STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 14-2618

MEX GROUP MAINTENANCE AND REPAIR, INC.,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing was held in this case, beginning on October 6 and 7, 2014, by video teleconference with sites in Fort Myers and Tallahassee, Florida, and continuing on October 8 and 17, 2014, in Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Alexander Brick, Esquire
Elizabeth A. Miller, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Kristian E. Dunn, Esquire
Bennett M. Miller, Esquire
Dunn & Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Mex Group Maintenance and Repair, Inc. (Respondent or Mex Group), failed to secure the payment of workers' compensation as required by chapter 440, Florida Statutes,[1/] and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 1, 2014, Petitioner, the Department of Financial Services, Division of Workers' Compensation (Petitioner or Department), served by hand delivery a Stop-Work Order (SWO) on Mex Group. The SWO alleged that Mex Group failed to provide workers' compensation coverage as required by law and materially understated or concealed payroll. The SWO included an Order of Penalty Assessment, which described, but did not quantify, the penalty to be assessed for the alleged violations.

Pursuant to the SWO's notice of rights, Mex Group filed a petition for a disputed-fact administrative hearing, and the case was forwarded to DOAH. At the parties' agreed request, a one-day hearing was set for August 26, 2014, by video teleconference in Fort Myers and Tallahassee, Florida.

On June 24, 2014, the Department moved for leave to file an Amended Order of Penalty Assessment to quantify the proposed penalty in the amount of $1,616,426.91. The motion was granted over Mex Group's objection, in a July 11, 2014, Order.

On August 1, 2014, Respondent filed an unopposed motion to continue the final hearing, because it had become apparent through discovery that two hearing days would be needed due to the complexity of the case and increasing number of witnesses. Respondent requested that the hearing be rescheduled for two days between October 3 and 14, 2014, when both parties were available. A continuance was ultimately granted, and the final hearing was rescheduled for October 7 through 9, 2014.

On September 22, 2014, the Department moved for leave to file a Second Amended Order of Penalty Assessment, to reduce the proposed penalty to $1,293,153.87. Mex Group opposed this request, but it was granted. One final amendment to the Department's proposed penalty assessment was permitted during the course of the hearing to correct a calculation error, which further reduced the proposed penalty to $1,213,357.30.[2/]

The parties did not file a joint pre-hearing stipulation.

At the final hearing, Petitioner presented testimony of the following witnesses: contractor representatives Christian Bowe, Gloria Vasquez, Grant Williams, David Sasser, Glen Rapp, Henry Ryan, Jessica Armstrong, Jeff Spencer, Brad Henderson, Deborah Landis, Tom Losey, John King, and Gregory Kendall; Jeff Lewis, accepted as an expert in southwest Florida construction industry standards for profit margins/payroll for labor-only contracts; Pedro Salmeron, a former Mex Group employee; Department

compliance investigators Aysia Elliott and Jack Gumph; Karen Phillips, Esquire, and Amy Dorsch, employees of Mex Group's workers' compensation insurance carrier; Thomas Keegan, a Collier County contractor licensing compliance officer; Department penalty auditor Chad Mason; and Frederick Carroll, III, CPA, accepted as an expert in accounting. Petitioner's Exhibits 1 through 7, 9 through 12, 14 through 20, 22, 24 through 28, 29 (without pages 429-431 and 435), 31 (without pages 492-503), 33, 35 through 40, 41 (without page 1223), 42, 45, 46 (without pages 1397-1398), 47, 48 (without pages 1659-1660), 50 (without pages 1715-1721), 51 through 60, and 63 through 66.[3/]

Respondent presented the testimony of the following witnesses: Kathleen Petracco, accepted as an expert in the sufficiency of business records for penalty calculation purposes; Antonio Lopez, insurance agent for Mex Group; Jessenia Reyes, former corporate officer of Mex Group and wife of Mex Group's owner; and Marco Rosales Trejo (Mr. Rosales), Mex Group's owner and sole corporate officer. A certified interpreter was present and assisted Mr. Rosales with English-Spanish translation for his testimony and documents, as he does not speak English well. Respondent's Exhibits 1 through 7, 9 through 12, and 30 were received in evidence. Respondent's "Supplementary Exhibits" 13 through 16 (filed and served on October 15, 2014) and 17 through

29 (filed and served on October 16, 2014), were not admitted in evidence, but were proffered.[4/]

The seven-volume Transcript of the final hearing was filed on November 24 and 25, 2014. The original filing deadline for proposed recommended orders (PROs) was extended twice on Respondent's unopposed motions. Both parties timely filed PROs by the extended deadline. The PROs have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the statutory requirement in chapter 440, Florida Statutes, that employers secure the payment of workers' compensation for the benefit of their employees.

2. Respondent is a Florida for-profit corporation, first incorporated on October 10, 2012, as Mex Group Cleaning Service, Inc. As initially organized, Respondent had two corporate officers: Mr. Rosales and his wife, Ms. Reyes.

3. In Respondent's annual report filed with the Division of Corporations on January 9, 2014, Ms. Reyes was removed from the listing of corporate officers, leaving Mr. Rosales as Respondent's sole corporate officer.

4. By articles of amendment filed on January 13, 2014, Respondent changed its name to Mex Group Maintenance and Repair, Inc., but the name Mex Group Cleaning Service remained in use.

5. From October 10, 2012, through September 30, 2013, Respondent had no workers' compensation insurance.

6. Mr. Rosales and Ms. Reyes were informed by their insurance agent that if Mex Group was a non-construction business, it could have up to three employees before the business would be required to obtain workers' compensation insurance.

7. Mr. Rosales and Ms. Reyes attempted to characterize Mex Group's business as strictly a janitorial company with no more than three workers at a time to clean houses. They called the workers "independent contractors" who were issued 1099 forms instead of W-2 forms. Neither Mr. Rosales nor Ms. Reyes offered specifics about the way the business was run before October 2013, or the terms on which workers agreed to work. They produced a single contract signed by one worker in March 2013. The contract is a form agreement to retain a "subcontractor." However, the blanks provided on the form for the terms of the agreement--what duties were to be performed, when and how the worker was supposed to work, and what the agreed compensation was--were left blank.

8. In contrast to the characterization of Mex Group's business as strictly janitorial, Mr. Rosales described the work performed by Mex Group in its first year this way:

> There were contractors that would pick up -- that would bring out carpets and rugs and I would pick them up and take them to the place [county dump]. . . . I would do my rounds and if I saw any construction jobs or a

> construction site, I would stop in and talk to the contractors. And if they had the job to pick up trash, I would do it. . . . Carpets, many times toilet bowls, sinks. And it was just remodeling jobs, you know, it was not new construction . . . and many times I also disposed of AC units and I would also pick those up . . . and boilers. (Pet. Exh. 63, pp. 14-16).

Mr. Rosales acknowledged that he used Mex Group workers to assist him with these debris removal jobs. Mr. Rosales's description of Mex Group's construction site debris removal work is credited.[5/] Mex Group was engaged in the construction industry in its first year of operations.

9. Beginning in October 2013, Respondent's business shifted to exclusively construction-related work, under the same name, Mex Group Cleaning Service, with some of the same employees (for example, Alberto Rodriguez, who signed the mostly-blank subcontractor agreement on March 1, 2013).

10. On October 1, 2013, Respondent applied for a workers' compensation insurance policy through the Florida United Businesses Association (FUBA). Respondent's application sought coverage for four employees who would be engaged in "masonry stucco" work, identified as class code 5022.[6/] The estimated payroll was $53,000.00 for the one-year policy period. By subsequent endorsement on October 8, 2013, the payroll estimate was increased by $20,000.00 for "wallboard" work (class code 5445), for a total estimated annual payroll of $73,000.00.

11. As explained by FUBA's general counsel, Karen Phillips, FUBA offered employers three different options for reporting payroll and paying for workers' compensation insurance coverage. First, an employer's annual premium could be set at the time of policy issuance based on the employer's estimated payroll and paid up front, subject to adjustment based on a payroll audit after the end of the policy period. Second, the annual premium could be set based on estimated payroll, but then divided into monthly installments and paid monthly, again, subject to adjustment based on a payroll audit after the end of the policy period. Third, an employer could elect to use a payroll company, and have the payroll company provide FUBA with monthly reports of the employer's actual payroll. Under this third option, although at the outset an employer estimates its payroll in the application for workers' compensation insurance, the premiums are not based on estimated payroll; they are calculated after the end of each month based on that month's actual payroll as reported by the payroll company. As reasonably suggested by Ms. Phillips, option three represents a trade-off, whereby the insurer accepts a delay in premium payments in exchange for the certainty that the premiums are based on an employer's actual payroll.

12. Mex Group elected the third option, to use a payroll company to report Mex Group's actual monthly payroll, so that Mex Group was to pay its workers' compensation insurance monthly

premium after the end of each month, based on its actual payroll for each month. The premium changed from month to month, because it was calculated on the basis of the actual payroll report.

13. The payroll company used by Mex Group--JEMA Accounting, Payroll, Taxes and More (JEMA)--is a related company to Mex Group, operating from the same address as is sometimes used for Mex Group, and run by Ms. Reyes. No evidence was offered regarding JEMA's actual ownership or organizational structure, but the business was referred to as "Jesse's company," and named for Ms. Reyes and Mr. Rosales (JE for Jessina and MA for Marco).

14. For the seven-month period from October 1, 2013, through April 30, 2014, the JEMA monthly reports of Respondent's actual payroll added up to just under $120,000 in total payroll. In October 2013, Mr. Rosales and Ms. Reyes were reported in the category of "officer/non-exempt," but with zero salary. An additional 42 paid "helpers" were listed. In November and December 2013, Mr. Rosales and Ms. Reyes were each shown as "officer/exempt," with zero salary. Beginning in January 2014, Mr. Rosales was the only person reported in the "officer/exempt" category, with zero salary. Ms. Reyes was not shown on the report at all, consistent with her removal as an officer on Mex Group's annual report. The February 2014 JEMA report showed 66 non-exempt paid "helpers;" the April 2014 report showed 79 such helpers. Virtually all of the listed paid individuals in these

reports were categorized in class code 5445 (wallboard/drywall installation); to a much lesser extent, workers were occasionally classified under class code 5022, for masonry/stucco work.

15. In late September or early October 2013, Respondent hired Pedro Salmeron as a construction supervisor to line up new job opportunities for Mex Group and the necessary workers to perform the required work, and to supervise the jobs. Particularly for projects on Florida's east coast that Mr. Salmeron lined up for Mex Group, the contractors retaining Mex Group often dealt exclusively or primarily with Mr. Salmeron.

16. For example, on November 12, 2013, Mr. Rosales signed a contract for Mex Group to provide masonry/stucco labor for projects with Ron Kendall Masonry/K&T Stoneworks. Mex Group's insurance agent issued a certificate of liability insurance to Ron Kendall Masonry/K&T Stoneworks confirming that Mex Group had general liability and workers' compensation insurance coverage, for the following operations: plastering or stucco work; masonry; and drywall or wallboard installation.

17. Mr. Rosales then turned the responsibility for this contract over to Mr. Salmeron. Mr. Rosales signed an authorization for Mr. Salmeron to act as Mex Group's representative for purposes of submitting bills, picking up checks, and signing releases "with regard to all work between my company and Ron Kendall Masonry/K&T Stoneworks." Pursuant to

this authorization, Mr. Salmeron lined up crews to perform masonry labor for a Walmart addition in Delray Beach and for a separate project (called Walmart at Fontainebleau) for the construction of a new store in Miami. Mr. Salmeron submitted the Mex Group invoices to the contractor for these projects. Checks were issued to Mex Group in payment of the invoices, and the checks were deposited to Mex Group's bank account.

18. Mr. Salmeron made frequent trips to the Mex Group office in Lehigh Acres, where he gave Mr. Rosales lists of the workers retained for the Mex Group jobs. Mr. Rosales had Mex Group checks prepared to pay a portion of the compensation owed to the workers. In addition, Mr. Rosales gave large cash amounts to Mr. Salmeron for Mr. Salmeron's compensation for his work for Mex Group and for Mr. Salmeron to use the remaining cash to pay the rest of the compensation owed to the Mex Group workers. As Mr. Salmeron explained, the workers he lined up for Mex Group jobs were to be paid $12.00 per hour, and they usually worked 40 to 45 hours per week. In such cases, the Mex Group checks that Mr. Rosales had prepared would only cover 20 to 25 hours per week at $8.00 per hour, with the difference paid in cash provided by Mr. Rosales to Mr. Salmeron for that purpose. Mr. Salmeron testified credibly that Mr. Rosales told him that the reason for paying the workers partially with checks and partially in cash was to keep Mex Group's insurance costs down.

19. The Department's workers' compensation compliance investigators conduct random inspections of work sites to verify compliance with workers' compensation insurance requirements. Similar inspections are conducted by county officials to verify compliance with local licensing requirements. These state and local inspectors encountered Mex Group workers at several different job sites. On October 30, 2013, for example, a Department compliance investigator observed workers performing masonry work at two job sites in Fort Myers, and upon inquiry, they said they worked for Mex Group. She recorded the workers' names and her findings, including her confirmation that Mex Group had workers' compensation insurance coverage. One worker's name matches a Mex Group paid "helper" listed in JEMA's October 2013 payroll report, although the report classifies the worker under the drywall class code instead of the masonry code.

20. On January 16, 2014, a Collier County licensing officer observed Mex Group workers at a job site performing masonry work. He issued a citation to Mex Group for unlicensed contracting because the company was not licensed to perform masonry work. A Mex Group check was issued to the county to pay the citation.

21. Workers' compensation compliance investigator Jack Gumph observed Mex Group workers on different jobs sites in December 2013 and January 2014, performing metal framework and masonry work. Mr. Gumph was able to confirm workers'

compensation coverage for Mex Group workers on these occasions. Again, at least some, but not all, of the workers' names identified by Mr. Gumph match the names of Mex Group workers on the JEMA actual payroll reports.

22. On February 18, 2014, Mr. Gumph conducted a compliance investigation at a construction site in Naples, referred to as "Treviso Bay." He observed a number of workers engaged in masonry work--erecting concrete slab and block walls for a multi-family, multi-story structure. Mr. Gumph memorialized the scene in photos, which are in evidence. (Pet. Exh. 11). Mr. Gumph spoke first with Esteban Cortes, identified as the foreman. Mr. Cortes told Mr. Gumph that he worked for Pedro. Mr. Gumph recorded the names of the 12 workers on the site. Mr. Gumph then called "Pedro" at the number provided by Mr. Cortes, and spoke with Pedro Salmeron. Mr. Salmeron reported that he and the workers performing masonry work at the Treviso Bay job site worked for Mex Group.

23. Mr. Gumph contacted Mex Group to inquire about Mr. Salmeron and the workers at the Treviso Bay job site. Mr. Rosales or Ms. Reyes informed Mr. Gumph that Mr. Salmeron and the crew at Treviso Bay did not work for Mex Group.

24. Mr. Gumph then contacted the contractor responsible for the masonry work at Treviso Bay, Elite Structural Services (Elite), and asked for information about the masons working on

that job site. Elite identified Mex Group as the subcontractor hired to provide the masonry labor, and gave Mr. Salmeron's name as the contact person for Mex Group. Elite's owner informed Mr. Gumph that Mr. Salmeron contacted him in November 2013, seeking work for Mex Group. When Elite retained Mex Group for masonry work, Mex Group's insurance agent issued a certificate of insurance to Elite, confirming Mex Group's general liability and workers' compensation insurance. Thereafter, Elite received Mex Group invoices billing for the masonry work, which Elite paid by check to Mex Group. Either Mr. Salmeron would pick up the checks or Elite would tape the check to the outside of their office door and someone--they did not know who--would pick the checks up.[7/]

25. Mr. Gumph contacted Mex Group a second time to ask again about Mr. Salmeron's connection with Mex Group. Mr. Rosales and Ms. Reyes told Mr. Gumph that they had met Mr. Salmeron in November 2013, when he came to the Mex Group office looking for work, but that they had no work for him. They said he walked out and they never saw or heard from him again.

26. Mr. Gumph arranged a meeting the next day at the Collier County contractor licensing office with Mr. Rosales and Ms. Reyes, and separately, with Mr. Salmeron.

27. Mr. Gumph met first with Mr. Salmeron. Mr. Salmeron showed Mr. Gumph a series of text messages on his phone between Mr. Salmeron and a phone number that Mr. Gumph confirmed was the

phone number on Mr. Rosales's business card. The messages clearly demonstrated their ongoing business relationship: Mr. Rosales would ask for the address of a job site to go pick up a check that Mr. Salmeron confirmed would be taped to the door; Mr. Rosales would ask Mr. Salmeron to give him the list of workers; Mr. Salmeron would send Mr. Rosales the contact information for a contractor's office manager for Mr. Rosales to send the paperwork; Mr. Salmeron would tell Mr. Rosales to deposit money in Mr. Salmeron's account, and Mr. Rosales would confirm having done so; and Mr. Rosales would send the Mex Group bank account and routing numbers for Mr. Salmeron to make a deposit to Mex Group's account. These and similar exchanges took place regularly from early January through February 18, 2014.

28. Mr. Gumph then met with Mr. Rosales and Ms. Reyes, and asked again about Mex Group's relationship with Mr. Salmeron. This time, the story changed.[8/] Mr. Rosales now said that Mex Group had hired Mr. Salmeron in November 2013, but fired him on December 4, 2013, when he claimed that a licensing problem forced Mex Group to cease all business operations. However, Mr. Gumph had already seen contradictory text messages, which made clear that Mex Group had neither ceased business operations nor severed its business relationship with Mr. Salmeron in early December 2013. For example, on January 31, 2014, Mr. Rosales asked Mr. Salmeron to give worker names for checks, and Mr. Salmeron's

response conveyed three names; those three names appear on JEMA's list of Mex Group workers on the January actual payroll report. Mr. Gumph also obtained information from Elite showing that it had received invoices for Mex Group work done in late January and early February 2014, which were paid by checks issued to Mex Group and deposited in Mex Group's account.

29. To look further into these discrepancies, Mr. Gumph served a business records request on Mex Group on February 19, 2014, for the production of certain business records, including the records Mex Group was required to maintain for its payroll, bank accounts, and business disbursements, for the period from December 18, 2013, through February 18, 2014.

30. On February 26 and 27, 2014, Mex Group sent records to Mr. Gumph. Mr. Gumph found documentation in Mex Group's records that the workers performing masonry work at the Treviso Bay job site had received checks from Mex Group, with the last checks being issued to them on January 31, 2014. The Mex Group records also included weekly pay sheets, mostly handwritten, documenting cash payments to Mr. Salmeron throughout the time period for which records were produced, with the last payment covering the week from February 8, 2014, to February 15, 2014.

31. The handwritten pay sheets alone recorded a total of $114,195 in cash payments to Mr. Salmeron. In addition, Mex Group's bank records included copies of paychecks to employees

totaling over $63,000. Mr. Gumph found that Mex Group's records documented total remuneration paid to employees of nearly $180,000 in two months.[9/]

32. Mr. Gumph obtained Mex Group's workers' compensation insurance documents from FUBA. He reviewed Mex Group's application, signed by Mr. Rosales on October 1, 2013, estimating that Mex Group would have four employees for masonry-stucco work, with annual payroll of $53,000.00. He also noted the policy endorsement later that same month, to add $20,000 of estimated payroll for drywall work.

33. Mr. Gumph also found that the Mex Group bank account from December 18, 2013, through February 18, 2014, showed approximately half a million dollars deposited, and over a quarter of a million dollars of cash ATM withdrawals. The cash payments to Mr. Salmeron would have accounted for roughly half of the cash withdrawals; however, there was no documentation showing the purposes for the remaining cash withdrawals, either in a disbursement journal or otherwise (such as receipts) in Mex Group's business records.

34. Mr. Gumph reasonably considered these discrepancies to be significant and concerning. As a result, the SWO was issued and Mr. Gumph hand delivered it to Mr. Rosales on May 1, 2014. Along with the SWO, Mr. Gumph served a second request for production of business records covering the time period of

October 10, 2012, through May 1, 2014, for purposes of calculating the penalty called for by section 440.107(7).

35. Continuing with his investigation after the SWO was issued, Mr. Gumph obtained from FUBA the monthly reports of Mex Group's payroll submitted by JEMA. He found that the reported payroll for the seven-month period from October 2013 through April 2014 added up to approximately $120,000, much less than the $180,000 in documented compensation to Mex Group employees that he had identified from Mex Group's records for just two months within that seven-month period.

36. Mr. Gumph also found that the JEMA monthly payroll reports did not disclose five employees whose names he had recorded from inspections of Mex Group job sites in December 2013 and January 2014, and whose status as Mex Group employees had been confirmed by Mr. Rosales.

37. As another step in his investigation, Mr. Gumph contacted Mex Group's insurance agent to determine how many certificates of insurance he had filled out at Mex Group's request to submit to contractors. Certificates of insurance are issued to contractors that have hired a subcontractor, to confirm to the contractors that the subcontractor they hired has its own workers' compensation insurance. Mr. Gumph determined from this investigation that certificates of insurance were issued by Mex Group's insurance agent to 79 contractors at Mex Group's request.

38. Mr. Gumph then issued requests for production of business records to those 79 contractors to obtain records regarding their business with Mex Group. He received records pursuant to those requests from 41 of the 79 contractors.

39. At hearing, the Department established that between October 1, 2013, and May 1, 2014, Mex Group received payments from various contractors totaling more than $2.3 million for providing masonry, metal framing, and drywall labor.[10/]

40. While one would reasonably expect that some business expenses, other than payroll, were incurred by Mex Group to generate that amount of income, the records produced by Mex Group are alarmingly inadequate to prove the type or amount of business expenses incurred during the time that income was generated.

41. For example, the Mex Group bank records that were produced show regular payments of many thousands per month to "American Express." However, no records were produced of an American Express credit card held by Mex Group, nor were there records of business expenses incurred on a personal credit card so as to justify payment from Mex Group funds.

42. Mr. Rosales sought to explain the large ATM cash withdrawals by testifying that he and Ms. Reyes both had ATM cards and they withdrew cash as their salary. When Mr. Rosales was asked what Ms. Reyes's salary was, his response was, "Whatever she needed." (Pet. Exh. 63, p. 57). However,

Ms. Reyes was not a corporate officer as of January 1, 2014; thus, if she was working for Mex Group and compensated, her salary was required to be included as payroll.

43. As for 2013, while Ms. Reyes elected to be exempt from workers' compensation coverage, any salary she earned would have had to be reported to the Internal Revenue Service (IRS), but no W-2 form or 1099 form was produced. Mr. Rosales also elected to be exempt in 2013; a W-2 form issued for Mr. Rosales's earnings in 2013 reported that he drew a total of $6,000 in wages from Mex Group. The claim of unlimited salaries for Mr. Rosales and Ms. Reyes as an explanation for the large ATM cash withdrawals is contrary to the evidence. Instead, the more credible explanation was provided by Mr. Salmeron--that Mex Group was paying its employees partially by check and partially in cash.

44. Frederick Carroll, III, CPA, offered his expert opinion for the Department that Mex Group's records were wholly insufficient to determine Mex Group's payroll in 2013 or in the partial year 2014. For 2013, he pointed specifically to the absence of a corporate tax return, which would have allowed a comparison of 1099s and W-2s with the salary and contractor expense claimed on the corporate return. He noted that Mex Group's 2012 tax return, filed mid-September 2013, reflected a tax year ending December 31, 2012. Thus, the 2013 tax return would have been due on March 15, 2014. With an extension, it

could have been filed as late as September 15, 2014, but the 2013 tax return should have been filed by then. However, no 2013 corporate tax return was offered in evidence by Mex Group.

45. Mr. Carroll opined that the large amount of unexplained cash disbursements caused concern in the absence of a full general ledger, with subsidiary journals, such as a disbursements ledger that would show the recipient of each cash disbursement and the purpose. Indeed, the Department requires employers to maintain precisely these kinds of records. If Mex Group maintains them, it did not produce them.

46. Mr. Carroll also observed inconsistencies from the documentation that was provided. For example, he offered the opinion that it appeared from some of the records that were produced that there may have been another corporate bank account besides those accounts disclosed in the records produced by Mex Group. Mr. Carroll's opinion was right on target, as revealed on the last day of hearing, when Mex Group attempted to offer records of an additional "overlooked" bank account that had not been disclosed previously. Mex Group was not permitted to present new records after Petitioner had rested its case. The belated offer was too late, far beyond the many past deadlines calling for disclosure of these records.

47. The Department proved, clearly and convincingly, that beginning on October 1, 2013, Mex Group failed to secure payment

of workers' compensation because Mex Group materially understated or concealed payroll. The JEMA monthly payroll reports provided to FUBA for Mex Group were materially understated when compared to the payroll that can be ascertained from what records Mex Group did produce to the Department. Compensation shown on the JEMA reports for listed employees was materially understated; and individual employees were omitted entirely from the reports.

48. When FUBA learned of the SWO, it cancelled Mex Group's policy and attempted a payroll audit. Mex Group was uncooperative. While some sort of audit was conducted, FUBA reasonably lacks confidence that the results uncovered the extent to which Mex Group understated or concealed payroll.[11/]

49. Mex Group contends that FUBA's audit must be accepted as a conclusive determination of the amount by which Mex Group's payroll was understated. However, the FUBA audit (in which FUBA lacks confidence) was not based on an evidentiary record created in a four-day hearing. The findings here are based--as they must be--exclusively on the record evidence.

Penalty Calculation

50. Based on the findings above, the penalty calculation is properly based on the time period from October 10, 2012, through May 1, 2014, which was the period of non-compliance.

51. The penalty calculation is carried out in accordance with a formula set forth on the Department's penalty calculation

worksheet, which is adopted as a rule. See Fla. Admin. Code R. 69L-6.027. Therefore, application of the formula is not subject to debate, so long as the proper values are plugged into the formula. The variables are: employee names; the period(s) of non-compliance; the gross payroll for such period(s); whether the payroll is actual or imputed; the class code; and the approved manual rate applicable to the class code for the time period(s).

52. The Department's first quantification of the penalty assessment in the Amended Order of Penalty Assessment imputed payroll for the entire time period, due to insufficient records to determine Mex Group's payroll.

53. Based on business records ultimately produced by Mex Group, the Department reasonably determined that the records were sufficient to determine Mex Group's payroll from October 10, 2012, through December 31, 2012. Included in the documents produced for this short period were bank records, the 1099s issued to five workers, and Mex Group's 2012 corporate tax return, as filed with the IRS, all of which tied together. In other words, the bank deposits matched the gross income shown on the tax return, and the withdrawals tied to the business expenses on the tax return, including compensation paid by Mex Group to the five workers, as shown on the 1099s.

54. The 2012 records were far from sufficient, however, for purposes of identifying the terms on which the five workers were

hired to work for Mex Group, what their duties were, or the terms for their compensation. There was no evidence offered to show whether workers were required to provide their own supplies and equipment, or whether those were provided by Mex Group. There was no documentation showing the sources of Mex Group's 2012 revenue; there were only bank records and the tax return showing the amount of revenue.

55. Mr. Rosales's testimony describing Mex Group's construction site debris removal jobs that he solicited from contractors and performed with hired helpers was credited. In the absence of records establishing the extent to which Mex Group's five workers in 2012 performed construction site debris removal, the Department reasonably classified those five workers in class code 5610 (Cleaner-Debris Removal-Construction).

56. The Department proved that the approved manual rate for code 5610 was applied to each worker's actual pay according to the 1099s to calculate the premium that should have been paid for workers' compensation coverage. That premium amount was then multiplied by 1.5 to obtain the statutory penalty.

57. For the remaining non-compliance period, January 1, 2013, through May 1, 2014, the Department proved, clearly and convincingly, that Mex Group's records were insufficient to determine actual payroll. Mr. Carroll's opinion is credited in this regard. The contrary opinion offered by Mex Group's expert

is not credited; she could not even establish as a predicate that she reviewed the records produced by Mex Group to the Department in response to its two business records requests.

58. The Department reasonably included 87 Mex Group employees for the entire time period for which payroll was imputed. The 87 employees either were identified as Mex Group employees by Mr. Gumph when conducting his compliance investigations at job sites, or identified in records as Mex Group employees at some point during the imputation period. While Respondent attempted to establish that not all 87 employees were working for Mex Group the entire time, the Department's approach is reasonable, consistent with Department rules and precedent, and in keeping the strong public policy underlying the workers' compensation laws. Employers are required to keep employee records that show "[e]ach day, month, and year or pay period when the employer engaged the person in employment." Fla. Admin. Code R. 69L-6.015(3)(a)3. In the absence of such records, the Department properly included all employees who worked for Mex Group at any time during the period in which payroll was imputed.

59. Class code 5022, for Masonry NOC (meaning "not otherwise classified"), was reasonably assigned to the 87 Mex Group employees for penalty calculation purposes. Code 5022 "includes masonry work in connection with the construction of residential, commercial, or industrial structures utilizing

brick, brick veneer or cement, concrete, stone, marble or glass blocks. . . . Code 5022 is additionally applied to plastering or stucco work on building exteriors." Mex Group records confirm that masonry, plastering, and stucco work accounted for a significant part of Mex Group's labor business; indeed, class code 5022 was the only class code identified in Mex Group's workers' compensation application as of October 1, 2013. Compliance investigators also confirm their multiple encounters with Mex Group employees at construction sites performing masonry and stucco work. Code 5022 was shown to be the highest job class code applicable to the 87 employees, based on a combination of records and the physical observations of the investigator.

60. The Department proved that the approved manual rates in effect for Masonry NOC were applied in its penalty calculations. The Department's calculation properly applied the approved manual rate in effect for the period of January 1, 2013, through June 30, 2013. When the approved rate was reduced on July 1, 2013, the Department applied the reduced rate to calculate the imputed penalty for July 1, 2013, through September 30, 2013.

61. From October 1, 2013, through May 1, 2014, the Department's penalty calculation reasonably used FUBA's approved rates applicable to the class code Masonry NOC for the workers' compensation insurance policy issued to Mex Group. The calculation for this period properly seeks to quantify the

premiums that would have been paid but for the violations. Accordingly, the premium that would have been charged for the imputed payroll was the appropriate starting place. The Department then subtracted (credited) the premiums actually paid by Mex Group.

62. The Department proved that it reasonably imputed salary to Mr. Rosales and Ms. Reyes for January 1, 2013, through March 4, 2013, because they did not receive their certificates of exemption as corporate officers until March 5, 2013. For this time period, the Department reasonably applied code 5610 to Mr. Rosales, as the highest class code supported by the evidence, based on his testimony describing the construction debris removal jobs he solicited from contractors and performed with Mex Group workers. For Ms. Reyes, the records show that her work for Mex Group was in an administrative or clerical capacity. She dispatched workers to jobs, and translated business documents for Mr. Rosales. Accordingly, the Department reasonably used class code 8810 (clerical NOC) to impute Ms. Reyes's salary.

63. The methodology for imputing payroll is set forth in section 440.107(7)(e) and Florida Administrative Code Rule 69L-6.021. The starting place is the statewide average weekly wage, as defined in section 440.12(2), Florida Statutes. Rule 69L-6.021 directs the Department to use the statewide average weekly wage that was in effect when the SWO was served on the employer.

The Department proved that the statewide average weekly wage in effect on May 1, 2014, was $827.08. This amount represents the statewide weekly wage averaged over the four quarters ending June 30, 2013, as reported by the Department of Economic Opportunity on November 18, 2013.

64. The Department properly applied the statewide average weekly wage, multiplied by 1.5 (as provided in § 440.107(7)(e), and the Department's penalty calculation worksheet), to calculate the gross payroll per person used in the penalty calculation for the first two imputed payroll time periods, January 1, 2013, through June 30, 2013, and July 1, 2013, through September 30, 2013. The differences in these two time periods are the inclusion of imputed payroll for Mr. Rosales and Ms. Reyes for part of the first time period, and application of the different approved manual rates in effect for the two time periods, as found above.

65. For the final time period, October 1, 2013, through May 1, 2014, the Department properly applied the statewide average weekly wage, multiplied by 1.5, multiplied by 87 employees, to determine the total imputed gross payroll.

66. The Department proved that it used appropriate values to calculate the penalty required for Mex Group's violations, and that the penalty calculation set forth in the Third Amended Order of Penalty Assessment is correct. The penalty that the

Department is required to assess for Mex Group's violations found herein is $1,213,357.30.

CONCLUSIONS OF LAW

67. DOAH has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

68. The Department is responsible for enforcing the requirement that employers subject to chapter 440, Florida Statutes, secure the payment of workers' compensation by obtaining workers' compensation coverage for their employees "that meets the requirements of [chapter 440] and the Florida Insurance Code." § 440.107(2), Fla. Stat. Even when an employer obtains workers' compensation insurance coverage, if the employer materially understates or conceals payroll, the employer is "deemed to have failed to secure payment of workers' compensation[.]" Id.

69. The failure of an employer to comply with the workers' compensation coverage requirements in chapter 440 "poses an immediate danger to public health, safety, and welfare." § 440.107(1), Fla. Stat. Accordingly, section 440.107 gives the Department broad investigative authority, including the power to compel production of business records to ensure employer compliance; broad enforcement authority, including the power to issue SWOs and assess penalties when the Department determines

there are violations; and corresponding rulemaking authority, to promulgate rules to administer section 440.107, which the Department has done in Florida Administrative Code Chapter 69L-6.

70. In this case, the Department issued its SWO and penalty assessment orders, charging that Mex Group failed to secure workers' compensation as required by chapter 440 for the period of October 10, 2012, through May 1, 2014, for which the Department contends that the penalty it calculated (as reduced by amended orders of penalty assessment) should be imposed.

71. Because administrative fines are penal in nature, the Department is required to prove its charges and the propriety of its penalty calculation by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1995).

72. As stated 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). Accord Westinghouse Electric Corp. v. Shuler Bros., 590 So. 2d 986, 988

(Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

73. However, on issues for which Respondent is asserting the affirmative, Respondent bears the burden of proof. In particular, to the extent that Respondent claims that prior to October 1, 2013, its workers were independent contractors, Respondent bears the burden of proving the statutory criteria for independent contractor status. See Dep't of Fin. Servs., Div. of Wrkrs.' Comp. v. Blue Diamond Deco Stone, Inc., Case No. 06-4198 (Fla. DOAH Feb. 21, 2007), modified on other grounds (Fla. DFS May 22, 2007) (recognizing that after a statutory amendment effective January 1, 2004, the party claiming that workers are independent contractors, so as to be excluded from the definition of a non-construction industry employee, has the burden of proving independent contractor status); see generally Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349 (Fla. 1st DCA 1977) (burden of proof is generally on the party asserting the affirmative of an issue).

74. Mex Group is charged with failing to secure the payment of workers' compensation, in violation of sections 440.10(1), 440.38(1), and 440.107(2). Section 440.107(2) provides in pertinent part:

> For purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. However, if at any time an employer materially understates or conceals payroll . . . such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.

75. Chapter 440 broadly defines "employer" as "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

76. "Employment" means "any service performed by an employee for the person employing him or her . . . [and includes] [a]ll 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." § 440.02(17)(a) & (b)2., Fla. Stat.

77. All persons receiving remuneration for services while engaged in employment are considered employees. § 440.02(15)(a), Fla. Stat.

78. The term "employee" includes "[a]n independent contractor working or performing services in the construction industry[.]" § 440.02(15)(c), Fla. Stat. Thus, in the construction industry, the "employee" definition "eliminates any legal significance in the distinction between an employee and an

independent contractor under the Workers' Compensation Law." Bend v. Shamrock Servs., 59 So. 3d 153, 155 (Fla. 1st DCA 2011).

79. In addition, sole proprietors, partners, and subcontractors performing services for remuneration in the construction industry are included in the statutory definition of "employee." § 440.02(15)(c)2., Fla. Stat. Certain corporate officers can become exempt from the coverage requirements of chapter 440, but must affirmatively make that election. §§ 440.02(15)(b) and 440.05, Fla. Stat.

80. Section 440.02(8), Florida Statutes, defines "construction industry" as "for-profit activities involving any building, clearing, filling, excavation, or a substantial improvement in the size or use of any structure or the appearance of any land." The Department is given authority to, "by rule, establish standard industrial classification codes and definitions thereof which meet the criteria of the terms 'construction industry' as set forth in this section." The Department has done so, in rule 69L-6.021.

81. As found above, the Department proved that Mex Group was engaged in the construction industry. As provided in rule 69L-6.021(2), "For purposes of this rule, 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."

82. From October 10, 2012, through September 30, 2013, Mex Group's business included debris removal work; Mr. Rosales solicited these jobs from contractors at construction sites.[12/] Mex Group's construction site debris removal work is properly classified under construction industry classification code 5610, adopted by rule 69L-6.021(2)(ww). From October 1, 2013, through May 1, 2014, Mex Group's business consisted of masonry, plastering, and stucco work, all properly classified as code 5022, and wallboard/drywall installation, class code 5445. These are both construction industry class codes, adopted by rule 69L-6.021(2)(j) and (ff), respectively.

83. It was undisputed that Mex Group had no workers' compensation insurance coverage until October 1, 2013. Accordingly, the Department proved that Mex Group failed to secure workers' compensation as required by chapter 440, from October 10, 2012, through September 30, 2013.

84. Based on the Findings of Fact above, the Department proved, clearly and convincingly, that Mex Group materially understated or concealed payroll from October 1, 2013, through May 1, 2014. The magnitude by which payroll was understated or concealed was shown to be more than just material; it was vast. The means by which Mex Group understated or concealed payroll was proven to be through a combination of omitting employees from its actual payroll reports and understating the amount of

compensation paid to those employees who were disclosed in its actual payroll reports. The Department proved that Mex Group engaged in a practice of issuing checks that covered only a fraction of employees' compensation, while directing cash payments to the workers for the rest of their compensation for the work they performed for Mex Group. Mex Group's own records disclose some of these cash payments, but the unexplained large cash withdrawals streaming from Mex Group's bank accounts suggest the likelihood of much larger undisclosed supplemental cash payments to employees.

85. Mex Group's material understatement and concealment of payroll from October 1, 2013, through May 1, 2014, is deemed the failure to secure workers' compensation. § 440.107(2), Fla. Stat.

86. Accordingly, the Department proved that Mex Group committed the charged violations, giving rise to the imposition of the penalties described in section 440.107(7)(d) and/or (e), and implementing rules.

87. Section 440.107(7) addresses the penalty determination, providing in pertinent part:

> (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.
>
> * * *
>
> (e) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

88. As found above, the Department properly calculated the penalty pursuant to section 440.107(7)(d) for the period of October 10, 2012, through December 31, 2012, based on Mex Group's actual payroll.

89. For the remaining non-compliance period, January 1, 2013, through May 1, 2014, the Department properly calculated the penalty pursuant to section 440.107(7)(e), by imputing Mex Group's payroll, based on its reasonable determination that Mex Group's business records were insufficient to determine payroll.

90. The glaring shortcomings in Mex Group's business records produced to the Department are evident from a review of what the Department's rule requires employers to maintain and produce upon demand. In its current form since 2005, Florida

Administrative Code Rule 69L-6.015 specifies the business-record requirements, including the following:

> (3) Employment records. Every employer shall maintain employment records pertaining to every person to whom the employer paid or owes remuneration for the performance of any work or service in connection with any employment under any appointment or contract for hire or apprenticeship.
>
> (a) The employment records required by this subsection shall indicate with regard to every such person:
>
> 1. Name of the person.
>
> 2. Social Security Number, Federal Employer Identification Number, or IRS Tax Identification Number of the person.
>
> 3. Each day, month, and year or pay period when the employer engaged the person in employment.
>
> 4. Amount of remuneration paid or owed by the employer for work or service performed by the person. Where remuneration is paid or owed on an hourly basis, the record shall indicate the day, month, and year of work or service and the number of hours worked by the person during each pay period. Where remuneration is paid or owed on any basis other than hourly, the record shall specify the basis, such as competitive bid, piece rate, or task, and indicate the day, month, and year, when remuneration was earned.
>
> (b) In addition, every employer shall maintain the following records for each such person:

1. All checks or other records provided to the person for salary, wage, or earned income.

2. All Form 1099 Miscellaneous Income and Form W-2 Wage and Tax Statements issued to the person.

3. All written contracts or agreements between the employer and the person that describe the terms of employment.

4. All employment and unemployment reports filed pursuant to Florida law.

(4) Tax records. Every employer shall maintain all forms, together with supporting records and schedules, filed with the Internal Revenue Service.

(5) Account records. Every employer shall maintain monthly, quarterly, or annual statements for all open or closed business accounts established by the employer or on its behalf with any credit card company or any financial institution, such as bank, savings bank, savings and loan association, credit union, or trust company.

(6) Disbursements. Every employer shall maintain a journal of its check and cash disbursements as well as a copy of each cashier's check, bank check, and money order, indicating chronologically the disbursement date, to whom the money was paid, the payment amount, and the purpose.

* * *

(10) Contracts. Each employer shall maintain:

(a) All complete executed written contracts between it and a general contractor, subcontractor, independent contractor, or employee leasing company licensed under Chapter 468, F.S., that specify the terms of

> reimbursement and performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship.
>
> (b) Any records that establish the statutory elements of independent contractor prescribed in Section 440.02(15)(d), F.S., for each worker who claims to be or who the employer claims to be an independent contractor and not an employee under the workers' compensation law.
>
> (11) Records retention. An employer under the workers' compensation law shall maintain the records specified in this rule for the current calendar year to date and for the preceding three calendar years, in original form, whether paper, film, machine readable electronic material, or other media. A legible copy of the original record is an acceptable substitute for the original.

91. Among other shortcomings, some of the more notable record deficiencies as measured by the rule requirements, and that caused the Department to reasonably deem the records insufficient to determine payroll, were as follows: Mex Group produced no records that showed, for each employee, each day, month, and year or pay period when Mex Group engaged the person in employment; Mex Group produced no records that showed the day, month, and year of work, and the number of hours worked, for each employee paid by the hour; Mex Group failed to produce all of its tax records (or explain why expected filings were not made); Mex Group failed to produce records of all of its business accounts; and Mex Group failed to produce a journal of its check and cash

disbursements "indicating chronologically the disbursements date, to whom the money was paid, the payment amount, and the purpose."

92. If an employer fails in its statutory and rule duty to maintain and produce the required business records, imputation follows as a matter of law. Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007); Jesus Sosa d/b/a Jesus Sosa Corp., a dissolved Florida corporation v. Dep't of Fin. Servs., Case No. 08-3078 (Fla. DOAH 08-3078), reversed in pertinent part (Fla. DFS Feb. 23, 2009) (Sosa Final Order) (clarifying that imputation is required whether an employer refuses to produce any records, or an employer produces records, but the records are insufficient); aff'd, per curiam, Case No. 1D09-1409 (Fla. 1st DCA Dec. 3, 2009). The Department followed its rule methodology to impute payroll, necessitated by Respondent's failure to maintain and produce sufficient records to determine payroll. Rule 69L-6.028(3) provides:

> When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the time period requested in the business records request for purposes of calculating the penalty provided for in Section 440.107(7)(d), F.S., the imputed weekly payroll for each employee, corporate officer, sole proprietor or partner shall be calculated as follows:
>
> (a) For each employee, other than corporate officers, identified by the department as an

> employee of such employer at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.
>
> (b) If the employer is a corporation, for each corporate officer of such employer identified as such on the records of the Division of Corporations at the time of issuance of the stop-work order, the imputed weekly payroll for each week of the employer's non-compliance for each such corporate officer shall be the statewide average weekly wage as defined in Section 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5.
>
> (c) If a portion of the period of non-compliance includes a partial week of non-compliance, the imputed weekly payroll for such partial week of non-compliance shall be prorated from the imputed weekly payroll for a full week.
>
> (d) The imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be assigned to the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of that employee's activities.

93. In applying the imputation rule, the Department properly included all Mex Group employees identified "at any time during the employer's non-compliance" for which record deficiencies required imputation. Department precedent

establishes that where the records are deficient, it is improper to attempt to pick partial information out of the deficient records in an attempt to patch together employee rosters. Instead, when an employer fails to produce all of the records required by rule 69L-6.015 to show the actual duration of each individual's employment, imputation of the employment duration is required. To do otherwise would "undoubtedly encourage unscrupulous employers to manipulate the Division by producing only those records that would illegally minimize the penalty prescribed by the governing statutes." Sosa Final Order at 3. As noted in the Sosa Final Order, this result was required even if the employer was merely negligent in failing to maintain all of the required records: "While imputation may work a hardship on an employer who is merely negligent and not ill-motivated, that employer can avoid that hardship by not indulging in that negligence." Id. at 3. The Department emphasized the public policy considerations that dictate "strict enforcement of legislation specifically designed to substantially punish non-compliant employers so as to increase employer compliance and ensure workers' compensation coverage for their employees." Id.

94. The Department properly selected classification codes, in accordance with the imputed payroll rule, based on "the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical

observation of that employee's activities." Fla. Admin. Code R. 69L-6.028(3)(d); Sosa Final Order at 2 (noting that the ALJ "correctly determined that the dearth of information supplied by Sosa's business records required imputation of classifications.").

95. The Department also followed the statutory directive to impute payroll using the "statewide average weekly wage," defined in section 440.12(2), multiplied by 1.5. § 440.107(7)(e), Fla. Stat. Section 440.12(2) provides:

> [T]he "statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported to the Department of Economic Opportunity for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. The statewide average weekly wage determined by the Department of Economic Opportunity shall be reported annually to the Legislature.

96. Rule 69L-6.028(3)(b) specifies that in imputing payroll, the Department is to use the statewide average weekly wage that is in effect at the time the stop-work order was issued to the employer. The Department did so; Respondent does not contend otherwise.

97. Respondent contends in its PRO that it was allowed to materially understate its payroll throughout the policy year, because the policy was an "open policy" whereby payroll was subject to adjustment throughout the policy term and a truing-up through an audit at the end of the policy term. That argument is contrary to the evidence.

98. While it is true that the FUBA policy was an "open policy" and that Respondent's payroll could change throughout the policy term, with resulting adjustments to the coverage and premiums, it is not true that Respondent's particular policy terms permitted any material understatement of Respondent's payroll. Instead, as found above, the option chosen by Respondent required it to self-report its actual payroll each month and pay monthly premiums after the end of each month, calculated on the basis of the monthly actual payroll report. As found above, each monthly "actual" payroll report submitted to FUBA materially understated and/or concealed payroll.

99. In this regard, this case is very different from Department of Financial Services, Division of Workers' Compensation v. Bicon, Case No. 05-2966 (Fla. DOAH Mar. 16, 2006), modified on other grounds (Fla. DFS June 14, 2006). In Bicon, the employer paid estimated premiums that were set on the basis of estimated payroll at the outset of the policy term. The ALJ found that the only evidence offered to prove the employer

materially understated payroll was the fact that the audit after the end of the policy term showed actual payroll that was much higher than the estimate. The ALJ found the evidence of underestimated payroll insufficient to prove understated payroll. In short, an underestimate does not equate to an understatement.

100. Unlike the employer in Bicon, Respondent did not elect the premium option for its FUBA policy to pay premiums on the basis of estimated payroll. While Respondent's PRO attempts to paraphrase the Bicon determinations as if they were applicable to this case, they simply do not fit. Here, there was compelling evidence of Respondent's material understatements, on a monthly basis, of its "actual" payroll.

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 determining that Respondent, Mex Group Maintenance and Repair, Inc., failed to secure the payment of workers' compensation for its employees in violation of sections 440.10(1)(a) and 440.38, Florida Statutes, and assessing a penalty against Respondent in the amount of $1,213,357.30.

DONE AND ENTERED this 13th day of February, 2015, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2015.

ENDNOTES

[1/] Unless otherwise indicated, references herein to Florida Statutes are to the 2013 codification, as the law in effect at the time of Respondent's alleged violations at issue. While some of the allegations address Respondent's actions in late 2012 and early 2013, the 2012 codification of chapter 440 was not materially different; a single 2013 bill amending chapter 440 did not materially alter any provisions germane to addressing Respondent's actions that predated that amendment. See Ch. 2013-141, § 4, Laws of Fla. (2013).

[2/] The Department offered the Third Amended Order of Penalty Assessment during hearing to account for a calculation error discovered while preparing for hearing. The sole change between the second and third proposed penalties was the correction of a single math error described on the record. The correction was in Respondent's favor. Accordingly, the Third Amended Order of Penalty Assessment was allowed, again, over Respondent's objection, despite the fact that the correction reduced the proposed penalty and had no effect on Respondent's ability to prepare its defense against the Department's penalty calculation.

[3/] Both parties' exhibits are replete with private identifying information, including social security numbers, driver's license

numbers, bank account numbers, and similar information that should have been redacted. Upon discovering the first few such entries at hearing, the undersigned initially agreed to take care of obliterating the numbers. However, it quickly became apparent that the failure to redact these sensitive entries was widespread throughout the voluminous exhibits. Upon closure of DOAH's case file, the exhibits will be part of the record transmitted to the Department. Counsel for the Department assumed responsibility for ensuring redaction of this private identifying information before the exhibits leave the Department's custody, such as in response to a public records request. In the future, parties are reminded that they are responsible for ensuring that confidential or sensitive private information that has no bearing on the issues in a proceeding is redacted. If there is any question about whether redaction is appropriate (such as if the sensitive information is relevant to the litigation, which is not the case here), an alternative would be to move for a protective order.

[4/] The 17 "supplementary exhibits" were not produced to the Department in response to either of its two business records requests served on February 19, 2014, and May 1, 2014, nor were they produced in response to the Department's formal discovery in this proceeding, nor were they disclosed as proposed exhibits by the deadline imposed by Order of Pre-Hearing Instructions (15 days before the final hearing). In its Notices of Filing the supplementary exhibits, Respondent asserted that the new proposed exhibits were "in response to" the Department's Third Amended Order of Penalty Assessment offered during the final hearing to correct a single math error. At hearing, Respondent retreated from the claim that the new exhibits responded in any way to the math error. Instead, the proposed new exhibits were described as additional records that had been overlooked, such as records of an additional bank account that had been omitted from the records produced to the Department. In addition, Mr. Rosales described one of the proposed supplementary exhibits as a document he prepared to summarize the other previously undisclosed records. Mr. Rosales admitted to having prepared this new summary at counsel's request during the days between October 8, 2014, when the hearing was scheduled to conclude, and the additional scheduled hearing day of October 17, 2014. Respondent sought to justify its 17 proposed new exhibits on the grounds that this is a de novo hearing. However, no concept of "de novo" could possibly justify waiting until after Petitioner rests its case and taking advantage of the fortuitous need for an additional hearing day to offer records that Respondent was obligated to provide long ago, and to prepare new proposed exhibits. The suggestion was, quite frankly, astonishing.

[5/] Mr. Rosales described Mex Group Cleaning Service's construction debris removal work in his deposition. (Pet. Exh. 63). At the final hearing, both Mr. Rosales and Ms. Reyes attempted to retreat from Mr. Rosales's deposition testimony, by suggesting that what Mr. Rosales meant to say in his deposition was that it was his personal hobby to pick up discarded items and sell them to scrap companies, which he did alone, after hours, and not on behalf of Mex Group Cleaning Service. Their attempted retreat from Mr. Rosales's clear description of the debris removal jobs he solicited from construction site contractors and performed with Mex Group Cleaning Service workers was not credible and is not credited.

[6/] References to "class codes" are to the construction industry classification codes and descriptions published in the Florida exception pages of the National Council of Compensation Insurance, Inc. (NCCI), Basic Manual, 2001 edition, and corresponding updates through February 1, 2011, incorporated by reference in Florida Administrative Code Rule 69L-6.021, as amended effective October 11, 2011.

[7/] At hearing, Mr. Rosales continued to deny that the Treviso Bay block masonry work supervised by Mr. Salmeron was for Mex Group. However, the testimony by Mr. Salmeron and Elite's owner corroborated Elite's business records, which included several Mex Group invoices to Elite for the block masonry work at Treviso Bay, and Elite checks to Mex Group from November 2013 to February 11, 2014. A Mex Group Cleaning Service invoice dated January 27, 2014, charged $9,215.00 for "block labor only" and was marked paid as of February 4, 2014, by check number 1590. A copy of that check shows that it was issued by Elite on February 4, 2014, payable to Mex Group Cleaning Service in the amount of $9,215.00. A copy of the back of the check shows that it was stamped for deposit to the account of Mex Group Cleaning Service Inc.; the same description applies to a check issued on January 28, 2014, and another check issued on February 11, 2014. Mr. Rosales's attempt to renounce any Mex Group connection to the Treviso Bay project was not credible and was contrary to the documentation produced by Elite.

[8/] Mr. Rosales's testimony describing Mex Group's relationship with Mr. Salmeron also kept changing. In deposition, Mr. Rosales testified that Mr. Salmeron came to Mex Group's office around the end of October 2013, and that he worked for Mex Group on "one job" involving drywall. After that job, Mr. Rosales said that he asked Mr. Salmeron to stop working for him. However, just a few pages later, Mr. Rosales changed his testimony to say that Mex

Group paid Mr. Salmeron for several jobs in November and December 2013, and early January 2014; that the contractors for whom these jobs were performed paid Mex Group; that Mr. Salmeron would arrange for workers for these jobs and give Mr. Rosales lists with the names of the workers; and that Mr. Rosales (Mex Group) gave payment to Mr. Salmeron for his services and for him to pay the workers hired for these jobs. But Mr. Rosales insisted that Mr. Salmeron did not work for Mex Group after the middle of January, because Mr. Salmeron started taking projects for work that Mex Group did not do. Mr. Rosales's own words sent by text message showed that Mr. Rosales's testimony was not truthful about when Mr. Salmeron stopped working for Mex Group. The impression given was that Mr. Rosales was attempting to cast the blame on Mr. Salmeron, as a scapegoat, for Mex Group's unauthorized masonry work for which it was cited in Collier County. However, the record is clear that masonry work was a significant part of Mex Group's business.

[9/] Mr. Gumph's findings were based on the documents produced by Mex Group in February 2014, in evidence as Petitioner's Exhibit 19. The cash payments to Mr. Salmeron identified by Mr. Gumph were taken from Mex Group's handwritten records at pages 173 through 182. However, additional cash payments, totaling $23,368.00, were recorded on pages 171 and 172. Therefore, Mex Group's records show total cash payments to Mr. Salmeron from December 18, 2013, through February 18, 2014, of $137,563.00, which would bring the total documented payroll to over $200,000 for this two-month period. It is also noteworthy that page 171 documents that workers were paid with a combination of checks and cash, a practice corroborated by Mr. Salmeron.

[10/] The $2.3 million of contractor payments to Mex Group for labor is culled only from the contractor records authenticated through deposition or hearing testimony of records custodians or other qualified witnesses who laid sufficient predicates for admission of the records under the "business records" hearsay exception. § 90.803(6), Fla. Stat. Respondent made blanket objections to any hearsay within those records, but Respondent was invited to point out specific instances of objectionable hearsay in its PRO, and did not. The undersigned finds that the business records generally had two categories of information: either regularly recorded entries by contractor personnel in the ordinary conduct of their business (such as marking invoices "paid" and issuing checks); or statements by agents or employees of Mex Group concerning matters within the scope of their agency or employment (such as the Mex Group invoices themselves describing the work billed, or certificates of insurance issued

by Mex Group's insurance agent), and thus, qualifying as admissions offered against a party. § 90.803(18)(d), Fla. Stat.

[11/] A workers' compensation claim was filed with FUBA by a Mex Group employee who was not disclosed as an employee in Mex Group's audited records. This one known omission (known only because the employee filed a claim for an on-the-job injury) reasonably causes FUBA concern that it still does not know the full extent of Respondent's payroll. In response, Mr. Rosales testified that the injured employee was not disclosed because he was only employed for one day, when he was injured on the job. According to Mr. Rosales, the employee was expected to come in to pick up his paycheck, but when the employee failed to pick up his paycheck (perhaps because he was in the hospital), the paycheck was voided. Mr. Rosales claims that it did not occur to him to mail the check to the injured employee, but said that he would probably do so now. Mr. Rosales's explanation for the omission of the injured employee from Respondent's payroll records is rejected as unreasonable. The employee admittedly worked for Mex Group for pay; even if the agreed compensation was not yet actually paid, it should have been reported as owed. See Fla. Admin. Code R. 69L-6.015(3)(a)4. (employer's records must identify amount of remuneration paid or owed by the employer for work performed by each employee). Mr. Rosales's rationale for not reporting the one employee known by FUBA to have been omitted suggests the possibility of others omitted for similar reasons.

[12/] As found above, the contrary testimony, contending that Respondent provided only residential janitorial services, was rejected as not credible. Accordingly, Respondent was subject to the workers' compensation requirements, as an employer engaged in the construction industry with at least one employee (defined to include an independent contractor). Moreover, even if the Department had failed to prove that Respondent was engaged in the construction industry in its first year, the evidence established that Respondent had four or more employees. Respondent had five employees in its first two and one half months of business, and increased the number of workers in 2013. Respondent's own exhibits establish that it added approximately ten workers in January 2013. Thus, Respondent would have been subject to the workers' compensation requirements even if it had not been in the construction industry, absent evidence proving that Respondent's workers were independent contractors. Although Respondent argued that was the case, Respondent failed to meet its burden of proving its contention that its workers were independent contractors. Section 440.02(15)(d) contains detailed criteria which must be met to satisfy the definition of independent

contractor, and there is insufficient evidence that any of the statutory criteria were met by Mex Group's workers between October 10, 2012, and September 30, 2013.

COPIES FURNISHED:

Kristian Eiler Dunn, Esquire
Dunn and Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301
(eServed)

Bennett M. Miller, Esquire
Dunn and Miller, P.A.
1606 Redwood Drive
Tallahassee, Florida 32301
(eServed)

Elizabeth A. Miller, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229
(eServed)

Julie Jones, CP, FRP, Agency Clerk
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390
(eServed)

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.