STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 13-2536

BARBER CUSTOM BUILDERS, INC.,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 10, 2014, in Tallahassee, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Trevor Suter, Esquire
Crystal D. Stephens, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Kristian Dunn, Esquire
Dickens and Dunn, P.L.
517 East College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner, Department of Financial Services, Division of Workers' Compensation ("Petitioner" or "Department")

properly issued a Stop-Work Order and Penalty Assessment against Respondent, Barber Custom Builders, Inc. ("Respondent" or "Barber") for failing to obtain workers' compensation insurance that meets the requirements of chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On June 5, 2013, Petitioner issued and served a Stop-Work Order, No. 13-273-1A, and Order of Penalty Assessment (collectively the "Stop-Work Order") alleging that Respondent was not in compliance with the workers' compensation coverage requirements of chapter 440. The Stop-Work Order was posted on the construction site and provided to Dennis Barber, and ordered Respondent to cease all business operations for all worksites in the state. The Stop-Work Order set the general penalty amount at 1.5 times the amount that the employer would have paid in premiums had workers' compensation insurance been procured.

On June 17, 2013, Petitioner issued an Amended Order of Penalty Assessment (hereinafter "Amended Order"). The Amended Order established a monetary penalty of $96,302.87.

On June 25, 2013, Respondent filed a Request for Hearing through which it disputed the allegations that it failed to obtain workers' compensation coverage that met the requirements of chapter 440. The Stop-Work Order, Amended Order, and Election of Proceeding were transmitted to the Division of

Administrative Hearings for a formal administrative hearing, which hearing was set to convene on September 10, 2013.

On August 14, 2013, Petitioner moved the presiding Administrative Law Judge to relinquish jurisdiction over this matter to the Department based on certain matters having been admitted in discovery. The motion was denied. The motion alternatively requested a continuance of the final hearing in order to allow it to receive discovery responses and prepare for hearing. The motion to continue was granted and the case was re-scheduled to commence on October 8, 2013.

On September 24, 2013, Respondent filed an unopposed motion to continue the final hearing, which included a 2nd Amended Order of Penalty Assessment by which the Department reduced the penalty assessed from $96,302.87 to $36,387.03. The continuance was for the purpose of allowing Respondent to depose the Department's penalty calculator as to the accuracy of the revised calculations. The motion was granted, and the parties were required to file a status report by October 15, 2013.

On October 15, 2013, Respondent filed a notice of availability providing dates on which the parties were available for the final hearing. Based thereon, the final hearing was re-scheduled to commence on December 4, 2013.

On November 7, 2013, this matter was transferred to the undersigned for further proceedings and disposition.

On November 21, 2013, Respondent filed an unopposed motion to continue the final hearing in which it represented that the sole remaining issue was the amount of the penalty, an amount that was being negotiated by the parties. Based on the representations in the motion, the final hearing was continued and re-scheduled for February 10, 2014.

On January 31, 2014, the parties timely filed their Joint Pre-hearing Stipulation and their respective witness and exhibit lists.

On February 4, 2014, Respondent filed a Motion to Dismiss and Amended Motion to Dismiss that were based on deficiencies in the issuance of the Stop-Work Order, specifically that the Stop-Work Order is an immediate final order that was entered without conforming with the requirements of section 120.569(2)(n), Florida Statutes. On February 6, 2014, Petitioner filed its response thereto.

The case proceeded to hearing on February 10, 2014. At the commencement of the hearing, the parties indicated that additional records had been discovered and provided to the Department that would likely result in a further recalculation of the penalty amount. It was agreed that the testimony of Lawrence Eaton would be received, as Mr. Eaton was a witness who had traveled to Tallahassee from out-of-town, but that the

hearing would otherwise be continued. A ruling on the Amended Motion to Dismiss was reserved.

On March 11, 2014, the Department filed an unopposed Motion to Modify Charging Documents, which included a 3rd Amended Order of Penalty Assessment that reduced the penalty assessed from $36,387.03 to $2,272.31. The motion was granted.

On March 12, 2014, the parties filed a Joint Stipulation and Status Report that requested disposition of this proceeding on stipulated exhibits and facts as follow:

1. Based on business records received from Respondent, the Department has recalculated the assessed penalty. The penalty has been reduced from $36,387.03 to $2,272.31.

2. The parties stipulate that exhibits 1 through 14 [as pre-numbered and filed by the Department on January 31, 2014] are admitted as evidence.

3. The parties stipulate that the attached 3rd Amended Order of Penalty Assessment is calculated correctly, if the manual rates were properly adopted by rule, and also admit the 3rd Amended Order of Penalty Assessment into evidence. However, Respondent disputes the use of the manual rates.

Based on the stipulations, the parties agreed to forego additional testimony, conclude the final hearing, and submit proposed recommended orders, with the sole remaining issues being 1) whether the Stop-Work Order is an immediate final order

as described in section 120.569(n), Florida Statutes, which was entered without having met the requirements of that section; 2) whether Petitioner's use of NCCI classification codes used to classify the nature of Respondent's business that are not currently adopted by rule is permissible; and 3) whether Petitioner may use approved manual rates that have been adopted by the Office of Insurance Regulation, but not by the Department of Financial Services, for establishing presumptive wages for calculating workers' compensation premiums.

There was no transcript filed of the February 10, 2014 hearing. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. References to statutes are to Florida Statutes (2013) unless otherwise noted.

FINDINGS OF FACT

1. On January 31, 2014, the parties filed a Joint Pre-hearing Stipulation, by which the parties stipulated to the facts set forth in the following paragraphs 2 through 12. Those facts are accepted and adopted by the undersigned.

2. The Department is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees and corporate officers.

3. Respondent, a Florida corporation, was engaged in business operations in the construction industry in the State of Florida from June 6, 2010 through June 5, 2013.

4. Respondent received a Stop-Work Order and Order of Penalty Assessment from the Department on June 5, 2013.

5. The Department had a legal basis to issue and serve Stop-Work Order 13-273-1A on Respondent. Respondent contests the validity of the Department's Stop-Work Order as a charging document.

6. Respondent received a Request for Production of Business Records for Penalty Assessment Calculation from the Department on June 5, 2013.

7. Respondent received an Amended Order of Penalty Assessment from the Department on June 17, 2013.

8. Respondent executed a Payment Agreement Schedule for Periodic Payment of Penalty and was issued an Order of Conditional Release from Stop-Work Order on August 6, 2013.

9. Respondent received a 2nd Amended Order of Penalty Assessment from the Department on September 25, 2013.

10. Respondent employed more than four non-exempt employees during the periods of June 10, 2010 through June 30, 2010; July 2, 2010 through December 31, 2010; January 14, 2011 through December 29, 2011; January 30, 2012 through December 16, 2012; and January 4, 201[3] through June 5, 2013.

11. Respondent was an "employer" as defined in chapter 440.

12. All of the individuals listed on the Penalty Worksheet of the [2nd Amended Order of Penalty Assessment], except Buffie Barber and Linda Barber, were "employees" in the State of Florida (as that term is defined in section 440.02(15)(a), Florida Statutes), of Respondent during the periods of non-compliance listed on the penalty worksheets.

13. In addition to the foregoing, in their March 12, 2014, Joint Stipulations and Status Report, the parties stipulated to the facts set forth in the following paragraphs 14 and 15. Those facts are accepted and adopted by the undersigned.

14. Based on business records received from Respondent, the Department has recalculated the assessed penalty. The penalty has been reduced from $36,387.03 to $2,272.31.

15. The 3rd Amended Order of Penalty Assessment is calculated correctly, if the manual rates were properly adopted by rule.

16. A review of the stipulated 3rd Amended Order of Penalty Assessment reveals assessed penalties for employees engaged in work described as class code 5403 (carpentry - NOC) and class code 8810 (clerical office employees - NOC).

17. Given the stipulations of the parties, further findings are unnecessary.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013).

19. Petitioner is the agency of the State of Florida charged, pursuant to section 440.107(3), with the duty to:

> 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.
>
> * * *
>
> (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.

20. Petitioner has the burden of proof in this case and must show by clear and convincing evidence that Respondent

violated the Workers' Compensation Law during the relevant period and that the penalty assessments are correct. §120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins., 707 So. 2d 941 (Fla. 3d DCA 1998). Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

21. It is well-established that the Department has "broad powers to investigate employers, to halt any work where employers are not complying, and to assess penalties on those who do not comply." Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007).

22. Pursuant to sections 440.10 and 440.38, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. Strict compliance with the Workers' Compensation Law is, therefore, required by the employer. See, e.g., Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182, 1185 (Fla. 4th DCA 2005); C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

23. Section 440.02(16)(a) defines “employer,” to include “every person carrying on any employment.”

24. Section 440.02(15)(a) defines “employee” to include “any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment.”

25. Section 440.02(17) defines “employment” to include “any service performed by an employee for the person employing him or her,” and includes “with respect to the construction industry, all private employment in which one or more employees are employed by the same employer.”

26. Section 440.02(8) defines “construction industry” to include “for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land.”

27. Section 440.02(8) further provides that Petitioner “may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term ‘construction industry’ as set forth in this section.”

28. By stipulation of the parties, the record contains clear and convincing evidence that Respondent was an "employer" for workers' compensation purposes because it was doing business in the construction industry. As such, Respondent was required

to secure and maintain compensation for its employees pursuant to section 440.10.

29. Section 440.107(7)(d)1. provides that:

> 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 $1,000.00, whichever is greater.

30. By stipulation of the parties, and based on business records provided by Respondent, the Department correctly calculated the assessed penalty in this case to be $2,272.31, provided the manual rates were properly adopted.

Stop-Work Order as Immediate Final Order

31. Respondent argues that a stop-work order entered pursuant to section 440.107 is, in effect, an immediate final order as described in section 120.569(2)(n). Section 120.569(2)(n) provides that:

> If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

32. Respondent argues that the stop-work order served by Mr. Eaton on June 5, 2013, is invalid since the Department's agency head made no finding "that an immediate danger to the public health, safety, or welfare requires an immediate final order," and that the Department's agency head did not "recite with particularity the facts underlying such finding in the final order."

33. Through its enactment of chapter 440, the Legislature has established that "[t]he workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike." § 440.011, Fla. Stat. In the view of the undersigned, chapter 440 establishes the comprehensive process by which workers' compensation benefits and remedies are to be extended, and provides the sole means by which the obligations of the workers' compensation program are to be enforced by the appropriate officials.

34. Section 440.107(7)(a) provides in pertinent part that:

> 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 . . . 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 . . . .

35. By its enactment of section 440.107(7)(a), the legislature has determined that the failure to maintain workers' compensation insurance is, as a matter of law, an immediate threat to human health safety and welfare so as to warrant issuance and service of a stop-work order. Thus, no separate finding by the agency head reciting the facts that establish such a danger is necessary.

36. Had the legislature intended for a stop-work order authorized and issued pursuant to section 440.107 to be considered to be an immediate final order as described in section 120.569(2)(n), it would have used that term.[1/] The fact that it did not is compelling evidence that such a result was not intended. See, e.g., First Quality Home Care, Inc. v. Alliance for Aging, Inc., 14 So. 3d 1149, 1153-1154 (Fla. 3rd DCA 2009)("had the Legislature intended to subject a private corporation designated as an AAA to the APA's bid protest procedures, it would have included that entity in the pertinent statutes defining 'agency.'").

37. In addition to the foregoing, section 120.52(7) defines a "final order" as:

> a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions

which are affirmative, negative, injunctive, or declaratory in form.

38. There is nothing in section 440.107 suggesting that a stop-work order is final in nature, with relief limited to appeal or injunction. Rather, the stop-work order is in the nature of an administrative complaint under rule 28-106.2015, for which the remedy of an administrative proceeding is available. See, e.g., Riopelle v. Dep't of Fin. Servs., Div. of Workers' Comp., 907 So. 2d 1220, 1222 (Fla. 1st DCA 2005)("The administrative law judge advised Riopelle by order that she had the right to request an expedited, summary hearing pursuant to section 120.574, Florida Statutes (2001). She instead sought relief under section 120.57(1), Florida Statutes (2001) . . . . Riopelle therefore fails to show that section 440.107 is unconstitutional by denying due process to an employer found to be in violation of chapter 440.").

39. The Stop-Work Order in this proceeding was accompanied by a Notice of Rights that advised Respondent of the process by which an administrative challenge to the proposed action was to be commenced. Respondent thereupon challenged the proposed action by timely filing its Request for Hearing under sections 120.569 and 120.57(1).

40. For the reasons set forth herein, a stop-work order issued under the authority of section 440.107(7)(a), Florida

Statutes, is not an immediate final order as described in section 120.569(2)(n), Florida Statutes.

NCCI classification codes

41. By stipulation, Respondent argues that it was an error for the Department to apply NCCI classification codes that are not currently adopted by rule to classify the nature of Respondent's business.

42. Section 440.107(9) provides that "[t]he department shall adopt rules to administer this section."

43. Section 440.02(8) provides, in pertinent part, that "[t]he division may, by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the term 'construction industry' as set forth in this section."

44. The 3rd Amended Order of Penalty Assessment charges Respondent with failing to obtain workers' compensation insurance coverage for employees engaged in work described in classification codes 5403 and 8810.

Classification Code 5403

45. Rule 69L-6.021(1) provides, in pertinent part, that:

> The Division 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 (2001 ed.), including updates through January 1, 2011.

46. Rule 69L-6.021(2) provides, in pertinent part, that "an employer is engaged in the construction industry when any portion of the employer's business operations is described in the construction industry classification codes that are adopted in this rule . . . . (cc) 5403 Carpentry - NOC."

47. Rule 69L-6.021(3) provides that:

> (3) The Division adopts the definitions published by NCCI, SCOPES® of Basic Manual Classifications (February 2011), including updates through February 1, 2011, 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 and can be obtained by writing to the Division of Workers' Compensation, Bureau of Compliance, 200 East Gaines Street, Tallahassee, Florida 32399-4228.

48. Despite the clear authority for the adoption of construction industry class codes, and the specific adoption of class code 5403, Respondent argues in its Proposed Recommended Order that the application of the rule, which was last amended on October 11, 2011, is invalid because "[t]he class code that the Department utilizes, 5403, has been revised a total of six times since February 1, 2011." There is no evidence in the record of this proceeding to support that allegation.

Furthermore, even if the classification code had been amended by NCCI, there is no evidence that the Department used the amended code, or that any amendment was material to the description of the business in which Respondent was engaged, i.e., general carpentry work.

49. Based on the foregoing, there was statutory authority for the Department to adopt construction industry class codes and, through its promulgation of rule 69L-6.021, the Department adopted the class code, 5403, cited in the 3rd Amended Order of Penalty Assessment.

<u>Classification Code 8810</u>

50. Rule 69L-6.031(1) provides, in pertinent part, that:

> (1) Under paragraph 440.107(7)(b), F.S., stop-work orders or orders of penalty assessment issued against a corporation, limited liability company, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity that has one or more of the same principals, limited liability company members, or officers as the predecessor corporation or business entity against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.
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> * * *
>
> (b) For employers engaged in the non-construction industry, a corporation, . . . and the successor corporation . . . are engaged in the same or equivalent trade or activity if they <u>each</u> perform or have performed business operations that include operations described in at least one

classification code that is in the manufacturing, goods and services, or the office and clerical industry group listed in subsection (6) of this rule. (emphasis added).

51. Rule 69L-6.031(6) provides, in pertinent part, that:

List of class codes, descriptions, and industry groups. A complete description of class codes is contained in the SCOPES® Manual Classifications (October 2005) published by the National Council on Compensation Insurance, Inc. (NCCI) and is available for viewing through the Division of Workers' Compensation, Bureau of Compliance, 2012 Capital Circle, S.E., Hartman Building, Tallahassee, Florida 32399-4228 or a copy is available, for a fee, by calling NCCI at 1(800)622-4123. The SCOPES® list of codes, descriptions and industry groups is as follows:

* * *

(c) Industry Group: Office & Clerical

* * *

10. 8810 CLERICAL OFFICE EMPLOYEES NOC

52. The Administrative Procedure Act, chapter 120, Florida Statutes, addresses the incorporation of materials by reference in section 120.54(1)(i), which provides, in pertinent part, that:

1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes.

* * *

> 6. The Department of State may adopt by rule requirements for incorporating materials pursuant to this paragraph.

53. Department of State rule 1-1.013, entitled "Materials Incorporated by Reference" provides, in pertinent part, that:

> (1) Any ordinance, standard, specification, guideline, manual, handbook, map, chart, graph, report, form or instructions to forms, or other similar material that meets the definition of rule provided in Section 120.52(16), F.S., and is generally available to affected persons may be incorporated by reference in a rule adopted pursuant to Section 120.54, F.S., and Rule 1-1.010, F.A.C.
>
> (2) A reference to material incorporated in a rule must include:
>
> (a) Specific identification of the incorporated material, along with an effective date. Forms and their instructions should be identified by title, the form number, and effective date. In addition, incorporated forms and instructions should clearly display the form title, form number, effective date, and the number of the rule in which it is incorporated.
>
> (b) A statement that the material is incorporated by reference.
>
> (c) A statement describing how an affected person may obtain a copy of the incorporated material.

54. Rule 1-1.013 does not prescribe particular language that must be used in order to constitute a "statement that the material is incorporated by reference." Although the identification of classification code 8810, clerical office

employees NOC, in rule 69L-6.031 does not use the words "incorporated by reference," the listing of the individual NCCI SCOPES® Manual Classifications codes by industry group, number, and name, along with the instruction that the SCOPES® Manual is available for viewing at the Department's offices, is sufficient to constitute a "statement" that the material is incorporated by reference.

55. Rule 69L-6.031 includes all of the information described in rule 1-1.013, and is sufficient to place any employer of reasonable intelligence on notice that the codes have been adopted by the Department for describing job classifications of Florida employees for which workers' compensation compliance is required.

56. The title of rule 69L-6.031, "Stop-Work Orders in Effect Against Successor Corporations or Business Entities," could be construed as an expression of intent that the incorporation of the classification codes listed therein is to apply only when a stop-work order is being applied to a successor. See, Op. Att'y Gen. Fla. 11-24 (2011)("While the title to an act is not dispositive of its effect, it may be considered in determining the intent of the Legislature.") However, general rules of construction indicate that "the title's primary purpose is to give notice of the subject matter contained in the act . . . and the language of the title is not

binding as to the meaning and application of the act." Carter v. Gov't Employees Ins. Co., 377 So. 2d 242, 243 (Fla. 1st DCA 1979).

57. The plain language of rule 69L-6.031 itself, when read in its entirety, demonstrates that the NCCI SCOPES® Manual Classifications codes incorporated by reference therein apply to the employing business entities and to successor entities with common governance and business activities. In that regard, the following provisions of the rule apply directly to the employer, and not to the successor entity:

> (4) An order applying a stop-work order or order of penalty assessment shall take effect when served upon the employer or, for a particular worksite, when served at that worksite.
>
> (5) Under paragraph 440.107(7)(c), F.S., the department shall assess a penalty of $1,000 per day against an employer for each day that the employer conducts business operations in violation of an order a applying a stop-work order or order of penalty assessment.

58. To accept an argument that rule 69L-6.031 does not allow the industry group codes to be used to establish the nature of an employer's business due to a narrow construction of the title of the rule would result in an absurd result, rendering a penalty assessment deficient as applied to an employer that failed to procure workers' compensation insurance for its employees, but enforceable against an arguably less

culpable successor business entity. Such a result is to be avoided. Murray v. Mariner Health, 994 So. 2d 1051, 1061 (Fla. 2008).

59. Based on the "statement" of the Department in rule 69L-6.031, and in light of the facts stipulated by the parties, the correctness of the action that led to the calculation and assessment of the penalty for Respondent's failure to maintain workers' compensation insurance for its employees as set forth in the 3rd Amended Order of Penalty Assessment was not impaired by any material error in the adoption of the NCCI SCOPES® Manual Classifications codes in rule 69L-6.031.

60. For the reasons set forth herein, it was not an error for the Department to use NCCI classification codes set forth in rule 69L-6.031 to classify the description of duties performed by Respondent's employees.

Approved Manual Rates

61. By stipulation, Respondent argues that it was an error for the Department to use approved manual rates that have been adopted by the Office of Insurance Regulation, but not by the Department of Financial Services, for establishing presumptive wages for calculating workers' compensation premiums.

62. Section 440.015 provides, in pertinent part, that:

> "[t]he department, agency, the Office of Insurance Regulation, and the Division of Administrative Hearings shall administer the

Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments."

63. Section 440.107 provides, in pertinent part, that:

> (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.
>
> * * *
>
> (7)(d)1. In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 3-year period or $1,000, whichever is greater.

64. Section 440.10(1)(g) provides, in pertinent part, that:

> Subject to s. 440.38, any employer who has employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees which utilizes Florida class codes, rates, rules, and manuals that are in compliance with and approved under the provisions of this chapter and the Florida Insurance Code.

65. Rule 69L-6.019(1) provides that:

> Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state shall obtain a

> Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)(g) and 440.38(7), F.S.

66. A review of the Florida Insurance Code reveals that the Office of Insurance Regulation, and not the Department, is the agency that has been granted authority by the legislature to approve manuals of rates for workers' compensation insurance.

67. Section 627.091 provides, in pertinent part, that:

> (1) As to workers' compensation . . . insurances, every insurer shall file with the office every manual of classifications, rules, and rates, every rating plan, and every modification of any of the foregoing which it proposes to use. Every insurer is authorized to include deductible provisions in its manual of classifications, rules, and rates. Such deductibles shall in all cases be in a form and manner which is consistent with the underlying purpose of chapter 440.
>
> * * *
>
> (6) Whenever the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state meets . . . , such meetings shall be held in this state and shall be subject to s. 286.011. The committee of such a rating organization shall provide at least 3 weeks' prior notice of such meetings to the office and shall provide at least 14 days' prior notice of such meetings to the public by publication in the Florida Administrative Register.

68. Section 627.101(4) provides, in pertinent part, that:

> If the office approves a filing, it shall give prompt notice thereof to the insurer or rating organization that made the filing, and in which case the filing shall become effective upon such approval or upon such subsequent date as may be satisfactory to the office and the insurer or rating organization that made the filing.

69. 627.151 provides, in pertinent part, that:

> (2) As to workers' compensation and employer's liability insurances, no manual of classifications, rule, rating plan, rating system, plan of operation, or any modification of any of the foregoing which establishes standards for measuring variations in hazards or expense provisions, or both, shall be disapproved if the rates thereby produced meet the applicable requirements of this part.

70. OIR rule 69O-189.016, entitled "Filing Procedures for Workers' Compensation Classifications, Rules, Rates, Rating Plans, Deviations and Forms," provides, in pertinent part, that:

> (1) Purpose: To establish the procedures to be utilized by insurers in the filing of workers' compensation classifications, rules, rates, rating plans, deviations and forms pursuant to Sections 627.091, 627.211 and 627.410, F.S.
>
> (2) Any insurer authorized to transact workers' compensation and employer's liability insurance in Florida shall file with the Office every manual of classifications, rules, rates, rating plans, deviations and every modification of any of the foregoing, which it proposes to use. An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating

> organization which makes such filings and by authorizing the Office to accept such filings in its behalf. No insurer shall use any workers' compensation and employer's liability classification, rule, rate or rating plan unless it has been filed with the Office and the filing has been affirmatively approved.

71. The issues of whether the OIR properly approved the NCCI manuals establishing rates and premiums for various businesses in Florida, or whether the Department applied a correct version of the NCCI manuals, have not been raised and are not subject to determination herein. Rather, the issue for determination in this proceeding is, by stipulation of the parties, whether the Department may use manual rates approved by the Office of Insurance Regulation rather than the Department for establishing presumptive wages for calculating workers' compensation premiums. Thus, the issue is one of authority, not implementation.

72. The provisions of the Florida Insurance Code referenced herein demonstrate that the Office of Insurance Regulation has specific legislative authority to approve manuals of classifications, rules, rates, and rating plans, including those of a rating organization such as the NCCI.

73. Given the authority legislatively conferred jointly on the OIR and the Department to administer the workers' compensation law, the specific authority granted by the

legislature to the OIR to approve workers compensation rating organization manual rates, and the direction of the legislature for the Department to calculate penalties by applying those "approved manual rates" to the employer's payroll in calculating penalties, it was not error for the Department to apply current NCCI manual rates approved by OIR in calculating the penalty to be assessed against Respondent for failing to maintain workers' compensation insurance for its employees. Cf., Eastern Air Lines, Inc. v. Dep't of Rev., 455 So. 2d 311, 316 (Fla. 1984) (explaining that where the legislature has "directed with precision" the manner in which a calculation is to be made, it is not an error to apply an independently-derived pricing index to provide aid in making the ministerial determination).[2/]

Conclusion

74. Based on the foregoing, Petitioner proved, by clear and convincing evidence, that Respondent is liable for payment of a penalty in the amount of $2,272.31 for its failure to secure and maintain compensation for its employees as set forth in the 3rd Amended Penalty Assessment.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation enter a final order assessing

a penalty of $2,272.31 against Respondent, Barber Custom Builders, Inc., for its failure to secure and maintain required workers' compensation insurance for its employees.

DONE AND ENTERED this 30th day of April, 2014, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2014.

ENDNOTES

[1/] The legislature has expressly defined certain orders as falling under the auspices of section 120.569(2)(n), a definition that is not applied to stop-work orders. See section 409.913(16)(d)("The agency shall impose [immediate suspension] on a provider or a person for any of the acts described in subsection (15): . . . (d) Immediate suspension, if the agency has received information of patient abuse or neglect or of any act prohibited by s. 409.920. Upon suspension, the agency must issue an immediate final order under s. 120.569(2)(n)"); section 496.419(10)("A finding of a violation . . . constitutes an immediate threat to the public health, safety, and welfare and is sufficient grounds for the department to issue an immediate order to cease and desist all solicitation activities. The order shall act as an immediate final order under s.120.569(2)(n) . . . ."); section 497.157(3)("Where the department determines that an emergency exists regarding any violation of this chapter by any unlicensed person or entity, the department may issue and serve an immediate final order upon

such unlicensed person or entity, in accordance with s. 120.569(2)(n)."); section 501.608(3)("Failure to obtain or display a license or a receipt of filing of an affidavit of exemption is sufficient grounds for the department to issue an immediate cease and desist order, which shall act as an immediate final order under s. 120.569(2)(n)."); section 628.461(5)(a)("The office shall, however, at any time that it finds an immediate danger to the public health, safety, and welfare of the domestic policyholders exists, immediately order, pursuant to s. 120.569(2)(n), the proposed acquisition temporarily disapproved and any further steps to conclude the acquisition ceased."); section 628.4615(6)(a)("The office shall, however, at any time it finds an immediate danger to the public health, safety, and welfare of the insureds exists, immediately order, pursuant to s. 120.569(2)(n), the proposed acquisition disapproved and any further steps to conclude the acquisition ceased.); and section 633.228(2)(a)("If . . . it is determined that a violation described in this section exists which poses an immediate danger to the public health, safety, or welfare, the State Fire Marshal may issue an order to vacate the building in question, which order shall be immediately effective and shall be an immediate final order under s. 120.569(2)(n).").

[2/] The undersigned is cognizant of the arguably contrary result reached by the First District Court of Appeals in Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642 (Fla. 1st DCA 2009). That case involved the application of a 2007 version of the federal FDA "Orange Book" to invalidate a Board of Pharmacy rule. The Orange Book is a listing of generic pharmaceutical drugs found to be therapeutically equivalent to "listed drugs," and is developed by application of the "complex science" of adopting and applying ever-changing methodology to reflect scientific developments. Id. at 656. The 2007 Orange Book relied upon by the ALJ was issued after the 2001 enactment of the statute that provided authority for the rule. The court, relying on a long line of cases recognizing that the Legislature may not incorporate a future federal act or ruling of a federal administrative body in a Florida statute (Id. at 654-655), held that it was error for an ALJ to apply the federal 2007 Orange Book based on authority derived from a 2001 Florida statute.

Abbott Labs is distinguishable from this case, which involves the more ministerial and mathematical process by which the Department applies manuals of classifications and rates approved by the OIR. As discussed herein, the OIR shares joint duties and responsibilities with the Department for the administration of the workers' compensation law, and is the

agency with the specific authority for approving the "manual rates" applied by the Department.

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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.