

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

DOAH Case No. 14-5941

AMERICAN PRO DIVING CENTER,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on June 12, 2015, in Crystal River, Florida, and on June 18, 2015, by video teleconference at sites in Tampa and Tallahassee, Florida, before James H. Peterson III, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Kristian Eiler Dunn, Esquire
Dunn and Miller, P.A.
215 East Tharpe Street
Tallahassee, Florida 32308

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 Amended Order of Penalty Assessment; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On October 1, 2014, the Department of Financial Services, Division of Workers' Compensation (Petitioner or the Department), issued a Stop-Work Order with an accompanying Order of Penalty Assessment (collectively Stop-Work Order) against American Pro Diving Center, Inc. (Respondent or American Pro Diving), for Respondent's alleged failure to secure workers' compensation insurance coverage for its employees. The Stop-Work Order was served upon Respondent on October 15, 2014. On October 20, 2014, the Department entered an Order Releasing Stop-Work Order (Revocation), which released the Stop-Work Order "effective back to the date of issuance."

On November 18, 2014, the Department issued another Order of Penalty Assessment (Order of Penalty Assessment) against Respondent without an accompanying stop-work order. The Order of Penalty Assessment was in the amount of \$35,429.50, and informed Respondent of its right to administrative review by filing a petition for hearing within 21 days. Respondent timely

requested an administrative hearing, and the Department transmitted that request to the Division of Administrative Hearings on December 16, 2014, for the assignment of an administrative law judge to conduct an administrative hearing.

The case was originally assigned to Administrative Law Judge Edward T. Bauer, who scheduled this case for a final hearing to be held February 17, 2015. The case was subsequently transferred to the undersigned and rescheduled.

At the beginning of the June 12, 2015, hearing, the Department's motion dated June 5, 2015, to reduce the alleged penalty assessed against Respondent from \$35,429.50 to \$3,581.96, with an Amended Order of Penalty Assessment, was granted. The Department presented the testimony of three witnesses, including: Investigator Dale Russell; Nicholas Thomas, a penalty auditor employed by the Department; and James Corbin Straub, who formerly worked at American Pro Diving. The Department introduced 17 exhibits received into evidence as Department's Exhibits P-1 through P-16 and P-19. Respondent presented the testimony of Kathleen Petracco, who was accepted as an expert witness; Michael Strmiska; Mariah Ellis; Michelle Goodenow; and Ron Goodenow. Respondent introduced nine exhibits received into evidence as Respondent's Exhibits R-1 through R-9.

The proceedings were transcribed and a transcript was ordered. The Transcript of the proceedings, consisting of two

volumes, was filed July 7, 2015. By agreement of the parties, the parties were allowed until August 31, 2015, to file their proposed recommended orders. Both parties timely filed their respective Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.^{2/}

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, incorporated on June 16, 1995, with its principal office located at 821 Southeast Highway 19, Crystal River, Florida 34429. Since incorporation, Respondent has been continuously engaged in business as a scuba diving tour and retail shop.

3. In August 2014, Department Compliance Officer Dale Russell (Investigator Russell) commenced an investigation to determine whether Respondent employed more than three employees; and, if so, whether Respondent had secured workers' compensation insurance coverage for its employees. The investigation of American Pro Diving was not instituted because of any public referral or reported injury. Rather, Investigator Russell was alerted to American Pro Diving based on "data mining."

4. Data mining is conducted by the Department by comparing information in its computer system's workers' compensation insurance coverage database with reports provided by businesses to the Florida Department of Revenue in the form of Re-employment Assistance Tax reports known as "UCT-6s."

5. UCT-6 information on American Pro Diving during the pertinent time period indicated that Respondent was paying unemployment insurance tax for 12 to 18 workers. The Department's database revealed that Respondent had no workers' compensation coverage.

6. On August 11, 2014, Investigator Russell visited American Pro Diving in Crystal River, Florida. On that day, Respondent's owner, Ron Goodenow, was not present or available. Mike Perry was at Respondent's service desk. Investigator Russell introduced himself to Mr. Perry and informed him that he was looking into whether employers were providing workers' compensation. Investigator Russell left his card and asked Mr. Perry to tell Respondent's owner to contact him.

7. During his investigation, Investigator Russell discovered that, in addition to paying unemployment taxes, Respondent was making W-4 withholdings for all those working at American Pro Diving, instead of issuing Form 1099s and having workers pay their own taxes and withholdings as is typical for independent contractors.

8. On August 13, 2014, Investigator Russell spoke to Mr. Ron Goodenow, on the telephone. Mr. Goodenow informed Investigator Russell that Respondent had no employees because all of those working at American Pro Diving were independent contractors. Mr. Goodenow explained to Investigator Russell that because of the business model, workers' compensation insurance was not available to dive shops.

9. During the telephone conversation, Investigator Russell warned Mr. Goodenow that the Department would issue a stop-work order and shut down Respondent's operations if Respondent was out of compliance with the workers' compensation laws. Investigator Russell provided Mr. Goodenow with the name of the Florida Joint Underwriters Association and some companies that provided workers' compensation coverage. Investigator Russell also suggested, as an alternative to obtaining workers' compensation coverage, that Respondent use an employee leasing company.

10. Investigator Russell further suggested that Mr. Goodenow exempt himself from the requirements of workers' compensation and designate three other people as employees. Investigator Russell recommended that Respondent stop paying UCT-6 unemployment taxes on the rest of the people, stop paying their withholding taxes, and transition to a Form 1099 method of

payment. He also suggested that American Pro Diving enter into signed contracts with its independent contractors.

11. In response to warnings and suggestions that he had received from Investigator Russell, Mr. Goodenow acquired an exemption from workers' compensation for himself on September 18, 2014,^{3/} and contacted the Florida Joint Underwriters Association to inquire about workers' compensation coverage. Mr. Goodenow also retained Michael Dean, Esquire, as legal counsel for American Pro Diving.^{4/}

12. According to Investigator Russell, during a conversation with Mr. Dean after Mr. Goodenow had advised that Mr. Dean was Respondent's counsel and spokesperson, Mr. Dean admitted that American Pro Diving employed, not as independent contractors, but as employees, Ron Goodenow, Sarah Huggett, James Corbin Straub, Maria Ellis, and Michael Strmiska. A related e-mail dated September 22, 2014, from Mr. Dean's legal assistant stated:

Mr. Russell,

In response to your telephone conference with Mr. Dean this morning, here is the status of the employees you requested:

Sarah Huggett-See attached documents.

James Corbin Straub-Shop Staff, part-time-on an "as needed basis" only.

Maria Ellis-Shop Staff.

Michael Strmiska-Shop Staff.

Stephanie Perry-our daughter-helps mom with payroll only for extra pocket money. (Does not have to do payroll as Michele usually does it.)

Attached to the e-mail was a "Captains License Receipt.pdf; Sarah Huggett-TWIC Card.pdf."

13. Rather than finding that Mr. Dean's discussions and his legal assistant's follow-up e-mail amount to admissions that American Pro Diving had employees required to be covered by workers' compensation insurance, it is found that they amount to nothing more than settlement discussions and negotiations.^{5/} This finding is based upon the fact that, at the time, American Pro Diving was trying to react to Investigator Russell's warnings, as well as upon the content of e-mail attachments, which are consistent with Mr. Goodenow's unwavering assertion that those working with American Pro Diving were independent contractors.

14. In the meantime, Mr. Goodenow's attempt to acquire workers' compensation coverage was being frustrated. In response to his inquiry, the Florida Joint Underwriters Association suggested that Respondent be issued a class code for oil-spill cleanup workers, as opposed to a code that would reflect American Pro Diving's operations.

15. Mr. Goodenow contacted Investigator Russell by telephone on September 26, 2014, and explained his frustration. During the conversation Mr. Goodenow reiterated his position that American Pro Diving did not have employees. After conferring with his supervisors, Investigator Russell called Mr. Goodenow back and informed him that if Respondent did not come into compliance, a stop-work order would be issued.

16. Thereafter, without interviewing any of the "employees" purportedly identified by Mr. Dean, other than Mr. Goodenow, on October 1, 2014, the Department issued the Stop-Work Order against Respondent. It was served on October 15, 2015.

17. Prior to service of the Stop-Work Order, on October 2, 2014, Respondent submitted workers' compensation application information to Investigator Russell with the assistance of its new legal counsel, Kristian Dunn. Although the Department introduced the submission and argued that it was an admission by Respondent that it had employees, it is found that the submission is nothing more than another attempt at settlement. See Endnote 4, below.

18. The Department entered the Revocation on October 20, 2014, releasing the Stop-Work Order "effective back to the date of issuance." A related Department memo dated October 20, 2014, signed by Investigator Russell and his supervisor, explained,

"SWO [Stop-Work Order] was served after the employer obtained his exemption which brought the total number of employees to under four."

19. On November 18, 2014, the Department issued the Order of Penalty Assessment against Respondent in the amount of \$35,429.50, without an accompanying stop-work order. The amount of the assessment was based on imputed payroll during an alleged penalty period from October 2, 2012, through October 1, 2014, for alleged employees Ron Goodenow, Sarah Huggett, James Corbin Straub, Maria Ellis, and Michael Strmiska.

20. There is no evidence that any of the alleged employees, other than Ron Goodenow, were interviewed prior to the issuance of the Order of Penalty Assessment.

21. The Department's Order of Penalty Assessment was amended at the beginning of the hearing upon the granting of the Department's Motion to Amend Order of Penalty Assessment, filed June 5, 2015, just one week before the final hearing. The Department's Amended Order of Penalty Assessment reduced the Order of Penalty Assessment from \$35,429.50, which was based on imputed payroll, to \$3,581.96, based upon actual payroll information. The penalty period under the Amended Order of Penalty Assessment is from December 5, 2013, through October 1, 2014.

22. Nicholas Thomas, penalty auditor for the Department, calculated the Amended Order of Penalty Assessment against Respondent based on the Department's allegation that Ron Goodenow, Mariah Ellis, James Corbin Straub, Michelle Goodenow, and Michael Strmiska were Respondent's employees.

23. In the Amended Order of Penalty Assessment, Mr. Thomas used the payroll information in Respondent's bank records and Department of Revenue UCT-6 employment tax reports to calculate the payroll for Respondent's alleged employees. Mr. Thomas explained that, although he had the tax reports for over five months, the delay in calculating the Amended Order of Penalty Assessment was because Respondent's bank records, alone, had been determined insufficient, and he was initially unsure whether he could use tax report information to assist in the calculation of actual payroll.

24. Upon determining that he could use the tax reports, Mr. Thomas then applied the premium rate associated with retail shop operations to Respondent's payroll to determine the amounts that Respondent would have paid in workers' compensation insurance premiums for the alleged employees had Respondent secured coverage during the penalty period.

25. As it was alleged that Respondent did not secure required workers' compensation coverage for the named employees, Mr. Thomas doubled this amount, pursuant to section

440.107(7)(d)1., Florida Statutes, to arrive at the penalty of \$3,581.96.

26. In his testimony, Mr. Thomas admitted that a person having their UCT-6 taxes paid by a company does not automatically make that person an employee of that company.

27. Although Mr. Thomas had made an assumption that one of the payments in Respondent's records indicated that it had paid for one of its worker's Coast Guard certifications, at the final hearing, he admitted that the records provided by American Pro Diving did not prove that any certifications or equipment for the alleged employees was ever bought by Respondent.

28. Mr. Thomas accurately explained that for a non-construction entity, a business with three or less employees is not required to obtain workers' compensation coverage.

29. Mr. Thomas also correctly stated that independent contractors are not considered employees for purposes of workers' compensation, and that such persons should not be listed on a penalty worksheet.

30. Mr. Thomas obtained the names of the five alleged employees for the penalty calculation from Investigator Russell. Mr. Thomas did not know whether the persons he listed on the penalty worksheet had been interviewed by Investigator Russell. Although Mr. Thomas spoke to Investigator Russell's supervisor, he never spoke to Investigator Russell about the people named on

the penalty worksheet. And, other than Mr. Goodenow, Mr. Thomas did not know whether the other four people listed on the penalty worksheet were independent contractors or employees.

31. In conducting the investigation, Investigator Russell did not follow the Department's training procedures which direct its investigators to interview all alleged independent contractors. It is clear that Mr. Goodenow told Investigator Russell that all workers at American Pro Diving were independent contractors. Other than his interview of Mr. Goodenow, however, Investigator Russell did not interview any of the alleged employees listed on the penalty worksheet.

32. In contrast, with the exception of Ron Goodenow, all of those workers at American Pro Diving interviewed by Investigator Russell were determined to be independent contractors or otherwise excluded from the penalty worksheet.

33. According to the testimony of Kathleen Petracco, a 10-year employee of the Department, who also worked in its Bureau of Enforcement for the Division of Workers' Compensation, it is improper and against Department procedure to assume the status of a worker by looking only at UCT-6 forms and the W-4 applications without interviewing the workers to hear how the workers describe themselves. That testimony is credited.

34. Although there were up to 18 workers at American Pro Diving who had their UCT-6 taxes paid by Respondent, only the

five listed on the penalty worksheet were deemed employees. And, for those ultimately determined to be independent contractors or otherwise absent from the penalty worksheet, Investigator Russell advised that his supervisors, not him, made the determination. He did not know the basis of that determination.

35. During his investigation, the only person Investigator Russell observed working at the shop was Mike Perry, but Mike Perry was not classified as an employee or listed on the penalty worksheet.

36. Investigator Russell attempted to explain the decision of who to list on the penalty worksheet by referencing information he had seen on Respondent's website, which describes the various backgrounds and talents of those working at American Pro Diving. It is found, however, that the website information was insufficient to establish whether those workers were employees when compared to the actual testimony and other evidence adduced at the final hearing.

37. Respondent's owner, Goodenow, gave credible testimony regarding his dive shop's business model and its dependence on independent contractors. Mr. Goodenow bought the dive shop 15 years ago. Since that time, he has been its president and only officer. Before he bought it, Mr. Goodenow was an independent contractor for the previous owners of the dive shop, not an

employee. As now-owner and president, Mr. Goodenow was an employee of American Pro Diving prior to receiving his exemption.

38. American Pro Diving's business depends on tourists in the Crystal River area for recreational diving tours. The tours, in turn, are dependent on the seasons, the weather, and manatee availability. As usual and customary for American Pro Diving and other dive tour businesses in the industry, Respondent utilizes individual independent contractors, as opposed to employees, in order to remain profitable and competitive. With the use of independent contractors, labor costs remain flexible and can adapt to seasonal and weather fluctuations which impact the number of tourists.

39. In addition, the dive industry traditionally has been populated by individuals that prefer to be independent contractors because of the increased independence, mobility, and schedule flexibility.

40. The independent contractors utilized by American Pro Diving provide their own gear and are responsible for the acquisition and maintenance of their educational and professional credentials. None of the workers at American Pro Diving have fixed employment schedules, there are no hourly wages, and everyone is paid based on tasks they undertake, such as participating in dive tours, handling boats, or cleaning the

pool utilized for instruction. In addition, the workers' pay is dependent on the number of customers on a boat, commissions from gear sold, tips received from customers, or the numbers of videos sold to the tourists.

41. Under Coast Guard regulations, vessel captains are ultimately responsible for their passengers. All captains working with American Pro Diving carry, and personally pay for, insurance to cover that potential liability. In fact, all of the workers at American Pro Diving carry their own liability insurance, with the exception Mr. Straub and Mr. Strmiska, who are teenagers without requisite experience.

42. America Pro Diving is insured for up to \$2,000,000 for the building and \$2,000,000 for the business to cover its customers and independent contractors. The coverage is specifically designed to cover independent contractors and customers, not employees.

43. All of those working at American Pro Diving, with the exception of Mr. Straub and Mr. Strmiska, possess Transportation Worker Identification Cards (TWIC) issued by the Department of Homeland Security. Those workers paid for the card application, background check, and renewal. No portion of the expense was paid by Respondent.

44. Mr. Goodenow gave those working at American Pro Diving the option of receiving payments using the W-4 tax form method

whereby Respondent took out withholdings, as opposed to the form 1099 method. For convenience, all of the workers initially chose the W-4 method. The reason that Respondent also paid unemployment taxes, evidenced by UCT-6 reports for the workers, was because Respondent's accountant advised Mr. Goodenow to do so to be consistent with the W-4 form withholdings. During the investigation in this case, however, Respondent began using the form 1099 method of payment and stopped making withholdings.

45. Ms. Michelle Goodenow is Mr. Goodenow's wife. Although married to Mr. Goodenow, she is not an owner or officer of American Pro Diving and shares no financial accounts with Respondent or her husband.

46. Ms. Goodenow is a licensed captain who maintains her own gear and pays for her own insurance, TWIC card, dive certifications, captain's credentials and training costs. She also developed a school outreach program and makes school presentations to bring in school groups to American Pro Diving for tours. The amount of her pay is not by hourly wage or salary, but based upon the amount of business she brings to American Pro Diving. She makes no money if no customers are booked and could suffer a financial loss if any of the equipment is damaged. She receives no sick leave or vacation. She is free to take her business to another dive shop if she chooses.

47. Ms. Goodenow chose to have her taxes withheld by Respondent via the W-4 method out of convenience, not because she considered herself to be an employee. She has always viewed herself as an independent contractor and never considered herself to be an employee. The Department excluded all other licensed captains from its list of Respondent's alleged employees. The evidence otherwise demonstrates that Ms. Goodenow is not an employee of American Pro Diving, but rather, is an independent contractor.

48. Michael Strmiska is Mr. and Mrs. Goodenow's son. There is no evidence that he has ever had an ownership interest in American Pro Diving. He was 17 years old at the time of Investigator Russell's investigation and 18 years old at the final hearing. He possesses his own open-water diving credentials and equipment for work.

49. Mr. Strmiska works at American Pro Diving in "tour support." Tour support encompasses a variety of tasks from helping customers with gear, helping tour operators with boat handling and summer snorkel camps, and loading and unloading the boats. While helping gear-up customers, he also sells gear and receives commissions for sales over \$1,500. He has never received any hourly wage for the tasks he completed at American Pro Diving.

50. A good portion of the money Mr. Strmiska made at American Pro Diving was through conducting snorkel camps in the summer with young children. If he did not have any attendees, he would make no money. If the attendees were few in number, his profits were less, because he was responsible for the cost of setting up the camp, gas for the trucks, and potential for damage to the equipment for which he was responsible.

51. Like the others working at American Pro Diving, Mr. Strmiska never had a set schedule and would call in for available work. He has always viewed himself as an independent contractor due to the fact that he could work as much or as little as he wanted. His skill and training are not entry level. The money that he made was variable, depending on the number of customers going on trips or purchasing gear. He also had the option of accruing extra money on a per-task basis, as opposed to hourly, by completing extra tasks, such as cleaning the boats, washing the trucks, and cleaning the indoor pool area.

52. The evidence showed that Mr. Strmiska was an independent contractor.

53. Maria Ellis is a 28-year-old female, divemaster-certified videographer for American Pro Diving tours. Although not a licensed boat captain at the time of the investigation, she was working to get her hours to become a licensed captain.

While receiving tips from customers for her work as a boat mate, the majority of her income was derived from sales of DVDs to customers from her videography. If she failed to execute a high-quality product, her sales would suffer.

54. Although she had her own video equipment when she moved to Crystal River to work with American Pro Diving, she used Respondent's camera to film the dive shop's customers because it was compatible with the DVD copier at the dive shop. She was responsible for any damage to the equipment. Ms. Ellis brought her own particular videographer skills to American Pro Diving that she acquired on her own through hours of practice, personal expense, and trial and error.

55. Ms. Ellis was otherwise responsible for her own gear, liability insurance, dive certifications, dive equipment, and was never paid by an hourly wage. Other than tips and payments as a mate on a per-capita basis, she made no money if no videos were sold and could suffer a financial loss if any of the equipment was broken.

56. In order to work a tour, Ms. Ellis would call into American Pro Diving to see if work was available.

57. Although Ms. Ellis chose to have her taxes withheld under the W-4 method for convenience, she always considered herself a sole proprietor, independent contractor, with her office at her home. The facts support this conclusion.

58. James Corben Straub, who was at all pertinent times a teenager, was the only one listed on the Department's penalty calculation sheet, other than Mr. Goodenow, who testified at the final hearing that he considered himself an employee, as opposed to an independent contractor. His testimony was different than his deposition testimony, wherein, in response to a question of whether he was an independent contractor, he testified that it could go either way. Mr. Straub testified that he changed his opinion about whether he was an independent contractor after doing some research and considering the fact that he had been required to sign a non-compete agreement with American Pro Diving.^{6/}

59. During the time that he worked at American Pro Diving, Mr. Straub was never paid an hourly wage and was not on a work schedule, but rather found out whether there was work to be done by calling in. In fact, Mr. Straub was infrequently at American Pro Diving because of his involvement with the Four-H Club.

60. While working at American Pro Diving, Mr. Straub's pay was based on a task-by-task basis, even if the tasks took longer on some days than others. His tasks and opportunities at American Pro Diving were similar to those of Mr. Strmiska. Like Mr. Strmiska and other independent contractors at American Pro Diving, Mr. Straub could potentially suffer a loss from damaging a vehicle or equipment under his charge.

61. Mr. Straub admitted that he chose to be paid on a W-4 tax withholding basis for convenience, instead of having to fill out a quarterly report, if paid under the Form 1099 method. He never received traditional benefits associated with employees. When he attempted to renegotiate with Mr. Goodenow for an employee-type position with traditional benefits, he was unsuccessful.

62. Mr. Straub may not have considered himself an independent contractor when he testified at trial, but his work schedule, responsibilities and expectations were much the same as other independent contractors working at American Pro Diving.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the subject matter and parties of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

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

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

66. Every employer is required to secure the payment of workers' compensation for the benefit of its employees, unless exempted or excluded under chapter 440. § 440.10, Fla. Stat.

67. "Employment," subject to Florida's workers' compensation law, 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.

68. The term "employee," as used in chapter 440, includes "[a]n independent contractor working or performing services in the construction industry." § 440.02(15)(c)3., Fla. Stat.

69. However, independent contractors who are not working in the construction industry are specifically excluded from the chapter 440 definition of employee. See 440.02(15)(d)1., Fla. Stat. ("'Employee' does not include . . . [a]n independent contractor who is not engaged in the construction industry.").

70. Respondent is a non-construction business entity in the dive industry. As a non-construction entity, the requirements for workers' compensation coverage are triggered when four or more employees are hired by a business. If there are under three employees then the business may operate without workers' compensation coverage. See § 440.02(17)(a) & (b)(2), Fla. Stat., quoted above.

71. 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).

72. Even though the Department has the ultimate burden, in this case, Respondent is asserting that all of its workers, except for its owner, Ron Goodenow, are independent contractors. Section 440.02(15)(d)1.c. provides:

Notwithstanding anything to the contrary in this subparagraph, an individual claiming to be an independent contractor has the burden of proving that he or she is an independent contractor for purposes of this chapter.

73. The criteria required to meet the definition of independent contractor are set forth in section 440.02(15)(d)1.a. & b., which provide:

a. In order to meet the definition of independent contractor, at least four of the following criteria must be met:

(I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;

(II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;

(III) The independent contractor receives compensation for services rendered or work

performed and such compensation is paid to a business rather than to an individual;

(IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;

(V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or

(VI) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

b. If four of the criteria listed in subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.

(II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.

(III) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform.

(IV) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.

(V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.

(VI) The independent contractor has continuing or recurring business liabilities or obligations.

(VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

74. As noted in the Findings of Fact, above, of those five alleged employees listed on the penalty worksheet, Michelle Goodenow, Mariah Ellis, and Michael Strmiska, all believed themselves to be independent contractors, and they are found, as a matter of fact, to be independent contractors. Further, by comparing the factual evidence of those three employees to the above criteria set forth in section 440.02(15)(d)1., quoted above, it is concluded that each demonstrated that they satisfied the following four criteria set forth in section 440.02(15)(d)1.a.: (I) [maintained their own equipment]; II [were sole proprietors not required to obtain a federal employer identification number]; III [were able to work for any entity]; and VI [pay based on completion of task or series of tasks].

75. In addition to meeting four criteria under section 440.02(15)(d)1.a., the three employees also satisfied I, III, IV, V, and VI of section 440.02(15)(d)1.b.

76. While arguably, Mr. Straub also qualified as an independent contractor, as the statute places the burden on one claiming to be an independent contractor to satisfy the criteria, a determination of whether Mr. Straub is an employee or independent contractor has not been made. Moreover, as three of the five listed on the penalty worksheet demonstrated that they were not employees, further determination of Mr. Straub's classification is unnecessary because the Department failed to meet its burden of proving that Respondent had four or more employees as alleged in the Amended Order of Penalty Assessment asserted against American Pro Diving. See § 440.02(17)(a) & (b)(2), Fla. Stat., quoted above; see also Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977) (party asserting the affirmative has the burden of proof).

77. Although the Department relied on the fact that Respondent made W-4 tax withholdings and filed UCT-6s for those working at American Pro Diving, that evidence, in light of other evidence and law analyzed above, was insufficient to establish that four or more of the workers listed on the penalty calculation worksheet, were employees. See e.g., D.F.S v. DTS, LLC, Case No. 09-3484 (Fla. DOAH Jan. 29, 2010; Fla. Dep't. of Fin. Servs. Apr. 28, 2010) (adopted Recommended Order finding that workers were independent contractors despite evidence that federal income tax withholdings and various other deductions,

such as Social Security and Medicare, were withheld from compensation).

78. In sum, the Department did not establish by clear and convincing evidence that Respondent failed to secure the payment of workers' compensation under chapter 440.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, evidence of record, candor and demeanor of the witnesses, and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, dismissing the Amended Order of Penalty Assessment, in its entirety.

DONE AND ENTERED this 7th day of October, 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 7th day of October, 2015.

ENDNOTES

^{1/} Unless otherwise indicated, all citations to the Florida Statutes are to the 2014 versions.

^{2/} Unfortunately, the Department's Proposed Recommended Order failed to provide citations to the record.

^{3/} An officer of a corporation who validly elects to be exempt by filing a notice of the election with the Department, as provided in section 440.05, is not an employee. § 440.02(15)(b)3., Fla. Stat.

^{4/} Although the exact timing was not established, the evidence also showed that, after Mr. Goodenow received Investigator Russell's warnings and suggestions, Respondent stopped filing UCT-6s and switched to the Form 1099 method of payment. Mr. Goodenow also acquired a written contract form with the intent of entering into written agreements to make it clear that those working with American Pro Diving were independent contractors. The form apparently contained a non-compete clause. Although some workers signed those forms, no signed contracts were submitted into evidence. While the Department argued that the purported non-compete clauses were contrary to Respondent's position that its workers were independent contractors, the evidence showed that inclusion of a non-compete clause was inadvertent, that Respondent never attempted to enforce a non-compete clause, and that all workers at American Pro Diving were always free to work and use their skills with any other dive shops or tours in the dive industry.

^{5/} "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." § 90.408, Fla. Stat.

^{6/} The alleged non-compete agreement was not offered or introduced into evidence. Although Mr. Straub testified that he was required to sign a non-compete agreement when he began working at American Pro Diving, considering other evidence and testimony that workers were not required to sign contracts until after Investigator Russell's suggestions to Mr. Goodenow during his investigation, it is found that the purported non-compete is in the same category as described in Endnote 3, above.

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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.