STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 15-5281

PEREZ CONCRETE, INC.,

Respondent,

and

K C CURB, INC.,

Intervenor.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), before Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"). The final hearing took place on January 26, 2016, in Orlando, Florida.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
Thomas Nemecek, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent and Intervenor:

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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner proved that Respondent violated chapter 440, Florida Statutes (2014),[1/] by failing to secure the payment of workers' compensation coverage as alleged in the Stop-Work Order and Amended Order of Penalty Assessment.

PRELIMINARY STATEMENT

On August 19, 2015, Petitioner, Department of Financial Services, Division of Workers' Compensation, issued a Stop-Work Order, ordering Respondent, Perez Concrete, Inc. ("Respondent" or "Perez Concrete"), to cease business operations. Petitioner alleged that Respondent failed to secure payment of workers' compensation coverage meeting the requirements of chapter 440 and the Insurance Code.

Petitioner issued an Amended Order of Penalty Assessment on September 30, 2015, assessing a penalty of $11,902.20. Respondent requested an administrative hearing to contest the penalty assessed.

The matter was referred to DOAH for the assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

On motion, and by Order dated December 2, 2015, the undersigned permitted KC Curb, Inc. ("KC Curb"), to intervene in this proceeding.

The final hearing was held on January 26, 2016. Petitioner presented the testimony of several witnesses as reflected in the record. Petitioner's Exhibits 1 through 9 were admitted into evidence without objection. Respondent presented the testimony of several witnesses as reflected in the record. Respondent's Exhibits A through N were admitted into evidence. Respondent's Exhibit O was offered, but upon objection, the undersigned sustained the objection, and it was not admitted.

The Transcript of the final hearing was filed with DOAH on March 7, 2016. The parties timely filed their proposed recommended orders. The proposed recommended orders were reviewed and given due consideration in preparing this Recommended Order.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant facts:

The Parties

1. Petitioner is the state agency responsible for enforcing the requirement in chapter 440 that employers in the state of Florida secure the payment of workers' compensation insurance benefits covering their employees.

2. Perez Concrete is a subcontractor/corporation registered to do business in Florida. Its principal business address is 6632 Willow Street, Mount Dora, Florida.

3. Intervenor, KC Curb, is a contractor/corporation registered to do business in Florida. Its principal business address is 4975 Patch Road, Orlando, Florida.

4. A representative of the FFVA Mutual Insurance Company (FFVA) testified. FFVA is a mutual insurance company in Florida which provides, among other things, workers' compensation insurance coverage. The witness was an underwriting supervisor.

5. In general, workers' compensation policies go through a yearly review and renewal process handled by the underwriter.

6. KC Curb had been a client of FFVA since 2006.

7. Perez Concrete has never been a client of FFVA, and Perez Concrete is not a named insured on the workers' compensation insurance policy held by KC Curb from 2013 through 2015.

8. There have been occasions when KC Curb picks up employees of subcontractors and includes them in its self-audits. Under those circumstances, KC Curb pays the premium for those particular subcontractor employees.

9. If KC Curb pays a premium that includes the payroll for a subcontractor's employee, his or her workers' compensation benefits are covered by the KC Curb workers' compensation policy.

10. FFVA performs an audit each year on all of the workers' compensation policies it writes. The final audit is performed, in part, to determine the final premium due on the account for that year.

11. During a final audit, FFVA reviews any payroll paid to subcontractors. If those subcontractors did not have a certificate of insurance, then FFVA would include the payroll paid to that subcontractor to calculate the final premium due from the general contractor.

12. If FFVA identified that there were certain subcontractor employees during the audit that worked for Perez Concrete, who were doing work on the subcontract with KC Curb, the premium would be calculated based upon those additional Perez Concrete employees.

13. As a result, those Perez Concrete employees would be covered under the KC Curb workers' compensation insurance policy and entitled to benefits if injured on the job. KC Curb's final premium would be based on the final yearly audit including any subcontractor employees of Perez Concrete. The subcontractor employees would be covered for any injuries on the job that might have occurred during the year audited.

14. The premium ultimately charged to the general contractor is based solely on the payroll, and not on named employees.

15. KC Curb also does a monthly self-audit which only includes its payroll. The company makes a monthly premium payment based on what is shown in its monthly audit.

16. If KC Curb picks up or includes an employee of a subcontractor on its monthly self-audit and reports pay going to that person, then that subcontractor employee is covered for workers' compensation benefits.

17. When end-of-the-year audits are performed, the reports provided by KC Curb contains names of its own employees or a description of employees. This report would list the employees of KC Curb, but it would not list the employees of any subcontractors, only the amount of payroll for those subcontractors.

18. The owner of Perez Concrete is Agustin Osorio, who testified.

19. Perez Concrete builds concrete sidewalks, driveways, curbs, and inlets. It also does the framing and finishes the concrete.

20. Perez Concrete had a workers' compensation insurance policy providing benefit to its employees in place from August 2013 through April 2015, with Madison Insurance Company. See, generally, Resp. Exhs. B-D.

21. Perez Concrete's policy was canceled for late payments on April 10, 2015. Apparently, Perez Concrete was late with two

payments, and the Madison Insurance Company canceled Perez Concrete's workers' compensation policy.

22. Perez Concrete had two employees, in addition to Osorio, in July 2015, when it was first visited by Petitioner's compliance investigator, Stephanie Scarton.

23. Scarton stopped by while the employees were performing a small sidewalk finished job in Rockledge, Florida, for KC Curb.

24. During this first meeting, Osorio told Scarton that the KC Curb's workers' compensation policy "was covering me." Osorio testified that she responded "everything was all right."

25. Upon questioning by the undersigned, Osorio clarified that the first visit of the investigator was in the middle of July 2015 at a work location in Rockledge, Florida. After discussing his operations and telling the investigator about the KC Curb policy coverage, she left. Osorio testified that Scarton called KC Curb that same day to confirm his comments, and then she told him that everything was "all right."

26. Osorio testified that the same investigator visited again on August 19, 2015. That day, she gave him the Stop-Work Order. Osorio testified that it was during the August 19, 2015, visit that she changed her previous response and said that Perez Concrete was not covered under the KC Curb policy.

27. As the owner, Osorio had a valid exemption for himself from workers' compensation coverage from January 2014 through January 2016. Resp. Exh. E.

28. Osorio had a conversation with "Robin" from KC Curb (date not specified). When he asked her whether Perez Concrete was covered, she told him that his company would be covered under KC Curb's workers' compensation policy.

29. Osorio testified that Perez Concrete pays KC Curb seven percent of the weekly revenue derived from working for KC Curb, in order to be included on KC Curbs workers' compensation policy. Perez Concrete pays an additional one percent to KC Curb to be included on its general liability insurance policy.

30. Perez Concrete had bought its own workers' compensation policy in 2013 and in 2014. Resp. Exhs. B-D.

31. When Perez Concrete's policy was canceled by Madison Insurance Company on April 10, 2015, Osorio contacted KC Curb about the insurance. Osorio understood that by doing so, he had secured the payment of workers' compensation insurance coverage for his employees.

32. When Osorio contacted the KC Curb representatives, he told them that he wanted to continue working with them and asked them about the insurance coverage.

33. Petitioner's compliance investigator, Scarton, testified. She has held that position since approximately April 2013.

34. She conducts random site visits to verify that companies have workers' compensation coverage. She conducts approximately 80 compliance investigations per month.

35. On July 6, 2015, she conducted a random visit at a construction site where concrete work was being performed by Perez Concrete.

36. She spoke with Osorio who told her that he did not have workers' compensation insurance coverage, but that he was covered through another company. In checking her CCAS automated data system, she confirmed that Perez Concrete did not carry its own workers' compensation policy.[2/]

37. After speaking with Osorio and getting his explanation, she contacted KC Curb and spoke with Robin Sempier. She was informed that KC Curb paid the workers' compensation coverage for Perez Concrete.

38. Sempier told the investigator that KC Curb was allowed to proceed in that fashion with its subcontractors under an arrangement from a previous compliance case handled by Petitioner.[3/]

39. After speaking with Sempier about Perez Concrete's situation, Scarton contacted her supervisor, Robert Serrone. He

directed her to refer the case involving Perez Concrete to Petitioner's fraud unit and to let them handle the investigation.

40. Scarton's next involvement was in August 2015, when she was contacted by her supervisor and directed to issue a stop-work order to Perez Concrete. She obtained the Stop-Work Order, and served it on Perez Concrete on August 19, 2015.

41. Petitioner also served Perez Concrete with a business records request. Perez Concrete did not comply with the request, nor did it submit any business records to Petitioner.

42. Upon inquiry by the undersigned, the parties stipulated on the record that the appropriate amount of the penalty would be $11,902.20, should a violation be proven.

43. The investigator asked the KC Curb representative to send her documentation confirming that KC Curb pays the workers' compensation coverage for Perez Concrete.

44. The investigator opined on cross-examination that the employees of Perez Concrete were not covered by KC Curb. Scarton concluded that "in accordance with the investigations that we conduct, Perez Concrete would need to carry the coverage." Tr., p. 139, line 7. She later stated that on July 6, 2015, she could not confirm insurance coverage "one way or another." Tr., p. 140, lines 6 and 13.

45. Professor Joseph W. Little of Gainesville, Florida, was called to testify as an expert on behalf of Perez Concrete and KC

Curb. He is currently employed as an adjunct faculty member at the University of Florida, College of Law. He is also Professor of Law Emeritus at the University of Florida, College of Law. He had been employed as a professor at the University of Florida, College of Law, since 1967, teaching workers' compensation law. Little is unquestionably an expert in the field of Workers' Compensation Law.

46. Little also authored the legal hornbook entitled "Workers' Compensation," a publication of the West Publishing Company.

47. Little reviewed the facts of the case by reviewing the documentation provided by counsel who retained him. This included the Stop-Work Order, the petition, an amended petition, motions, and orders issued in the case. He also studied the applicable statutes and administrative rules of Petitioner as well as decisional law that he felt was relevant.[4/]

48. Little testified, and the undersigned considered, that he was not aware of any decisional law in the state of Florida interpreting the word "secure" to mean "buy" or "must buy," so long as there was an agreement between the subcontractor and the prime contractor that one or the other would purchase the insurance. Tr., p. 180, line 4.

49. Little testified that the concept of the "statutory employer" found in chapter 440 has remained in place and steady

throughout the history of the statute. He pointed out other relevant statutes in chapter 440 that needed to be read in pari materia with one another.

50. An insurance agent from Bouchard Insurance, John Manis, also testified. Bouchard Insurance is a commercial insurance agency which sells workers' compensation insurance. Bouchard Insurance represents FFVA and sells workers' compensation insurance as an agent for that company.

51. Manis had worked on the KC Curb account since 2005. He is familiar with how KC Curb and FFVA conduct their workers' compensation business together, including the payment of premiums. When a workers' compensation policy is written, the business will give its payrolls to the agent who determines the class codes that are applied and used in the policy.

52. At the end of each year, an audit is conducted on those payrolls to determine whether or not the business owes money to FFVA, or if a refund from FFVA is in order.

53. Some companies, like KC Curb, do a monthly audit--during which they input their payroll and are told what premium is due for the month.

54. When a subcontractor of KC Curb declines or fails to obtain its own insurance policy, the subcontractor's employee becomes "like an employee of KC Curb," and FFVA will charge KC Curb for those employees, as if they were its own.

55. The names of actual subcontractor employees are provided at audit time, not during the year. Apparently, this is a common practice in the industry.

56. The office manager for KC Curb is Sempier. She testified that KC Curb is a concrete curb construction company that has been in business for 22 years in the Orlando area. It performs concrete construction services using a combination of in-house crews and subcontractors.

57. One of Sempier's duties is to monitor subcontractor compliance with the Workers' Compensation Laws. She characterized KC Curb as being "very on top of that."

58. Subcontractors are required to provide KC Curb with certificates of insurance before they start any work. Subcontractors are required to produce a certificate of workers' compensation insurance, or they go under the KC Curb policy as an uninsured subcontractor.

59. Although KC Curb requires subcontractors to get their own insurance because this is much less expensive, some of them cannot or do not secure their own, so KC Curb secures it. The subcontractor is back-charged for this coverage.

60. In monthly workers' compensation self-audits, Sempier includes a sheet that shows payroll for KC Curb's uninsured contractors and its own employees. Those numbers are combined together along with other clerical classes and the insurance

premium payment is calculated. Tr., p. 221, line 3. Although not required by the FFVA, KC Curb includes payroll numbers for its uninsured subcontractors in each monthly self-audit. Tr., p. 221, line 11.

61. Respondent's Exhibit J, entitled "Self-Reported Payroll," was explained by the witness. The document, prepared and issued by KC Curb for 2015, includes an entry reflecting the total payroll paid each month for KC Curb. This included both KC Curb's own W-2 employees and employees of subcontractors. Tr., p. 227, line 19.

62. The second page of Respondent's Exhibit J (with information regarding other subcontractors redacted) shows that the payroll for employees of Perez Concrete was included beginning April 2, 2015. Tr., p. 224, line 16. Respondent's Exhibit J indicates, bottom right, the number of employees that were picked up from Perez Concrete.[5/]

63. Monthly premiums are paid by KC Curb instantaneously "on-line" and are based on the total payroll numbers listed in Respondent's Exhibit J, beginning with page 2. The payment comes directly out a KC Curb's checking account.

64. Sempier testified that once payment was made, all employees included in the payroll amounts are covered by KC Curb's workers' compensation policy, including the Perez Concrete

employee number listed. Tr., p. 224, line 23, and p. 253, line 14. See Resp. Ex. J, p. 2, bottom right.

65. Work orders are received from the subcontractors for KC Curb. Those work orders are supposed to list the names of the subcontractor's employees. In this manner, KC Curb is able to determine how many employees are going to be covered by insurance for a particular subcontractor.

66. When KC Curb was informed that the policy of insurance for Perez Concrete had been canceled, KC Curb called Perez Concrete's insurance agent to get the exact date of cancellation.

67. When Perez Concrete's workers' compensation insurance cancellation was confirmed, KC Curb notified Perez Concrete in writing that it needed to promptly provide new certificates of insurance. See Resp. Exh. H. Perez Concrete was likewise notified in writing of KC Curb's requirements for "KC Curb to provide Workers' Compensation Insurance for your Company." See Resp. Exh. I.

68. Osorio testified that Perez Concrete chose to have KC Curb secure the insurance for Perez Concrete after April 10, 2015, and he signed Respondent's Exhibit I agreeing to follow the guidelines for workers' compensation insurance.

69. Thereafter, KC Curb began to pick up and include Perez Concrete's employees on its monthly self-audits. Likewise, it

started to pay a premium amount for insurance which included payroll related to Perez Concrete's employees.

70. Sempier was contacted by Petitioner's investigator, Scarton. When she informed the investigator that KC Curb was compliant with the law and was following a procedure previously permitted, the investigator called back that same day and asked for her to get something from her agent verifying that Perez Concrete was covered. Sempier testified that she promptly obtained a letter from KC Curb's insurance confirming coverage for Perez Concrete and thought she attached it with her email back to the investigator. Tr., p. 256, line 18.

71. She subsequently learned that she attached the wrong document to the email, and the investigator did not receive the confirmation letter.[6/]

72. The evidence indicated that in the year 2015, KC Curb provided workers' compensation insurance coverage as a "statutory employer" for the employees of approximately seven of its subcontractors.

CONCLUSIONS OF LAW

73. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

Burden of Proof

74. This is a penal proceeding brought by Petitioner to enforce the workers' compensation coverage requirements found in chapter 440, by levying a sizeable monetary fine of $11,902.20 against Respondent. As a result, Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the violation(s) alleged in the Amended Order of Penalty Assessment. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

75. The clear and convincing evidence standard of proof has been described by the Florida Supreme Court as follows:

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

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

Applicable Case Law

76. Workers' compensation is a branch of law which is entirely statutory in origin. Shaw v. Cambridge Integrated Servs. Grp., Inc., 888 So. 2d 58, 61 (Fla. 4th DCA 2004). Its

creation "involved a legislative balancing of competing interests, creating a system of shared benefits and burdens for its participants." Sun Bank/S. Fla., N.A. v. Baker, 632 So. 2d 669, 672 (Fla. 4th DCA 1994). Workers' compensation "was unknown to the common law." Shaw, 888 So. 2d at 61.

77. Since workers' compensation is created and governed by statute, the statute must be strictly construed. See Summit Claims Mgmt. v. Lawyers Express Trucking, Inc., 913 So. 2d 1182 (Fla. 4th DCA 2005); Dep't of Fin. Servs. v. L & I Consol. Servs., Inc., Case No. 08-5911 (Fla. DOAH May 28, 2009; Fla. DFS July 2, 2009).

78. In light of its historical and purely statutory origin, it is reasonable to conclude that the only rights available to, or obligations required of, employers and carriers are those specifically delineated in the statute. See, generally, Fid. & Cas. Co. of N.Y. v. Bedingfield, 60 So. 2d 489, 495 (Fla. 1952); and Summit Claims Mgmt., supra. Similarly, in order to avail itself of the benefits conferred by statute, an affected party must comply with the rules and conditions stated therein. Cont'l Ins. Co. v. Indus. Fire & Cas. Ins. Co., 427 So. 2d 792, 793 (Fla. 3d DCA 1983).

79. The term "secure payment of compensation" does not impose an automatic duty to actually pay benefits, but only requires that payment be insured "with any stock company or mutual

company or association or exchange, authorized to do business in the State." Mena v. J.I.L. Constr. Group Corp., 79 So. 3d 219 (Fla. 4th DCA 2012).

80. In this case, Petitioner has taken the position that Respondent must secure payment of compensation by purchasing and maintaining its own policy of workers' compensation insurance. Several district court of appeal cases touch upon what the phrase means.

81. The First District Court of Appeal's opinion in Limerock Industries, Inc. v. Pridgeon, 743 So. 2d 176 (Fla. 1st DCA 1999), is instructive. In Pridgeon, the trial court concluded that the appellant had failed to secure payment of compensation as required by the workers' compensation law and disallowed the appellant's claim of immunity from suit. The trial court agreed with the appellee who claimed that the appellant was not immune since it had "misclassified" Pridgeon as an independent contractor, and the insurance carrier had, therefore, not considered Pridgeon's risk factors and salary in computing the amount of the appellant's premium.

82. On appeal, the appellant argued that it had fulfilled its obligation, regardless of the misclassification issue, where a workers' compensation policy covering the employee was, in fact, in place when the employee was injured.

83. The First District Court of Appeal agreed that the appellant was in compliance with the statute and held:

> The issue before us is resolved by section 440.38 (1), which provides that "every employer shall secure the payment of compensation under this chapter . . . . By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the state." It is undisputed that the appellant had in place at the time of the accident a policy of workers' compensation insurance that covered all employees of the appellant. Although erroneously classified as an independent contractor, Mr. Pridgeon was an employee of the appellant and was accordingly covered under the policy. We therefore conclude that the appellant did "secure payment of compensation" within the meaning of section 440.11 (1).

In short, the Court concluded that since coverage was in place protecting the employees of Limerock Industries, Inc., that was sufficient to comply with the statute.

84. Likewise, the Fourth District Court of Appeal in Mena v. J.I.L. Constr. Group Corp., 79 So. 3d 219 (Fla. 4th DCA 2012), addressed the definition of the phrase "secure payment of compensation," where it stated:

> The statutory language "secure payment of compensation" means "insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the State." § 440.38(1)(a), Florida statutes (2004); Limerock Indus., Inc. v. Pridgeon, 743 So. 2d 176 (1st DCA 1999). We therefore reject Mena's argument that the

> term imposes an automatic duty to actually pay benefits wherever it is used in the statute.

85. Finally, and in a more wide-ranging definition of the term, the phrase to "secure payment" was explained by Florida's Third District Court of Appeal as follows, "The liability imposed on employers to 'secure payment' of compensation requires only that an employer insure and keep insured the payment of those workers' compensation benefits guaranteed by section 440.10(1)(a); it does not impose a duty to actually pay benefits to an employee." VMS, Inc. v. Alfonso, 147 So. 3d. 1071 (Fla. 3d DCA 2014)(en banc).

86. What is clear and significant is that the First, Third, and Fourth District Courts of Appeal apply a fairly broad and pragmatic definition of what constitutes compliance with the requirement to "secure payment."[7/]

87. The Florida Supreme Court's opinion in Deen v. Quantum Resources, 750 So. 2d 616 (Fla. 1999), also sheds some light on "how" an employer may satisfy its obligation to secure the payment of workers' compensation benefits to its employees. The Court reviewed, in part, the statutory list of the "ways" an employer can secure coverage found in section 440.38(1). The Court commented that "this section [section 1] is only an authorization as to how workers' compensation coverage may be secured and is not

a grant of immunity as required by our Jones decision." Id. at 619.

88. Although the Deen case addresses other issues, it suggests that compliance by an employer with *any* subsection from the list of coverage options outlined in section 440.38(1) would suffice.

89. To that point, the first subsection (a) of section 440.38(1) describes one of the options:

> (1) Every employer shall secure the payment of compensation under this chapter:
>
> (a) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association or exchange, authorized to do business in the state.[8/]

90. As previously noted, the correct outcome of this case hinges, in part, on the proper definition of the phrase "secure payment". This analysis requires not only a careful review of the applicable workers' compensation case law, but also a brief analysis of the statutes and cases on statutory interpretation.

Applicable Statutes

91. Pursuant to sections 440.10, 440.107(2), and 440.38, every employer is required to secure workers' compensation insurance coverage for the benefit of its employees unless exempted or otherwise excluded under chapter 440.

92. Under chapter 440, securing the payment of workers' compensation means obtaining coverage that meets the requirements of chapter 440 and the Florida Insurance Code. § 404.107(2), Fla. Stat.

93. Interestingly enough, at section 440.107(2), the statute also defines what does *not* constitute securing payment of workers' compensation:

> However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, 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. (emphasis added).

§ 440.107, Fla. Stat.

94. There was no allegation or proof in this case to show that the proposed penalty was levied for an understatement, concealment, or misrepresentation. Rather, Petitioner concluded that Respondent had not secured workers' compensation coverage for its employees.

Applicable Principles of Statutory Construction

95. The Legislature has provided some guidance regarding the proper interpretation of the phrase "secure payment." This

includes the following excerpt from section 440.015, entitled "Legislative Intent," which provides:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. . . . and the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer. It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. (emphasis added).

As a result, decisional law related to the rules of statutory construction should be consulted.

96. When interpreting a statute and attempting to discern legislative intent, courts must first look to the actual language used in the statute. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000); Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996).

97. When interpreting a statute, the plain and ordinary meaning of the words of the statute must control. Fla. Dep't of Envtl. Prot. v. Contract Point Fla. Parks, LLC, 986 So. 2d 1260 (Fla. 2008); Marrero v. State, 71 So. 3d 881 (Fla. 2011).

98. It is also axiomatic that an administrative rule cannot enlarge, modify, or contravene provisions of a statute. Dep't of Bus. Reg. v. Salvation, Ltd., 452 So. 2d 65, 66 (Fla. 1st DCA

1984); Seitz v. Duval Cnty. Sch. Bd., 366 So. 2d 119, 121 (Fla. 1st DCA 1979); State Dep't of HRS v. McTigue, 387 So. 2d 454 (Fla. 1st DCA 1980). A rule which purports to do so constitutes an invalid exercise of delegated legislative authority. Nicholas v. Wainwright, 152 So. 2d 458, 460 (Fla. 1963).

99. In sum, courts must not defer to an agency's construction or application of a statute if the agency's interpretation conflicts with the plain and ordinary meaning of the statute. State Farm Fla. Ins. Co. v. Unlimited Restoration Specialists, Inc., 84 So. 3d 390 (Fla. 5th DCA 2012); Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 848 (Fla. 1st DCA 2002).

100. "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Forsythe, 604 So. 2d at 452, 454 (quoting Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, 694-95 (Fla. 1918)).

101. A court does not have the authority to strike a clause or word where such a revision would substantively change the entire meaning of the statute in a manner contrary to its plain meaning. Under fundamental principles of separation of powers, courts cannot judicially alter the wording of a statute where the Legislature clearly has not done so. A court's function is to

interpret statutes as they are written and give effect to each word in the statute. Fla. Dep't of Rev. v. Fla. Mun. Power Ag., 789 So. 2d 320 (Fla. 2001).

102. As previously discussed, at all times during the penalty period, Respondent was required to secure workers' compensation coverage for its employees. § 440.10(1)(a), Fla. Stat.; § 440.02(17)(b)2., Fla. Stat.

103. Additionally, Intervenor was obligated to secure and maintain workers' compensation coverage for subcontractors, such as Respondent, who did not have or hold valid certificates of exemption or workers' compensation coverage during the penalty period. Under this arrangement, Intervenor is considered to be the "statutory employer" of Respondent's employees. More specifically, section 440.10(1)(b) states, in pertinent part:

> (b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

104. This law introduces a purely statutory concept and imputes employment of the subcontractor's employees to the contractor for purposes of securing workers' compensation coverage. Thus, if a subcontractor has secured its own coverage,

then the general contractor is not liable for securing workers' compensation for that subcontractor. However, if the subcontractor has not secured workers' compensation coverage, or loses it, then the general contractor is liable for securing workers' compensation coverage for that subcontractor. See, generally, Mena v. J.I.L. Constr. Grp. Corp., 79 So. 3d 219 (Fla. 4th DCA 2012) ("where a subcontractor performing part of the work of a contractor fails to secure payment of compensation, the contractor is liable for the same").

105. Here, it is undisputed that Intervenor contracted with Respondent to perform cement work and services. It is further undisputed that Respondent lost and did not have valid workers' compensation insurance coverage beginning in April 2015.

106. Accordingly, Intervenor was liable, under section 440.10, to secure workers' compensation coverage for Respondent's employees.

107. The evidence was undisputed that Intervenor did, in fact, obtain and maintain workers' compensation coverage for Respondent's employees during the penalty period. See Resp. Exh. L.

108. In the absence of any case, rule, or statutory provision which explicitly requires a subcontractor to actually buy and maintain its own separate policy of workers' compensation

insurance, the undersigned cannot recommend engrafting such a requirement onto the statute.

109. Further, the undersigned believes that it is significant that the Legislature used the broader, more all-encompassing words "secure" and "obtain coverage" to define an employer's obligation. It could have, but did not use, the phrase "must buy" or "must maintain" its own "separate policy" of insurance.

110. The undersigned concludes that this was an intentional choice of words, and cannot, by way of this Recommended Order, ascribe a different interpretation.[9/]

111. The undersigned's conclusion and reasoning is also supported by other provisions of chapter 440 and the Florida Administrative Code which should be read in pari materia with sections 440.107(2) and 440.38. For instance, section 440.10(d) envisions that there may be situations where a contractor may provide or secures coverage for one of its subcontractors, it reads:

> (d)1. If a contractor becomes liable for the payment of compensation to the employees of a subcontractor who has failed to secure such payment in violation of s. 440.38, the contractor or other third-party payor shall be entitled to recover from the subcontractor all benefits paid or payable plus interest unless the contractor and subcontractor have agreed

> in writing that the contractor will provide coverage. (emphasis added).

§ 440.10., Fla. Stat.

112. Likewise, Florida Administrative Code Rule 69L-6.015(9)(a) contemplates the same:

> (9) Workers' compensation insurance and certificates of election to be exempt.
>
> (a) Every employer shall maintain all workers' compensation insurance policies obtained by the employer or on the employer's behalf and all endorsements, declaration pages, certificates of workers' compensation insurance, notices of cancellation, notices of non-renewal, or notices of reinstatement of such policies. (emphasis added).

113. Finally, Petitioner bore the ultimate burden of proving by clear and convincing evidence that Respondent violated the statute. This burden rested with Petitioner throughout the proceedings.

114. In many respects, this case boils down to whether or not the undersigned has "a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). At the end of the day, Petitioner has not met this burden.

115. To that point, Petitioner has suggested in its Memorandum that if Respondent worked at *other* job sites for *other*

contractors during the penalty period (April 10, 2015, through August 19, 2015), then Respondent's workers would not be covered under Intervenor's policy while on those other jobs, and this would violate the statute because there would or may be a gap in the coverage.

116. Irrespective, after reviewing the testimony and documents in this case, there was no evidence presented to prove that Respondent did, in fact, work on other projects for other contractors. It was Petitioner's burden to prove this point to advance that argument.

117. Furthermore, there was no proof from Petitioner to show what the details of Intervenor's insurance policy were, nor was the policy admitted into evidence. The testimony from multiple witnesses reinforced the factual conclusion that Respondent's employees were, in fact, covered under Intervenor's policy of insurance during the entire penalty period. Again, the burden fell on Petitioner to prove that the policy fell short or did not cover Respondent's employees.

118. As a result, Petitioner's argument concerning a potential gap or lapse in coverage is speculative and unavailing. The only proof presented, and the reasonable inferences drawn from that proof, is that Respondent's work during the penalty period from April 10, 2015, through August 19, 2015, was on Intervenor's projects.

119. By securing, and thereby obtaining, insurance coverage for its employees through the method of an agreement with the "statutory employer," Intervenor, Respondent fulfilled its legal obligation to secure workers' compensation insurance coverage under chapter 440.[10/]

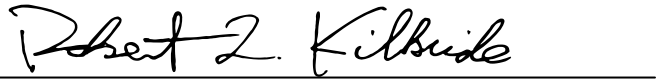
120. Irrespective of the merits of the lively arguments advanced by the parties for or against the use of the Laura Evans settlement, this case stands and falls on its own "compliance" merits. The undersigned finds that Respondent was in compliance during the applicable penalty period by securing workers' compensation coverage through the statutory employer, Intervenor.[11/]

121. To sustain its burden of proof and assess this penalty, Petitioner was obligated to prove that Respondent was out of compliance by clear and convincing evidence. In reviewing the evidence and the applicable law, the undersigned concludes that it has not done so.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Department of Financial Services, Division of Workers' Compensation, issue a final order withdrawing or dismissing the proposed penalty and finding that Respondent was in compliance with the statute during the relevant period of time.

DONE AND ENTERED this 5th day of April, 2016, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2016.

ENDNOTES

[1/] References to the Florida Statutes are to the 2014 version, unless otherwise indicated.

[2/] On the record, the parties stipulated that Perez Concrete did not have its own policy of insurance from April 10, 2015, through the date of the second site visit on August 19, 2015.

[3/] The investigator did not research Sempier's claim that this coverage arrangement had been previously approved in a prior case with Petitioner. On cross-examination, the investigator stated that she was not aware of any factual distinctions or differences between the Perez Concrete scenario and the prior case involving another subcontractor, Laura Evans.

[4/] The undersigned ruled prior to Little's testimony that testimony concerning the interpretation of substantive areas of the Workers' Compensation Law would not be considered. Further, the undersigned would not consider opinion testimony from Little concerning the ultimate question of whether or not Perez Concrete was in violation of chapter 440 by failing to secure workers' compensation coverage for its employees, since these matters were within the province of the ALJ. The undersigned agreed, however, to consider Little's testimony concerning the history behind the

adoption of the workers' compensation statute, chapter 440, or other areas that might assist the undersigned in a manner permitted by the rules of evidence.

[5/] Only the first page of Respondent's Exhibit J is sent to FFVA; the remaining pages, entitled "Workers Comp Backup Split," are maintained and kept by KC Curb for its own self-auditing purposes. Tr., p. 227, line 14.

[6/] Respondent's Exhibit L, a confirmation of coverage letter from Bouchard Insurance to KC Curb dated July 6, 2015, was admitted by the undersigned since it supplemented or explained other admissible evidence.

[7/] The undersigned has not located, and the parties have not provided, a case directly on point interpreting the statute in the manner suggested by Petitioner.

[8/] The evidence adduced at hearing disclosed that Respondent's coverage through the statutory employer, KC Curb, was ultimately with and through "any stock company or mutual company or association or exchange, authorized to do business in the state," resulting in Respondent insuring and keeping insured the payment of workers' compensation for its employees.

[9/] Since the disputed phrases used in chapter 440 are plain and unambiguous, the construction of the phrases as applied in this Recommended Order comports with the requirement that the statute be strictly construed. Summit Claims Mgmt., supra.

[10/] The undersigned is not persuaded that the settlement agreement in the Laura Evans case is determinative or binding in this case. The parties were different, and the facts and circumstances of that case were not fully vetted at the final hearing. Further, no final order from that case was admitted by the parties to trigger any administrative finality. Thomson v. Dep't of Envtl. Reg., 511 So. 2d 989 (Fla. 1987); and Delray Med. Ctr., Inc. v. Ag. for Health Care Admin., 5 So. 3d 26 (Fla. 4th DCA 2009). Furthermore, the settlement agreement cannot be considered an admission against Petitioner's interest. Mortg. Guar. Ins. Corp. v. Stewart, 427 So. 2d 776 (Fla. 3d DCA 1983) (settlements or offers of settlement have never been considered admissions against interest binding on the parties making them. See, e.g., § 90.408, Fla. Stat. (1981); McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 274 (2d ed. 1972)). As a final point, even statements made in a settlement letter or agreement are generally protected. Benoit, Inc. v. Dist. Bd. of Trs. of St. Johns River

Cmty. Coll. of Fla., 463 So. 2d 1260 hn.2 (Fla. 5th DCA 1984) (where the court explained why such statements should not be allowed as an admission against interest: "An inevitable effect of this exception permitting admissions of fact to be used as evidence is to inhibit freedom of communication with respect to compromise, and to serve as a trap for the unwary. These considerations account for the expansion of the rule to include evidence of conduct or statements made in compromise negotiations."). As a result the undersigned concludes that none of the "Whereas" clauses or statements in the body of the Laura Evans settlement agreement should be considered.

[11/] The undersigned has not been provided with any compelling case law or statutory authority which prohibits a subcontractor from complying with the statute in this manner.

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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.