STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

2 FRIENDS, INC., d/b/a LA PAZ MEXICAN GRILL,	)	
Petitioner,	)	
vs.	)	Case No. 07-2041
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Respondent.	)	

RECOMMENDED ORDER

This case was heard by P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in accordance with duly issued notice, on April 16, 2008, in Inverness, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Leon M. Boyajan, II, Esquire
Leon M. Boyajan, II, P.A.
2303 West Highway 44
Inverness, Florida 34453-3809

For Respondent: Thomas H. Duffy, Esquire
Department of Financial Services
200 East Gaines Street, 6th Floor
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner was operating its restaurant business in

violation of Chapter 440, Florida Statutes, the Florida Workers' Compensation Law, by failing to have required workers' compensation coverage. The related issues are whether the Department should therefore issue a Stop Work Order, whether a penalty should be imposed for so operating and what the correct penalty should be.

PRELIMINARY STATEMENT

This dispute commenced when the Respondent, the Department of Financial Services, Division of Workers' Compensation (Department) issued a stop work order to Petitioner, 2 Friends, Inc., d/b/a La Paz Mexican Grill (Petitioner). The Stop Work Order was issued because of a requirement in Chapter 440, Florida Statutes, which mandates that employers secure payment of workers' compensation insurance coverage for their workers. The Petitioner's business is a restaurant, he was therefore required to secure such coverage if he had four or more employees. Two Orders of Penalty Assessment were issued and amended. Thereafter, a Third Amended Order of Penalty Assessment was issued on April 3, 2007, concerning which the Petitioner filed a timely Petition for Administrative Hearing. The matter was ultimately referred to the Division of Administrative Hearings on May 9, 2007. After granting an agreed-upon extension for response to Initial Order, Initial Order responses were filed on or about May 29, 2007. The matter

was originally scheduled for hearing for August 2, 2007. Shortly prior to the hearing, by Motion, the hearing was continued and the case was placed in abated status because of an agreement by the parties that it be so due to a pending and related criminal proceeding. The abatement period was thereafter extended, by Order, at the request of both parties and, with the criminal matter being resolved, the case was scheduled for hearing for April 16, 2008. The hearing was conducted that day.

When the cause came on for hearing as noticed, the Department presented the testimony of one witness and had 14 documents introduced into evidence. The Petitioner called one witness and also introduced 14 exhibits into evidence. A transcript was thereafter ordered and duly filed and the parties were given an opportunity to submit proposed recommended orders. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Department is an Agency of the State of Florida charged with enforcing the statutory requirement, specifically Section 440.107, Florida Statutes, which mandates that employers in Florida secure the payment of workers' compensation insurance coverage for the benefit of employees. The Petitioner is a restaurant operating in the vicinity of Crystal River, Florida,

which opened for business sometime in the year 2005. At certain times during its operation, which are those times relevant to this proceeding, the restaurant had four or more employees, and was thus subject to the requirement to secure payment of workers' compensation for those employees.

2. Wanda Rivera is an investigator for the Division's Bureau of Compliance. On January 12, 2007, she was referred to investigate a restaurant in Crystal River, Florida. There was another restaurant nearby, the La Paz Mexican Grill, the Petitioner's business. Because she was in the area she made a routine visit to that restaurant as well. When Ms. Rivera entered the restaurant she saw two waitresses as well as another employee and the owner of the restaurant. She made a report of her visit as well as other events and observed facts from her investigation and included them as part of a narrative in her initial investigative report.

3. Ms. Rivera checked the Department's Coverage and Compliance Automated System (CCAS) data base by first looking up the name La Paz Mexican Grill. She spoke to the restaurant's owner, Aswaldo Vazquez, and learned that the actual corporate name was 2 Friends, Inc. She researched that name in the Division's data base and found no indication of workers' compensation coverage for that corporation. She also interviewed workers present at the restaurant.

4. Mr. Vazquez told Ms. Rivera that there were five employees and that the restaurant did not have workers' compensation coverage. Ms. Rivera also checked the CCAS data base, as well as the Department of State, Division of Corporation's data base. She thereby discovered that Mr. Vazquez was an officer of the corporation, but that he did not have an exemption from workers' compensation coverage which corporate officers may apply for and obtain.

5. Ms. Rivera presented her investigative findings to her supervisor and after having done so issued a Stop Work Order, Number 07-012-D3, and served it upon Mr. Vazquez. She hand wrote the Stop Work Order Number on that form, having received that number from her supervisor. She served it on Mr. Vazquez personally on that same day, January 12, 2007.

6. Part of her training as an investigator had emphasized serving documents personally on employers. The Stop Work Order was a three part form; she gave the yellow carbon copy of the Stop Work Order to Mr. Vazquez by hand delivery and, in checking her official file in the case in preparation for hearing, she found that her file contained no yellow copy of the Stop Work Order Form, corroborating her testimony that she had personally served the yellow copy of the Stop Work Order on Mr. Vazquez on January 12, 2007.

7. The Stop Work Order specifically stated that all business operations had to cease immediately and could not resume until the Department issued an order releasing the Stop Work Order. The Order also stated that a penalty of $1,000.00 a day would be assessed the employer who conducted business operations in violation of the Stop Work Order.

8. Ms. Rivera and Mr. Vazquez are fluent Spanish speakers. Ms. Rivera therefore conducted her interview with Mr. Vazquez in Spanish to assure that he understood all facets of the Division's position in his situation. She answered his questions and explained to him that the Stop Work Order was to take effect immediately and that there would be a $1,000.00 dollar per day fine for working in violation of the Stop Work Order.

9. She also issued and served a Request for Production of Business Records for Penalty Assessment Calculation. The records were to be produced within five business days. Two types of records were requested: those that would show how much payroll the establishment had paid over the previous three years and those that would show exemptions.

10. The request for records allows the employer five days to provide the documents; if no records were received within 15 days of the request, the Department could impute the gross payroll. Three weeks after serving the request on Mr. Vazquez,

Ms. Rivera received some records by mail on February 2, 2007. They were insufficient for her investigation. Thus, not having received records from which she could calculate payroll and determine when the restaurant had four or more employees, Ms. Rivera, in accordance with statute, imputed the payroll and thereupon calculated a penalty of $34,240.30 based upon the imputed amount. She issued an Amended Order of Penalty Assessment to that effect on February 5, 2007, and it was served by certified mail on Mr. Vazquez on February 7, 2007. It was also served by a process server on February 13, 2007.

11. That Amended Order of Penalty Assessment did not reference the Stop Work Order Number nor did it reflect the date it was issued. Ms. Rivera forgot to include this information when she filled out the Order. The Amended Order of Penalty Assessment did, however, have the following language:

> The Stop Work Order issued in this case shall remain in effect until either (a) the Division issues an order releasing the Stop Work Order upon finding that the employer has come into compliance with the coverage requirements of the workers' compensation law and pays the total penalty in full, or (b) the Division issues an Order of Conditional Release from Stop Work Order pursuant to the employer coming into compliance with the coverage requirements of the workers' compensation law and entering into a payment agreement schedule for periodic payment of penalty.

12. On February 7, 2007, Mr. Vazquez phoned Ms. Rivera asking why his penalty was that high, stating that his accountant could provide additional records. Ms. Rivera had telephone contact at least twice with Mr. Vazquez between February 7, and March 29, 2007. When she contacted him at the restaurant, a voice would answer, "La Paz Mexican Restaurant, how may I help you?" She asked Mr. Vazquez if the restaurant was actually operating, and told him that he could not open for business while a Stop Work Order was in effect. She was assured that the restaurant was not working. Mr. Vazquez also told her that more records would be produced.

13. On March 29, 2007, however, Ms. Rivera had not received any new records, so she visited the restaurant and found that it was open for business in violation of the Stop Work Order. Because the restaurant is open seven days a week, Ms. Rivera assessed an additional penalty of $1,000.00 per day since the Stop Work Order had been issued. She thus issued a Second Amended Order of Penalty Assessment for the sum of $110,240.30. The Second Amended Order of Penalty Assessment referred to Stop Work Order Number 07-012-D3, stating that the Stop Work Order had been filed on January 12, 2007, and noting that the Amended Order of Penalty Assessment was dated February 5, 2007, and the Order showed an issuance date of March 29, 2007.

14. On the next day, March 30, 2007, Ms. Rivera received more business records, from which she could calculate a penalty without imputing the payroll. Ms. Rivera calculated the new penalty at $79,690.36. Before she could issue a new penalty order, however, Mr. Vazquez contacted her and said that his restaurant had been closed for several days while he was traveling. He subsequently provided documents to Ms. Rivera that showed that he was out of the country for nine days. While 76 days had elapsed between the date the Stop Work Order was issued and the date Ms. Rivera found the restaurant had been open, Ms. Rivera determined that she would assess the penalty for only 67 days of that period. This decision was based upon Mr. Vazquez's documentation and her giving him the benefit of the doubt in accepting his representation that he had been out of the country for nine days and not operating.

15. She then re-calculated the penalty as being $70,060.36 and issued a Third Amended Order of Penalty Assessment to that effect. The Third Amended Order of Penalty Assessment made reference to Stop Work Order Number 07-012-D3, and notes that the Stop Work Order was issued on January 12, 2007. The Third Amended Order has "February 5, 2007," in the line on the order for "issuance date." The entry for "issuance date" on the Third Amended Order of Penalty Assessment is incorrect and it should

have been April 3, 2007, the date the Amended Order of Penalty Assessment was issued.

16. The penalty worksheet for the Third Amended Order of Penalty Assessment shows that there was $25,793.55 in payroll for the relevant portions of 2005; $8,635.30 for relevant portions of 2006 during which times the restaurant had four employees. There was $1,370.21 in payroll for the relevant first 12 days of 2007, which was up until the time the Stop Work Order was issued. Ms. Rivera did not include the payroll for periods of time when the record showed the restaurant did not have four employees and her work papers so reflect. The payroll was calculated from 2005 forward because the business opened that year.

17. On April 4, 2007, Mr. Vazquez brought his restaurant into compliance by reducing his staff to less than four employees and he entered into an agreement with the Department whereby he would pay down 10 percent of the penalty and agree to pay the remainder in 60 interest free monthly payments.

18. Mr. Vazquez, in effect, does not contest the Division's position that he was required to carry workers' compensation coverage during the pertinent time periods and that he did not have such coverage. In actuality he disputes the amount of the penalty because he maintains that he did not receive the Stop Work Order until March 29, 2007. Mr. Vazquez

is the president of the 2 Friends, Inc., Corporation. He speaks English and opined during his testimony that he reads 60 to 70 percent of English text. He knows people who are fluent in English and has people to whom he can show documents written in English if he does not understand any part of such.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

20. Cases in which the Agency attempts an administrative fine have been deemed to be penal in nature. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996); L and W Plastering and Drywall Services, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 06-3261 (DOAH, March 16, 2007). See also § 120.57(1)(j), Fla. Stat. which provides that:

> Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . (Emphasis supplied.)

21. The Agency is asserting the affirmative of the issue before this forum and thus has the burden of proof. Balino v. Dept. of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). The Agency takes

the position that the proof standard is "clear and convincing" evidence in this penal proceeding. It acknowledges the holding in Olender Construction, Inc. v. Dept. of Financial Services, Division of Workers' Compensation, Case No. 06-5023 (DOAH March 14, 2008), finding the standard to be preponderance of evidence, however.

22. The Agency has established, by either measure with unrefuted, persuasive evidence that the Stop Work Order and Third Penalty Assessment were properly issued and calculated, however. Sections 440.10 and 440.38, Florida Statutes, impose upon all employers the obligation to secure the payment of workers' compensation. This obligation is governed by Section 440.107(2), Florida Statutes, which reads, in relevant part:

> For purposes of this section, 'securing the payment of workers' compensation 'means obtaining coverage that meets requirements of this chapter and the Florida Insurance Code . . .'

23. The Department has established that the Petitioner violated Sections 440.10 and 440.38, Florida Statutes. The Petitioner was an "employer" for workers' compensation purposes because it was not in the construction industry and it regularly employed at times pertinent to this prosecution, at least four employees. See §§ 440.02(16)(a), and 440.02(17)(b)2. Fla. Stat.

25. The Department's duties and power to enforce compliance with the requirement to provide payment of workers' compensation is provided at Section 440.107, Florida Statutes. Section 440.107(3)(g), Florida Statutes, authorizes the Division to issue Stop Work Orders and Penalty Assessment Orders in enforcement of

its coverage requirements and Section 440.107(3)(c), Florida Statutes, authorizes the Department to examine and copy employers' business records. Section 440.107(7)(a), Florida Statutes, provides in pertinent part:

> Whenever the Department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter or to produce the required business records under subsection (5) within five business days after receipt of the written request of the department, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a Stop-Work Order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a Stop-Work Order within 72 hours.

Thus the Stop Work Order in this case was mandated by the above statute.

26. Section 440.107(7)(d)1. provides:

> In addition to any penalty, Stop-Work Order, or injunction, the department shall assess against any employer who has failed to secure 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 three-year period or $1,000.00, whichever is greater.

Thus, the Department has a statutory mandate to use and the established formula to calculate the penalty and on that basis calculated an amount equal to one and one-half times the workers' compensation premium the Petitioner employer evaded since its business opened in 2005.

27. Florida Administrative Code Rule 69L-6.025 provides for a penalty calculation worksheet for the Department investigators to employ. An analysis of that worksheet shows that the important calculation is to establish the premium that should have been paid. Premium is equal to one hundredth of each employee's pay, the gross payroll, which is then multiplied by an established rate based on the risk of injury, known as the "approved manual rate." The Department properly assessed the penalty of $67,000.00 for working in violation of the Stop Work Order. Testimony established that the restaurant was open seven days a week and that on at least 67 days between February and March 29, 2007, the restaurant conducted regular business operations. Mr. Vazquez, in fact, did not dispute the Department's contention that he did not close the restaurant after being served with a Stop Work Order. Rather, his defense was predicated on his purported lack of understanding that he was required to close. That defense is not persuasive for the reasons delineated below.

28. First, Ms. Rivera credibly testified that she fully explained to Mr. Vazquez, at the time she issued the Stop Work Order and more than once thereafter, that his restaurant had to close and remain closed until a penalty was paid and he became compliant with the workers' compensation coverage law, either by acquiring coverage or by reducing his staff below the staff level for which coverage is required. Secondly, the Stop Work Order itself notified him: "If the employer conducts any business operations in violation of this Stop Work Order, a penalty of $1,000.00 for each day of violation shall be assessed." Mr. Vazquez was told this in Spanish, his native language, and in English, which he can read. He also acknowledged he has persons available who can read English to him if that were required. He was thus given to understand that his business would be fined for every day he was open in violation of the Stop Work Order.

29. Mr. Vazquez testified that it was his understanding that the matter had been resolved, but that testimony is refuted by other evidence. Ms. Rivera for instance credibly testified that she never told him that the Stop Work Order had been rescinded and as noted above, she repeatedly told him his restaurant could not be opened until a penalty was paid. Secondly, he received, as early as February 7, 2007, an Amended

Order of Penalty Assessment that made reference to the Stop Work Order.

30. Mr. Vazquez also testified that he never received a copy of the Stop Work Order and therefore did not know that it was in effect. This is contrary to other credible evidence, however. First of all there is a copy of such a document admitted as Department's Exhibit Five. Secondly, Ms. Rivera testified that she served a yellow carbon copy of the Stop Work Order on Mr. Vazquez on January 12, 2007, by placing it in his hand. Service of such papers is strongly emphasized by the Department in its investigator training, and as Ms. Rivera had only been recently trained, her testimony on this point is deemed credible. Moreover, she testified that there was no yellow copy remaining in her file, which tends to corroborate her testimony that she had given the yellow copy to Mr. Vazquez in accordance with her training. Third, Ms. Rivera made a contemporaneous narrative account of her actions, which is depicted in Department's Exhibit One. That narrative recounts her issuance and serving of the Stop Work Order SWO07-012-D3. There was no objection at trial to this document being admitted, even though it is hearsay. Because of the lack of objection it was admitted, and, in any event, if nothing else constitutes corroborative or explanatory hearsay for purposes of Section 120.57(1)(c), Florida Statutes. The Petitioner noted in its

Petition that the Amended Order of Penalty Assessment did not actually make reference to a Stop Work Order. Although it is true that the lines were mistakenly left blank concerning the Stop Work Order by the investigator on the Third Amended Order of Penalty Assessment, that is still not proof that the Stop Work Order was not issued, served, and operative.

31. The Department has established that it issued the Stop Work Order and served it personally upon Mr. Vazquez on January 12, 2007. The Petitioner was properly put on notice that it was required to cease business operations on that date and could not reopen until the release of the Stop Work Order by the Department.

32. The Department is required by statute to impose the penalty for working in violation of the Stop Work Order. Section 440.107(7)(c), Florida Statutes, is unequivocal:

> The department shall assess of $1,000.00 per day against an employer for each day that the employer conducts business operations that are in violation of a stop work order.

The Department was therefore required to issue the Order and to penalize the Petitioner for not having secured payment of workers' compensation. The relevant calculations resulted in the imposition of a $67,000.00 penalty for working in violation of the Stop Work Order.

33. The Department did exercise discretion insofar as it could in order to give the Petitioner the benefit of the doubt. That is, Ms. Rivera accepted at fact value that Mr. Vazquez's assertion that his restaurant was closed for nine days while he was out of the country was true. Moreover, the Department accepted, and calculated the penalty from business records that were provided well after the time the Department was required to accept such records. Two subsections of Florida Administrative Code Rule 69L-6.028 provide pertinently as follows:

> (1) In the event that an employer fails to provide business records sufficient for the department to determine the employers payroll for the period requested for the calculation of the penalty pursuant to Section 440.107(7)(e), Florida Statutes, the department shall impute payroll at any time after the expiration of 15 business days after receipt by the employer of a written request to produce such business records.

Under this subsection, the Department must impute payroll after 15 days if it has received no records, or insufficient records, from which it can calculate a penalty. Subsection (3) also states:

> If subsequent to imputation of weekly payroll pursuant to subsection (2) herein, but before and only until the expiration of 45 calendar days from receipt by the employer of written request to produce business records, the employer provides business records sufficient for the department to determine the employer's payroll for the period requested for the calculation of the penalty pursuant to

> Section 440.107(7)(e), Florida Statutes, the department shall recalculate the employer's penalty to reflect the payroll information provided in such business records. Thus, under this subsection, the department must not impute the payroll for purposes of calculation if the employer provides records within 45 days of the request.

34. The rule does not require the Department to impute payroll if records are received after 45 days, and does not prohibit the Department from doing what it did here: to accept the records 77 days from service of the request. The Department would have been within its authority to refuse to accept the more complete payroll records and in proceeding with the Second Amended Order of Penalty Assessment, which would result in a penalty of $110,240.30. Instead, the Department exercised discretion and accepted the records, although filed 77 days after service of the records request, thereby calculating the penalty at $70,060.36. The Petitioner thereby avoided more than $40,000.00 in additional penalty.

35. In summary, the Department has established its position in this case by unrefuted, credible persuasive evidence. It is thus established that an appropriate penalty for the Petitioner's failure to maintain required workers' compensation coverage, during the times pertinent to this case, delineated in the above findings of fact, is $70,060.36.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services finding that the Petitioner, 2 Friends Inc., d/b/a/ La Paz Mexican Grill, has failed to secure required workers' compensation coverage for its employees in violation of Sections 440.10(1)(a) and 440.38(1), Florida Statutes (2007), and that a penalty against that entity be accessed in the amount of $70,060.36, and that said final order provide for an acceptable installment payment arrangement whereby the amount may be paid over a period of at least 60 months at no interest.

DONE AND ENTERED this 30th day of July, 2008, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
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this 30th day of July, 2008.

COPIES FURNISHED:

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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.