STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION, Petitioner, vs. MACS CONSTRUCTION AND CONCRETE, INC., Respondent.	)	Case No. 04-3789

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Section 120.569, Florida Statutes, and Section 120.57(1), Florida Statutes, on June 8, 2005, by video teleconference at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Joe Thompson, Esquire
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Division of Workers' Compensation
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For Respondent: Gary A. Issacs, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent owes $1,568,399.00 or $2,323,765.60 as a penalty for failing to secure workers' compensation insurance for its employees, as required by Florida law.

PRELIMINARY STATEMENT

On or about August 17, 2004, Petitioner issued an Amended Order of Penalty Assessment advising that it was assessing a penalty of $2,443,311.23 against Respondent for "[f]ail[ing] to secure the payment of workers' compensation within the meaning of § 440.107(2), Fla. Stat. by: failing to obtain coverage that meets the requirements of CH. 440, Fla. Stat. and the Insurance Code." Respondent subsequently filed a request for a "formal Administrative hearing on this matter." On October 15, 2004, Petitioner referred the matter to DOAH for the assignment of a DOAH administrative law judge to conduct the hearing Respondent had requested. After being assigned the case, the undersigned, on October 26, 2004, set the case for final hearing and issued an Order of Pre-Hearing Instructions.

In accordance with the undersigned's October 26, 2004, Order of Pre-Hearing Instructions, the parties, on June 1, 2005,

filed a Joint Stipulation, which read, in pertinent part, as follows:

> Pursuant to the Order of Pre-Hearing Instructions in the above-styled action, the Department of Financial Services, Division of Workers' Compensation (Petitioner) and Macs Construction and Concrete Inc. (Respondent), submit their joint stipulation with regard to the following matters:
>
> (a) NATURE OF THE CONTROVERSY: This is a proceeding pursuant to chapter 440, Florida Statutes and related statutes by Petitioner to enforce the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees. Petitioner issued an initial Stop Work Order and Order of Penalty Assessment (Stop Work Order) and a subsequent Amended Order of Penalty Assessment (Amended Order) to Respondent, alleging that Respondent failed to abide by the statutory requirement in chapter 440.
>
> (b) EACH PARTY'S POSITION: It is perhaps most pertinent first to identify the areas of agreement and stipulation between the parties. Following that will be a description of each party's position with regard to issues to be resolved at trial.
>
> FOR THE PURPOSE OF THIS ADMINISTRATIVE HEARING THE PARTIES AGREE AND STIPULATE TO THE FOLLOWING FACTS AND/OR ANSWERS TO MIXED QUESTIONS OF LAW AND FACT:
>
> 1. On the date of issue of the Stop Work Order (on or about August 2, 2004), Respondent was required to have secured the payment of workers' compensation for the benefit of its employees, in accordance with chapter 440, Florida Statutes.

2. On the date of issue of the Stop Work Order (on or about August 2, 2004), Respondent had not secured the payment of workers' compensation for the benefit of its employees because Respondent did not have in place workers' compensation insurance that complied with the requirements of chapter 440, Florida Statutes.

3. The Stop Work Order and Amended Order were properly served on Respondent.

4. The amount of penalty assessed by Petitioner in the Amended Order is $2,443,311.23.

5. Due to Respondent's failure to abide by the relevant sections of chapter 440 (including but not necessarily limited to sections 440.10 and 440.38, Florida Statutes), Respondent is liable for and owes at least $1,568,399.00 as a penalty for violating the relevant section of chapter 440.

6. The relevant statute for calculation and imposition of the penalty amount is section 440.107, Florida Statutes.

7. Petitioner will issue a final order as part of this proceeding that will assess a penalty against Respondent of at least $1,568,399.00 for which amount Respondent is liable and owes as a penalty for violating relevant sections of chapter 440.

As to the remaining central issue in the instant action, the parties disagree as to the meaning of section 440.107(7)(d)1.; specifically, the parties disagree as to the meaning of the phrase ". . . the amount the employer would have paid in premium applying approved manual rates to the employer's payroll . . . ." Even more specifically, the parties disagree as the meaning of the

term "approved manual rates." Petitioner's and Respondent's positions on this issue are as follows:

> Petitioner's position: The application of "approved manual rates" to Respondent's payroll necessarily requires that no discounts or credits referenced in the National Council on Compensation Insurance's Basic Manual (Florida state-specific pages) be applied to the calculation of the penalty against Respondent.
>
> Respondent's position: The application of "approved manual rates" to Respondent's payroll necessarily requires that the following credit and discount referenced in the National Council on Compensation Insurance's Basic Manual (Florida state-specific pages) be applied to the calculation of the penalty against Respondent:
>
> Florida Contracting Classification Premium Adjustment Program (FCCPAP) construction credit
>
> Standard Premium Discount
>
> The parties will present direct evidence at trial as to whether the above credit and discount are applicable to the to the calculation of the penalty amount against Respondent.

With regard to a more ancillary matter, the parties also disagree as to the class codes assigned to certain employees of Respondent. Respondent asserts that certain employees were assigned a costlier class code than was warranted; Petitioner disagrees, but as of the date of submittal of this Joint Stipulation the parties are attempting to resolve their differences before trial. The presentation of direct evidence on this

issue may or may not be required as of the date of trial.

* * *

(e) and (f) STATEMENT OF FACTS ADMITTED AND STATEMENT OF LAW ON WHICH THERE IS AGREEMENT:

The parties refer to section (b) of this document and incorporate it here by reference.

(g) and (h) STATEMENT OF ISSUES OF FACT AND LAW REMAINING TO BE LITIGATED

The parties refer to section (b) of this document for issues that remain to be litigated, and incorporate that section here by reference.

* * *

In a footnote, the parties added:

> A class code is a number assigned to a certain type of work or activity that an employee may perform--e.g., Concrete (class code 5221), Executive Supervisor (class code 5606), or Clerical (class code 8810). The use of class codes published in the National Council on Compensation Insurance's SCOPES Manual has been adopted by rule by Petitioner.[1] A rate of insurance (a cost per $100.00 of payroll) is assigned to each class based on the level of complexity and/or risk associated the activity (with a more complex or riskier activity assigned a costlier rate), and is published in the National Council on Compensation Insurance's Basic Manual. Use of the Basic Manual has also been adopted by rule by Petitioner.

On June 7, 2005, Petitioner filed an Unopposed Motion to Amend Administrative Penalty Amount, which read, in pertinent part, as follows:

> COMES NOW THE PETITIONER IN THE ABOVE-STYLED ACTION, the Department of Financial Services, Division of Workers' Compensation (Department), to submit its unopposed motion to amend the amount of the administrative penalty, and to state:
>
> 1. The final hearing in this matter is scheduled to take place on June 8, 2005 before Administrative Law Judge Stuart Lerner at video teleconference sites in Tallahassee and West Palm beach, Florida.
>
> 1. Both the Department and Respondent entered into and filed a joint stipulation on or about June 1, 2005 that narrowed the issues in the instant action. The Department and Respondent agreed and stipulated that the amount that Respondent owes in the instant action for having violated various sections of chapter 440, Florida Statutes is at least $1,568,399.00. The parties further agreed that as a result of this action the Department will issue a final order in an amount that is at least equal to $1,568,399.00, and for which amount Respondent will be found owing and liable.
>
> 3. The parties have reached agreement on another issue (identified as an "ancillary issue" on page 3 of the joint stipulation filed on or about June 1, 2005) as to how some employees should be identified under class codes (i.e., the type of work they performed). Due to adjustment of the class codes that had been at issue, the parties now agree that the maximum amount of the penalty at issue is $2,323,765.60. The Department desires to issue a new (second) Amended Order of Penalty Assessment to

> Respondent that reflects the amended amount of penalty at issue.
>
> 4. Counsel for both parties have discussed this Motion to Amend and are in agreement as to its substance.
>
> WHEREFORE, the Department moves that the Administrative Law Judge issue an order that allows the Department to issue an Amended Order of Penalty Assessment that reflects an administrative penalty amount of $2,323,765.60.

In a footnote, Petitioner added:

> In the first Amended Order of Penalty Assessment that was issued in this case and is on file with the Administrative Law Judge and the Division of Administrative Hearings, the penalty amount at issue was $2,443,311.23. Though the parties disagree as to exactly how much Respondent owes as a penalty amount, as indicated above Respondent has stipulated that it owes an amount of at least $1,568,399.00. The Department contends that the new penalty amount owed by Respondent is $2,323,765.60 (subject to the Administrative Law Judge's granting of this Motion to Amend). The remaining issue to be tried on June 8, 2005 would be whether Respondent owes $1,568,399.00 or $2,323,765.60 as a penalty amount.

As noted above, the final hearing in this case was held on June 8, 2005.[2] At the outset of the hearing, the undersigned granted Petitioner's Unopposed Motion to Amend Administrative Penalty Amount. Three witnesses testified at the hearing: Robert Barnes, Andrew Sabolic, and George (Don) Craig. In addition, a total of 11 exhibits (Petitioner's Exhibits 1

through 6, and Respondent's Exhibits 1 through 5) were offered and received into evidence.

At the close of the evidentiary portion of the hearing on June 8, 2005, the undersigned, on the record, advised that proposed recommended orders had to be filed with DOAH within 30 days of the date of the filing with DOAH of the hearing transcript.

The transcript of the final hearing (consisting of one volume) was filed with DOAH on June 27, 2005.

Petitioner and Respondent filed their Proposed Recommended Orders on July 27, 2005.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the sweeping factual stipulations set forth in the parties' June 1, 2005, Joint Stipulation[3]:

Legislative History of the "Penalty Calculation" Provisions of Section 440.107(7), Florida Statutes

1. Since October 1, 2003, the effective date of Chapter 2003-412, Laws of Florida, Section 440.107(7)(d)1., Florida Statutes, has provided as follows:

> In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 1.5 times the amount the employer would have

> paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period or $1,000, whichever is greater.

2. Prior to its being amended by Chapter 2003-412, Laws of Florida, Section 440.107(7), Florida Statutes, read, in pertinent part, as follows:

> (7) In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer, who has failed to secure the payment of compensation as required by this chapter, a penalty in the following amount:
>
> (a) An amount equal to at least the amount that the employer would have paid or up to twice the amount the employer would have paid during periods it illegally failed to secure payment of compensation in the preceding 3-year period based on the employer's payroll during the preceding 3-year period; or
>
> (b) One thousand dollars, whichever is greater.

3. The Senate Staff Analysis and Economic Analysis for the senate bill that ultimately became Chapter 2003-412, Laws of Florida, contained the following explanation of the "change" the bill would make to the foregoing "penalty calculation" provisions of Section 440.107(7), Florida Statutes[4]:

> The department is required to assess an employer that fails to secure the payment of compensation an amount equal to 1.5 times, rather than 2 times, the amount the employer

would have paid in the preceding three years or $1,000, which is greater.

There was no mention in the staff analysis of any other "change" to these provisions.

The NCCI Basic Manual

4. The National Council on Compensation Insurance, Inc. (NCCI) is a licensed rating organization that makes rate filings in Florida on behalf of workers' compensation insurers (who are bound by these filings if the filings are approved by Florida's Office of Insurance Regulation, unless a "deviation" is permitted pursuant to Section 627.11, Florida Statutes).

5. The NCCI publishes and submits to the Office of Insurance Regulation for approval a Basic Manual that contains standard workers' compensation premium rates for specified payroll code classifications, as well as a methodology for calculating the amount of workers' compensation insurance premiums employers may be charged.

6. This methodology is referred to in the Basic Manual as the "Florida Workers Compensation Premium Algorithm" (Algorithm).

7. According to the Algorithm, the first step in the premium calculating process is to determine the employer's "manual premium," which is accomplished by applying the rates set forth in the manual (or manual rates) to the employer's

payroll as follows (for each payroll code classification): "(PAYROLL/100) x RATE)."

8. Adjustments to the "manual premium" are then made, as appropriate, before a final premium is calculated.

9. Among the factors taken into consideration in determining the extent of any such adjustments to the "manual premium" in a particular case are the employer's loss experience, deductible amounts, premium size (with employers who pay "larger premium[s]" entitled to a "Premium Discount"), and, in the case of a "policy that contains one or more contracting classifications," the wages the employer pays its employees in these classifications (with employers "paying their employees a better wage" entitled to a "Contracting Classification Premium Adjustment Program" credit).

Petitioner's Construction of the "Penalty Calculation" Provisions of Section 440.107(7), Florida Statutes

10. In discharging its responsibility under Section 440.107(7), Florida Statutes, to assess a penalty "against any employer who has failed to secure the payment of compensation as required," Petitioner has consistently construed the language in the statute, "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. It has done so under both the pre-

and post-Chapter 2003-412, Laws of Florida, versions of Section 440.107(7).

11. This construction is incorporated in Petitioner's "Penalty Calculation Worksheet," which Florida Administrative Code Rule 69L-6.027 provides Petitioner "shall use" when "calculating penalties to be assessed against employers pursuant to Section 440.107, F.S." (Florida Administrative Code Rule 69L-6.027 first took effect on December 29, 2004.)

Penalty Calculation in the Instant Case

12. In the instant case, "1.5 times the amount the [Respondent] would have paid in premium when applying approved manual rates to [Respondent's] payroll during periods for which it failed to secure the payment of workers' compensation" equals $2,323,765.60.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

14. Both parties agree that the instant case turns on how Section 440.107(7)(d)1., Florida Statutes, should be interpreted.

15. As they indicated in their Joint Stipulation, their dispute centers on whether "[t]he application of 'approved manual rates' to Respondent's payroll [as directed by Section

440.107(7)(d)1., Florida Statutes] necessarily requires that no discounts or credits referenced in the National Council on Compensation Insurance's Basic Manual (Florida state-specific pages) be applied to the calculation of the penalty against Respondent." Petitioner contends that it does, whereas Respondent takes the contrary position, arguing that "the following credit and discount referenced in the National Council on Compensation Insurance's Basic Manual (Florida state-specific pages) [must] be applied . . . : Florida Contracting Classification Premium Adjustment Program (FCCPAP) construction credit [and] Standard Premium Discount."

16. To resolve this dispute concerning the proper interpretation of Section 440.107(7)(d)1., Florida Statutes, it is necessary to ascertain what the Legislature intended. See Daniels v. Florida Department of Health, 898 So. 2d 61, 64 (Fla. 2005)("In construing a statute we are to give effect to the Legislature's intent."); Department of Revenue v. Lockheed Martin Corporation, -- So.2d -- , 2005 WL 1544773 *2 (Fla. 1st DCA July 5, 2005)("Legislative intent is the polestar that guides a court's statutory construction analysis."); and Health Options, Inc. v. Agency For Health Care Administration, 889 So. 2d 849, 851 (Fla. 1st DCA 2004)("We begin our analysis with adherence to the rule that in construing a statute's terms, the

polestar that guides a court's inquiry is the legislative intent.").

17. "The fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature." State v. Sousa, 903 So. 2d 923, 928 (Fla. 2005).

18. "If statutory intent is unclear from the plain language of the statute, only then may '[the tribunal] apply rules of statutory construction and explore legislative history to determine legislative intent.'" Crescent Miami Center, LLC v. Florida Department of Revenue, 903 So. 2d 913, 918 (Fla. 2005).

19. It is evident from an examination of the language used in Section 440.107(7)(d)1., Florida Statutes, that the construction advanced by Petitioner is the one the Legislature intended.

20. In the statute, the Legislature has directed Petitioner to calculate the penalty to be assessed against a non-compliant employer by determining "the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll" (or, in other words, determining, for each payroll code classification, what the employer's "manual premium" would have been during the period of non-compliance). No reference is made in Section 440.107(7)(d)1., Florida

Statutes, to Petitioner's "applying" anything other than "approved manual rates" in determining, for purposes of calculating the penalty to be assessed against the employer, "the amount the employer would have paid in premium." Accordingly, to read the statute as contemplating that Petitioner would, in addition to "applying approved manual rates to the employer's payroll," also "apply" credits and discounts (as well as surcharges) in making this determination would add words to the statute not placed there by the Legislature. This neither the undersigned nor Petitioner may do. See Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999)("We are not at liberty to add words to statutes that were not placed there by the Legislature."); Chaffee v. Miami Transfer Company, Inc., 288 So. 2d 209, 215 (Fla. 1974)("To say, as the employer would have us do, that in merger cases the true meaning of s 440.15(3)(u) is that disability for purposes of that section is the greater of physical impairment or loss of earning capacity only if there is a loss of earning capacity is to invoke a limitation or to add words to the statute not placed there by the Legislature. This we may not do."); In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1137 (Fla. 1990)("Courts should not add additional words to a statute not placed there by the legislature, especially where uncertainty exists as to the intent of the legislature."); PW

Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988)("The express mention of one thing implies the exclusion of another."); Alsop v. Pierce, 19 So. 2d 799, 805-06 (Fla. 1944)("When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way."); Childers v. Cape Canaveral Hosp., Inc., 898 So. 2d 973, 975 (Fla. 5th DCA 2005)("Courts must give statutory language its plain and ordinary meaning, and is not at liberty to add words that were not placed there by the legislature."); Sun Coast International Inc. v. Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, 596 So. 2d 1118, 1121 (Fla. 1st DCA 1992)("[A] legislative direction as to *how* a thing shall be done is, in effect, a prohibition against its being done in any other way.); and Hialeah, Inc., v. B & G Horse Transportation, Inc., 368 So. 2d 930, 933 (Fla. 3d DCA 1979)("[A] court may not invoke a limitation or add words to a statute not placed there by the legislature. . . . Construing Section 323.24 to provide jurisdiction for the enjoining of persons who intend to or are preparing to operate a vehicle in violation of Chapter 323, requires the court to extend the meaning of the section beyond that intended by the legislature, and requires the addition of words to the section.").

21. Because it is clear from the language used by the Legislature in Section 440.107(7)(d)1., Florida Statutes, that Petitioner's construction of the statute carries out legislative intent, it is unnecessary to look beyond this language and examine the statute's legislative history to determine whether a contrary construction is warranted. See Sousa, 903 So. 2d at 928 ("Courts are not to change the plain meaning of a statute by turning to legislative history if the meaning of the statute can be discerned from the language in the statute."); Crescent Miami Center, LLC, 903 So. 2d at 918; Knowles v. Beverly Enterprises-Florida, Inc.,898 So. 2d 1, 10 (Fla. 2004)("Because we agree that the language used by the Legislature is unambiguous, it is not necessary to examine the legislative history."); Goldenberg v. Sawczak, 791 So. 2d 1078, 1083 (Fla. 2001)("No reliance on legislative history is needed to determine intent where the statutory language is clear."); and Bryan v. State, 865 So. 2d 677, 679 (Fla. 4th DCA 2004)("Only if it is unclear should the court resort to traditional rules of statutory construction and examine legislative history.").

22. Nonetheless, it is worthy of note that the statute's legislative history, if anything, supports Petitioner's construction. Cf. U.S. v. Searcy, -- F.3d -- , 2005 WL 1767649 (11th Cir. 2005)("Although it is unnecessary to look at the legislative history to reach this conclusion, we note that it

also supports the categorization of § 2422(b) as a crime of violence for career offender purposes.").

23. The pre-Chapter 2003-412, Laws of Florida, version of Section 440.107(7), Florida Statutes, simply provided that the determination of the "amount the employer would have paid" during the period of non-compliance be "based on the employer's payroll" during that period, and it gave no further specific guidance as to how this "amount" should be calculated. Petitioner's consistent practice under this version of the statute was to apply "approved manual rates," and not to consider the possible applicability of any credit, discount, or surcharge, in arriving at "the amount the employer would have paid." The changes made to the statute through the enactment of Chapter 2003-412, Laws of Florida, reflect the Legislature's approval of this methodology. Had the Legislature wanted Petitioner to include credits, discounts, and surcharges in its calculation and not rely only on the application of "approved manual rates" (as Petitioner had been doing), the Legislature would have so specified in the amended statute. Its failure to have done so is compelling evidence that this was not its intent.[5] See State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973)("When the Legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by the State tax administrators.

The mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law. The language of the amendment in 1971 was intended to make the statute correspond to what had previously been supposed or assumed to be the law. The circumstances here are such that the Legislature merely intended to clarify its original intention rather than change the law.")(citations omitted.); Cole Vision Corp. v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404, 408 (Fla. 1st DCA 1997)("[T]he Board for many years before 1991, in rules, declaratory statements and disciplinary proceedings, interpreted sections 463.014(10(a) and (b) as prohibiting professional associations and affiliations between optometrists and optical corporations. The legislature therefore must be presumed to have adopted the Board's interpretation that professional associations and affiliations between optometrists and lay corporations for the provision of optometric services are unlawful when it reenacted the statute in 1991."); Davies v. Bossert, 449 So. 2d 418, 420 (Fla. 3d DCA 1984)("[B]ecause the legislature enacted only minor amendments to the statute, consistent with technological developments in mass communication media, it is presumed that it approved the interpretation given the earlier statute by the Florida Supreme Court."); and

Peninsular Supply Co. v. C.B. Day Realty of Florida, 423 So. 2d 500, 502 (Fla. 3d DCA 1982)("If the legislature had intended that a materialman who failed to give a timely notice to the owner should be without any remedy, specifically an equitable lien, it would have said so explicitly, in light of the number of cases which had previously construed the statute. When the legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by courts or administrators, except to the extent to which the new enactment differs from prior constructions.").

24. Without encountering any legislative disapproval, Petitioner has continued to consistently calculate "the amount the employer would have paid," for purposes of determining the appropriate penalty to impose on a non-compliant employer under Section 440.107(7), Florida Statutes, the same way it had prior to the effective date of Chapter 2003-412, Laws of Florida. Moreover, it has incorporated this methodology in a rule, Florida Administrative Code Rule 69L-6.027. This rule has the effect of law, and it is not subject to invalidation in this Section 120.57 substantial interest proceeding. See State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("We note that agency rules and regulations, duly promulgated under the authority of law, have the effect of law."); City of Palm Bay v. Department of Transportation, 588 So. 2d 624, 628 (Fla. 1st DCA 1991)("The

same principle applies to duly promulgated agency rules, which will be treated as presumptively valid until invalidated in a section 120.56 rule challenge."); Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985)("[A] valid rule or regulation of an administrative agency has the force and effect of law."); and Department of Law Enforcement, Criminal Justice Standards and Training Commission v. Retureta, No. 03-3659PL, 2004 WL 1588971 *6 (Fla. DOAH July 14, 2004)(Recommended Order)("[S]tatutory law does not authorize an Administrative Law Judge to invalidate agency rules, unless as a result of a rule challenge, pursuant to Section 120.56, Florida Statutes. Thus, absent a successful rule challenge or judicial order, the Administrative Law Judge must apply Florida Administrative Code Rule 11B-27.0011(4)(b) . . . .").

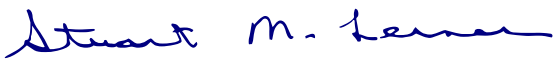
25. Employing this longstanding methodology which is now incorporated in Florida Administrative Code Rule 69L-6.027 to the facts of the instant case results in the determination that, in accordance with Section 440.107(7)(d)1., Florida Statutes, Respondent should pay a $2,323,765.60 penalty for failing to secure workers' compensation insurance for its employees.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner order Respondent to pay a $2,323,765.60 penalty for failing to secure workers' compensation insurance for its employees.

DONE AND ENTERED this 5th day of August, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 5th day of August, 2005.

ENDNOTES

1./ "Class code" is defined in Petitioner's Florida Administrative Code Rule 69L-3.002(4), Florida Administrative Code, as follows:

> "Class Code" means the 4-digit code assigned by the National Council on Compensation Insurance (NCCI) for the particular occupation of the injured employee, as it exists in the NCCI Scopes(TM) Manual 2004

Edition, which is hereby incorporated by reference."

2./ The final hearing was originally scheduled to commence on December 15, 2004, but was continued three times.

3./ These factual stipulations have been accepted. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation. Indeed, on appeal neither party will be heard to suggest that the facts were other than as stipulated or that any material facts w[ere] omitted"); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

4./ "[S]ince 1982 th[e] [Florida Supreme] Court has on numerous occasions looked to legislative history and staff analysis to discern legislative intent." American Home Assurance Co. v. Plaza Materials Corporation, -- So. 2d -- , 2005 WL 1575877 *7 (Fla. July 7, 2005).

5./ Further evidence of this lack of legislative intent is the absence of any mention of such a change in the Senate Staff Analysis and Economic Analysis for the senate bill that ultimately became Chapter 2003-412, Laws of Florida. See American Home Assurance Co., 2005 WL 1575877 *7.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.