

FILED

MAR 11 2019

Chief Financial Officer
Docketed by: *J. Johnson*



CHIEF FINANCIAL OFFICER
JIMMY PATRONIS
STATE OF FLORIDA

2019 MAR 12 PM 1:05
DIVISION OF
ADMINISTRATIVE HEARINGS

FILED

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

v.

AMERIBUILD CONSTRUCTION
MGT., INC.,

Respondent.

DOAH CASE NO.: 18-0426
DFS CASE NO.: 17-250-D5-WC

FINAL ORDER

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

RULING ON RESPONDENT'S EXCEPTIONS

Exceptions to a recommended order are authorized by section 120.57(1)(k), Florida Statutes (2018), and Rule 28-106.217, *Florida Administrative Code*.

The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

§ 120.57(1)(k), Fla. Stat. (2018).¹


¹ Respondent's exceptions are argued in a series of paragraphs lacking clear organization, but it appears that the intended organization is as follows: (a) paragraph 1 addresses Findings of Fact paragraph 7; (b) paragraph 2 addresses Findings of Fact paragraph 10; (c) paragraphs 3-12 address Findings of Fact paragraph 13; (d)

paragraph 15. Respondent did not file an exception to paragraph 15, which finds that Respondent “would concede that the imputed payroll and concomitant penalty are correct” if the ALJ found Respondent had a legal obligation to provide coverage to its subcontractor’s employees. Because Respondent did not file an exception to paragraph 15, the exception need not be addressed. It is noted, however, that paragraphs 15 and 30 are supported by competent, substantial evidence and applicable law, and would not be set aside in any event. *Pillsbury*, 744 So. 2d at 1041. Further, Respondent now attempts to circumvent the predicate finding for paragraph 30 by improperly asserting new factual contentions for the first time in Respondent’s exceptions. For the above reasons, Respondent’s exception to paragraph 30 is 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.

Accordingly, Ameribuild Construction Mgt., Inc., is assessed a penalty of \$132,593.32.

DONE and ORDERED this 11th day of March, 2019.



Ryan West
Chief of Staff



Exceptions to Recommended Order Paragraphs 7, 10, 13, 17-19, and 27

Respondent challenges factual findings contained in paragraphs 7, 10, 13, 17-19, and 27² of the Recommended Order. These exceptions are addressed together because the challenges all relate to the credibility of witnesses and weight of the evidence. As explained in *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006):

Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses.

If, as in this case, the issue is primarily one of the weight or credibility of the witnesses, it does not matter that there might be competent substantial evidence to support a contrary view of the evidence.

The challenged findings set forth above, when assessed in context and against the entire record, are supported by competent, substantial evidence. Therefore, Respondent's exceptions to paragraphs 7, 10, 13, 17-19, and 27 are rejected. *See Pillsbury v. Dep't of HRS*, 744 So. 2d 1040, 1041 (Fla. 2d DCA 1999).

Exception to Recommended Order Paragraph 30

Respondent's exception to paragraph 30 challenges the validity of the amount of the assessed penalty. Respondent essentially argues that its penalty should be no greater than the penalty imposed on its subcontractor in a separate proceeding. Conclusions of Law paragraph 30 is entirely premised on and flows legally from Findings of Fact

paragraphs 13-17 address Findings of Fact paragraphs 17-19; (e) paragraphs 18-25 address Conclusions of Law paragraph 27; and (f) paragraphs 26-29 address Conclusions of Law paragraph 30. The remaining paragraphs (30-37) consist of arguments directed at disputed portions of the recommended order not identified by page number or paragraph. Therefore, the arguments contained in paragraphs 30-37 of Respondent's exceptions are disregarded.

² In the Recommended Order, paragraph 27 is labeled by the Administrative Law Judge ("ALJ") as a Conclusion of Law; however, Respondent challenges the factual basis underlying the conclusion of law.

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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