STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN COATINGS, INC., d/b/a A. C. PAINTING, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 08-1925
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to appropriate notice, this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly designated Administrative Law Judge of the Division of Administrative Hearings, in Orlando, Florida, on January 28, 2009. The appearances were as follows:

APPEARANCES

Petitioner: Robert L. Dietz, Esquire
Zimmerman, Kiser & Sutcliffe, P.A.
Post Office Box 3000
Orlando, Florida 32802

Respondents: Thomas H. Duffy, Esquire
Douglas D. Dolan, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner corporation's workers' compensation insurance policy was in compliance with the provisions of Chapter 440, Florida Statutes, cited below, despite not having a specific Florida endorsement; whether the Department properly issued a Stop Work Order against the Petitioner and whether the proposed penalty of $240,927.55 was properly assessed.

PRELIMINARY STATEMENT

This proceeding arose upon the issuance of a Stop Work Order to American Coatings, Inc., a Tennessee corporation, doing business in Florida under the name A.C. Painting, Inc. (Petitioner). An investigation was initiated by a workers' compensation compliance investigator for the Department's Division of Workers' Compensation (Division) (Respondent) which revealed that the Petitioner corporation had been allegedly performing work in Florida without valid Florida workers' compensation coverage. The Stop Work Order was issued on February 19, 2008. After requesting and receiving the relevant business records from American Coatings, the Division's investigation calculated and assessed a penalty, as provided by Section 440.107(7), Florida Statutes, in the amount of $240,927.55.

The Petitioner chose to contest the Division's position as to the question of whether proper workers' compensation coverage was in force at the times pertinent hereto, and as to the manner and amount in which the penalty was assessed. A Petition for Administrative Hearing was therefore timely filed on March 7, 2008, and the matter was referred to the Division of Administrative Hearings. The case was assigned to the undersigned Administrative Law Judge and scheduled for hearing on July 22, 2008. After demonstration of good cause, by agreement of the parties, the case was continued twice and ultimately scheduled and heard on the above-referenced date.

The case came on for hearing as noticed. The Respondent Agency presented the testimony of two witnesses at the hearing and introduced 19 exhibits into evidence. The Petitioner called one witness and introduced two exhibits into evidence. Upon concluding the hearing a Transcript of the testimony was ordered and was filed on March 16, 2009. The Proposed Recommended Orders were timely filed on or before March 26, 2009. Those Proposed Recommended Orders and briefs were considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, American Coatings, Inc., is a commercial painting corporation based in Tennessee. It has been in business since 1994 in the State of Tennessee, and through a

predecessor entity, since 1985. The Petitioner does business in other states, including the State of Florida, and in fact operates in approximately 14 states. It has done so since the year 2000. It has had no workers' compensation claims from any of its Florida work sites during the entire time it has operated in Florida. On February 19, 2008, the Petitioner was painting portions of the premises at "the Estates of Rockledge" in Rockledge, Florida. It had other operations in Florida in the three years prior to February 28, 2008. When the Petitioner applied for workers' compensation coverage in Tennessee, the Petitioner advised its broker and insurance carrier that it maintained operations in Florida. The workers' compensation carrier and agent provided certificates of workers' compensation insurance for the Petitioner's Florida operations which supported its good faith belief that it had valid workers' compensation insurance in Florida.

2. Respondent presented no evidence that Mr. Carswell and the Petitioner have committed fraud, misrepresentation, or omission concerning the obtaining and maintaining of workers' compensation insurance coverage for its Florida operations. There was no attempt to conceal the fact that the Petitioner had insurable operations in Florida. For the three years prior to February 28, 2008, the Petitioner maintained a policy of workers' compensation insurance for all employees, including

those employees that performed operations in Florida. A workers' compensation premium was paid for each employee in question for all periods in the three years preceding February 28, 2008.

3. The Respondent is an Agency of the State of Florida responsible for enforcing the various statutory requirements of Chapter 440, Florida Statutes, including Sections 440.107 and 440.38, Florida Statutes (2007). Its authority includes Section 440.10(1)(a), Florida Statutes, which imposes upon all employers in Florida the obligation to secure the payment of workers' compensation. The Respondent is statutorily charged with the obligation to monitor employers operating in Florida, to ensure that statutory employers maintain appropriate workers' compensation coverage on employees. There is no dispute that the Petitioner, is an "employer" for purposes of Sections 440.02(16)(a) and 440.02(17)(b)2., Florida Statutes (2007). It was operating in the construction industry and regularly employed at least one person.

4. Pursuant to the Division's statutory authority, Investigator Eugene Wyatt of the Department's Division of Workers' Compensation, Bureau of Compliance, visited the subject worksite in Brevard County, Florida, where an apartment complex was under construction. Mr. Wyatt inquired at the general contractor's headquarters trailer and was told that a painting

subcontractor known as American Coatings was employing workers on the site. Using the Federal Employer Identification Number, Mr. Wyatt checked with the Department's Coverage and Compliance Automated System (CCAS) data base and learned that American Coatings, Inc. the Petitioner, which did business in Florida as A.C. Painting, Inc., did not have a record of a Florida workers' compensation coverage policy since December of 2003. Upon inquiry of the general contractor's supervisor at the job site, Mr. Wyatt learned that American Coatings, Inc., had furnished proof of insurance to the general contractor. It was shown as a certificate of liability insurance from American Coatings, in evidence as Department's Exhibit 17.

5. Investigator Wyatt contacted the agent who had produced the Certificate of Insurance and asked if a Florida endorsement had been procured for that policy. He was told that the policy had a "an all states" endorsement. Mr. Wyatt then contacted the underwriter and was told that it was a policy for Tennessee and not for Florida (apparently Tennessee rates and codes applied).

6. The investigator then contacted Benjamin Carswell, the President of the Petitioner. He informed him that in his view the company was not in compliance with the Florida requirement that workers' compensation policies covering Florida work and Florida employees be specifically endorsed for the State of Florida. He stated that he would issue a Stop Work Order, which

he did on February 19, 2008. (SWO). The SWO was posted at the worksite and served personally on Mr. Carswell on February 21, 2008. After the Petitioner entered into an installment payment plan as to the penalty, the SWO was ended with an Order of Conditional Release, on February 28, 2008.

7. The Petitioner sent a copy of consolidated insurance policy number WC8263193, by fax to Terrence Phillips, the chief of the Respondent's Orlando compliance office. The information page of this policy showed that only Tennessee was listed in item 3A of the policy. Item 3C stated that the policy was in effect in all other states, however, except for North Dakota, Ohio, Washington, West Virginia, and the states listed in item 3A. Item 4 listed various occupational classifications with their codes and the premium rates for each. The codes were for the State of Tennessee. The effect of these terms was that Florida was included in the category for "all other states."

8. Florida Law requires that Florida be listed as a state in item 3A, and requires a policy to utilize Florida class codes, rates, rules, and manuals, in order for an employer to be compliant with workers' compensation coverage requirements of Chapter 440, Florida Statutes. Investigator Wyatt determined that compliance was deficient and that a penalty should be calculated and assessed. He therefore served a request for production of business records on Mr. Carswell on February 21,

2008. The business records were necessary to construct the payroll amounts and number of employees at issue, so that the penalty, based upon the Petitioner's Florida Payroll, could be calculated.

9. Mr. Carswell believed in good faith, throughout all times pertinent to this matter that his company was compliant with Florida workers' compensation coverage requirements. After compliance was called into question, however, he also obtained an additional workers' compensation insurance policy, apparently obtained on or about February 20, 2008. It showed that coverage was effective, related back to May 1, 2007. Based upon this additional policy, the Petitioner provided Investigator Wyatt with an additional certificate of insurance for this policy.

10. On March 6, 2008, Investigator Wyatt learned that the SWO was a duplicate and had to be substituted. A new SWO was issued as an amended SWO. A Second Amended Order of Penalty Assessment and an Amended Order of Conditional Release from SWO, under the second SWO number of 08-092-D4, was issued.

11. Investigator Wyatt calculated the penalty by reviewing the business records supplied by the Petitioner and determining what each employee had been paid between February 23 and December 31, 2005; during all of 2006; during all of 2007 and between January 1, and February 22, 2008. Each employee's payroll, for each year or portion thereof, was divided by 100

and multiplied by an actuarial figure known as the "approved manual rate," which is related to the job duties the employee performed. In the case at hand, all the employees were engaged in commercial painting and, therefore, their classification codes were all 5474. Each trade, occupation or profession has a particular code assigned to it by the National Council on Compensation Insurance (NCCI) and each code has its own rate, the codes and rates being adopted in the Respondent Agency's Rules. The product of one one-hundredth of the gross payroll, and the approved manual rate, constitutes the "evaded premium." In effect this is the insurance premium the employer should have paid during the years it did not actually secure the appropriate payment of workers' compensation for its Florida Employees (proper Florida or Florida-endorsed coverage). Each employee's premium added together was then multiplied by the statutory factor of 1.5 in order to determine the total penalty amount the Respondent seeks to assess.

12. The penalty amount herein was calculated using the correct Florida Approved Manual Rate and class codes. The Respondent established that its calculations indicated that, for the Florida employees of the Petitioner, based upon its Florida payrolls for the three year period in question, the total workers' compensation premium, under the Florida rate, would be in the amount of $160,618.15. Based upon that Florida workers'

compensation premium amount, when multiplied by the statutory factor of 1.5 times that amount, the Respondent arrived at a total proposed assessed penalty of $240,927.55.

13. The Petitioner established, through the testimony of Mr. Carswell that, for the time period at issue, for the Florida employees and payroll, the Petitioner had paid workers' compensation premiums of $111,682.21 for the coverage it had in effect. It acknowledges that this was not paid pursuant to Florida rates, rather it was based upon Tennessee rates. It is the position of the Petitioner that the difference in premiums. between the above Florida premium amount, and the premium that the Petitioner actually paid, was $48,935.94. The Petitioner maintains that this differential is what really should be determined to be the unpaid or "evaded" premium, based upon Florida rates, and, if that amount was multiplied by 1.5 then the total penalty actually due should be $73,403.91.

14. An initial penalty payment of $24,092.76 has already been made by the Petitioner. Periodic penalty payments, assessed beginning March 2008, and continuing, have been paid in the amount of $36,139.40. The total penalty already paid by the Petitioner, as of the hearing date, is thus $60,232.16. The Petitioner contends that the actual penalty to be paid should be based upon the differential between the correct total premium due, when using the correct Florida manual rate, and the total

premium actually paid by the Petitioner, which, when applied in the above-referenced calculation results in the penalty due of $73,402.91. This would then be reduced by $60,232.17, the amount already paid, for a total remaining amount due of $13,171.75, as of the hearing date.

CONCLUSIONS OF LAW

15. 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. (2008).

16. Cases involving the proposed assessment of administrative fines have been held to be penal in nature. Therefore, the Respondent is required to prove its case by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932, 935 (Fla. 1996); James T. Quinn d/b/a James Quinn v. Dept. of Financial Services, Division of Workers' Compensation, Case No. 08-2745 (DOAH: Nov. 7, 2008). See also § 120.57(1)(j), Fla. Stat. (2008), "findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure discipline proceedings or except as otherwise provided by statute . . ."

17. In order to prove its case the Respondent had to demonstrate that the Petitioner is an employer for purposes of Florida law and did not secure the payment of workers'

compensation for its employees in the manner provided in the statutory authority referenced herein. There was no dispute that the Petitioner was an "employer," inasmuch as it was operating in the construction industry in Florida and regularly employed at least one person. §§ 440.02(16)(a) and 440.02(17)(b)2, Fla. Stat. (2007).

18. The Respondent has established by clear and convincing evidence that the Petitioner violated Sections 440.10 and 440.38, Florida Statutes. Under the circumstances referenced in the above Findings of Fact, that violation was not willful or intentional. The Petitioner was under a good faith belief, based upon representations of its insurance agent and/or broker, that it had complied with Florida workers' compensation requirements. The referenced statutory provisions imposed upon all employers the obligation to secure payment of workers' compensation for employees. Section 440.10(1)(a), Florida Statutes, provides as follows:

> Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.

19. Section 440.38, Florida Statutes, states, in relevant part:

> (1) Every employer shall secure the payment of compensation under this chapter:
>
> (a) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the state . . . .

20. The obligations set out in Sections 440.10(1)(a) and 440.38(1)(a), Florida Statutes, are governed by Section 440.107(2), Florida Statutes, which reads, in relevant part:

> (2) For purposes of this section, 'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. . . .
>
> (3) The department shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes.

At the hearing Petitioner contended, that its lack of a violation of the second sentence of subsection (2) above was exculpatory. That provision provides as follows:

> However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals

> information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.

21. The Department does not dispute that the Petitioner has not been accused of, and did not materially understate or conceal its payroll, misrepresent or conceal its employee duties, or materially misrepresent or conceal information relevant to a rating modification factor. The Petitioner claimed that such an allegation was necessary in order to justify a Stop Work Order and a penalty. That position is without merit. The first sentence of subsection (2), quoted above, is distinct from the rest of the subsection. Employers can be stopped from working and assessed monetary penalties if they do not secure payment of workers' compensation for employees. It is clear from subsection (3) that securing coverage is a separate requirement from providing accurate information to carriers. Finally, an employer who has not secured coverage might not have provided any information at all to a carrier.

22. The essential issue in this proceeding concerns whether the consolidated insurance policy of the Petitioner, number WC8263193, complied with Florida's requirements for workers' compensation policies issued to out-of-state domiciled

employers, operating in Florida with Florida employees (employees based in Florida in accordance with the authority cited below). The Petitioner contends that it secured the payment of workers' compensation coverage through this policy and the Department argues that the policy was not sufficient to comply with Florida statutes and rules concerning the proper characteristics of workers' compensation coverage. The Petitioner concedes that the payment of workers' compensation secured by the policy referenced above was not at Florida premium rates.

23. The policy did not secure the payment of workers' compensation in Florida in the manner required by Florida law. Section 440.10(1)(g), Florida Statutes, provides in pertinent part:

> Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code. . . . The department shall adopt rules for construction industry and nonconstruction-industry employers with regard to the activities that define what constitutes being "engaged in work" in this state, using the following standards:
>
> 1. For employees of nonconstruction-industry employers who have their headquarters outside of Florida and also operate in Florida and who are routinely

> crossing state lines, but usually return to their homes each night, the employee shall be assigned to the headquarters' state. However, the construction industry employees performing new construction or alterations in Florida shall be assigned to Florida even if the employees return to their home state each night.
>
> * * *
>
> 3. For construction contractors who maintain a permanent staff of employees and superintendents, if any of these employees or superintendents are assigned to a job that is located in Florida, either for the duration of the job or any portion thereof, their payroll shall be assigned to Florida rather than the headquarters' state.
>
> 4. Employees who are hired for a specific project in Florida shall be assigned to Florida.

24. Similarly, Section 440.38 states in relevant part:

> (7) Any employer who meets the requirements of subsection (1) through a policy of insurance issued outside of this state must at all times, with respect to all employees working in this state, maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that accurately reflects the work performed in this state by such employees.

25. The Department has promulgated Florida Administrative Code Rule 69L-6.019, to apply to the above-referenced Section 440.10(1)(g), Florida Statutes. That rule provides:

> (1) Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees that utilizes Florida

class codes, rates, rules and manuals that are in compliance with and approved under the provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)(g) And 440.38(7), F.S.

(2) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., any policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state must be issued by an insurer that holds a valid Certificate of Authority in the State of Florida.

(3) In order to comply with Sections 440.10(1)(g) and 440.38(7), F.S., for any workers' compensation policy or endorsement presented by an employer as proof of workers' compensation coverage for employees engaged in work in this state:

(a) The policy information page (NCCI form number WC 00 00 01 A) must list "Florida" in Item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(b) The policy information page endorsement (NCCI form number WC 89 07 00 B) must list "Florida" in item 3.A. and use Florida approved classification codes, rates, and estimated payroll in Item 4.

(4) A workers' compensation policy that lists "Florida" in Item 3.C. of the policy information page (NCCI form number WC 00 00 01 A) does not meet the requirements of Sections 440.10(1)(g) and 440.38(7), F.S., and is not valid proof of workers' compensation coverage for employees engaged in work in this state.

(5) Workers' Compensation and Employees Liability Insurance Policy-Information Page, NCCI form numbers WC 00 00 01 A (rev. May 1, 1988) and Workers' Compensation and

Employers Liability Insurance Policy - Policy Information Page Endorsement, WC 89 06 00 B (rev. July 7, 2001) are hereby adopted and incorporated herein by reference. These forms can be obtained from the Florida Department of Financial Services, Division of Workers' Compensation, 200 East Gaines Street, Tallahassee, FL 32399-4228.

(6) An employee of a construction industry employer headquartered outside the state of Florida is "engaged in work" in Florida if he or she participates in any one of the following activities in the state of Florida:

(a) The employee engages in new construction, alterations, or any job or any construction activities involving any form of the building, clearing, filling, excavation or improvement in the size or use of any structure or the appearance of any land as defined in Section 440.02(8), F.S., or performs any job duties or activities which would be subject to those contracting classifications identified in the Contracting Classification Premium Adjustment Program contained in the Florida State Special pages of the Basic Manual (as incorporated in Rule 69L-6.021, F.A.C.) within the borders of the state of Florida, regardless of whether an employee returns to his or her state each night, or

(b) If the employer maintains a permanent staff of employees or superintendents and the staff employee or superintendent is assigned to construction activities in Florida for the duration of the job or any portion thereof, or

(c) If the employer hires employees in Florida for the specific purpose of completing all or any portion of construction contract work and related

construction activities in the state of Florida.

26. The Petitioner's Tennessee policy did not contain a proper Florida endorsement in Item 3.A. of the information page of the policy. The Petitioner's policy in effect on February 19, 2008, only listed Tennessee under Item 3.A. Florida Administrative Code Rule 69L-6.019(3)(a) provides that if Florida is not a listed state in item 3.A., then the policy does not have a Florida endorsement and the employer has thus not secured the payment of workers' compensation for Florida employees as contemplated by that rule and in the manner provided in the statute. Thus, the policy at issue lacked a Florida endorsement as required by Sections 440.10(1)(g) and 440.38(7), Florida Statutes.

27. The Respondent maintains that the Petitioner's reliance on the "all states coverage" provided in Item 3.C. of the Petitioner's policy is misplaced. The above-quoted rule makes clear that policies listing Florida only under Item 3.C. are not compliant with Florida law as a Florida endorsement. The Tennessee policy, moreover, used only Tennessee class codes and rates. The Florida approved manual rate for the class code 5474, germane to this case, was $13.51 per $100.00 in payroll. The Tennessee policy using Tennessee's 2007 rates shows that the Petitioner would have been charged $8.90 for $100.00 in payroll,

a substantial cheaper premium rate. Moreover, the Tennessee policy listed different classification codes from those accepted in Florida, set forth in Florida Administrative Code Rules 69L-6.021(1) and 69L-6.031(6).

28. The Petitioner argued that the Tennessee policy did provide coverage for Florida employees, even if Florida was not a listed state in Item 3.A of the policy's information page. The Petitioner asserts that the policy terms show that it would cover any injuries suffered in any of the states covered in Item 3.C., "the other states coverage," so long as proper notice was given to the insurer in advance. The Petitioner's evidence does indeed show that the employees in question would be covered by that policy.

29. The coverage based upon Item 3.C., however, upon which Petitioner relies, does not provide the endorsement required by Section 440.38(7), Florida Statutes. Numerous Recommended Orders from the Division of Administrative Hearings have determined that "other states" language functionally identical to that at issue herein did not exempt an employer with an out-of-state policy from obtaining a Florida policy or policy endorsement. See, e.g., Triple M Enterprises, Inc. v. Department of Financial Services, Division of Workers' Compensation, Case No. 04-2524, (DOAH: Jan. 13, 2005) (other states language in policy did not exempt out-of-state employer

with Alabama policy from requirement of obtaining Florida policy or endorsement that would apply Florida rates, rules, and class codes to Alabama policy).

30. Indeed, there is a difference between coverage, i.e. what an insurer may ultimately cover under a policy, and compliance with Florida law. That distinction was recognized in U.S. Builders, L.P. v. Department of Financial Services, Division of Workers' Compensation, Case No. 07-4428 (DOAH: Jan 14, 2009). In that case, a Texas-based employer had a workers' compensation insurance policy in effect. The information page of that policy did not list Florida in Item 3.A. but did list Florida in Item 3.C.; it did not have Florida class codes or rates in Item 4 of the policy, but also had a provision whereby the insurer would cover injuries suffered in other states if notice were given. Id. at 4-6. An insurance company employee testifying in that case showed that the company would have provided coverage for injuries suffered in Florida even in the absence of notice. Id. at 6.

31. The Administrative Law Judge in that case determined that the employer had not complied with Florida law and therefore was required to pay the assessed penalty. His Recommended Order provided:

> 27. The evidence clearly and convincingly establishes that the policy maintained by Petitioner failed to comply with the

requirements of Florida Administrative Code Rule 69L-6.019 from October 1, 2006, to June 18, 2007. First, Florida was not listed in Item 3.A of the Information Page as required by paragraphs (3)(a) and (3)(b) of the rule. Second, even though Florida was included in the 'other states coverage' provided for in Item 3.C. of the Information Page, that is insufficient as a matter of law under subsection (4) of the rule. Third, Florida-approved classification codes, rates, and estimated payroll were not used to calculate the premium in Item 4 of the Information Page as required by paragraphs (3)(a) and (3)(b) of the rule, even though the premium paid by Petitioner appears to have been calculated using a higher rate than the Florida rate:

28. The fact that Petitioner's employees working in Florida may have been covered by virtue of the "other sates insurance" provision of the policy is immaterial under the Department's rules. **Coverage and compliance are separate concepts**. See Dept. of Financial Servs. v. Raylin Steel Erectors, Inc., Case No. 05-2289, 2005 Fla. Div. Adm. Hear. LEXIS 1336, at ¶¶ 28, 31 (DOAH Oct. 19, 2005) (explaining that "other states insurance" coverage was no longer sufficient to meet the requirements of Florida law after the 2003 amendments to Section 440.38(7), Florida Statutes), adopted in pertinent part, Case No. 78712-05-WC (DFS Jan. 19, 2006); Triple M Enterprises, Inc. v. Dept. of Financial Servs., Case No. 04-2524, 2004 Fla. Div. Adm. Hear. LEXIS 2509 (DOAH Jan. 13, 2005) (concluding that the employer failed to comply with Florida law even though employees would have received benefits under an "other states insurance" provision nearly identical to the one at issue in this case).

32. The case of Department of Financial Services v. Raylin Steel Erectors, Inc., Case No. 05-2289, (DOAH Oct. 19, 2005)

cited in U.S. Builders, is also on point. That case involved workers who were insured under a Georgia policy that listed Florida in the "other states" provision. The Administrative Law Judge noted that during the penalty period the Department had established, Section 440.38(7), Florida Statutes, had been enacted and Florida Administrative Code Rule 69L-6.019 had been promulgated by the Respondent. This created the requirement that employers have Florida-endorsed coverage using Florida rates and rules. Judge Cohen ruled:

> It is found by clear and convincing evidence that Respondent failed to comply with Section 440.38(7), Florida Statutes (2003), because during that portion of the penalty period subsequent to October 1, 2003, Respondent was working in Florida without the required endorsement to its workers' compensation insurance policy that would base its coverage on Florida premium rates and rules. Respondent's policy indicates that Respondent's coverage was issued in Georgia and was based on Georgia's premium rates, not Florida premium rates. The policy, including the "Other States Insurance" endorsement does not satisfy the requirements of Section 440.38(7), Florida Statutes (2003). Respondent failed to maintain, at all times, the Florida premium rate endorsement required by Section 440.38(7), Florida Statutes (2003). However, for the period of any work performed prior to October 1, 2003, Petitioner failed to prove by clear and convincing evidence that Respondent's "other states coverage" would not cover its sub-subcontractors and their employees who worked on Respondent's projects in Florida.

Raylin Steel Erectors at ¶ 31.

33. Thus it is apparent that, since 2003, with the enactment of Section 440.38(7), Florida Statutes (2003), all employers operating in Florida must acquire workers' compensation coverage that employs Florida rates and rules. The promulgation of Florida Administrative Code Rule 69L-6.019 shows what is required to demonstrate a proper Florida endorsement for insurance policies issued to out-of-state companies. The Petitioner's Tennessee policy did not have a proper Florida endorsement and so the Petitioner did not secure the payment of workers' compensation in the manner required by Florida law for its employees, although the persuasive evidence shows that those employees were covered by the workers' compensation policy under the "other states" coverage provision and that the benefits to any injured worker would be no different than those otherwise required by Florida law.

34. The decision in Raylin Steel Erectors and U.S. Builders is consistent with other recommended orders. See Department of Financial Services, Division of Workers' Compensation v. U and M Contractors, Case No. 04-3041, ¶¶ 10, 28, 31 (DOAH Apr. 7, 2005); Department of Financial Services, Division of Workers' Compensation v. William R. Sims Roofing, Inc., Case No. 06-1169 ¶¶ 11, 52-53, 57-59 (DOAH Nov. 30, 2006); Department of Financial Services, Division of Workers Compensation v. HR Electric, Inc., Case No. 04-2965 ¶¶ 4, 9, 29-

31, (DOAH Jun. 8, 2006); Department of Financial Services, Division of Workers Compensation v. Simpro Homes, Case No. 06-731 ¶¶ 10-11, 30, 32-33 (DOAH Aug. 4, 2006).

35. Section 440.107, Florida Statutes (2007), set out the Department's duties and powers to enforce compliance with the requirement to provide for the payment of workers' compensation. Section 440.107(3)(g), Florida Statutes, authorizes the Department to issue Stop-work Orders and Penalty Assessment Orders in its enforcement of workers' compensation coverage requirements.

36. As to penalties, Section 440.107, Florida Statutes, states in pertinent part:

> (7)(d)1. 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.

Thus, as the Department is obligated by statute to use an established formula to calculate the penalty, it was justified in penalizing the Petitioner an amount equal to one-and-one half times the workers' compensation premiums the Petitioner evaded for the three-year audit period at issue.

37. The methodology for calculating the penalty is mandated by rule and statute. Florida Administrative Code Rule 69L-6.025 adopts a penalty calculation worksheet for the Department's investigators to utilize. Analysis of that worksheet shows that an important calculation is to establish the premium that should have been paid. Premium is equal to 1/100th of each employee's pay, i.e., the gross payroll-which is then multiplied by an established rate based on the risk of injury (the approved manual rate).

38. The premium "the employer would have paid" under the relevant Florida annual rate was this established to be $160,618.15. The unrefuted testimony of the Petitioner's witness, Benjamin Carswell, establishes that the Petitioner paid workers' compensation premium of $111,682.21 for the workers' compensation policy it had in force covering its Florida employees, issued in Tennessee. This was admittedly not based on Florida rates, but the persuasive evidence showed it provided workers' compensation benefits at Florida-required levels.

39. In reality the "evaded premium" (to use Respondent's term) was not the entire $160,618.15 "Florida rate premium," but rather the differential between that premium amount and the non-Florida rate-based premium actually paid, $111,682.21. That amount would be $48,935.94. 1.5 times $48,935.94 results in a penalty actually due, under such a construction of Section

440.107(7)(d)(1), Florida Statutes (2007), of $73,402.91. Applying a credit for penalty already paid of $60.232.16 (through the hearing date) results in a penalty balance due, at that point, of $13,171.75.

40. Such a construction of the above penalty statute is reasonable in serving the legislative purpose of ensuring that all employers, employing Florida employees, on Florida jobs, provide coverage at the same rates, so that those paying Florida premium rates do not, in effect, subsidize those who pay a lower rate, by using a non-compliant policy with non-Florida premium rates. In the situation at hand, a penalty based on the above differential serves that purpose, and is a reasonable, a just way to construe that statute under the peculiar facts and circumstances of this case. This is not the, perhaps, more typical situation where the non-compliant employer has secured no workers' compensation coverage and thus paid no premiums. In that circumstance, the calculation of the penalty based on the full three-year Florida payroll at the Florida premium rates would be appropriate. That is not the situation and correct interpretation here.

41. It is also noted that the Petitioner is paying a monthly penalty of $3,613.79. The above-referenced amount of penalty determined to be due is as of the date of the hearing and represents payments made through January 2009. The amount

herein determined to be due should be adjusted to credit payments made since January 28, 2009.

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, Division of Workers' Compensation, finding that the Petitioner failed to fully secure the payment of workers' compensation for its employees in the manner prescribed by the above-referenced authority and that a penalty in the amount of $73,402.91 is due, less a credit of $60,232.16 already paid, and with credit applied to the above amount for penalty payments made since January 28, 2009.

DONE AND ENTERED this 5th day of May, 2009, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 5th day of May, 2009.

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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.