STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 13-0799

CUSTOM GRANITE KITCHENS AND BATHS, LLC,

Respondent.
_____/

RECOMMENDED ORDER

On June 13, 2013, a duly-noticed hearing was held via video teleconference with sites in Jacksonville, Panama City, and Tallahassee, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jesse A. Haskins, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Michael J. Rudicell, Esquire
Michael J. Rudicell, PA
4309 B Spanish Trail
Pensacola, Florida 32504

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated the provisions of chapter 440, Florida Statutes, by failing to

secure the payment of workers' compensation, as alleged in the Stop-Work Order and Third Amended Order of Penalty Assessment, and if so, what penalty is appropriate.

PRELIMINARY STATEMENT

On July 20, 2012, following investigation and site inspection, Petitioner hand-delivered to Mr. Sherman Yarbrough a Stop-Work Order and an Order of Penalty Assessment addressed to Custom Granite Kitchens and Baths, LLC (Respondent or the LLC). On August 9, 2012, an Amended Order of Penalty Assessment was served on Respondent, assessing a penalty of $1,005.66. On August 10, 2012, Petitioner received a letter from Respondent, signed by Mr. Sherman Yarbrough, stating that the LLC had just been formed and had "no activity of any kind" in Florida. Petitioner also received an Election of Proceeding form requesting an administrative hearing to contest disputed facts.

A Second Amended Order of Penalty Assessment in the amount of $2,005.66, adding a fine for working on October 26, 2012, in violation of the Stop-Work Order, was served on Respondent on February 15, 2013. The matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge on March 5, 2013. Following deposition of a witness, Petitioner sought to file a Third Amended Order of Penalty Assessment imposing a total fine of $2,508.49.

Pursuant to notice, the final hearing was conducted on June 13, 2013. No prejudice was found to Respondent and the pending Motion to Amend Order of Penalty Assessment was granted at hearing. The parties entered into a written Stipulation of Facts, as well as an oral stipulation that if the charged violations were proven, the penalty amounts calculated by Petitioner in the Penalty Assessments were accurate. These stipulated facts are included among the findings of fact set out below.

Petitioner presented the testimony of four witnesses: Mr. Don Hurst, Compliance Investigator; Mr. Calvin Johnson, construction worker and, later, purchaser of the LLC; Mr. Sherman Yarbrough, construction company owner and owner of the LLC at the time of the alleged violations; and Ms. Betty Jo Laws, Office Manager for Payroll Services, Inc. Petitioner introduced 20 exhibits: P-1 through P-15 and P-18 through P-22.

Respondent presented the testimony of Mr. Yarbrough and Ms. Marion Tucker, Secretary of the LLC. Respondent introduced nine exhibits: R-1 through R-5, R-7, R-8, R-10, and R-12.

The two-volume Transcript was filed on July 1, 2013. The parties timely filed Proposed Recommended Orders which were considered in the preparation of this Recommended Order. A Reply to Respondent's Proposed Recommended Order was also filed by Petitioner. Under Florida Administrative Code Rule 28-

106.215, parties are authorized to file post-hearing submittals within a time period designated by the presiding officer. At hearing, the undersigned only authorized the filing of Proposed Recommended Orders within 10 days. No motion was filed requesting permission to file a reply or pleading other than the Proposed Recommended Orders, and the Reply to Respondent's Proposed Recommended Order was not considered.

FINDINGS OF FACT

1. The Department of Financial Services (Petitioner or the Department) is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for their employees and corporate officers.

2. Mr. Donald Hurst is a workers' compensation compliance investigator for the Department of Financial Services, Division of Workers' Compensation. He has been employed in that capacity for about nine years and has conducted approximately 7,000 investigations.

3. On December 20, 2007, Mr. Sherman Yarbrough registered the fictitious name of Custom Granite Kitchens and Baths (CGKB) with the Florida Department of State, showing the mailing address for the business as 1210 West 15th Street, Panama City, Florida. Department of State records show Mr. Yarbrough as the

owner of the fictitious name, and show that it was in effect until December 31, 2012.

4. Payroll Services, Inc. (Payroll Services), is a broker for employee leasing companies. Ms. Betty Jo Laws is the office manager. Ms. Laws performs bookkeeping duties, and, at all times relevant here, sold employee leasing services to employers. When clients came in seeking employee leasing services, she would take down all of the information, find an appropriate leasing company from among the several that Payroll Services represented, and assist the client in completing all of the required paperwork.

5. American Staff Management (ASM), a Florida corporation engaged in employee leasing, assigns its employees to various clients as "co-employers." ASM provides those employees with workers' compensation coverage and payroll and tax services, while allocating to the client extensive direction and control over the day-to-day work activities of the assigned employees.

6. On or about October 6, 2011, CGKB entered into a Service Agreement through Payroll Services under which ASM would provide it employee leasing services. Under the agreement, ASM would co-employ certain employees and provide them with workers' compensation and other benefits of employment. ASM would issue the payroll checks and be responsible for meeting tax accounting and reporting requirements related to the employment. The

agreement provided that ASM would not be considered the employer for any individual until ASM's new hire paperwork, an I-9 form (if required), and a W-4 tax withholding form were received by ASM. It further provided that ASM would not be considered the employer until CGKB had been notified by ASM that the employee had been hired by ASM as an assigned employee. CGKB would pay ASM the regular rate of pay for the employees along with an additional fee of 19.68 percent of the payroll for these services.

7. In December of 2011, Mr. Charles Burchell, representing SSI Management (SSI), came down from Brentwood, Tennessee, to look at the VUE, a condominium that SSI was constructing at 2303 Highway 98, Mexico Beach, Florida. Mr. Yarbrough walked onto the site, gave Mr. Burchell a card from CGKB, and told Mr. Burchell that he did tile and cabinet work.

8. Sometime in the middle of June 2012, SSI entered into a contract with CGKB for construction work at the VUE.

9. Mr. Burchell's testimony indicated that he was not sure if SSI's contract was with the LLC or CGKB:

> Q: So in the course of your dealings with Mr. Yarbrough, did he ever -- do you remember what he said about the LLC?
> A: No.
> Q: Do you recall him saying anything about the LLC?
> A: You know, I just know when we wrote checks, we wrote it to his personal name. I don't know about the LLC.

Q: So you're not sure?
A: No, I'm not sure.
Q: Okay.
A: I just know his business card said Custom Granite Kitchens and Baths. I don't have any idea, you know, the status of the company or anything else.

10. Mr. Burchell testified that he asked Mr. Yarbrough for proof of insurance when he started the job and several times afterwards, but did not receive any information from him.

11. Mr. Burchell testified that SSI distributed its first check for the Mexico Beach project, made out to Sherman Yarbrough, on or about June 22, 2012. The contract for the construction work had to have been entered into sometime before this, and Custom Granite Kitchens and Baths, LLC, was not yet in existence.

12. Custom Granite Kitchens and Baths, LLC, was created on June 29, 2012. The registered agent was listed as Mr. Sherman Yarbrough, 1210 West 15th Street, Panama City, Florida. Mr. Yarbrough testified that he was aware his ownership of the fictional name of Custom Granite Kitchens and Baths was due to expire at the end of the year. He testified that he was planning to sell the company and so decided not to renew the fictional name but instead create an LLC and convert the existing business into that.

13. Mr. Sherman Yarbrough is the sole owner of Custom Granite Kitchens and Baths, LLC. Mr. Yarbrough is a managing member of the LLC and is the party in actual control of the LLC.

14. On July 3, 2012, Mr. Yarbrough obtained a notice from the Internal Revenue Service assigning the LLC an Employer Identification Number. On this same date, Mr. Calvin Johnson filled out the following employment paperwork: a W-4 form for tax withholding allowances; portions of the Department of Homeland Security's Employment Eligibility I-9 form; an ASM Employee Enrollment Paperwork form, and an ASM Employment Agreement. The bottom portion of the I-9 form indicated the "Business or Organization Name" as "Custom Granite Kitchens and Baths, LLC," but was not signed in the space provided for the signature of an authorized representative of the employer. At the bottom of the ASM Employee Enrollment Paperwork form, in a box indicating that it was "To be completed by Supervisor," the worksite employer was identified as "Custom Granite Kitchens and Baths, LLC."

15. Mr. Johnson began construction work at the Mexico Beach property on July 3, 2012, working alongside employees of CGKB. Mr. Johnson was paid on Fridays in cash for his work by Mr. Yarbrough. Beginning with an ASM check dated July 24, 2012, he was paid by check.

16. On July 11, 2012, Mr. Nicholas Tucker, who had worked for Mr. Yarbrough previously, started to work on the Mexico Beach property. On his ASM Employee Enrollment Paperwork form, the "Worksite Employer" was listed as "Custom Granite Kitchens and Baths." Mr. Tucker signed the ASM Employment Agreement, the W-4 form, and the I-9 form on July 20, 2012. The bottom portion of the I-9 form, which had a space for "Business or Organization Name," was left incomplete.

17. On or about July 14, Mr. Yarbrough told Ms. Laws at Payroll Services that Ms. Marion Tucker would be bringing Payroll Services two new employment applications. Ms. Tucker worked for Mr. Yarbrough at CGKB as the secretary, and was also listed as a managing member of the new LLC.

18. On or about July 17, 2012, Mr. Michael Chapman began work at the Mexico Beach property. On the ASM Employee Enrollment Paperwork form, the "Worksite Employer" was listed as "Custom Granite Kitchens and Baths." Mr. Tucker signed the ASM Employment Agreement, the W-4 form, and the I-9 form on July 18, 2012. The bottom portion of the I-9 form, which had a space for "Business or Organization Name," was left incomplete.

19. On July 20, 2012, Mr. Hurst conducted a site visit at 2303 Highway 98, Mexico Beach, Florida. He observed a worker cutting tile in the parking area. The worker identified himself as Mr. Eulalio Galindo and he produced a business card for CGKB.

The card indicated that Mr. Sherman Yarbrough was the owner. Mr. Galindo indicated the employees were paid through an employee leasing company, but he did not know the name of it.

20. Mr. Hurst interviewed three other workers at the worksite. Mr. Charles Rustad and Mr. Nick Tucker were sanding down drywall. Mr. Rustad said he had been working for Mr. Yarbrough for about 10 months. Mr. Tucker said he had been working about a week. In another room, Mr. Chapman was painting. He said he had been working for Mr. Yarbrough for only about three days.

21. Mr. Johnson was also on the worksite on July 20, 2012, doing tile edging in a bathroom. He and Mr. Hurst did not meet, and Mr. Johnson only learned of Mr. Hurst's visit later, when he came down for another load of tiles.

22. Mr. Johnson, Mr. Tucker, and Mr. Chapman were engaged in construction activity at the Mexico Beach property.

23. Mr. Hurst checked the Department of State's website for information on Custom Granite Kitchens and Baths, and when he did his search he came up with Custom Granite Kitchens and Baths, LLC. It showed that the LLC had been an active entity since June 29, 2012, and listed Mr. Yarbrough as the registered agent.

24. Mr. Hurst completed a Field Interview Worksheet, on which he listed the time as 11:30 a.m. on July 20. He listed

the business name as Custom Granite Kitchens and Baths, LLC, and wrote down the names and contact information for the four workers with whom he had talked.

25. Mr. Hurst checked the Coverage and Compliance Automated System (CCAS) maintained by the Department to see if an insurance company had provided information regarding workers' compensation insurance. CCAS did not show any workers' compensation coverage for the LLC. CCAS also did not show any exemptions for the LLC on file.

26. On July 20, 2012, Mr. Yarbrough went to Payroll Services and told Ms. Laws that he wanted to obtain workers' compensation coverage for the LLC. He provided her with the notice from the Internal Revenue Service dated July 3, 2012, assigning the LLC an Employer Identification Number. Mr. Yarbrough watched Ms. Laws complete a Service Agreement between ASM and the LLC, which Mr. Yarbrough then signed and dated. Based on information provided to her by Mr. Yarbrough and a printout of information he gave her from the "Sunbiz" web site, Ms. Laws also completed the Payroll Services Client Information Form for the LLC, indicating the "desired effective date" of coverage to be July 20, 2012. Mr. Yarbrough gave Ms. Laws the employment papers for Mr. Johnson to submit to ASM as an employee of the LLC. Although Mr. Yarbrough maintained he did not take action on July 20, 2012, to obtain workers'

compensation for Mr. Johnson on behalf of the LLC, Mr. Yarbrough was evasive and nonresponsive in his testimony, and generally not at all credible.

27. Mr. Yarbrough also gave Ms. Laws the employment application papers that had been completed by Mr. Johnson. Mr. Yarbrough said that "Marion" (Ms. Tucker) would be bringing a couple more new employment applications later. After Mr. Yarbrough left, Ms. Laws noted that there was no signature of employer in the bottom portion of the I-9 form, so she signed Mr. Johnson's name to it. Mr. Yarbrough did not take any steps on June 20, 2012, to transfer any of the four people who were already covered employees of CGKB to the new LLC.

28. Mr. Hurst called Ms. Tucker and asked about workers' compensation coverage. Ms. Tucker referred him to Ms. Laws. When Mr. Hurst contacted Ms. Laws, she explained that Payroll Services was a broker for leasing companies, and that the leasing company for CGKB was ASM. When Mr. Hurst asked about any new employees, Ms. Laws stated she had a new application for Mr. Johnson. She provided Mr. Johnson's documentation to Mr. Hurst by e-mail. She told Mr. Hurst that it was her understanding that Mr. Yarbrough was transferring the company over to the LLC.

29. Mr. Hurst then called ASM. He was told that ASM provided no coverage to the LLC, but covered four employees --

Mr. Yarbrough, Ms. Tucker, Mr. Rustad, and Mr. Galindo -- under Sherman Yarbrough as employer. Mr. Hurst was told that Mr. Tucker and Mr. Chapman were not covered by ASM.

30. Based upon the information provided to him that Mr. Tucker and Mr. Chapman had no coverage, Mr. Hurst contacted his supervisor. She authorized issuance of a Stop-Work Order and an Order of Penalty Assessment, which were served on the LLC on July 20, 2012. No Stop-Work Order or Order of Penalty Assessment was served on CGKB.

31. The LLC also received a Request for Production of Business Records for Penalty Assessment Calculation from the Department on July 20, 2012. The Department requested business records from June 29, 2012 (the date the LLC was made active with the Department of State), until July 20, 2012.

32. Mr. Hurst testified that he issued the Stop-Work Order to Custom Granite Kitchens and Baths, LLC, instead of Sherman Yarbrough because, in addition to the information from Ms. Laws, "the business card I was given stated Custom Granite Kitchens and Baths, and I verified on the corporate website that Custom Granite Kitchens and Baths, LLC, was an active company." Department of State records also indicated that "Custom Granite Kitchens and Baths" was registered as a fictitious name owned by Mr. Yarbrough, but there was no evidence as to whether Mr. Hurst was aware of that fact at the time.

33. Shortly after Mr. Yarbrough left the Payroll Services office on July 20, 2012, Ms. Tucker delivered the employment documents of Mr. Tucker and Mr. Chapman to Ms. Laws.

34. Ms. Laws filled in the bottom portion of Mr. Tucker's I-9 form. She indicated the "Business or Organization Name" as "Custom Granite Kitchens and Baths, LLC, Panama City." Ms. Laws testified that she did this based upon the statements of Mr. Yarbrough earlier that day that he was transferring CGKB into the LLC. She stated that Mr. Yarbrough did not specifically tell her that the LLC was Mr. Tucker's employer and that this was an assumption on her part. Ms. Laws did not have the Florida driver's license information and social security number filled out on Mr. Tucker's I-9 form, and so his paperwork was not immediately faxed to ASM. Ms. Tucker gave that information to Ms. Laws the following Monday, and Ms. Laws then completed the form and faxed it to ASM on July 23, 2012.

35. Ms. Laws also filled in the bottom portion of Mr. Chapman's I-9 form. She filled in the "Business or Organization Name" information with "Custom Granite Kitchens and Baths, Panama City." Ms. Laws did not explain why she did not put the LLC as the business on Mr. Chapman's form as she had on Mr. Tucker's. Mr. Chapman's forms were faxed to ASM shortly after Ms. Tucker dropped them off.

36. On July 23, 2012, Mr. Hurst called Ms. Laws to see if she had received any new employee paperwork. She stated that she had, and sent him the documentation. ASM later confirmed to Mr. Hurst that they had received the paperwork for Mr. Tucker and Mr. Chapman, and that they were now covered as employees. The employee list from ASM dated July 23, 2012, shows Mr. Johnson, Mr. Tucker, and Mr. Chapman all listed as employees of Sherman Yarbrough, all with a "Hire Date" of July 23, 2012. Mr. Galindo, Mr. Rustad, Ms. Tucker, and Mr. Yarbrough also continued to be shown as employees of Sherman Yarbrough.

37. In checks prepared by ASM on Monday, July 23, 2012, and dated July 24, 2012, Mr. Johnson was paid for 36 hours of work, Mr. Tucker was paid for 27 hours of work, and Mr. Chapman was paid for 20 hours of work. As the president of ASM, Mr. James Moran, testified, ASM would pay employees retroactive wages to make sure the taxes were accounted for properly. He attributed the work hours to days prior to July 23, 2012, and testified that because of the number of hours, it was reasonable to assume that these three men were working on July 20, 2012, or before. Mr. Moran testified that he received payment for ASM's services for these hours from Mr. Yarbrough, and that insurance premiums were paid to the workers' compensation carrier, Castle Point, for this period of time. He also testified, however,

that all three men were only accepted as ASM employees on July 23, 2012.

38. CGKB did not meet its responsibility to secure workers' compensation for Mr. Tucker and Mr. Chapman until July 23, 2012.

39. The LLC did not meet its responsibility to secure workers' compensation for Mr. Johnson until July 23, 2012.

40. On July 26, 2012, Mr. Yarbrough signed the Election of Proceeding Form on behalf of the LLC, stating that there was a dispute of the material facts alleged in the Stop-Work Order.

41. Respondent did not respond to the Request for Business Records for Penalty Assessment Calculation. Mr. Hurst referred the file on the LLC to the Department's Penalty Audit Section so that the penalty could be imputed.

42. A letter on ASM letterhead dated August 3, 2012, and addressed to Mr. Michael Chapman indicated that ASM had been notified that Mr. Chapman was "no longer employed at Sherman Yarbrough as of 7/17/2012." This was the same date that had been indicated as the "Original Date of Hire" on Mr. Chapman's ASM Employee Enrollment Paperwork form. There was no testimony explaining how he could have been terminated on a date prior to his acceptance as an ASM employee on July 23, 2012, or the reasons for his termination.

43. Mr. Yarbrough submitted the Election of Proceeding form and a letter to the Department stating:

> The company in question, Custom Granite Kitchens and Baths, LLC has no employees. This company was just founded and has no activity of any kind in the State of Florida. This matter has been a mistake.

The Election form and letter were received by the Department on August 9, 2012.

44. Respondent was served with an Amended Order of Penalty Assessment from the Department on August 9, 2013.

45. Mr. Yarbrough filed another Election of Proceeding dated August 10, 2012, again requesting a formal hearing, which was received on August 16, 2012, by the Department.

46. Sometime in August, Mr. Burchell asked Mr. Yarbrough not to come back to the Mexico Beach property and SSI hired someone else to finish the job. Mr. Burchell testified that he believed Mr. Yarbrough and his company were not large enough to handle a project of the size SSI was pursuing. He said the termination had to do with timeliness more than any failure to obtain workers' compensation coverage.

47. A check dated August 17, 2012, made out to the order of Sherman Yarbrough and drawn on the account of SSI-MDI Mexico Beach, LLC, was received as final payment for the construction work CGKB performed on the Mexico Beach property. The name and address shown on the check were Sherman Yarbrough, Custom

Granite Kitchens and Baths, 1210 West 15th Street, Panama City, Florida.

48. In a letter dated August 24, 2012, ASM notified Mr. Yarbrough that the agreement between ASM and CGKB was terminated as of August 7, 2012, "for failure to report, run, and/or pick up payroll." It went on to say that all certificates of insurance issued on CGKB's behalf had been cancelled. Separate letters on ASM letterhead with the same date and addressed to Mr. Nick Tucker and Ms. Marion Tucker indicate that the "leasing agreement between American Staff Management IV, Inc., (ASM) and Sherman Yarbrough dba Custom Granite Kitchens has ended." The letter goes on to explain that the recipients of the letter were no longer covered under ASM's workers' compensation policy.

49. On October 26, 2012, Mr. Yarbrough and Mr. Johnson entered into a Lease/Purchase Agreement. Mr. Yarbrough leased Mr. Johnson "Custom Granite Kitchens and Baths dba and Custom Granite Kitchens and Baths, LLC." The Agreement provided for the transfer of equipment and supplies, as well as arrangements for Mr. Johnson to pay Mr. Yarbrough $300.00 per job, with a minimum of six jobs per month, for a period of 36 months. After this lease period of three years, Mr. Johnson would become the owner. The agreement itemized several items of equipment and stated, "Sherman Yarbrough will maintain the Cabinet Division of

Custom Granite Kitchens & Baths, LLC." It also provided, "Sherman Yarbrough will continue to sell granite for the Granite Division during promotion of the Cabinet Division at no commission other than the $300.00 per job as set forth in this agreement."

50. Respondent received the Second Amended Order of Penalty Assessment from the Department on February 26, 2013, assessing a penalty for violation of the Stop-Work Order. Mr. Hurst had concluded from the Lease/Purchase Agreement that the LLC was in violation of the order because it conducted several activities. Mr. Hurst testified, "It wrote the contract up, he signed the contract, and it also stated in the contract that the division of the -- the Granite Division and the Cabinet Division of Custom Granite Kitchens and Baths, LLC, was active and was continuing to remain active."

51. The Department referred this matter to the Division of Administrative Hearings on March 5, 2013, about seven and a half months after the Stop-Work Order was served.

52. After taking a telephonic deposition of Mr. Johnson, the Department determined that he had been employed by the LLC and did not have workers' compensation coverage. The Department prepared a Third Amended Order of Penalty Assessment.

53. Respondent was provided with a copy of the proposed Third Amended Order of Penalty Assessment on June 5, 2013.

54. None of the employees listed in the penalty worksheets included with any of the Orders of Penalty Assessment can be classified as independent contractors, as defined in section 440.02, Florida Statutes.

55. Mr. Johnson was an employee of the LLC on July 20, 2012, and before.

56. The Department did not prove that Mr. Chapman or Mr. Tucker were employees of the LLC at any time between June 29, 2012, and July 20, 2012. Evidence showed that Mr. Chapman and Mr. Tucker were instead employees of CGKB on July 20, 2012, and before.

57. The LLC did not secure workers' compensation coverage for Mr. Johnson before July 23, 2012.

58. The LLC did not engage in business operations on October 26, 2012.

59. The parties stipulated that the Department assigned the appropriate class code and manual rates from the National Council on Compensation Insurance, Inc., SCOPES Manual.

60. The parties stipulated that if the charged violations were proven, the penalty amounts calculated by Petitioner in the Penalty Assessments were accurate.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this

proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).[1/]

62. Petitioner has the responsibility to enforce the requirement that employers secure the payment of workers' compensation for the benefit of employees as required by chapter 440, Florida Statutes.

63. Petitioner seeks to penalize Respondent for failure to secure the payment of workers' compensation pursuant to section 440.107(7).

64. Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the violations alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

65. The clear and convincing standard of proof has been described by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

66. Respondent is a Florida Limited Liability Company subject to the provisions of chapter 440, Florida Statutes.

Failure to Secure Payment of Workers' Compensation

67. Section 440.10(1)(a) provides in relevant part:

> 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.

68. Under section 440.02(16)(a), an "employer" includes every person carrying on any employment. This section goes on to provide:

> 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.

69. Assuming that this statute is applicable to a Limited Liability Company,[2/] if the LLC is carrying on any employment, Mr. Yarbrough, as the party in actual control of the LLC, is considered the employer for purposes of section 440.107. This "strict liability" provision would create legal accountability for purposes of the workers' compensation law without the

finding of fraudulent or improper use of the corporate form that normally is necessary to "pierce the corporate veil."[3/]

70. However, this case does not involve any "piercing of the corporate veil" through section 440.02(16)(a) or otherwise. The key issue here is not whether Mr. Yarbrough statutorily becomes the employer for any employment carried on by the LLC. Rather, the issue is whether the LLC in fact carried on any employment in the first place. The suggestion by Petitioner that the statute should be read loosely in a reciprocal fashion so as to impute employments carried on by Mr. Yarbrough to the LLC is not supported by the language of the statute, and is not accepted.

71. Section 440.02(15)(a) provides:

> '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.

Petitioner must show, then, that there was an appointment or contract for hire, express or implied, oral or written, between the LLC and the alleged employees here: Mr. Johnson, Mr. Tucker, and Mr. Chapman.

72. The arguments of both Petitioner and Respondent suggest that the conversion of CGKB into the LLC was an act that

took place, or would take place, at a single point in time. Petitioner argues that this occurred on June 29, 2012, while Respondent argues that Mr. Yarbrough intended to eventually do this, but took no action until after July 20, 2012, if at all. The evidence does not support either contention. It is clear that Mr. Yarbrough was neither careful nor systematic in maintaining the legal distinction between the sole proprietorship and the LLC. The LLC and CGKB existed at the same time. The resulting confusion was compounded by the actions of Payroll Services and ASM.

73. Petitioner proved by clear and convincing evidence that there was a contract for hire between Mr. Johnson and the LLC. The bottom of his ASM Employee Enrollment Paperwork form, in the space labeled "To be completed by Supervisor," was filled in to indicate that the Worksite employer was "Custom Granite Kitchens and Baths LLC." The bottom of the I-9 form also indicated "Custom Granite Kitchens and Baths LLC" under "Business or Organization Name." Mr. Yarbrough obtained an Employer Identification Number from the Internal Revenue Service on the day that Mr. Johnson filled out this paperwork. Mr. Yarbrough personally delivered Mr. Johnson's documents and the Internal Revenue Service form to Ms. Laws at Payroll Services on July 20, 2012, where he told Ms. Laws he would be converting CGKB to the LLC. He watched Ms. Laws fill out a new

agreement between the LLC and ASM and he signed it. The contract of employment between the LLC and Mr. Johnson was clear even without the signature of Mr. Yarbrough on the I-9 form, which was added by Ms. Laws.

74. Mr. Johnson began construction work on July 3, 2012, and was paid in cash for that work by Mr. Yarbrough, managing member of the LLC. Mr. Johnson was working on July 20, 2012. Beginning with the ASM check dated July 24, 2012, he was paid by check. ASM's action in classifying Mr. Johnson as a co-employee of CGKB as opposed to the LLC did not affect Mr. Johnson's actual status as an employee of the LLC.

75. On the other hand, Petitioner failed to prove that Mr. Tucker or Mr. Chapman ever performed any work for the LLC or were its employees. While the LLC was in existence at the time each was hired, so was CGKB. Mr. Yarbrough took no action to transfer his existing employees to the LLC, but continued to operate as a sole proprietor under the name CGKB. Unlike the ASM Employee Enrollment Paperwork form of Mr. Johnson, which had the new LLC designated as the "Worksite Employer," the ASM Employee Enrollment Paperwork forms of Mr. Tucker and Mr. Chapman each showed the employer as CGKB.

76. Employment by CGKB is simply employment by Mr. Yarbrough, not the LLC. Doing business under a fictitious name does not create an entity distinct from the person

operating the business; the fictitious name and the sole proprietor's name are simply two different names for one legal person. In fact, the single reference to the LLC in the paperwork of Mr. Tucker or Mr. Chapman was on the bottom of Mr. Tucker's I-9 form, which Ms. Laws admitted she later added to the form without specific direction to do so. There was no testimony from either Mr. Tucker or Mr. Chapman at hearing, and no other evidence to connect them to the LLC as opposed to CGKB. This does not constitute clear and convincing evidence.

77. Respondent argues that even if it is found to be an employer, the evidence shows that workers' compensation insurance was in effect on July 20, 2013. Mr. Moran's testimony did indicate that although Mr. Johnson, Mr. Tucker, and Mr. Chapman were not accepted as employees until July 23, 2012, they were all paid retroactively. Mr. Moran further testified that not only did ASM collect its service fees for several work hours prior to the actual hire date, but that it also forwarded insurance premiums to the carrier for these hours. Respondent therefore maintains that coverage was in effect on July 20, 2012.

78. However, retroactive coverage put into place by ASM on July 23, 2012, well after the determination on July 20, 2012, that there was no coverage in effect, does not vitiate that determination or meet an employer's responsibilities under Florida's workers' compensation law. U.S. Builders, L.P. v.

Dep't of Fin. Servs., Case No. 07-4428 (Fla. DOAH Jan. 14, 2009; Fla. DFS Feb. 23, 2009)("back-dated" coverage not material because Florida law does not recognize retroactive compliance with workers' compensation requirements); Dep't of Fin. Servs. v. H.R. Elec., Case No. 04-2965 (Fla. DOAH Jun. 8, 2006; Fla. DFS Aug. 22, 2006)(retroactive coverage obtained after issuance of stop-work order does not satisfy employer's obligation); Dep't of Labor & Emp. Sec. v. E. Pers. Servs., Inc., Case No. 99-2048 (Fla. DOAH Oct. 12, 1999; Fla. DLES Nov. 30, 1999)(obtaining coverage after compliance investigator visits site and determines no coverage in effect is no defense to stop-work order or penalty assessment).

Violation of the Stop-Work Order

79. In addition to the assessed penalty for failure to obtain workers' compensation coverage, Petitioner assessed a $1000.00 penalty against the LLC for violating the Stop-Work Order. Section 440.107(7)(c) provides:

> 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.

80. The term "business operations" is not defined by the statute, but in the context of the construction industry the term has been interpreted by the Department to include not only construction work per se, but also other activities related to

the course of business. Dep't of Fin. Servs. v. William R. Sims Roofing, Inc., Case No. 06-1169 (Fla. DOAH Nov. 30, 2006; Fla. DFS Feb. 15, 2007)(act of pulling a permit to perform roofing services is "conducting business operations" when a Stop-Work Order is in effect); Dep't of Fin. Servs v. Snyder Martin, d/b/a Affordable Fencing, Case No. 05-2325 (Fla. DOAH Sept. 15, 2005; Fla. DFS March 7, 2006)(placing a bid on a job as well as completing it constituted violations of a Stop-Work Order).

81. Petitioner alleges that the Lease/Purchase Agreement executed on October 26, 2012, proves that the LLC was conducting business operations on that date. Mr. Hurst stated that the Agreement was evidence of the LLC's business operations for three reasons: the LLC wrote the contract up; Mr. Yarbrough signed the contract; and the terms of the contract indicated that the LLC was active and was continuing to remain active.

82. However, the act of selling the LLC to another owner cannot reasonably be said to be a violation of the Stop-Work Order by the LLC. A legally active LLC which had been conducting absolutely no business operations but had the potential to conduct them in the future might easily be sold, especially in conjunction with the sole proprietorship and the personal property that were part of the sale. Its owner, in this case Mr. Yarbrough, would be the logical person to prepare the documents transferring the entities he owned, and to sign

them. The sale itself, apart from any business operations indicated by the terms of the contract, was clearly not an operation in the course of the trade, business, activity, or occupation that the LLC was formed to conduct, and so would not constitute a "business operation" of the LLC under the statute.[4/]

83. Further, the terms of the statute contemplate that a change of ownership may take place, for they describe the circumstances under which a Stop-Work Order applies to successor corporations or business entities. Section 440.107(7)(b) provides:

> 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.

If the transfer of ownership of a corporation, partnership, or sole proprietorship was prohibited when a Stop-Work Order was in effect, there would be no need for this rule.[5/]

84. The fact that the Lease/Purchase Agreement was prepared by Mr. Yarbrough and signed by him provides no evidence of "business operations" being conducted by the LLC.

85. Mr. Hurst also suggested that the terms of the Lease/Purchase Agreement indicated that business operations were

being conducted by the LLC. The Agreement does not generally indicate that business has been conducted by the LLC, but only reflects the intention that business "will" be conducted by it in the future. Only two phrases could be construed otherwise, and they are ambiguous. The first is that "Sherman Yarbrough will maintain the Cabinet Division of Custom Granite Kitchens & Baths, LLC." While the word "maintain" might well be construed to refer to the maintenance of some operations that the "Cabinet Division" had been conducting after the date of the Stop-Work Order, it might just as easily refer to maintenance of the structure and capabilities of the LLC and to proposed future activity that had been discussed between the parties to the Agreement.

86. The second provision states that "Sherman Yarbrough will continue to sell granite for the Granite Division during promotion of the Cabinet Division at no commission other than the $300.00 per job as set forth in this agreement." Again, this could mean that the Granite Division had been selling granite in the past, or, alternatively, it might mean only that Sherman Yarbrough had been selling granite in the past and would continue to do so in the future on behalf of the Granite Division during the promotion. These two provisions are thus ambiguous and do not provide clear and convincing evidence of business operations on the part of the LLC.[6/]

87. Petitioner failed to prove by clear and convincing evidence that the LLC was engaged in business operations on October 26, 2012, as alleged.

Penalty Calculations

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

> In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure 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.

89. Florida Administrative Code Rule 69L-6.021(1), effective October 11, 2011, incorporates by reference the classification codes and descriptions 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 (2001 edition), including updates through January 1, 2011. Rule 69L-6.021(2)(jj) references classification code number 5474, covering painting not otherwise classified in the NCCI Manual, which was used by the Department in computing the assessed penalties.

90. Rule 69L-6.028(3)(d) states that when an employer fails to produce records sufficient to establish payroll, the imputed weekly payroll for each employee is calculated using the highest-rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of that employee's activities. There was no evidence that Mr. Hurst ever observed Mr. Johnson painting.

91. ASM records showed only classification code 5348 pertaining to ceramic tile, indoor stone, marble, or mosaic work for CGKB employees other than Mr. Yarbrough and Ms. Tucker, and of course no codes associated with the LLC. The parties stipulated that the Department assigned the appropriate classification codes and manual rates from the NCCI SCOPES Manual.[7/]

92. Notwithstanding the testimony at hearing that Mr. Johnson began his employment on July 3, 2012, the LLC's failure to produce requested records to indicate the period of noncompliance dictates that an earlier date be used when computing the penalty. When an employer refuses to provide required business records, the Department must impute the missing payroll for the period of time specified in the request to produce when assessing the penalty. Twin City Roofing Constr. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007); Olender Const. Co. v. Dep't of Fin. Servs., Case

No. 06-5023 (Fla. DOAH July 29, 2008), rejected in part, Case No. 86845-06-WC (Fla. DFS Sept. 16, 2008). The records requested here were for the period June 29, 2012, through July 20, 2012. The parties stipulated that the penalty of $502.83 for the employment of Mr. Johnson was correctly computed in this case. As that amount is less than the statutory minimum, a penalty of $1000.00 should be imposed.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Department of Financial Services, Division of Workers' Compensation, enter a final order determining that Custom Granite Kitchens and Baths, LLC, violated the requirement in chapter 440, Florida Statutes, that it secure workers' compensation coverage for Mr. Calvin Johnson, and imposing upon it a total penalty assessment of $1,000.00.

DONE AND ENTERED this 23rd day of July, 2013, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of July, 2013.

ENDNOTES

[1/] All other references to statutes and rules are to the versions in effect during the relevant period of June and July 2012, except as otherwise indicated.

[2/] In another context, Florida Administrative Code Rule 69L-6.012(1)(a), governing notice of election to be exempt from coverage, states in part that "a limited liability company created and approved under Chapter 608, F.S., is not a corporation for purposes of Chapter 440, F.S."

[3/] A general principle of corporate law is that a corporation is a separate legal entity, distinct from the individual persons comprising it, and that there is no basis for imposing liability upon the owners. See Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008). Aside from statutory mandate, three factors have been cited as justifying the "piercing of the corporate veil" to hold individuals liable: (1) the shareholder dominated the corporation to such an extent that the shareholder was in fact the alter ego of the corporation; (2) the corporate form was used fraudulently or for an improper purpose; and (3) the fraudulent or improper use caused injury to the claimant. See § 608.701, Fla. Stat.

[4/] Although not directly applicable here, a similar approach has been taken by the Department in determining when a successor entity is engaged in business operations prohibited by a Stop-Work Order. Florida Administrative Code Rule 69L-6.031(1)(a) provides that successor entities are "engaged in the same or equivalent trade or activity if they each perform or have performed business operations that include operations described in at least one classification code listed in rule 69L-6.021, F.A.C."

[5/] Whether Mr. Johnson's "lease" of the LCC could be construed as a successor business entity or whether the LLC conducted business operations after the date of the Lease/Purchase Agreement in violation of the Stop-Work Order are not at issue in the instant case.

[6/] Petitioner correctly notes in its Proposed Recommended Order that Mr. Yarbrough admitted painting on behalf of the "Cabinet Division" of Respondent after the Stop-Work Order was issued. Contrary to the assertion of Petitioner, however, Mr. Yarbrough specifically denied that this took place at the time of the agreement. This leaves no evidence to support a finding that that work took place on or about October 26, 2012. Mr. Johnson also testified that he worked at the Mexico Beach property after the Stop-Work Order, but there is credible evidence from Mr. Burchell that work by CGKB and the LLC at the Mexico Beach property ended sometime in August. While it is well settled that an Administrative Complaint need not be cast with the same degree of "technical nicety" required for a criminal prosecution, the allegations must state the acts complained of with sufficient specificity to allow the Respondent a fair chance to prepare a defense. Libby Investigations v. Dep't of State, 685 So. 2d 69 (Fla. 1st DCA 1996); Davis v. Dep't of Prof. Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984). Admissions of conduct different than that alleged by Petitioner, taking place at different times than alleged by Petitioner, do not constitute clear and convincing evidence of the allegation in this case.

[7/] Petitioner offered no citation to any rule incorporating the applied manual rates. Florida Administrative Code Rules 69L-6.021 and 69L-6.031 incorporate classification codes of versions of the SCOPES Manual without mention of periodic updates to the manual rates established by NCCI.

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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.