



FLORIDA  
DEPARTMENT OF  
FINANCIAL SERVICES



**FILED**

**TOM GALLAGHER**  
CHIEF FINANCIAL OFFICER  
STATE OF FLORIDA

OCT - 7 2005

Chief Financial Officer  
Docketed by: *[Signature]*

04-3789  
SML  
Closed

Case No. 78595-04-WC

IN THE MATTER OF:

MACS CONSTRUCTION AND CONCRETE, INC.

000005

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order rendered on August 5, 2005, after a hearing conducted pursuant to Sections 120.57(1), and 120.569, Florida Statutes, by Administrative Law Judge Stuart M. Lerner. Respondent, Macs Construction and Concrete, Inc., filed exceptions on August 22, 2005. The Petitioner, Department of Financial Services, Division of Workers' Compensation, filed a response to the exceptions on September 1, 2005. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, the Respondent's exceptions, and Petitioner's Response, have all been considered during the promulgation of this Final Order.

The Respondent asserted in its exceptions that the Administrative Law Judge failed to consider that the uncontroverted evidence presented at the hearing established that the Respondent would have paid an amount in premium equal to \$1,045,599.33 pursuant to Section 440.107(7)(d)1., Florida Statutes (2003). Respondent's assertions rest on the erroneous assumption that Respondent is somehow entitled to credits and discounts that appear in the Florida Workers' Compensation Premium Algorithm, when the "premium that would have been

paid" is calculated according to Section 440.107(7)(d)1., Florida Statutes. As noted throughout the Findings of Fact and Conclusions of Law in the Recommended Order, the Administrative Law Judge determined that the plain language of the statute indicates no mention of the requirement for Petitioner to include such credits and discounts in its calculation of the pertinent penalty amount and, therefore, Respondent was not entitled to them. Respondent misapplies the Administrative Law Judge's reasoning in paragraph 20 of the Recommended Order to justify its own conclusion that it owes a penalty of \$1,568,399.00 instead of the \$2,323,765.60 amount referenced in the Recommended Order. The Administrative Law Judge correctly concluded that the Petitioner has consistently construed the language in Section 440.107(7), Florida Statutes, "the amount the employer would have paid," as meaning the aggregate of the "manual premiums" for each applicable payroll code classification, calculated as described in the NCCI Basic Manual, when assessing a penalty against an employer. This construction is incorporated in Petitioner's "Penalty Calculation Worksheet", which Rule 69L-6.027, Florida Administrative Code provides Petitioner "shall use" when "calculating penalties to be assessed against employers pursuant to Section 440.107, F.S." In the present case, the Administrative Law Judge correctly concluded that 1.5 times the amount the Respondent would have paid in premium when applying approved manual rates to the Respondent's payroll during periods for which it failed to secure the payment of workers' compensation equals \$2,323,765.60. Accordingly, Respondent's exceptions are rejected.

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law made by the Administrative Law Judge are adopted as the Department's Findings of Fact, and Conclusions of Law.

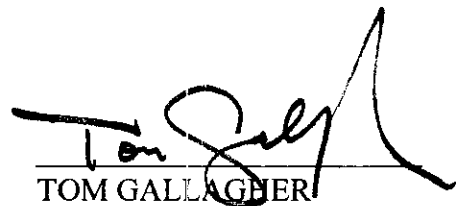
IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department, and that Macs Construction and Concrete, Inc., is directed to pay the sum of \$2,323,765.60 to the Department within thirty days from the date hereof.

ACCORDINGLY, IT IS HEREBY FURTHER ORDERED that the Second Amended Order of Penalty Assessment entered by the Division of Workers' Compensation is affirmed, and that Macs Construction and Concrete, Inc., shall cease all business operations unless and until it provides evidence satisfactory to the Division of Workers' Compensation of having now complied with the workers' compensation law by securing the necessary workers' compensation coverage for covered employees and, pursuant to Section 440.107(7)(a), Florida Statutes, paid the civil penalty imposed herein.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Fla. R. App.P. 9.110. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same and the appropriate filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 7 day of October, 2005.

  
TOM GALLAGHER  
Chief Financial Officer

Copies Furnished To:

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