STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION, | ) | |
| Petitioner, | ) | |
| vs. | ) | Case No. 06-0024 |
| TWIN CITY ROOFING CONSTRUCTION SPECIALIST, INC., | ) | |
| Respondent. | ) | |

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 29, 2006, by video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: John M. Iriye, Esquire
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For Respondent: Steven N. Lippman, Esquire
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## STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Second Amended Order of Penalty Assessment filed February 2, 2006, and, if so, the penalty that should be imposed.

## PRELIMINARY STATEMENT

On July 8, 2005, the Department of Financial Services, Division of Workers' Compensation ("Department") issued a Stop Work Order directing Twin City Roofing Construction Specialist, Inc. ("Twin City") to immediately "stop work and cease all business operations" in Florida because it had failed to obtain workers' compensation insurance coverage meeting the requirements of Chapter 440, Florida Statutes (2005),[1] and the Florida Insurance Code. On the same date, the Department issued an Order of Penalty Assessment against Twin City imposing a penalty pursuant to Section 440.107(7)(d), Florida Statutes. On October 13, 2006, the Department issued an Amended Order of Penalty Assessment in which it assessed a penalty of $65,945.22 for Twin City's failure to obtain workers' compensation insurance coverage as required by statute and a penalty of $2,000.00 for Twin City's failure to stop work for two days after the issuance of the Stop Work Order. Twin City timely filed a Petition for Hearing Under Section 120.57(1), in which it disputed the allegations contained in the Amended Order of Penalty Assessment. The Department forwarded the matter to the

Division of Administrative Hearings for assignment of an Administrative Law Judge. Pursuant to notice, the final hearing was held on June 29, 2006.

On February 2, 2006, the Department filed a Motion to Amend Order of Penalty Assessment in which the Department requested that it be allowed to amend the Amended Order of Penalty Assessment to include a recalculation of the penalty for failure to secure workers' compensation insurance coverage based on the highest classification applicable to Twin City's business; the motion was granted in an order entered February 21, 2006. In the Second Amended Order of Penalty Assessment, the Department assessed a penalty of $129,825.66 for Twin City's failure to obtain workers' compensation insurance coverage as required by statute and a penalty of $2,000.00 for Twin City's failure to stop work for two days after the issuance of the Stop Work Order.[2] On April 7, 2006, Twin City filed a Motion for Leave to File an Amended Petition for Hearing, and the motion was granted in an order entered April 21, 2006. In the Amended Petition for Hearing, Twin City disputed the Department's penalty assessment calculation on the grounds that it incorrectly included in the calculation payroll for a person who was not an employee of Twin City, for leased employees, for persons who did not work in Florida during the time period covered in the penalty assessment, and for persons who provided services on a

gratuitous basis. Twin City also contended that several of its employees were covered by the company's Minnesota workers' compensation insurance.

At the hearing, the Department presented the testimony of Robert Barnes and Lee Pease, and Petitioner's Exhibits 1 through 8 and 10 through 16 were offered and received into evidence; Petitioner's Exhibit 9 was offered but rejected. Twin City offered the testimony of Fred Allen Ehlert, and Respondent's Composite Exhibit 1 was offered and received into evidence. Twin City's objection to receiving the testimony of Mr. Pease on certain subjects was sustained, and the Department has submitted a written proffer of the testimony it expected to elicit. Finally, official recognition was granted Florida Administrative Code Rule Chapter 69L-6.

The transcript of the proceedings was filed with the Division of Administrative Hearings on July 19, 2006. An order was entered on August 4, 2006, granting an extension of time for filing proposed recommended orders until August 17, 2006. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with the responsibility of enforcing the requirement of Section 440.107, Florida Statutes, that employers in Florida secure workers' compensation insurance coverage for their employees. § 440.107(3), Fla. Stat.

2. Twin City is a Minnesota corporation that registered to do business in Florida on October 24, 2004. During the times material to this proceeding, Twin City was engaged in the roofing business.

3. On July 8, 2004, an investigator employed by the Department stopped at Twin City's office in Jupiter, Florida, because he had observed vehicles parked around the office that had signs indicating that the company engaged in roofing work. He arrived at the office early, and waited about 15 minutes, when individuals began arriving in the office parking lot. Most of the individuals wore shirts that carried the name "Twin City Roofing."

4. When he consulted the database routinely used by the Department to determine whether businesses operating in Florida had workers' compensation insurance coverage as required by

Florida law, the Department's investigator found no record that Twin City had obtained a Florida policy providing workers' compensation insurance coverage for its employees.

5. Twin City did, however, have workers' compensation insurance coverage through the Minnesota Workers' Compensation Assigned Risk Plan, which issued a Standard Workers' Compensation and Employers' Liability Policy covering Twin City only under the Workers' Compensation Law of Minnesota. Pursuant to Section 3.C. of the policy, the policy did not apply in any state other than Minnesota.

6. The Department's investigator issued a Stop Work Order and an Order of Penalty Assessment on July 8, 2004, and personally delivered them to the Twin City office. The Stop Work Order required that Twin City "cease all business operations in this state" and advised that a penalty of $1,000.00 per day would be imposed if Twin City were to conduct any business in violation of the Stop Work Order. Twin City violated the Stop Work Order by continuing to engage in business activities on July 12 and 13, 2005.

7. At the same time he delivered the Stop Work Order and the Order of Penalty Assessment to Twin City's office, the Department's investigator hand-delivered a Request for Production of Business Records for Penalty Assessment Calculation.

Identification of Twin City's employees

8. The Department's investigator questioned a number of the individuals he saw in Twin City's parking lot on the morning of July 8, 2005, and asked if they were employed by Twin City. On the basis of a "Turn Around Report" provided later in the day by Twin City, the Department's investigator verified that, except for Aaron Colborn, Jimmy Benegas, and Jaime Andrade, the individuals he questioned in the parking lot were leased employees and that the leasing company provided these employees with workers' compensation insurance coverage, as required by Florida law.

9. Aaron Colborn and Jimmy Benegas were not leased employees, and, based on the admission of Twin City, Aaron Colborn and Jimmy Benegas were employees of Twin City during the period extending from October 24, 2004, through July 8, 2005.[3]

10. Jaime Andrade was one of the individuals standing outside the Twin City office on the morning of July 8, 2004. Unlike the other individuals, Mr. Andrade was not wearing a shirt bearing Twin City's name. Mr. Andrade told the investigator that he was a Twin City employee, that he had been employed for only two days, and that he had not yet been paid. His name did not appear on the list of leased employees provided in the Turn Around Report. The Department's investigator included Mr. Andrade as an employee of Twin City based on

Mr. Andrade's statements. The evidence presented by the Department is not sufficient, however, to establish that Jaime Andrade was an employee of Twin City during this period.

11. The investigator also spoke with several individuals in the Twin City office during his early-morning visit on July 8, 2004, and during a visit later that morning. The investigator spoke with James Geisen, the president of Twin City, and Jeffrey Willett, Mr. Geisen's stepson, who both identified themselves as Twin City employees. The investigator also observed Karen Geisin, James Geisen's wife, apparently working at a desk in the office, and he assumed that Mrs. Geisen was also an employee of Twin City.

12. Twin City does not dispute that Mr. Geisen and Mr. Willett were employed by Twin City during the time it did business in Florida.[4] Mr. Geisen worked in Florida with Twin City for approximately half of the period extending from October 24, 2004, through July 8, 2005, and was paid a salary by Twin City during this period. Mr. Willett worked in Florida with Twin City for approximately half of the period extending from January 1, 2005, through July 8, 2005, and was paid a salary by Twin City during this period. Mr. Geisen and Mr. Willett were, therefore, imputed to be employees of Twin City for the period extending from October 24, 2004, through July 8, 2005.

13. Mrs. Geisen often accompanied her husband to Florida during the period extending from October 24, 2005, through July 8, 2005. She sometimes worked for Twin City in Florida, but she did not receive any salary or other remuneration for her services. Based on the admission of Twin City, however, Mrs. Geisen was an employee of Twin City during the period at issue.[5]

14. The employees of Twin City for the period at issue, therefore, were James Geisin, Karen Geisin, Jeffrey Willett, Aaron Colborn, and Jimmy Benegas.

Penalty assessment for failure to secure workers' compensation coverage.

15. The penalty for failure to secure the workers' compensation insurance coverage required by Florida law is 1.5 times the premium that would have been charged for such coverage for each employee. The premium is calculated by applying the approved manual rate for workers' compensation insurance coverage for each employee to each $100.00 of the gross payroll for each employee.

16. Twin City failed to provide payroll records on which the Department's investigator could base his calculation of the penalty for Twin City's failure to obtain the workers' compensation insurance coverage required by Florida law within 45 days of the date of the July 8, 2005, request.

17. Based on his observations and because of the lack of payroll records for Twin City, the Department's investigator included as employees in his calculation the six individuals he observed at Twin City on July 8, 2005, who were not identified as leased employees: James Geisen; Karen Geisen; Jeff Willett; Aaron Colborn; Jimmy Benegas, and Jaime Andrade.

18. Because Twin City failed to provide payroll records from which the Department's investigator could determine the gross payroll for these six individuals, the Department's investigator applied Florida's official statewide average weekly wage to determine the gross payroll to be imputed to each of the six individuals. Florida's official statewide average weekly wage was $626.00 per week for the period extending from October 24, 2004, through December 31, 2004, and $651.38 for the period extending from January 1, 2005, through July 8, 2005. The gross payroll imputed to each of the six employees was, therefore, $9,770.70 from October 24, 2004, through December 31, 2004, and $26,380.89 from January 1, 2005, through July 8, 2005.

19. In calculating the premium for workers' compensation insurance coverage, the Department's investigator used the risk classifications and definitions of the National Council of Compensation Insurance, Inc. ("NCCI") SCOPES Manual. Because Twin City provided no payroll records, the Department's investigator classified all six individuals under the highest-

rated classification for Twin City's business operations, which was classification code 5551, the classification code assigned to employees of businesses engaged in roofing activities of all kinds. The approved Florida manual rate assigned to Scopes classification code 5551 was $46.17 per $100.00 of payroll for the period extending from October 24, 2004, through December 31, 2004, and $37.58 per $100.00 of payroll for the period extending from January 1, 2005, through July 8, 2005.

20. The Department's investigator used these figures to calculate the workers' compensation insurance coverage premium for each of Twin City's employees as $4,511.13 for the period extending from October 24, 2004, through December 31, 2004, and $9,913.94 for the period extending from January 1, 2005, through July 8, 2005, for a total premium of $86,550.42. The penalty assessment was calculated by multiplying the total premium by 1.5, for a penalty of $129,825.66.

21. Because the evidence establishes that Twin City had five rather than six employees during the period at issue herein, the penalty calculation must be modified as follows: The total penalty must be reduced by $21,637.61 ($6,766.70 + $14,870.91), for a revised total penalty of $108,188.05 ($129,825.66 - $21,637.61).

## CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

23. The Department must prove by a preponderance of the evidence that Twin City failed to provide its employees with workers' compensation insurance coverage and that the civil and administrative penalties assessed are correct. See Department of Labor and Employment Security, Division of Workers' Compensation v. Patrick Jackey, d/b/a Bert's World of Color, DOAH Case No. 98-2496, page 5 (Recommended Order December 4, 1998)("Although violations of Chapter 440, Florida Statutes, can result in a substantial fine, which may even render an employer insolvent, the employer nonetheless does not have a license or property interest at stake so as to raise the standard of proof to clear and convincing evidence"); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981)("In accordance with the general rule, applicable in court proceedings, 'the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.' Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)."); § 120.57(1)(j), Fla. Stat.

24. Every employer is required to secure the payment of compensation for the benefit of its employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. The Department has the duty of enforcing the employer's compliance with the requirements of the workers' compensation law. § 440.107(3), Fla. Stat.

25. An "employer" is defined as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat. "Employment . . . means any service performed by an employee for the person employing him or her." § 440.02(17)(a), Fla. Stat. And "employee means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment . . . ." § 440.02(15)(a), Fla. Stat.

26. Based on the findings of fact herein, the Department carried its burden of proving by a preponderance of the evidence that Twin City was an employer as defined in Section 440.02(16)(a), Florida Statutes, and that it engaged in activities of employment as that term is defined in Section 440.02(17)(a), Florida Statutes, between October 24, 2004, and July 8, 2005. The Department also carried its burden of providing by a preponderance of the evidence that Twin City engaged in the roofing business. By its own admission, Twin City employed James Geisen, Karen Geisen, Jeffrey Willett, Aaron Colborn, and Jimmy Benegas during the period at issue.

27. Twin City consistently maintained that it never employed an individual named Jaime Andrade. Based on the findings of fact herein, the Department has failed to prove by a preponderance of the evidence that Mr. Andrade was a Twin City employee. The Department relied exclusively on statements Mr. Andrade made to the Department's investigator in reaching its conclusion that Mr. Andrade was an employee of Twin City, but the Department presented no other persuasive evidence relating to Mr. Andrade's status as a Twin City employee, and it failed to establish that Mr. Andrade's statements were "admissions" that could be used against Twin City pursuant to the exception to the hearsay rule found in Section 90.803(18), Florida Statutes. Because of the limitation on the use of hearsay evidence in administrative proceedings, the hearsay statements of Mr. Andrade cannot be used to establish that he was, in fact, a Twin City employee. See § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").[6]

28. As noted in the findings of fact herein, Twin City did not have workers' compensation insurance coverage for five employees working in Florida during the period at issue. Section 440.107(7)(a), Florida Statutes, authorizes the

Department to issue a stop work order whenever it determines that an employer has failed to obtain workers' compensation insurance coverage, and the effect of the order is to require that the employer cease all business operations in the state. If an employer fails to cease all business operations, the Department is required to levy a penalty of $1,000.00 per day for each day the employer is in violation of a stop work order. § 440.107(7)(c), Fla. Stat. Twin City does not challenge the Department's imposition of a $2,000 penalty for a two-day violation of the Stop Work Order issued July 8, 2005.

29. The Department is also required by Section 440.107(7)(d)1., Florida Statutes, to "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."

30. The Department is authorized by Section 440.107(9), Florida Statutes, to enact rules to implement Section 440.107, and it has done so in Florida Administrative Chapter 69L-6. Rule 69L-6.015 requires employers in Florida to "maintain employment records pertaining to every person to whom the

employer paid or owes remuneration for the performance of any work or service in connection with any employment" for "the current calendar year to date and for the preceding three calendar years" and to "produce the records when requested by the division pursuant to Section 440.107." Fla. Admin. Code R. 69L-6.015(1), (3), and (11).

31. As set forth in the findings of fact herein, Twin City failed to provide any business records in response to the Division's Request for Production of Business Records for Penalty Assessment Calculation. Section 440.107(7)(e), Florida Statutes, provides as follows:

> When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

32. In Florida Administrative Code Rule 69L-6.028, the Department has set forth the procedures to be used in imputing payroll:

> (2) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for purposes of calculating the penalty provided for in Section 440.107(7)(d), F.S., the imputed weekly payroll for each employee,

corporate officer, sole proprietor or partner for the portion of the period of the employer's non-compliance occurring on or after October 1, 2003 shall be calculated as follows:

(a) For employees other than corporate officers, for each employee identified by the department as an employee of such employer at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.

* * *

(c) If a portion of the period of non-compliance includes a partial week of non-compliance, the imputed weekly payroll for such partial week of non-compliance shall be prorated from the imputed weekly payroll for a full week.

(Emphasis added.)

33. Section 440.12(2), Florida Statutes, provides in pertinent part:

For the purpose of this subsection, the "statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law as reported to the Agency for Workforce Innovation for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Agency for Workforce Innovation on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries

> occurring in the calendar year immediately following. The statewide average weekly wage determined by the Agency for Workforce Innovation shall be reported annually to the Legislature.

34. In Florida Administrative Code Rule 69L-6.021(1), the Department has adopted "the classification codes and descriptions that are specified in the Florida Contracting Classification Premium Adjustment Program, and published in the Florida exception pages of the National Council on Compensation Insurance, Inc. (NCCI), Basic Manual (1996 ed., issued January 21, 2003)" to determine the approved manual rates for different types of construction activities. "Roofing - All kinds and Yard Employees, Drivers" is included as classification code 5551 in the Florida exception pages of the NCCI Basic Manual. Fla. Admin. Code R. 69L-6.021(1)(tt).

35. In Florida Administrative Code Rule 69L-6.021(2), the Department has adopted

> the definitions published by NCCI, SCOPES® of Basic Manual Classifications (January, 2003) that correspond to the classification codes and descriptions adopted in subsection (1) above. The definitions identify the workplace operations that satisfy the criteria of the term "construction industry" as used in the workers' compensation law. The definitions are hereby incorporated by reference . . . .

36. As noted in the findings of fact herein, the Department assigned classification code 5551 to the employees of

Twin City. In the absence of payroll records for Twin City's five employees, the Department could not ascertain the nature of the work or service performed by the employees. It was, therefore, justified as a matter of law in applying the highest classification code appropriate for Twin City's business in ascertaining the approved manual rate to be used in calculating the workers' compensation premium that would have been paid by Twin City had it secured workers' compensation insurance coverage pursuant to Florida law.

37. Based on the findings of fact herein, the Department has proven by a preponderance of the evidence that it correctly calculated the imputed payroll for each employee of Twin City for the period at issue herein. The Department's total penalty calculation is incorrect, however, insofar as payroll and premium for Jaime Andrade is included in the calculation of the penalty to be imposed pursuant to Section 440.107(7)(d)1. The total penalty must, therefore, be reduced by $21,637.61 for a revised total penalty of $108,188.05.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order:

1. Finding that Twin City Roofing Construction Specialists, Inc., failed to have Florida workers' compensation insurance coverage for five of its employees, in violation of Sections 440.10(1)(a) and 440.38(1), Florida Statutes;

2. Assessing a penalty against Twin City in the amount of $108,188.05, which is equal to 1.5 times premium based on imputed payroll for these five employees and on the approved manual rate for the classification code 5551 for the period extending from October 24, 2004, through December 31, 2004, and from January 1, 2005, through July 8, 2005, as provided in Section 440.107(7)(a), (d), and (e), Florida Statutes;

3. Finding that Twin City engaged in business operations for two days during the pendency of the Stop Work Order issued July 8, 2005, in violation of Section 440.107(7)(a), Florida Statutes, and imposing a penalty of $2,000.00, against Twin City for engaging in business operations on July 12 and 13, 2005, as provided in Section 440.107(7)(a) and (c), Florida Statutes.

DONE AND ENTERED this 30th day of August, 2006, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2006.

## ENDNOTES

[1]/ All references to the Florida Statutes herein are to the 2005 edition unless otherwise indicated.

[2]/ Twin City does not contest the assessment of the $2,000.00 penalty for violating the Stop Work Order.

[3]/ See Petitioner's Exhibit 8, paragraph 2. Twin City did not request permission to withdraw or amend this admission, and it is, therefore, conclusively established for purposes of this proceeding. Fla. R. Civ. P. 1.370(b); see also § 120.569(2)(f), Fla. Stat.

[4]/ See endnote 3, infra.

[5]/ See endnote 3, infra.

[6]/ The Department presented some attenuated circumstantial evidence purporting to link Mr. Andrade to two leased employees working for Twin City, but the evidence was not sufficient to permit a reasonable inference that Mr. Andrade was a Twin City employee.

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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.