STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILLENIUM HOMES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-6237
	)	
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH), on December 15, 2009, in Naples, Florida.

APPEARANCES

For Petitioner: Peter T. Flood, Esquire
125 North Airport Road, Suite 202
Naples, Florida 34104

For Respondent: Timothy L. Newhall, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Millenium Homes, Inc. (Petitioner) conducted operations in the State of Florida without obtaining workers' compensation coverage which meets the requirements of

Chapter 440, Florida Statutes (2008), in violation of Subsection 440.107(2), Florida Statutes (2008)[1], as alleged in the Stop-Work Order and Order and Penalty Assessment and the Fifth Amended Order of Penalty Assessment.

If so, what penalty should be assessed by the Department of Financial Services, Division of Workers' Compensation (Respondent), pursuant to Section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

On September 4, 2008, Respondent issued and served a Stop-Work Order and Order of Penalty Assessment, directing Petitioner to immediately stop work and cease all business operations in Florida. Respondent requested and received business records and calculated that Petitioner owed a penalty in the amount of $425,104.38. Respondent served an Amended Order of Penalty Assessment (AOPA) upon Petitioner on October 9, 2008. A Second Amended Order of Penalty Assessment increasing the assessed penalty to $426,359.94 was subsequently served on Petitioner. Petitioner timely filed a Petition for Hearing on or about October 16, 2008, and this matter was referred to DOAH to conduct the formal hearing. This matter was set for hearing for February 17, 2009, and after two continuances granted at the request of the parties, this matter was placed in abeyance, although discovery continued. On June 19, 2009, a Third Amended Order of Penalty Assessment was filed, lowering the penalty

assessment to $316.072.72. Following additional discovery this matter was reset for hearing. Following the transfer of this matter to the undersigned Administrative Law Judge the final hearing was held in Naples, Florida, on December 15, 2009.

At the beginning of the hearing, Respondent was granted leave to file a Fourth Amended Order of Penalty Assessment, which lowered the assessed penalty to $314,377.87. Respondent called two witnesses: Maria Seidler, an investigator for Respondent, and Lynne Murcia, Respondent's penalty calculator. Respondent's Exhibits 1-4, 6, 7, and 8 were received into evidence. Petitioner offered the testimony of two witnesses: Javier Lopez, an employee of Petitioner, and James Loubert, President and sole shareholder of Petitioner. Petitioner's Exhibits 1-5 were offered and received into evidence.

The Transcript of the proceeding was filed with DOAH on January 15, 2010. On March 25, 2010, Respondent again filed a Motion to Amend Order of Penalty Assessment, seeking leave to file the Fifth Amended Order of Penalty Assessment (Fifth AOPA). Without objection, the motion was granted, and the Fifth AOPA was filed on March 30, 2010. The Fifth AOPA deleted all per diem payments from the penalty worksheet, decreasing the assessed penalty to $66,099.37. After five extensions requested by the parties, Respondent filed its Proposed Recommended Order on March 30, 2010. Petitioner's proposals were received on

April 5, 2010. Both parties' proposals have been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is the state agency charged with the responsibility of enforcing the requirements of Chapter 440, Florida Statutes, that employers in Florida secure the payment of workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Workers' compensation coverage is required if a business entity has one or more employees and is engaged in the construction industry in Florida. The payment of workers' compensation coverage may be secured via three non-mutually exclusive methods: 1) the purchase of a workers' compensation insurance policy; 2) arranging for the payment of wages and workers' compensation coverage through an employee leasing company; and 3) applying for and receiving a certificate of exemption from workers' compensation coverage if certain statutorily mandated criteria are met.

3. On September 4, 2008, Maria Seidler, a compliance investigator employed by Respondent, was making random site visits at the Bella Vida development in North Fort Myers. Seidler observed eight workers unloading a truck, taking measurements, and performing various tasks on new homes under construction. All eight of the men were engaged in some type of

activity on the job site. None were merely standing around, sitting in a truck, or otherwise idle.

4. Seidler had all eight men stand in front of her, spoke to them in Spanish, and recorded their names on her field interview worksheet. All eight men advised Seidler, in Spanish, that they worked for Millenium Homes. None of the men advised Seidler that they did not work for Petitioner, nor that they were present in hopes of applying for a job. The individual apparently in charge at the job site, did not advise Seidler that not all of the men present were working for Petitioner.

5. The evidence demonstrated that D.R. Horton was the general contractor for the project, and that D.R. Horton had contracted with Petitioner to frame out the housing units at the project. The eight men, who were present on the job site and who identified themselves as employees of Petitioner, confirmed that they were present on September 4, 2008, to perform framing.

6. Framing is a construction activity as contemplated by Subsection 440.02(8), Florida Statutes, and Florida Administrative Code Rule 69L-6.021.

7. James Loubert, president and sole shareholder of Petitioner, was not on the job site at the time of Seidler's arrival, and she initially spoke with him by telephone. Loubert arrived at the job site a short time later. Loubert advised Seidler that Petitioner had secured workers' compensation

coverage for its employees through an employee leasing arrangement with Employee Leasing Solutions (ELS). This coverage was later confirmed by Seidler. However, of the eight workers found on the job site, three workers, Alejandro Osorio, Josue Sanchez Bautista, and Luis Aguilar, were not named on the ELS list of Petitioner's active, covered employees.

8. Seidler was very definite and precise in her testimony that she observed Alejandro Osorio, Josue Sanchez Bautista, and Luis Aguilar wearing hard hats and engaging in work activities upon her arrival at the job site. Her testimony is found to be credible.

9. When Loubert arrived at the job site, he informed Seidler that two of the workers, not listed on Petitioner's active employee roster, were to have been sent home to pick up their Social Security cards, and that he had called in the third worker, Josue Sanchez Bautista, to ELS. Loubert did not inform Seidler that Osorio, Bautista, and Aguilar were not employees of Petitioner and were merely present at the job site in hopes of applying for a job.

10. The Pre-hearing Stipulation signed by counsel for the parties and filed with the DOAH clerk on December 8, 2009, contained the following statements of admitted facts in section E:

> 6) Respondent's [sic] employees Josue Sanchez Bautista, Luis Aguilar, and Juan Perez had not been called into and accepted as employees by ELS as of September 4, 2008.
>
> 7) Respondent [sic] was not in compliance with the coverage requirements of Chapter 440, Florida Statutes, as of September 4, 2008.[2]

11. At the hearing, both Javier Perez and Loubert testified that Osorio, Bautista, and Aguilar were not employees of Petitioner, but rather were waiting on site for Loubert to arrive, so that they could ask for jobs. However, they were all wearing hard hats.

12. The testimony of Perez and Loubert is inconsistent with the observations of Seidler, as well as the statements made to Seidler by Loubert at the job site on September 8, 2008, and is, therefore, not credible.

13. Petitioner had no workers' compensation coverage other than that provided though ELS, and no active exemptions. James Loubert is the only officer of Petitioner, and did not have an exemption from coverage as of September 4, 2008.

14. At the work-site, a Stop-Work Order 08-234-D7 was issued and personally served upon James Loubert based upon Petitioner's failure to secure the payment of workers' compensation for its employees Josue Sanchez Bautista, Luis Aguilar, and Alejandro Osorio. A business records request was also served on Loubert in order to obtain the records necessary

to calculate and assess a penalty on Petitioner based upon its failure to comply with the coverage requirements of Chapter 440, Florida Statutes. Pursuant to Section 440.107(5), Florida Statutes, Petitioner's business records were requested back to September 5, 2005, or three years prior to the issuance of the Stop-Work Order.

15. Petitioner produced the register for its primary checking account to Respondent on September 4, 2008, in response to Respondent's request for business records.

16. Lynne Murcia is a compliance specialist for Respondent. She reviews business records produced by employers to determine the amount of payroll on which workers' compensation premium was not paid, in order to calculate an appropriate penalty for violations of the coverage requirements of Chapter 440, Florida Statutes.

17. Upon review of the business records initially produced by Petitioner, it was determined that the register from one of Petitioner's two business checking accounts was missing. The records initially produced by Petitioner were, therefore, insufficient for the calculation of an appropriate penalty. It was requested that Petitioner produce the register for the second checking account, and those records were quickly produced. Thereafter, a 45-page summary of all transactions potentially meeting the definitions of payroll set forth in

Florida Administrative Code Rule 69L-6.035 (the Rule), was prepared and an Order of Penalty Assessment issued.

18. In determining which payments should potentially be considered payroll, pursuant to the Rule, all payments made by Petitioner directly to its employees that did not pass through ELS were included. To the extent that those direct payments meet the definition of payroll, they were subject to workers' compensation premium and would be properly included in an assessed penalty.

19. Petitioner also made direct "per diem" payments to reimburse its employees for the cost of meals and lodging which they incurred during the times that they were required to travel away from home to perform their jobs. The per diem rates were calculated pursuant to Internal Revenue Service guidelines, and were deducted as a business expense on Petitioner's income tax returns for the years 2005-2007.

20. The Rule requires that expense reimbursements by an employer to employees be included as payroll subject to workers' compensation premium to the extent that the business records of the employer do not confirm that the expenses were incurred as valid business expenses.

21. All per diem payments made by Petitioner to its employees were included in the calculations, because Petitioner did not produce the receipts reflecting that its employees had

actually incurred meal and lodging expenses in those amounts. However, following the December 15, 2009, hearing, Respondent examined the issue further and concluded that Petitioner's per diem payments to its employees were properly documented as business expenses on Petitioner's income tax returns. Respondent thereafter sought leave to file its Fifth Amended Order of Penalty Assessment deleting all per diem payments from the assessed penalty.

22. Petitioner made numerous payments to third parties who provided construction, maintenance, or janitorial services at the homes of James Loubert, his father, Adrian Loubert, and his wife, April White, or who provided child care services for the Loubert family. For example, Petitioner paid $1,500.00 for tile work performed at James Loubert's residence; $478.00 to Alex Ortiz, Antonio Elias, and Candy Ortiz for pressure-washing the homes of James Loubert and April White; $2,548.14 to Pedro Delgano for building cabinets for the homes of James Loubert and his father; $11,326.40 to Rick Wilson for painting the houses of James and Adrian Loubert; and beginning August 23, 2007, through December 20, 2007, $1,433.66 to Diane Berger for cleaning James Loubert's home. Petitioner also paid $3,402.00 to Cinta Smollis for babysitting services provided to Loubert. These individuals do not appear on the penalty work sheet of the Fifth Amended

Order of Penalty Assessment, since they do not meet the statutory definition of employees.

23. Petitioner also paid large sums of money to Adrian Loubert for the purchase of a farm in Canada. In addition, James Loubert testified that some of the payments to his father represented expense reimbursements, suggesting that, at some point, Adrian Loubert had been an employee of Petitioner. Petitioner did not introduce any exhibits into evidence reflecting the nature or amount of the reimbursements allegedly being made to Adrian Loubert.

24. James Loubert was actively involved in the carpentry work performed by Petitioner, on the project on which the stop-work order was issued as well as on prior projects. Nevertheless, he received only a minimal salary through Petitioner's employee leasing company, ELS. In 2007, Loubert received a total salary of $11,000.00 through ELS. In 2008, he received a total salary through ELS of only $7,200.00. Any payments that James Loubert received directly from Petitioner, that meet the definition of payroll set forth in the Rule, were subject to workers' compensation premium, and are therefore subject to penalty.

25. During the three-year penalty period specified by the statute, Petitioner made many cash payments to, or for the benefit of, James Loubert. The business records produced by

Petitioner indicate that these cash payments were made to payees such as Blockbuster Video, Toys-R-Us, and PetsMart, as well as for vacation expenses. In addition, James Loubert took large amounts of cash from Petitioner to facilitate his hobby of racing cars.

26. Throughout the penalty period, Petitioner also made numerous payments to Loubert's wife, April White, and to his daughter, Alexa Seagate. Petitioner also made numerous payments to Gary White, his father-in-law and one of Petitioner's employees. James Loubert testified that the payments made to, or on behalf of, family members, the payments made to third-party payees, and the cash payments which he took from Petitioner reflected shareholder distributions. However, the memo lines on those payment entries do not indicate that those payments were intended to be shareholder distributions. Petitioner's business records reflect that the memo line on a check would indicate that it was a shareholder distribution, if that was what it was intended to be. This was the practice on other transactions. In addition, James Loubert testified that the memos for his Quick Books entries reflect "exactly what" each payment was for. Presumably those memo entries are the same as the memo entries on the corresponding checks.

27. The payments made by Petitioner to third parties from which it appears that Petitioner did not receive services or a

benefit, including but not limited to the payments made to family members of James Loubert, and the cash payments made by Petitioner to finance James Loubert's auto racing hobby, do not constitute legitimate business expenses.

28. Petitioner frequently made loans or wage advances to its employees. Although Loubert testified that those loans were repaid to him, he later acknowledged that a $2,000.00 loan to employee Rachel Broulet was never paid back, and that a $975.00 loan to Nicholas Susa was never repaid. Petitioner did not produce business records or documentary evidence at the hearing that indicates that any of the loans which it made to employees were repaid.

29. The State of Florida has adopted a classification code developed by the National Council of Compensation Insurance (NCCI), which assigns individual four digit codes to various classes of labor. This classification code is utilized to segregate different categories of labor by risk and to determine appropriate workers' compensation premiums for those classes of labor in Florida. Fla. Admin. Code R. 69L-6.021.

30. As noted above, Petitioner was performing framing work at the time of the September 4, 2008, inspection. Because Petitioner's employees were observed at work constructing residential homes, classification code 5645, detached one or two family dwellings, was correctly applied to Petitioner's

employees directly engaged in construction activities. This includes Javier Perez, as he was working along with and directly supervising the other seven carpenters who were working on site when the inspection took place.

31. Classification code 8742, outside sales, has been applied to James Loubert, as he was not observed working on September 4, 2008. However, Loubert did testify at his deposition that he usually performed construction work along side Petitioner's other employees, but Respondent did not apply the construction code to him in the Fifth Amended Order of Penalty Assessment.

32. Classification code 8810 was correctly applied to those employees of Petitioner who performed clerical work in the office.

33. The appropriate manual rates for each year of the penalty period of September 5, 2005, through September 4, 2008, was applied for each classification code assigned to Petitioner's employees.

34. In preparing the Fifth Amended Order of Penalty Assessment, the amount of unsecured payroll attributable to each employee of Petitioner listed on the penalty worksheet was correctly calculated. From the evidence, Luis Aguilar and Alejandro Osorio were to be paid $10.00 per hour. There was no evidence that Aguilar and Osorio had worked prior to the

issuance of the Stop-Work Order, and therefore, earnings of $80.00 assigned, reflecting eight hours at $10.00 per hour for September 4, 2008, was correct. Petitioner failed to provide any business records or other information concerning the rate of pay for Josue Sanchez Bautista, the third non-compliant worker. Bautista's wages for September 4, 2008, can be imputed utilizing the statewide average wage pursuant to Subsection 440.107(7)(e), Florida Statutes.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2009).

36. The Legislature has delegated to Respondent the authority to enforce the workers' compensation coverage requirements of Chapter 440, Florida Statutes. See § 440.107(3), Fla. Stat. In Respondent's interpretation of the statutes it is charged with enforcing, including Section 440.107, Florida Statutes, it is entitled to great deference. Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002); Florida Hospital v. Agency for Health Care Administration, 823 So. 2d 844 (Fla. 1st DCA 2002).

37. Respondent is seeking to assess an administrative fine against Petitioner. As administrative fines are penal in nature, Respondent is required to prove that Petitioner failed

to secure the payment of workers' compensation insurance coverage for its employees by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Department of Financial Services, Division of Workers' Compensation v. John H. Woods d/b/a Woods Construction, Case No. 08-5348 (DOAH July 17, 2009, adopted in toto).

38. Subsection 440.10(1)(a), Florida Statutes, reads as follows:

> (1)(a) 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.

39. Subsection 440.38(1)(a), Florida Statutes, reads as follows:

> (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.

40. Section 440.107, Florida Statutes, reads in pertinent part:

> (1) The Legislature finds that the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare.
>
> (2) For the 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, ...
>
> * * *
>
> (7)(a) 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 . . . such failure shall be deemed an immediate serious danger to the 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.
>
> * * *
>
> (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 the 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.

41. 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. "Employee means any person who received remuneration from an employer for the performance of any work or service while engaged in any employment. . . ." § 440.02(15)(a), Fla. Stat.

42. Subsection 440.02(8), Florida Statutes, reads as follows:

> (8) "Construction industry" means for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land. However, "construction" does not mean a homeowner's act of construction or the result of a construction upon his or her own premises, provided such premises are not intended to be sold, resold, or leased by the owner within 1 year after the commencement of construction. The division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term "construction industry" as set forth in this section.

43. Subsection 440.02(17)(b), Florida Statutes, defines employment subject to workers' compensation coverage as:

> (b) "Employment" includes:
>
> * * *
>
> 2. All private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.

44. Subsection 440.09(1), Florida Statutes, requires that "[t]he employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment. . . ."

45. Florida Administrative Code Rule 69L-6.035, reads in pertinent part:

> (1) For purposes of determining payroll for calculating a penalty pursuant to Section 440.107(7)(d)1., F.S., the Department shall when applicable include any one or more of the following as remuneration to employees based upon evidence received in its investigation:
>
> (a) Wages or salaries paid to employees by or on behalf of the employer;
>
> (b) Payments, including cash payments, made to employees by or on behalf of the employer;
>
> (c) Payments, including cash payments, made to a third person or party by or on behalf

of the employer for services provided to the employer by the employees;

(d) Bonuses paid to employees by or behalf of the employer;

(e) Payments made to employees by or on behalf of the employer on any basis other than time worked, such as piecework, profit sharing, dividends, income distributions, or incentive plans;

(f) Expense reimbursements made to employees by or on behalf of the employer, to the extent that the employer's business records do not confirm that the expense was incurred as a valid business expense;

(g) Loans made to employees by or on behalf of the employer to the extend that such loans have not been repaid to the employer;

* * *

(2) For the purposes of calculating a penalty pursuant to Section 440.107(7)(d)1., F.S., payroll for an officer of a corporation as defined in Section 440.02(9), F.S., shall be based on remuneration factors listed in paragraphs (1)(a) through (j) of this rule where applicable, or the state 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, whichever is less.

46. Florida Administrative Code Rule 69L-6.028 (2008) reads, in pertinent part:

(1) In the event an employer fails to produce 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), F.S., the department shall impute payroll at any time after the

> expiration of fifteen business days after receipt by the employer of a written request to produce such business records.
>
> (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 of the portion 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.

47. The payments which Petitioner made to third parties, including but not limited to those detailed above, and to Adrian Loubert, as set forth in paragraph 23, are properly reallocated to James Loubert as personal compensation for services which he performed on behalf of Petitioner, pursuant to the Rule.

48. The large cash payments which Petitioner made to James Loubert, which he used primarily to finance his auto racing hobby, and to a lesser extent for family expenses, were also properly accounted for as personal compensation to James Loubert

pursuant to the Rule. As with the payments made to third parties and Adrian Loubert, James Loubert utilized the cash payments from Petitioner for his own personal benefit and for the benefit of his family members.

49. The payments made by Petitioner, to or on behalf of, James Loubert's wife and daughter were also properly reclassified as personal compensation to James Loubert, pursuant to the Rule. Those payments made by Petitioner to third parties were in return for services performed by James Loubert for Petitioner.

50. The reallocation of payments made by Petitioner to third parties, including members of James Loubert's family, as well as Petitioner's cash payments made directly to James Loubert, as personal compensation to Loubert is particularly appropriate in light of the fact that James Loubert performed services on behalf of Petitioner and yet took only a minimal salary through Petitioner's employee leasing company. By providing large sums of money to James Loubert while he drew only a minimum salary through ELS, Petitioner has wrongly avoided workers' compensation premiums on payments which squarely meet the definition of payroll set forth in the Rule.

51. Florida Administrative Code Rule 69L-6.035(2), limits the amount of payroll that may be assigned to a corporate officer to the amount calculated pursuant to Sections (a)-(j) of

Florida Administrative Code Rule 69L-6.035(1) or the statewide average wage, times 1.5, whichever is lower. The evidence demonstrates that payments to third parties and cash totaling $300,564.40 have been properly reallocated to James Loubert as personal compensation. However, correctly applying Florida Administrative Code Rule 69L-6.035(2) would limit the amount of those payments reallocated to James Loubert as wages subject to workers' compensation premium and penalty to the appropriate state average weekly wage for each year of the penalty period times 1.5. Therefore, the sum of $17,424.43 is correctly allocated to James Loubert as payroll for the period of September 5, 2005, through December 31, 2005, $53,962.98 for 2006, and $55,950.00 for 2007. To the extent that those payments reallocated to James Loubert for the years in question exceed the state average weekly wage times 1.5, they are properly designated as shareholder distributions which are excluded from payroll.

52. Petitioner failed to produce business records of any type demonstrating that any payments made to Gary White, during the penalty period were, in fact, reimbursements. As the records and testimony provided by Petitioner make it impossible to determine which payments to White constitute payroll and which constitute expense reimbursements, it is proper to include all such payments as payroll.

53. Petitioner did not produce any records that reflect that any alleged loans or payroll advances made to its employees were in fact repaid. Therefore, it is proper to include all such loans as payroll pursuant to the Rule.

54. The income of Josue Sanchez Batista for one day, September 4, 2008, is properly imputed, given the failure of Petitioner to provide any information as to the amount of his pay. The earnings of Alejandro Osorio and Luis Aguilar, based upon information provided by Petitioner that they were to be paid at the rate of $10.00 per hour, is proper.

55. In his deposition testimony, James Loubert testified that in 2006 he made a loan to Petitioner in the amount of $254,000.00. Respondent's Exhibits 6 and 7 indicate that payments were made by Petitioner to James Loubert in 2007 totaling $54,600.00 for "2007 (sic) loan reimbursement." Petitioner offered no evidence at the hearing to verify the making of such a loan, or that any of the 2007 payments made to James Loubert were loan repayments.

56. However, even if it is accepted that Petitioner made loan repayments to James Loubert in the amount of $54,600.00 in 2007, this does not make the assignment of income to James Loubert, as payroll, in the amount of $55,950.00 for 2007 incorrect. In 2007, James Loubert received direct payments totaling in excess of $15,000.00 in addition to those payments

notated as loan repayments. Subtracting the $54,600 in loan repayments from the total of the direct payments and third party payments reallocated to James Loubert leaves more than $62,000.00, an amount well in excess of the maximum attributable as income to Loubert as a corporate officer for 2007.

57. The procedure mandated by Subsection 440.107(7)(d)1., Florida Statutes, to calculate the penalty owed by Petitioner by virtue of its failure to comply with the coverage requirements of Chapter 440, Florida Statutes is proper. Using the penalty worksheet, mandated by Florida Administrative Code Rule 69L-6.027, those transactions constituting payroll for which no workers' compensation premiums had been paid were properly identified, assigned the appropriate classification code, and then the applicable period of non-compliance for each individual employee was also identified. The gross payroll amount for each employee for each period of non-compliance, divided by 100 and multiplied by the applicable approved manual rate, results in the amount of workers' compensation premium that Petitioner should have paid. The amount of premium that Petitioner should have paid multiplied by 1.5 determines the correct amount of the penalty owed by Petitioner as a result of its failure to comply with the coverage requirements of Chapter 440, Florida Statutes.

58. Based upon the findings of fact and the definitions set forth above, the evidence is clear and convincing that, Petitioner, Millenium Homes, Inc. is an employer engaged in the construction industry. Petitioner is, therefore, required to provide workers' compensation insurance coverage for its employees, as well as employees of subcontractors who have not secured the payment of workers' compensation.

59. Based upon the findings of fact and statutory provisions set forth above, the evidence is clear and convincing that Petitioner was not in conformance with the coverage requirements of Chapter 440, Florida Statutes, on September 4, 2008, and the Stop-Work Order was properly issued.

60. Therefore, it has been demonstrated by clear and convincing evidence, that Petitioner was not in compliance with the coverage requirements of Chapter 440, Florida Statutes, and that a penalty, in the amount of $66,099.37, should be assessed for Petitioner's failure to secure the payment of workers' compensation for its employees.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order finding that Millenium Homes, Inc., failed to secure the payment of workers' compensation insurance coverage for its employees, in violation of Section 440.38(1),

Florida Statutes, and that a penalty in the amount of $66,099.37 should be imposed for the failure to provide the required workers' compensation insurance coverage.

DONE AND ORDERED this 28th day of May, 2010, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of May, 2010.

ENDNOTES

[1/] All references to Florida Statutes are to Florida Statutes (2008), unless otherwise indicated.

[2/] Admitted facts 6 and 7 were clearly intended to state that Petitioner, Millenium Homes, Inc., was not in compliance with Chapter 440, Florida Statutes. However, due to the unusual circumstances in which Millenium Homes, Inc. was designated as the Petitioner and the Department was designated as the Respondent, the Petitioner was mistakenly referred to as the Respondent and vice versa throughout the entire proceedings.

COPIES FURNISHED:

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Tallahassee, Florida 32399-0307

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.