

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 09-0641
)
AJ'S TILE AND MARBLE, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 22, 2009, by video teleconference, with the Petitioner appearing in Tallahassee, Florida, and the Respondent's Qualified Representative appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kristian E. Dunn, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Herbert Grodin, Qualified Representative
Sobel & Cookler, CPAs
950 Jericho Turnpike
Westbury, New York 11590

STATEMENT OF THE ISSUE

Whether the Petitioner failed to secure workers' compensation insurance coverage for its employees, as set forth in the Stop-Work Order dated October 15, 2008, and, if so, the penalty that should be assessed.

PRELIMINARY STATEMENT

On October 15, 2008, the Department of Financial Services, Division of Workers' Compensation ("Department"), issued a Stop-Work Order directing AJ's Marble & Tile, Inc. (AJ's Marble & Tile"), to immediately stop work and cease all business operations in Florida because it had allegedly failed to obtain workers' compensation insurance meeting the requirements of Chapter 440, Florida Statutes (2008),¹ and the Florida Insurance Code. The Stop-Work Order included an Order of Penalty Assessment reciting the statutory penalty for failure to obtain workers' compensation insurance coverage.

The Stop-Work Order was hand-delivered to the owner of AJ's Marble & Tile, Anibal Garcia, on October 15, 2008, together with a Request for Production of Business Records for Penalty Assessment Calculation. On October 24, 2008, the Department issued an Amended Order of Penalty Assessment based on documents furnished by AJ's Marble & Tile, in which it included a proposed penalty in the amount of \$109,837.09 attributable to AJ's Marble & Tile's failure to secure workers' compensation

insurance coverage. No proposed penalty for violating the Stop-Work Order was included in the October 24, 2008, Amended Order of Penalty Assessment.

AJ's Marble & Tile timely filed a request for an administrative hearing through Herbert Grodin of Sobel & Cookler, CPAs, a business located in Westbury, New York. The Department transmitted the matter to the Division of Administrative Hearings for the assignment of an administrative law judge. A Notice of Hearing by Video Teleconference was issued on February 16, 2009, scheduling the final hearing for April 22, 2009. In addition, an order was entered on that date advising AJ's Marble & Tile of Florida Administrative Code Rules 28-106.106 and .107, which relate to representation of a party in an administrative proceeding by a person other than an attorney licensed to practice law in Florida and of the need for that person to be authorized to appear in the proceeding as the party's qualified representative. A copy of the referenced rules was provided with the order.

After receiving the necessary materials from Mr. Grodin, an order was entered on April 10, 2009, accepting Mr. Grodin as AJ's Marble & Tile's qualified representative. An Order Directing Filing of Exhibits was entered on April 10, 2009, directing the parties to file the exhibits they intended to offer into evidence at the final hearing no later than five days

prior to the hearing, which, in this case, was Friday, April 17, 2009.

AJ's Marble & Tile filed a copy of its proposed exhibits on April 16, 2009. On April 17, 2009, the Department filed some of the exhibits it intended to offer into evidence at the final hearing. The exhibits were accompanied by a notice from counsel for the Department stating that he had been unable to comply fully with the Order Directing Filing of Exhibits because he had been in a final hearing with another administrative law judge that had been extended a day longer than scheduled.

The Department filed with the Division of Administrative Hearings the remainder of the exhibits it intended to offer into evidence on April 20, 2009, accompanied by a document entitled "Addendum to Exhibits for Hearing." Although the Certificate of Service appended to the addendum indicated that the exhibits had been served on Mr. Grodin by hand-delivery on April 20, 2009, counsel for the Department represented in the text of the addendum that Mr. Grodin had refused to accept the exhibits and that they would be provided to him on the morning of the final hearing.

On April 17, 2009, the Department also filed an Unopposed Motion to Amend Charging Documents, to which it attached a Second Amended Order of Penalty Assessment. The proposed penalty stated for AJ's Marble & Tile's alleged failure to

secure workers' compensation insurance coverage for its employees was increased to \$111,840.64, and the Department included for the first time a proposed penalty in the amount of \$48,000.00 attributable to AJ's Marble & Tile alleged failure to cease its business operations in Florida in accordance with the Stop-Work Order issued October 15, 2008, for a total proposed penalty of \$159,840.64.

In the motion to amend the Amended Order of Penalty Assessment, counsel for the Department represented that he had contacted Mr. Grodin and that Mr. Grodin stated that he did not oppose the amendment. Counsel for the Department also noted in the motion that he had advised Mr. Grodin of the possibility of requesting a continuance due to the short time remaining until the hearing but that Mr. Grodin stated he was not inclined to request a continuance. Because the Department had represented that its motion was unopposed and because the motion was not filed until late in the afternoon of Friday, April 17, 2009, and not received by the undersigned until Monday, April 20, 2009, two business days before the final hearing, no written order was entered on the motion prior to the final hearing.

The final hearing was convened on April 22, 2009. Shortly after the final hearing was convened, the undersigned took up the matter of the Unopposed Motion to Amend Charging Documents. The undersigned indicated her understanding that Mr. Grodin did

not oppose the amendment, but Mr. Grodin indicated that he did, in fact, oppose the amendment. Mr. Grodin further stated that he had not received a copy of the motion or a copy of the proposed Second Amended Order of Penalty Assessment, even though counsel for the Department stated that a copy had been sent to Mr. Grodin by facsimile transmittal to Mr. Grodin's office on April 17, 2009. Counsel for the Department also represented that the increased proposed penalties included in the proposed Second Amended Order of Penalty Assessment were based on documents provided to the Department by AJ's Marble & Tile or by Mr. Grodin.

A Department representative present with Mr. Grodin at the Miami teleconference site provided Mr. Grodin with a copy of the motion and proposed amendment, and the hearing was recessed to give Mr. Grodin an opportunity to review the documents. At the conclusion of the recess, Mr. Grodin renewed his objection to allowing the proposed amendment, stating that AJ's Marble & Tile did not violate the Stop-Work Order but, rather, that the individuals it engaged to work as independent contractors continued to work. The undersigned explained to Mr. Grodin that the significant change in the proposed Second Amended Order of Penalty Assessment was the additional proposed penalty for violation of the Stop-Work Order; that the Department had to prove by evidence presented at the final hearing that AJ's

Marble & Tile continued to operate its business after issuance of the Stop-Work Order, as well as the number of days it had done so; and that, if the Department proved these facts, the penalty for each day a business continues to operate after issuance of a Stop-Work Order is mandated by statute as \$1,000.00 per day. Because the violation of the Stop-Work Order and the accuracy of the proposed penalty calculation were issues of fact to be proven by the Department and because of the representation that the documents on which the proposed penalties in the Second Amended Order of Penalty Assessment had been calculated were provided by AJ's Marble & Tile or Mr. Grodin, the undersigned granted the motion to amend the penalty assessment, and the Second Amended Order of Penalty Assessment filed April 17, 2009, was identified as the charging document in the case.

The matter of the Department's exhibits was then discussed. Counsel for the Department acknowledged that his exhibits were not filed with the Division of Administrative Hearings nor served on Mr. Grodin within the five days specified in the Order Directing Filing of Exhibits, but he represented that he had offered to have the exhibits hand-delivered to Mr. Grodin on the morning of April 20, 2009. Mr. Grodin confirmed at the final hearing that he had refused to accept hand-delivery of the documents. Counsel for the Department also represented that the

documents to be offered as exhibits by the Department were provided by Mr. Grodin or by AJ's Marble & Tile, except for the Second Amended Order of Penalty Assessment and the accompanying Penalty Worksheet, several spreadsheets breaking down the calculations made by the Department, and a packet of certified documents retrieved from the Department's Coverage and Compliance Automated System ("CCAS") database.

Because of the potential prejudice to AJ's Marble & Tile resulting from the Department's failure to file and serve its proposed exhibits timely, the undersigned explained to Mr. Grodin that the only way to cure the prejudice was to continue the hearing until a later date to give him time to review the documents and prepare his defense. In response, Mr. Grodin suggested that he review the documents as they came up during the hearing and state his objections at that time. A recess was taken to allow time for counsel for the Department, Mr. Grodin, and the Department investigator present with Mr. Grodin at the Miami, Florida, location to discuss the documents at issue. At the conclusion of the recess, the Mr. Grodin indicated that he was ready to proceed with the hearing.

At the hearing, the Department presented the testimony of Ann Johnson, and the following Petitioner's exhibits were offered and received into evidence: Petitioner's Exhibits 1a,

1b, 1c, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, and 3. Mr. Grodin testified on behalf of AJ's Marble & Tile, and Respondent's Exhibits A through F were offered and received into evidence.

Mr. Grodin did not object to the admission of any of the Department's exhibits except Petitioner's Exhibit 3, which consists of the Second Amended Order of Penalty Assessment, the Penalty Worksheet; a breakdown of the amounts of gross payroll attributed to each individual listed in the Penalty Worksheet, and a spreadsheet breaking down the calculations the Department used to arrive at the proposed \$48,000.00 penalty assessment for AJ's Marble & Tile's alleged violation of the October 15, 2008, Stop-Work Order. Mr. Grodin objected to the introduction of this exhibit on the grounds that he disagreed with the calculations used to determine the proposed penalty for the alleged violation of the Stop-Work Order.

The undersigned advised Mr. Grodin that he could cross-examine the Department's witness regarding the correctness of the information contained in the calculation of the proposed \$48,000.00 penalty and the manner in which the calculations had been made. The undersigned then asked Mr. Grodin to identify the evidence and/or witnesses he would present to refute the violation of the Stop-Work Order and the calculation of the proposed \$48,000.00 penalty. Mr. Grodin responded that he would present his own testimony and that he was in a position to give

that testimony at the hearing on April 22, 2009. Based on this representation, the undersigned received Petitioner's Exhibit 3 into evidence.

In correspondence directed to the undersigned dated April 23, 2009, and filed with the Division of Administrative Hearings April 27, 2009, Mr. Grodin expressed his displeasure with the manner in which the undersigned had conducted the final hearing, especially with regard to allowing the Department's exhibits into evidence despite the late disclosure and filing of the exhibits.² Mr. Grodin pointed out that the Department had violated both the Order of Pre-Hearing Instructions entered February 16, 2009, and the Order Directing Filing of Exhibits entered April 10, 2009, and he requested that the case be dismissed because the Department had violated these orders. Mr. Grodin requested in the alternative that a mistrial be declared and the matter scheduled for another final hearing, during which he could present the testimony of witnesses he would have presented had he received timely disclosure of the Department's exhibits. A copy of this correspondence was forwarded to the Department, together with a Notice of Ex Parte Communication; the Department did not file a response to Mr. Grodin's request, and no action was taken on the requests prior to receipt of the parties' proposed recommended orders.

During the hearing, errors were discovered in the Department's calculations. With Mr. Grodin's agreement, the Department filed on April 28, 2009, an Unopposed Motion to Amend Charging Documents, in which the proposed penalty included in the Second Amended Order of Penalty Assessment was decreased. Because the proposed amendment was discussed by the parties at the hearing and because Mr. Grodin stated that he did not object to the amendment, the Department's motion is granted, and the Third Amended Order of Penalty Assessment, which includes a proposed penalty assessment of \$158,775.09, shall be considered the charging document in this case.

The one-volume transcript of the proceeding was filed on May 11, 2009. On May 18, 2009, AJ's Marble & Tile filed its Proposed Recommended Order, in which Mr. Grodin again expressed his displeasure with the manner in which the final hearing was conducted. The Department filed its Proposed Recommended Order on May 21, 2009. Upon review of the proposed recommended orders, the undersigned noticed a discrepancy between information contained in the Department's proposed findings of fact and the representation of the Department at the final hearing that Mr. Grodin or AJ's Marble & Tile had provided all documents introduced into evidence at the hearing, except those specifically identified at the hearing.

It appeared from the information in the Department's proposed findings of fact that certain documents may have been provided to the Department by a source other than Mr. Grodin or AJ's Marble & Tile. An Order to Show Cause was, therefore, entered on June 30, 2009, ordering the Department to show cause why the final hearing should not be re-opened to allow testimony on the source of these certain documents and to allow AJ's Marble & Tile the opportunity to offer evidence regarding the documents. The Department filed its response to the Order to Show Cause on July 10, 2009, and a hearing was held on August 26, 2009, with the parties attending by telephone. During the telephone hearing, the undersigned stated her intent to grant Mr. Grodin's request to re-open the final hearing. Mr. Grodin requested time to consult with his client, and he agreed to report his client's decision on reopening the hearing on or before September 14, 2009. In correspondence dated September 11, 2009, Mr. Grodin stated that his client could not afford to continue litigation in the case, that the case should be decided on the evidence presented at the final hearing, and that the case should be dismissed because of the late disclosure of the Department's exhibits.

The parties' proposed recommended orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

1. The Department is the state agency responsible for enforcing the requirement of Section 440.107, Florida Statutes, that employers in Florida secure workers' compensation insurance coverage for their employees pursuant to Chapter 440, Florida Statutes. § 440.107(3), Fla. Stat.

2. At the times material to this proceeding, AJ's Marble & Tile was a Florida corporation located in Pembroke Pines, Florida. Anibal Garcia was the owner of AJ's Marble & Tile, which, at the times material to this proceeding, engaged in the business of designing and arranging decorative marble and tile.

3. AJ's Marble & Tile created the design of the marble and tile, and arranged for the installation of the marble and tile in accordance with the design. The workers hired by AJ's Marble & Tile to perform the installations signed a document entitled "Contract for Performance, Independent Contractors" and a document entitled "Independent Contractors Agreement." AJ's Marble & Tile issued annually an Internal Revenue Form 1099, which reports "Miscellaneous Income," to each worker installing marble and tile pursuant to the contract and agreement they signed with AJ's Marble & Tile.

4. On or about October 15, 2008, Ann Johnson, a compliance investigator employed by the Department, conducted a random site visit to a fast-food-restaurant construction site located in the area which she was assigned to patrol. Ms. Johnson was approached by a person who identified himself as the general contractor, and he provided Ms. Johnson with the names of the seven companies that were working on the site at the time of the site visit.

5. Ms. Johnson went to her car and conducted research on the seven companies identified by the general contractor using the Department's CCAS database, which provides information on workers' compensation insurance coverage and exemptions. Ms. Johnson's research on the CCAS database revealed that six of the companies working on the construction site had workers' compensation insurance coverage for their employees. Ms. Johnson also found in the CCAS database an exemption from Chapter 440, Florida Statutes, issued to Anibal Garcia, the owner and an officer of AJ's Marble & Tile. Ms. Johnson did not, however, find any record in the CCAS database to show that AJ's Marble & Tile had workers' compensation insurance coverage for any employee.

6. Ms. Johnson approached the men whom the general contractor identified as working for AJ's Marble & Tile. She observed one man installing decorative tile on the outside of

the building and three men installing tile in two bathrooms inside the building; one of the three men inside the building was working with a tile saw.

7. Ms. Johnson, who is fluent in Spanish, interviewed the men in Spanish since that was their native language. The four men told Ms. Johnson that they were employed and paid by AJ's Marble & Tile.

8. Ms. Johnson obtained AJ's Marble & Tile's telephone number and called the company's office. She spoke with Mr. Garcia, who told her that he did not have workers' compensation insurance coverage for the men on the construction site but that he did have an exemption for himself

9. Ms. Johnson told Mr. Garcia to meet her at the construction site, and he arrived there about an hour later. While she was waiting for Mr. Garcia, Ms. Johnson spoke with her supervisor; with his authorization, she prepared a Stop-Work Order and a Request for Production of Business Records for Penalty Assessment Calculation for AJ's Marble & Tile. Ms. Johnson personally delivered these documents to Mr. Garcia when he arrived at the construction site.

10 The Stop-Work Order prepared by Ms. Johnson on October 15, 2008, directed AJ's Marble & Tile to cease all business operations in Florida until the Department issued an order releasing the Stop-Work Order, citing as authority

Section 440.107, Florida Statutes. The Stop-Work Order also included an Order of Penalty Assessment that stated in general terms the statutory penalty for failure to secure workers' compensation coverage.

11. The Request for Production of Business Records for Penalty Assessment Calculation directed that AJ's Marble & Tile to provide business records from October 16, 2005, through October 15, 2008, for examination and copying within five days of the date on which the request was received. AJ's Marble & Tile and its Certified Public Accountant, Herbert Grodin, provided documents to the Department for the three-year period consisting of check stubs, the payroll ledger, Internal Revenue Service Form 1099s, and independent contractor agreements.

12. Ms. Johnson identified each person who had been paid by AJ's Marble & Tile for tile installation from October 16, 2005, through October 15, 2008, from the payroll records provided by AJ's Marble & Tile, and she ran their Social Security numbers through the Department's CCAS database. She found that, during the relevant time period, none of the individuals listed had an exemption from Chapter 440, Florida Statutes, and that none had workers' compensation insurance coverage. Ms. Johnson further determined that AJ's Marble & Tile had not provided workers' compensation insurance coverage to the persons identified in its payroll documents during the

period from October 16, 2005, through October 15, 2008, when the Stop-Work Order was issued.

Calculation of proposed penalty assessment for failure to provide workers' compensation insurance coverage.

13. Ms. Johnson verified the amounts paid by AJ's Marble & Tile to each worker it paid to install marble and tile during the relevant time period by correlating the information in the payroll ledger, the information on the check stubs, and the information in the Internal Revenue Service Form 1099s. With few exceptions, the payroll information contained in these documents was consistent.

14. Ms. Johnson referred to the National Council of Compensation Insurance ("NCCI") SCOPES Basic Manual of Classifications ("SCOPES Manual") to determine the classification code attributable to the businesses and workers engaged in decorative tile work. The classification code assigned by Ms. Johnson to AJ's Marble & Tile and the workers it paid to install tile and marble was Code 5348.

15. According to the SCOPES Manual and to Florida Administrative Code Rule 69L-6.021(1)(z), Code 5348 is applicable to the construction industry. The SCOPES Manual identifies the type of work covered by Code 5348 as "Tile and Terrazzo Contractors"; Florida Administrative Code Rule 69L-6.021(1)(z) identifies the type of work covered by Code 5348 as

"Stone, Mosaic or Terrazzo or Ceramic Tile Work Inside." The SCOPES Manual states that Code 5348 is

applied to contractors engaged in tile, stone, mosaic, or marble work. It includes the installation of glazed porcelain or ceramic wall, ceiling, or floor tiles as found in . . . various rooms in residences. . . . Inside and outside work, of a primarily decorative, artistic, or ornamental nature, such as setting surface or wall tile of polished stone or marble, fine mosaic wall and ceiling work, inside and outside, is included within the scope of Code 5348.

16. The manual rates approved in Florida for use in determining the amount of workers' compensation insurance premiums are contained in the pages of the NCCI Basic Manual applicable to Florida. Ms. Johnson consulted the applicable pages of the NCCI Basic Manual to determine the approved manual rate in Florida for workers classified under Code 5348. The approved manual rate effective January 1, 2005, for Code 5348 was \$10.28 per \$100.00 of payroll; the approved manual rate in Florida effective January 1, 2006, for Code 5348 was \$10.03 per \$100.00 of payroll; the approved manual rate in Florida effective January 1, 2007, for Code 5348 was \$8.34 per \$100.00 of payroll; the approved manual rate in Florida effective January 1, 2008, for Code 5348 was \$6.55 per \$100.00 of payroll.

17. Ms. Johnson calculated the total proposed penalty attributable to AJ's Marble & Tile's failure to provide workers'

compensation insurance coverage for the workers it paid to install marble and tile during the relevant time period as follows: She listed each of the workers paid by AJ's Marble & Tile's on the Penalty Worksheet; she assigned each worker Code 5348, which defined their workplace operations in accordance with the SCOPES Manual; she set out the dates during which AJ's Marble & Tile did not provide workers' compensation insurance coverage for these workers; she entered the annual or pro-rated gross payroll for each worker during the period of non-compliance; she divided the gross payroll for each worker by 100; she set out the Florida-approved manual rate for each worker during the period of non-compliance in accordance with the classification code assigned the worker; she determined the premium that AJ's Marble & Tile would have paid for workers' compensation insurance coverage for each worker during the period of non-compliance by multiplying the approved manual rate by one one-hundredth of the gross payroll for each worker; she calculated the proposed penalty attributable to each worker during the period of non-compliance by multiplying the premium for each worker by 1.5; and, finally, she calculated the total proposed penalty attributable to AJ's Marble & Tile's failure to secure workers' compensation insurance coverage for its workers during the time periods at issue.

18. On October 24, 2008, Ms. Johnson issued an Amended Order of Penalty Assessment setting forth a total proposed penalty of \$109,837.09, all of which was attributable to AJ's Marble & Tile's "[f]ailure to secure the payment of workers' compensation within the meaning of section 440.107(2), F.S. by failing to obtain coverage that meets the requirements of Chapter 440, F.S., and the Insurance Code." The Amended Order of Penalty Assessment included the following language, in bold print:

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 requirement 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.

19. In the Second Amended Order of Penalty Assessment filed April 17, 2009, Ms. Johnson calculated a proposed penalty of \$111,840.64 attributable to AJ's Marble & Tile's failure to secure workers' compensation insurance coverage and added a proposed penalty for violation of the Stop-Work Order; in the Third Amended Order of Penalty Assessment filed April 28, 2009, Ms. Johnson calculated a proposed penalty of \$110,775.09

attributable to AJ's Marble & Tile failure to secure workers' compensation insurance coverage and again included a proposed penalty for violation of the Stop-Work Order.

Calculation of proposed penalty for failure to cease business operations as required in the October 15, 2008, Stop-Work Order.

20. On or about October 22, 2008, Ms. Johnson was provided documents indicating that AJ's Marble & Tile entered into an employee-leasing contract with South East Personnel Leasing on October 17, 2008. She also was provided a Certificate of Liability Insurance issued to South East Personnel Leasing showing that it had a workers' compensation insurance policy, effective January 1, 2008, through January 1, 2009, applying specifically to active employees leased to AJ's Marble & Tile.³

21. At some point subsequent to issuance of the Amended Order of Penalty Assessment on October 24, 2008, Ms. Johnson came into possession of weekly payroll registers generated by South East Personnel Leasing for the employees leased to AJ's Marble & Tile. The earliest payroll register was for the pay period ending October 26, 2008, and the most recent register was for the pay period ending March 20, 2009.⁴ The payroll registers contained the names of the employees leased to AJ's Marble & Tile; the regular and overtime hours they worked during the weekly pay period; and each employee's gross pay, deductions, and the net pay.

22. The personnel registers establish that AJ's Marble & Tile continued engaging in business in Florida after the issuance of the Stop-Work Order on October 15, 2008, without having obtained an order from the Division of Workers' Compensation releasing the Stop-Work Order or an Order of Conditional Release From Stop-Work Order. Ms. Johnson, therefore, calculated a proposed penalty attributable to AJ's Marble & Tile violation of the Stop-Work Order based on the information contained in the payroll registers she received from South East Personnel Leasing.

23. In determining the number of work days AJ's Marble & Tile was in violation of the Stop-Work Order, Ms. Johnson took the number of hours worked each week by each leased employee as listed on the weekly pay registers; she then identified the greatest number of hours worked by an employee during each weekly pay period; she estimated that the typical work day for one of AJ's Marble & Tile's leased employees would be 10 hours; she divided the greatest number of hours worked each pay period by 10 and rounded up or down as seemed appropriate to arrive at the number of work days on which at least one employee leased by AJ's Marble & Tile worked during each weekly pay period; and she totaled the number of work days she had calculated for each week to arrive at the total number of work days that AJ's Marble & Tile had engaged in business during the relevant period.

24. Ms. Johnson determined from her calculations that AJ's Marble & Tile had engaged in business for a total of 48 work days during the period extending from October 16, 2008, through March 20, 2009.

25. The manner in which the Department calculated the number of days to attribute to AJ's Marble & Tile for the purpose of assessing a penalty for violation of the Stop-Work Order appears reasonable under the circumstances and the attribution of 48 days on which AJ's Marble & Tile is charged with conducting business operations in violation of the Stop-Work Order results in AJ's Marble & Tile being charged a penalty for fewer days than it would be had the Department calculated the number of days strictly on the basis of five days for each week between October 15, 2008, and March 30, 2009.

26. In the Third Amended Order of Penalty Assessment, Ms. Johnson included a proposed penalty of \$48,000.00 for AJ's Marble & Tile's violation of the October 15, 2008, Stop-Work Order, for a total proposed penalty in the amount of \$158,775.09.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 440.107(13), Florida Statutes (2009).

28. The Department seeks to impose an administrative penalty on AJ's Marble & Tile attributable to its failure to secure workers' compensation insurance coverage for its employees and its failure to cease business operations as required by the Stop-Work Order issued October 15, 2008. Accordingly, the Department must prove the charges and the proposed penalty amounts set forth in the Stop-Work Order and Third Amended Order of Penalty Assessment by clear and convincing evidence. See Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. Section 440.38(1), Florida Statutes, provides in pertinent part that "[e]very 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." The compensation and benefits required by Chapter 440, Florida Statutes, must be paid as follows: "The 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. § 440.09(1), Fla. Stat.

30. The definitions pertinent to this matter are found in Section 440.02, Florida Statutes, as follows:

(15)(a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.

* * *

c) "Employee" includes:

* * *

3. An independent contractor working or performing services in the construction industry.

* * *

(16)(a) "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

* * *

(17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.

(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.

31. Florida Administrative Code Rule 69L-6.021 provides in pertinent part as follows:

The Department adopts the classification codes and descriptions that are specified in the Florida Contracting Classification Premium Adjustment Program, and published in the Florida exception pages of the National Council on Compensation Insurance, Inc. (NCCI), Basic Manual (October 2005 ed.). For convenience, the Division lists here the classification codes and descriptions that are published in the Florida exception pages of the Basic Manual and adopted in this rule.

* * *

(z) 5348 Stone, Mosaic or Terrazzo or Ceramic Tile Work Inside

* * *

(2) The Division adopts the definitions published by NCCI, SCOPES® of Basic Manual Classifications (October 2005) that correspond to the classification codes and descriptions adopted in subsection (1) above. The definitions identify the workplace operations that satisfy the criteria of the term "construction industry" as used in the workers' compensation law. The definitions are hereby incorporated by reference

32. Based on the findings of fact herein and the definitions set out above, AJ's Marble & Tile was, at the times material to this proceeding, an employer pursuant to the definition of employer set forth in Section 440.02(17)(a) and (b)2., Florida Statutes. AJ's Marble & Tile is engaged in the construction industry because decorative marble and tile installation is considered part of the construction industry pursuant to Florida Administrative Code Rule 69L-6.021(1)(z) and in accordance with the definition contained in the SCOPES Manual. The workers receiving payment for services performed for AJ's Marble & Tile, even though they were treated by AJ's Marble & Tile as independent contractors, are considered employees of AJ's Marble & Tile for purposes of Chapter 440, Florida Statutes, by virtue of the inclusion in the definition of "employee" "[a]n independent contractor working or performing services in the construction industry." § 440.02(15)(c)3., Florida Statutes.⁵ AJ's Marble & Tile is, therefore, required to provide workers' compensation insurance coverage for the workers it paid to install marble and tile.

33. Section 440.107, Florida Statutes, provides 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, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under this chapter, the department shall have the power to:

(a) Conduct investigations for the purpose of ensuring employer compliance.

(b) Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.

(c) Examine and copy business records.

(d) Administer oaths and affirmations.

(e) Certify to official acts.

(f) Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

(h) Enforce the terms of a stop-work order.

(i) Levy and pursue actions to recover penalties.

(j) Seek injunctions and other appropriate relief.

* * *

(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 or to produce the required business records under subsection (5) within 5 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. The order shall take effect when served upon the employer or, for a particular employer worksite, when served at that worksite. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance. A stop-work order . . . shall remain in effect until the department issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this chapter and has paid any penalty assessed under this section. The department may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this chapter and has agreed to remit periodic payments of the

penalty pursuant to a payment agreement
schedule with the department. . . .

(b) Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.

(c) The department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.

(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.

(Emphasis added.)

34. Based on the findings of fact herein, the penalty attributable to AJ's Marble & Tile's failure to secure workers' compensation insurance coverage for its employees, as set out on the Penalty Worksheet attached to the Third Amended Order of Penalty Assessment, was calculated in conformance with the requirements of Section 440.107(7)(d)1., Florida Statutes, on

the form required by Florida Administrative Code Rule 69L-6.027. The Department has, therefore, proven by clear and convincing evidence that AJ's Marble & Tile was properly assessed \$110,775.09 as the penalty for its failure to secure workers' compensation insurance coverage for its employees during the time periods at issue.

35. Based on the findings of fact herein, immediately after being served with the Stop-Work Order, AJ's Marble & Tile entered into an employee-leasing agreement with South East Personnel Leasing, which agreement included workers' compensation insurance coverage for the employees leased by AJ's Marble & Tile. AJ's Marble & Tile, therefore, satisfied one of the requirements necessary for the issuance of an Order of Conditional Release from Stop-Work Order pursuant to Section 440.107(7)(a), Florida Statutes. It did not, however, satisfy the second requirement of Section 440.107(7)(a), Florida Statutes, that it either pay the assessed penalty in full or "remit periodic payments of the penalty pursuant to a payment agreement schedule with the department." The Department has, therefore, met its burden of proving by clear and convincing evidence that AJ's Marble & Tile violated the Stop-Work Order from October 15, 2008, through March 20, 2009.

36. Based on the findings of fact herein, the appropriate penalty to impose on AJ's Marble & Tile for violation of the

Stop-Work Order is \$48,000.00 pursuant to the requirement in Section 440.107(7)(c), Florida Statutes, that "[t]he department shall assess a penalty of \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order."

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:

(1) Finding that AJ's Marble & Tile, Inc., failed to secure workers' compensation insurance coverage for its employees in violation of Section 440.38(1), Florida Statutes, from October 16, 2005, through Oct 15, 2008, and imposing a penalty in the amount of \$110,775.09 for the failure to provide the required workers' compensation insurance coverage; and

(2) Finding that AJ's Marble & Tile violated Section 440.107(7)(a), Florida Statutes, by conducting business operations in violation of the Stop-Work Order issued October 15, 2008, that AJ's Marble & Tile conducted business for 48 days during the period extending from October 15, 2008, through March 20, 2009, and imposing a penalty in the amount of \$48,000.00, as required by Section 440.107(7)(c), Florida Statutes.

DONE AND ENTERED this 2nd day of November, 2009, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 2009.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2008 edition unless indicated otherwise.

^{2/} Mr. Grodin also faulted the undersigned for not allowing him to present testimony regarding what he characterized as the unprofessional attitude of Ann Johnson, the Department's compliance investigator who conducted the investigation of AJ's Marble & Tile. During the final hearing, however, the undersigned explained to Mr. Grodin that any alleged misconduct committed during the investigation by Ms. Johnson could be presented to the Department in a complaint but that his complaints were not relevant to a determination of the issues of whether AJ's Marble & Tile should be assessed a penalty and, if so, the amount of the penalty.

^{3/} Petitioner's Exhibit 2h. A review of the documents included in this exhibit indicate that the certificate and other details of South East Personnel Leasing's relationship with AJ's Marble & Tile were provided by South East Personnel Leasing.

^{4/} It is apparent from a review of the record that these documents were not provided by AJ's Marble & Tile or Mr. Grodin

but were provided by the leasing company. It is noted, however, that AJ's Marble & Tile included in Respondent's Exhibit C two payroll registers from "South East Employee Leasing, Inc.," the most recent for the pay period ending April 1, 2009.

^{5/} It is not necessary to reach the issue of whether the workers met the definition of independent contractors in Section 440.02(15)(d), Florida Statutes, because that applies only to "[a]n independent contractor who is not engaged in the construction industry."

COPIES FURNISHED:

Kristian E. Dunn, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

Herbert Grodin
Sobel & Cookler, CPAs
950 Jericho Turnpike
Westbury, New York 11590

Alex Sink, Chief Financial Officer
Department of Financial Services
The Capitol, Plaza level 11
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza level 11
Tallahassee, Florida 32399-0300

Tracey Beal, Agency Clerk
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

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.