

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 14-2830

A TO Z ROOFING, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 28, 2014, in Tallahassee, Florida, before James H. Peterson, III, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary K. Surles, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent Richard Paul Morejon, pro se
A to Z Roofing, Inc.
3539 Apalachee Parkway, Suite 3-204
Tallahassee, Florida 32311

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated the provisions of chapter 440, Florida Statutes,^{1/} by failing to secure the payment of workers' compensation, as alleged in the

Stop-Work Order and Third Amended Order of Penalty Assessment, and if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On September 23, 2013, the Department of Financial Services, Division of Workers' Compensation (Department or Petitioner), issued and delivered a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) against Respondent A to Z Roofing, Inc. (A to Z Roofing or Respondent), ordering Respondent to immediately cease all business operations for all worksites in the State. On September 30, 2013, the Department delivered an Amended Order of Penalty Assessment to Respondent. The Stop-Work Order advised Respondent of its right to have administrative review of the Department's action by filing a petition for hearing within 21 days. Respondent timely requested an administrative hearing by filing with the Department a document dated October 3, 2013, entitled "Election of Proceeding" (Request for Hearing) in which Respondent contested one or more of the Department's allegations in the Stop-Work Order and Amended Order of Penalty Assessment. The Department's Agency Clerk's stamp indicates that Respondent's Request for Hearing was filed with the Department on October 10, 2013. Despite the requirement in section 120.569(2)(a), Florida Statutes, that an agency notify the Division of Administrative hearing by electronic means within 15 days from receipt of a

petition or request for hearing, the Department did not transmit Respondent's Request for Hearing to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing until June 16, 2014.

Pursuant to the parties' Joint Response to the Initial Order, this case was initially consolidated with Department of Financial Services v. A 2 Z Roofing, DOAH Case No. 14-2829, and the final hearing for the consolidated cases was scheduled for September 3, 2014. Thereafter, at the Department's request, the hearing was continued and rescheduled for October 28, 2014.

Prior to the final hearing, a telephonic hearing was held September 11, 2014, on Respondent's Motion to Clarify, from which an Order dated September 12, 2014, was entered severing this case from DOAH Case No. 14-2829, and ordering the parties to be "prepared to discuss the implications of the seemingly inordinate delay between the time that Respondent requested a hearing and Petitioner's referral of the case to the Division of Administrative Hearings." Thereafter, the Department filed a Motion to Consolidate Cases, seeking to again consolidate this case with DOAH Case No. 14-2829 and further postpone the final hearing in this case, on the ground that Respondent's president, Richard Morejon, had acquired the stock of the respondent in

Case No. 14-2829 (A 2 Z, Inc.). The Motion to Consolidate was opposed by Respondent and was denied.

At the beginning of the final hearing held October 28, 2014, Petitioner's Motion for Official Recognition was denied to the extent that it sought official recognition of Petitioner's Exhibits 1 through 16 and 20 through 23, consisting of investigative matters in the Department's file relating to Respondent. Although not articulated at the final hearing, the undersigned recognizes the statutes cited in paragraphs 1 through 5 of Petitioner's Motion for Official Recognition, as well as the excerpt from the SCOPES® Manual, the Workers' Compensation approved rates, and the Average Weekly Wage Report for years 2009-2013, referenced in the Motion and provided to the undersigned as Petitioner's Exhibits 17 through 19, and as to those matters, Petitioner's Motion for Official Recognition is granted.

During the hearing, the Department presented the testimony of three witnesses, including: complainant Yasar Korkmaz; Respondent's president, Richard Paul Morejon; and Chad Mason, a penalty auditor employed by the Department. Petitioner's Exhibits P-1 through P-25 were received into evidence. Respondent presented the testimony of complainant Yasar Korkmaz, who testified on his own behalf. Respondent offered three

exhibits which were received into evidence as Respondent's Exhibits R-1 through R-3.

The proceedings were transcribed and a transcript was ordered. The parties requested and were given 30 days from the filing of the transcript with the Division of Administrative Hearings within which to submit proposed recommended orders. The Transcript, consisting of two volumes, was filed on November 17, 2014. By Order granting the parties' agreement for extension of time, the parties were given additional time, until December 31, 2014, within which to file their proposed recommended orders. The parties thereafter timely filed their respective Proposed Recommended Orders, both of which 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 that employers secure workers' compensation coverage for the benefit of their employees.

2. Respondent is a Florida, for-profit corporation with its principal office located at 3539 Apalachee Parkway, Suite 3-204, Tallahassee, Florida 32311. Respondent was incorporated on October 26, 2012, and has been engaged in the construction industry in Florida as a roofing company since October 31, 2012.

3. From Respondent's inception, Richard Paul Morejon has been Respondent's president, secretary, and treasurer, and has received compensation from Respondent's roofing contract proceeds.

4. In July or August 2013, the Department received a complaint alleging that Respondent was not in compliance with Florida's Workers' Compensation Law. The Department assigned investigation of the complaint to then-Department investigator Carey Horn.

5. Based upon materials apparently gathered and reports purportedly authored by Investigator Horn, the Department issued a stop-work order dated September 23, 2013, to Respondent alleging that Respondent did not secure workers' compensation coverage for its employees as required. The Department, however, did not call Investigator Horn as a witness, and, despite Mr. Morejon's attempt to subpoena her to testify in this case, Investigator Horn could not be found. The Department's delay in referring this case for a final hearing either caused or contributed to Investigator Horn's unavailability as a witness in this proceeding.

6. The reports and conclusions of Investigator Horn were prepared in anticipation of litigation and are hearsay.^{2/} Therefore, they have not been used to support factual findings

in this Recommended Order unless corroborative of non-hearsay evidence.^{3/}

7. In addition, on October 20, 2014, the Department filed a document entitled "Joint Prehearing Stipulation" signed by the Department's counsel and Mr. Morejon purporting to contain a number of stipulated facts and factual admissions by Mr. Morejon on behalf of Respondent. However, at the final hearing, the manner in which the Joint Prehearing Stipulation was procured was brought into question when Mr. Morejon advised that he was told to sign it and that the stipulation would be "ironed out" at the final hearing. The Department's counsel confirmed that the conversation occurred regarding the correct classification code to be utilized in calculating the penalty against Respondent. Accordingly, it was ruled at the final hearing that the Joint Stipulation would not be used to support a finding regarding the classification. Upon further consideration of Mr. Morejon's comments and the Department's counsel's admission as to the manner in which at least one of the stipulated facts was secured, the undersigned has not utilized and otherwise rejects as untrustworthy the document entitled "Joint Prehearing Stipulation" filed in this case on October 20, 2014, finding that it does not represent any bona fide stipulations or admissions.

8. Nevertheless, in his testimony during his deposition and at the final hearing in this case, Mr. Morejon admitted a number of factual matters demonstrating that Respondent was not in compliance with Florida's Workers' Compensation Law on September 23, 2013.

9. The factual findings in this Recommended Order are derived from Mr. Morejon's testimony, non-hearsay evidence, and corroborative hearsay submitted during the final hearing.

10. On September 23, 2013, Investigator Horn visited a jobsite at a residence located at 5747 Sioux Drive, Tallahassee, Florida (Jobsite), where Respondent, through employees, was performing roofing and related activities.

11. On that date, Mr. Morejon was on the ground supervising two men on the roof engaged in roofing activities and two men on the ground picking up debris, for a total of five men, including Mr. Morejon, at the Jobsite working for Respondent. There was another man sitting in a vehicle at the Jobsite that day who never did any work for Respondent.

12. There is no evidence that Respondent provided workers' compensation coverage for any of the men working at the Jobsite that day.

13. The two men working on the roof were Guadalupe Perez-Martinez and Hermilo Perez-Martinez. At the time, Guadalupe Perez-Martinez had an exemption from the requirements for

workers' compensation through his company, Lupe Builders, LLC. Although Hermilo Perez-Martinez previously had an exemption from the requirements of workers' compensation through Perez Builders, LLC, that exemption expired the previous month, on August 3, 2013.

14. There is no evidence that the two men picking up debris, Hermilo Pantaleon Paz and Timotio Aguilar, qualified for an exemption from workers' compensation coverage that day.

15. Although Mr. Morejon had an exemption from the requirements of Florida's Workers' Compensation Law for a separate and unaffiliated company, Comerxio, Mr. Morejon did not have an exemption from the coverage requirements of Florida's Workers' Compensation Law for Respondent on September 23, 2013, or during the relative time periods of this case.

16. According to Mr. Morejon, other than Guadalupe Perez-Martinez, none of the other workers at the Jobsite that day had ever performed work for Respondent. Mr. Morejon also recalled that another person on the Jobsite that day, David Amaro-Rodriguez, just sat in a car and performed no work. Mr. Morejon's recollections are unrefuted. The Department's delay in referring this case undoubtedly affected the ability of either party to call other witnesses, including a number of the workers or the investigator, who were at the Jobsite that day.

17. During the relevant time periods, Respondent did not maintain a bank account to pay its employees and it did not directly pay Mr. Morejon or other employees. Rather, historically, proceeds from roofing contracts performed by Respondent were deposited into a bank account held by another corporation named "A 2 Z Roofing, Inc." After paying various expenses, including permit fees, materials, and other costs associated with the roofing contracts, A 2 Z Roofing, Inc., paid Mr. Morejon, and any others performing work under the contracts, by check.

18. On September 23, 2013, the Department personally served the Respondent with a stop work order (Stop Work Order) and a request for production of business records for penalty assessment calculation (Records Request).

19. The Records Request requested Respondent's corporate records, licenses, payroll documents, account documents, disbursements, contracts for work, employee leasing information, subcontractors, and workers' compensation coverage or exemptions "for the period from 10/31/2012 through 09/23/2013 [the Non-Compliance Period]." The Records Request further stated, in part:

The employer should scan and email the records requested herein to the investigator with the Department of Financial Services, Division of Workers' Compensation for examination within 5 business days after

receipt of this Request for Production of Business Records. If the employer fails to provide the required business records sufficient to enable the Department of Financial Services, Division of Workers' Compensation to determine the employer's payroll for the period requested for the calculation of the penalty provided in section 440.107(7)(d), F.S., the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in section 440.12(2), F.S. multiplied by 1.5. The Department shall impute the employer's payroll at any time after ten, but before the expiration of twenty business days after receipt by the employer of a written request to produce such business records. (FAC 69L-6.028) If the employer is unable to scan and email these documents, please mail or deliver copies to our office located at 200 East Gaines Street Tallahassee, FL, 32399-4228.

20. The next day, September 24, 2013, Mr. Morejon hand delivered Respondent's business records to the Department in response to the Records Request. The business records delivered by Mr. Morejon included roofing permit applications; roofing permits issued to A to Z Roofing, Inc.; several contracts between homeowners and A to Z Roofing, Inc., identifying Mr. Morejon as project manager; five checks from A 2 Z Roofing, Inc. (not Respondent), payable to the City of Tallahassee; and 24 checks from A 2 Z Roofing, Inc., payable to "Mr. Morejon - Petty Cash."

21. The 24 checks from A 2 Z Roofing, Inc., to Mr. Morejon totaled \$55,955.^{4/} The checks, dated from November 17, 2012, to

August 23, 2013, constitute all of the money paid to Mr. Morejon from Respondent's roofing contract proceeds during the Non-Compliance Period.

22. In addition to the 24 checks payable to Mr. Morejon, it is evident that the Department also received other checks from A 2 Z Roofing, Inc., from the records requests made in this case and in DOAH Case No. 14-2829, made payable to Lupe Builders, LLC, Gene Pfund, and perhaps others, during the Non-Compliance Period. The Department, however, did not utilize those records in its determinations in this case. In fact, the Department's penalty auditor did not utilize payments made by A 2 Z Roofing, Inc., in calculating the penalty because, in the Department's penalty auditor's opinion, Respondent was not compliant because it did not have a bank account. Final Hearing Transcript, pp. 232-233.

23. The determination of payroll, however, is not dependent on whether an employer has a bank account or whether the employer is the entity that pays its employees. Rather, the Department's own rule defining payroll considers "[p]ayments, including cash payments, made to employees by or on behalf of the employer" in determining payroll. See Fla. Admin. Code Rule 69L-6.035(1)(b) (emphasis added).

24. During the hearing, the Department, through counsel, stated that the payments from A 2 Z Roofing to Lupe Builders,

LLC, or Gene Pfund were not considered because those entities had valid exemptions from the requirements of workers' compensation. In addition, the Department complained that their receipt of bank records from A 2 Z Roofing, Inc., had been delayed and took the position that bank records from A 2 Z Roofing, Inc., would not be utilized in this case. The Department's own discovery tactics, however, were responsible for delays in responses to its requests for records from A 2 Z Roofing, Inc.^{5/}

25. Considering the records produced by Respondent introduced into evidence in this case, the testimony of Mr. Morejon regarding the checks payable to him from A 2 Z Roofing, Inc., the Department's unwillingness to utilize other records from A 2 Z Roofing, Inc., in its possession, and evidence of the total payments to Mr. Morejon during the Non-Compliance Period, it is found that the Department's decision to impute payroll is unfounded.

26. Imputation of payroll would improperly allow the Department to benefit from its own lack of analysis. The imputed payroll determined by the Department in the amount of \$347,334.69 exceeds Respondent's total revenue for the Non-Compliance Period by more than \$100,000^{6/} and is based, at least in part, upon hearsay evidence prepared by a witness whose

unavailability was likely caused by the Department's undue delay in referring Respondent's Request for Hearing.

27. Furthermore, the records produced by Respondent and the evidence in this case are sufficient to determine Respondent's payroll for use in the calculation of a penalty pursuant to section 440.107(7)(d)1.

28. The evidence demonstrated that the \$55,955 reflected in checks payable to Mr. Morejon from A 2 Z Roofing, Inc., represent all of the payments to Respondent's employees who were not covered by workers' compensation while performing services for roofing contracts during the Non-Compliance Period, other than payments reflected in records the Department may have in its possession but did not present at the final hearing.

29. It was also shown, however, that the \$55,955 was paid to Mr. Morejon without the maintenance of a cash log or cash journal and without securing the payment of workers' compensation coverage for Mr. Morejon or others receiving cash payments from those funds. And, there is no evidence that any of those employees were exempt from the requirements of workers' compensation.

30. Respondent was required to secure workers' compensation coverage and failed to secure that coverage under Florida's Workers' Compensation Law for its employees who were paid \$55,955.00 during the Non-Compliance Period. Therefore,

the Department was justified in issuing the Stop Work Order delivered to Mr. Morejon on September 23, 2013.

31. Although the Department failed to show that Respondent's payroll should be imputed, the evidence adduced at the final hearing demonstrated that a penalty should be imposed against Respondent for failure to pay workers' compensation for its employees who were paid a total of \$55,955 during the Non-Compliance Period.

32. For determining the appropriate penalty, the Department has adopted a penalty calculation worksheet to aid in calculating penalties against employers pursuant to section 440.107, Florida Statutes. See Florida Administrative Code Rule 69L-6.027.

33. The classification codes listed in the National Council on Compensation Insurance ("NCCI") Scopes® Manual have been adopted by the Department through Florida Administrative Code Rules 69L-6.021 and 69L-6.031. Classification codes are four-digit codes assigned to occupations by NCCI to assist in the calculation of workers' compensation insurance premiums.

34. Under the descriptions listed in the NCCI Scopes® Manual, the proper classification code for Respondent's employees is 5551, which corresponds to "Roofing - All Kinds and Drivers."

35. The Department has adopted the approved manual rates in the Florida Administrative Code, as authorized by section 440.107(7). Rule 69L-6.027 adopts form number DFS-F4-1595, the Penalty Calculation Worksheet, which specifically incorporates approved manual rates.

36. As accurately set forth in the Penalty Calculation Worksheets attached to the Amended Order of Penalty Assessment, the approved manual rates for the following periods of Non-Compliance were:

From 10/31/2012 to 12/31/2012 the rate was 17.10;

From 01/01/2013 to 06/30/2013 the rate was 18.17;

From 07/01/2013 to 09/23/2013 the rate was 18.03.

37. A breakdown of Respondent's total payroll of \$55,955 based upon check dates corresponding to the manual rates in effect during the Non-Compliance Period, is as follows:

From 10/31/2012 to 12/31/2012 payroll totaled \$6,300;

From 01/01/2013 to 06/30/2013 payroll totaled \$33,655;

From 07/01/2013 to 09/23/2013 payroll totaled \$16,000.

38. Calculation of the penalty, using the Penalty Calculation Worksheet and Respondent's payroll based on records (as opposed to imputed) during the Non-Compliance Period, results in a total penalty of \$15,116.12, as follows:

Calculation Method	(a) Class Code	(b) Non-Compliance period		(c) Gross Payroll	(d) /100	(e) Approved Rates	(f) Premium (d)X(e)	(g) Penalty (f)X 1.5
Records	5551	10/31/12	12/31/12	6,300	63	17.10	1,077.30	1,616.25
Records	5551	01/01/13	06/30/13	33,655	336.55	18.17	6,115.11	9,172.67
Records	5551	07/01/13	09/23/13	16,000	160	18.03	2,884.80	4,327.20
Totals:				\$55,955.00				\$15,116.12

39. The clear and convincing evidence in this proceeding demonstrated that Respondent was in violation of Florida's Workers' Compensation law because it employed one or more uninsured employees in the construction industry throughout the Non-Compliance Penalty, and that the appropriate penalty, based upon Respondent's payroll, is in the amount of \$15,116.12.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

41. The Department is responsible for enforcing the requirement that employers coming within the provisions of chapter 440, Florida Statutes, obtain workers' compensation coverage for their employees "that meets the requirements of [chapter 440] and the Florida Insurance Code." § 440.107(2), Fla. Stat.

42. As the party asserting the affirmative in this proceeding, the Department has the burden of proof. See, e.g., Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

43. Because the Department is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

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

45. "Employment" subject to Florida's workers' compensation law "means any service performed by an employee for the person employing him or her . . . [and] with respect to the construction industry, [includes] all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) & (b)(2), Fla. Stat.

46. The definitional section of chapter 440 defines "employee" as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." § 440.02(15)(a), Fla. Stat.

47. The term "employee" as used in chapter 440 also includes "[a]n independent contractor working or performing services in the construction industry . . . [as well as a] sole proprietor who engages in the construction industry and a

partner or partnership that is engaged in the construction industry." § 440.02(15)(c), Fla. Stat.

48. In addition, the chapter 440 definition of "employee" includes "[a]ll persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor." § 440.02(15)(c)(2), Fla. Stat.

49. Officers of corporations, however, including up to three listed officers of a corporation involved in the construction industry who each own at least a 10 percent share of the corporation, may elect to be exempt from the requirement that they be covered by workers' compensation insurance. An officer of a corporation who validly elects to be exempt by filing a notice of the election with the Department is not an employee. § 440.02(15)(b), Fla. Stat.

50. Section 440.107 sets out the Department's duties and powers to enforce compliance with the requirement that an employer secure the payment of workers' compensation for its employees. The Department is empowered to examine and copy the business records of any employer conducting business in the state of Florida to determine whether it is in compliance with the Workers' Compensation Law. § 440.107(3), Fla. Stat.

Whenever the Department finds that an employer required to secure workers' compensation coverage for an employee has failed to do so, such failure is deemed an immediate serious danger to the public health, safety, and welfare sufficient to justify service by the Department of a stop-work order on the employer, requiring the cessation of all business operations.

§§ 440.107(1) & (7)(a), Fla. Stat.

51. 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." Section 440.02(8) further provides that "[t]he division may, 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."

52. An employer is engaged in the construction industry when any portion of the employer's business operations is described in the construction classification codes that are adopted in Florida Administrative Code Rule 69L-6.021. Subsection (uu) of rule 69L-6.021 identifies classification code 5551 as "Roofing - All Kinds and Drivers."

53. The roofing activities performed by the Respondent throughout the Non-Compliance Period constituted employment

within the construction industry. Because the Respondent was in the construction industry, it was an employer if it had at least one employee. § 440.02(17)(b)2., Fla. Stat.

54. Respondent had at least one or more employees, including Mr. Morejon, throughout the Non-Compliance Period. Mr. Morejon did not validly elect to be exempt as an officer of Respondent from the requirement that he be covered with workers' compensation insurance for work performed for Respondent. In addition, evidence indicated that Respondent employed at least one other worker without workers' compensation coverage during the Non-Compliance Period. Therefore, Respondent was required to have secured the payment of workers' compensation coverage for its employees.

55. Section 440.107(7)(a) provides:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

56. On September 23, 2013, the Respondent had at least one employee in the construction industry without workers'

compensation coverage or a valid exemption from such coverage. Therefore, the Stop Work Order was justified. Thereafter, after receiving Respondent's Request for Hearing on October 10, 2013, the Department unjustifiably delayed referral of this case for eight months beyond the 15-day time period set forth in section 120.569(2)(a).

57. Regarding the assessment of penalties, section 440.107(7)(d)1. provides that:

[i]n 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.

58. Section 440.10(1)(g) requires employers to obtain workers' compensation insurance policies that "utilize the manual rates," approved pursuant to the Florida Insurance Code. The Department therefore is required to utilize these approved manual rates to comply with its statutory requirement to assess penalties based on evaded workers' compensation insurance premiums.

59. Pursuant to this statutory authority, the Department has promulgated Florida Administrative Code Rule 69L-6.021,

which adopts the definitions found in the NCCI Scopes® Manual, including updates through February 1, 2011. Fla. Admin. Code R. 69L-6.021(1), (2), and (3).

60. Rule 69L-6.021(2) lists the workplace operations that fall within the statutory definition of "construction industry" and includes "Roofing - All Kinds and Drivers" using the NCCI Scopes® Manual description of classification code 5551. Fla. Admin. Code R. 69L-6.021(2)(uu).

61. Section 440.107(7)(e) provides that:

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.

62. As indicated in the Findings of Fact above, however, under the circumstances, the evidence failed to show that the records timely provided by Respondent were insufficient to enable the Department to determine payroll, and Respondent's records are otherwise found to be sufficient. Therefore, imputation of payroll pursuant to section 440.107(7)(e) was not necessary or appropriate in this case.

63. The correct methodology for calculating the penalty in this case uses the classification codes listed in the NCCI

Scopes® Manual, which has been adopted by the Department through Florida Administrative Code Rule 69L-6.021. In addition, pursuant to section 440.107(7)(d)1., the penalty is 1.5 times the amount Respondent should have paid in workers' compensation premiums for the Non-Compliance Period.

64. The total penalty calculated in the amount of \$15,116.12 by utilizing the methodology prescribed by section 440.107 is the correct penalty to be assessed against Respondent under the facts and law in this case.

65. The clear and convincing evidence in this case demonstrated that Respondent was required but failed to secure the payment of workers' compensation for its employees during the Non-Compliance Period as required by Florida's Workers' Compensation Law, and the penalty for that violation is \$15,116.12.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a Final Order consistent with this Recommended Order upholding the Stop Work Order, and reducing the penalty set forth in the Amended Order of Penalty Assessment to \$15,116.12 by recalculating the penalty based upon Respondent's payroll of \$55,955.00 during the Non-Compliance Period.

DONE AND ENTERED this 5th day of February, 2015, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2015.

ENDNOTES

^{1/} Unless otherwise indicated, all citations to the Florida Statutes are to current versions which have not substantively changed since the time of the allegations in this case.

^{2/} § 90.801(c), Fla. Stat. (definition of "hearsay"); see also King v. Auto Supply of Jupiter, Inc., 917 So. 2d 1015, 1019 (Fla. 1st DCA 2005) (quoting Professor Ehrhardt comments, Florida Evidence, § 803.6 at 786 (2004)) (If "a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized.").

^{3/} § 120.57(1)(c), Fla. Stat.

^{4/} There were a total of 25 checks attached to Exhibit P-12. The last page of the exhibit, however, contains an extra duplicate of check number 2381 and was excluded from the total.

^{5/} While this case and DOAH Case No. 14-2829 were consolidated, the Department sought bank records from "A 2 Z Roofing, Inc. d/b/a A to Z Roofing, Inc." As explained in the Order entered after a telephonic motion hearing in this case on September 12, 2014:

[Respondent's] Motion to Clarify is GRANTED to the extent that it requests protection from discovery for those bank records sought from A 2 Z Roofing, Inc.'s bank with subpoenas seeking records of "A 2 Z Roofing d/b/a A to Z Roofing, Inc." For reasons explained during the telephonic hearing, it cannot be assumed that A 2 Z Roofing, Inc., was or is doing business as A to Z Roofing, Inc. Therefore, discovery of A 2 Z Roofing, Inc.'s banking records may only be obtained through subsequent discovery requests that are not styled as, or purport to seek records from, A 2 Z Roofing Inc. d/b/a A to Z Roofing, Inc.

^{6/} According to records produced by Respondent, and as explained by Mr. Morejon's testimony, which is credited, there were a total of 31 roofing permits issued to Respondent for projects that were completed during the Non-Compliance Period. See Exhibits P-9, P-14, and P-15. Although the business records produced by Respondent did not contain all of the contracts between the owners and A to Z Roofing, Inc., for those projects, the "valuation" amount set forth on the corresponding permits reflect the contract amounts paid to Respondent for all of the roofing projects completed by Respondent during the Non-Compliance Period. The valuation amounts on the 31 permits for roofing projects completed by Respondent during the Non-Compliance Period total \$223,616. The \$223,616 in proceeds represents Respondent's total revenue for the Non-Compliance Period.

COPIES FURNISHED:

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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.