without first reviewing an audit conducted pursuant to section 440.381(6)(b), Florida Statutes. The Department previously rejected a similar argument in the matter of *Dep't of Fin. Servs. v. Mex Group Maint. & Repair, Inc.*, Case No. 14-2618, at RO ¶¶ 97-100 (Fla. DOAH Feb. 13, 2015; DFS May 12, 2015). There, respondent argued that it was allowed to materially understate its payroll because it could change throughout the policy term, and adjustments to the coverage and premiums were made through an end of policy term audit to reconcile the estimated payroll with the actual payroll (*Mex Group* RO ¶¶ 97-98). The ALJ in *Mex Group* found the employer's monthly statements to the carrier, which grossly understated payroll, were not excused by the availability of the year-end audit. *Id.* In the instant matter, as in *Mex Group*, there is compelling evidence of the employer's material misstatements to the carrier throughout the look-back period (RO ¶¶ 7, 11, 12, 13, 15, 17 & 28).

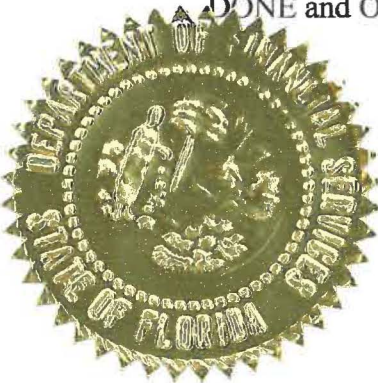
Respondent's third exception also takes issue with the ALJ's finding that the Department's failure to complete an audit prior to initiating the enforcement action was *de minimus*. The ALJ is correct, and the lack of an audit in this matter was harmless error. Courts have consistently applied the harmless error rule when reviewing agency action resulting from a procedural error. *Carter v. Dep't of Bus. & Prof'l Reg.*, 633 So. 2d 3 (Fla. 1994). Whether a particular procedural defect may be termed harmless depends in large measure on the nature of the significance of the error and its relationship to the rights of the affected party. *Halpin v. Unemplmt. App. Comm'n*, 516 So. 2d 1027, 1028 (Fla. 1st DCA 1987). The Department's initiation of the enforcement action without first conducting an audit did not materially impair the fairness of this proceeding. Indeed, respondent was afforded a *de novo* proceeding before an ALJ to review the Stop-Work Order and the 2nd Amended Order of Penalty Assessment. §

120.57(1)(k), Fla. Stat. A year-end audit would merely serve as persuasive evidence in the *de novo* proceeding, and would not alter the parties' status in any meaningful way, other than to delay the initiation of the Department's enforcement action.

Respondent's final exception reiterates the legal arguments and positions rejected above.

Accordingly, an \$891,418.46 penalty is imposed against Best Framing USA, Inc., for its failure to secure workers' compensation. Respondent must pay the penalty in full within thirty days (less any payments made to date) or execute a payment agreement with the Department to pay the penalty by installments.

DONE and ORDERED this 21st day of June, 2017.



A handwritten signature in black ink, appearing to read "R. C. Kneip". The signature is written in a cursive style with a long, sweeping tail.

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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