

FILED

JUN 25 2018

Chief Financial Officer

Docketed by: 



CHIEF FINANCIAL OFFICER
JIMMY PATRONIS
STATE OF FLORIDA

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

DOAH CASE NOs.: 17-0879 c/w 17-1558
DFS CASE NOs.: 16-198-1A-WC c/w
16-148-1A-WC

v.

ROYAL ROOFING AND RESTORATION, INC.,

Respondent.

FINAL ORDER

THIS CAUSE came on for consideration of and for final agency action on a Recommended Order ("RO"). The Petitioner timely filed exceptions to the RO. The Respondent did not file exceptions or a response to Petitioner's exceptions.

RULING ON PETITIONER'S EXCEPTIONS

Petitioner raises four exceptions. Because each exception is rooted in the definition of the term "payroll" under Rule 69L-6.035, *Florida Administrative Code*, the exceptions are addressed together. The exceptions attack the RO's exclusion of certain payments from the penalty calculation.

The exceptions correctly note the definition of "payroll" under the rule is broad enough to capture the types of payments Respondent made to its insured employees to reimburse them for various expenses; however, the charging documents do not charge Respondent with making material misrepresentations or concealing payroll. Therefore,

findings relative to unreported payroll (“uninsured payroll”) fall outside of the scope of the charging documents (the SWOs and the AOPAs) and are immaterial to the outcome of this matter. See Dep’t of Fin. Servs, Div. of Workers’ Comp. v. Palatka Welding Shop, Inc., Case No. 10-1675 (DOAH Nov. 24, 2010; DFS Feb. 23, 2011).

In Palatka, the Department checked the second box on the SWO (described as “a form with supporting allegations that may be selected by checking the box next to the allegation”) charging the employer with “materially misrepresenting and concealing employee duties as to avoid proper classification for premium calculation.” The AOPA issued at a later date made the same selection. In this matter, the only box marked on the charging documents is the first box charging a failure to obtain coverage.¹

The exceptions also attack other findings, but these findings, in addition to relating back to the payroll issue, are premised on the Department’s failure to prove an alleged fact. It is well-settled that, “A decision in favor of a party without the burden of proof is not required to be supported by competent, substantial evidence.”² And, an agency is “not empowered to bypass the ALJ’s factual exoneration ... of the... charges simply by reweighing the evidence and making contrary findings.”³

Thus, the findings of fact that find the Department did not prove Respondent employed certain individuals, or Respondent failed to provide coverage for an employee,

¹ Cottrill v. Dep’t of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996). (“Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act.”); Beckett v. Dep’t. of Fin. Servs, 982 So.2d 94 (Fla. 1st DCA 2008). The Department has taken the position in prior cases that the charges set forth under box one and box two are distinct violations. See, Dep’t of Fin. Servs, Div. of Workers’ Comp. v. American Coatings, Inc., d/b/a A.C. Painting, Inc., (DOAH Case No. 08-1925; DFS Case No. 08-092-D4) (settled prior to issuance of a final order). The RO rejected American Coatings position and adopted the position advocated by the Department in its PRO. (Even if the Division had marked box 2, the RO consistently found a lack of proof, *albeit*, it was error for the ALJ to consider issues outside of the charging documents.)

² Mitchell v. XO Communications, 966 So.2d 489 (Fla. 1st DCA 2007); Beckett v. Dep’t of Fin. Servs., 982 So.2d 94 (Fla. 1st DCA 2008); Fitzgerald v. Osceola County School Bd., 974 So. 2d 1161 (Fla. 1st DCA 2008).

³ Bemenderfer v. Dept. of Bus. & Prof’l Reg., 955 So.2d 659 (Fla. 4th DCA 2007).

may not be modified or rejected.⁴ Further, individuals not named in the charging documents cannot form the basis for a penalty assessment.

Therefore, apart from the second sentence in the fourth exception, correctly noting the minimum penalty is \$1,000.00 under section 440.107(7)(d)1., Florida Statutes, the exceptions are rejected.

After reviewing the record, including all testimony and admitted exhibits, considering applicable law, and otherwise being fully apprised in all material premises, the Recommended Order is hereby adopted in part and modified or rejected in part.⁵

The Findings of Fact and Conclusions of Law are tainted to a large extent by the infusion of facts and legal issues falling outside of the scope of the charging documents, primarily in regards to payments made to insured employees or, in some instances, to persons not named in the charging documents. As noted, disciplinary action cannot be premised on conduct not alleged in the charging document. Cottrill.

Under these circumstances in this instance it is far more expeditious to note the adoption of the findings and conclusions falling within the charging documents rather than untangle this “mass of legal spaghetti.”⁶ Therefore, only the penalties related to uninsured persons named in the 2nd AOPAs are adopted as valid and enforceable.

⁴ For example, see Findings of Fact paragraphs 42, 50, 58, 74, 81-82, 87, 89, 93, 115, and 125. See also Conclusions of Law paragraphs 140 and 143.

⁵ See Phillips v. Bd. of Dentistry, Dep't of Health, 884 So. 2d 78 (Fla. 4th DCA 2004). To correct a scrivener's error, the captions on pages 5 and 7 are modified to read DOAH Case No. 17-1558 (which relates to DFS Case No. 16-148-1A, May 4, 2016) and DOAH Case No. 17-0879 (which relates to DFS Case No. 16-198-1A, June 8, 2016), respectively.

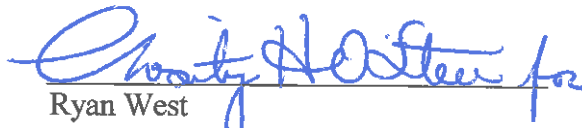
⁶ Benedict v. Foster, 300 So. 2d 8 (Fla. 1974). The primary source of this mass of spaghetti are payments described in the RO as “uninsured payroll” which in some instances means wages paid to uninsured employees and in other instances refers to payments made by Respondent to insured employees, but made directly and not through the employee leasing company. Extra sauce is added by the inclusion of individuals not named in the charging documents, whose identities were discovered from purportedly untimely documents and included in draft revisions to the charging documents. However, a draft is just that and nothing more. Moreover, under the Accardi doctrine an agency is compelled to follow its rules or explain the deviation. See Atlantis at Perdido Ass'n, Inc. v. Warner, 932 So. 2d 1206 (Fla. 1st DCA 2006)

Findings of Fact paragraph 63 correctly finds the Department proved Respondent failed to obtain coverage for Dustin Hansel (SWO 16-148-1A), and Findings of Fact paragraph 119 correctly finds the Department proved Respondent failed to obtain coverage for Emilio Lopez and Ramon Gonzales (SWO 16-198-1A).⁷

The Recommendation is modified to adjust the recommended penalty in each case to the statutorily required minimum penalty of \$1000.00.⁸

Accordingly, Royal Roofing and Restoration, Inc., is assessed a penalty of \$1,000.00 in DOAH Case No. 17-0879/SWO-16-198-1A, and a penalty of \$1,000.00 in DOAH Case No. 17-1558/SWO-16-148-1A. Within 30 days from the date of this Final Order, Respondent must pay the penalty in full, less any payments made to date, or execute a payment agreement with the Department of Financial Services to pay the penalty by installments.

DONE and ORDERED this 20TH day of JUNE, 2018


Ryan West
Chief of Staff

See also Charles Koch, Policymaking by the Administrative Judiciary, 56 Ala. L. Rev. 693 (Spring, 2005) (“The agency head promulgates rules, and administrative law doctrine compels the agency to obey the rules or justify its disobedience. Throughout the hierarchy, agency adjudicators—including administrative judges—are required to apply rules and policy pronouncements.”) The applicable rule imposes a 20 day deadline to provide records following issuance of an Amended Order of Penalty Assessment. Notwithstanding this principle of administrative law, the ALJ determined she could rely on information in the draft revisions to the 2nd AOPA. However, to the extent the information derived from the documents falls outside of the scope of the charging documents, it is not material. Palatka. (In many instances, whether addressing matters within or without the scope of the charging documents, the RO finds the Division did not prove its case. As previously noted, such findings cannot be set aside on review. Mitchell; Beckett; Fitzgerald.)

⁷ The RO erroneously includes a penalty for Ms. Fischer under SWO-16-148-1A, but the Division did not name Ms. Fischer in the charging documents. The RO also erroneously includes a penalty for Claudia Hansel under SWO 16-198-1A, but like Ms. Fischer, Ms. Hansel is not named in the charging documents. The errors are harmless; both the incorrect and corrected penalty total less than the minimum penalty.

⁸ Additionally, the Recommendation section is modified to correct a scrivener’s error. The RO inverts the case numbers. Also, it inverts the penalty amounts stated in paragraphs 141 and 144; however, this is a harmless error because it does not impact the outcome of this proceeding. Gonzalez v. Dep’t of Health, 120 So. 3d 234 (Fla. 1st DCA 2013). As noted, both cases result in the same \$1,000 minimum penalty.

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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