STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 15-7356

SOLER AND SON ROOFING,

Respondent.
_____/

RECOMMENDED ORDER

On April 27, 2016, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jonathan Anthony Martin, Esquire
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Department of Financial Services
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For Respondent: Daniel R. Vega, Esquire
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STATEMENT OF THE ISSUES

The issues are whether, under section 440.107, Florida Statutes, Petitioner may calculate a penalty assessment for a failure to secure the payment of workers' compensation for one day as though the failure persisted over two years and whether Petitioner may calculate a penalty assessment based on double the statewide average weekly wage (AWW) when the lone uncovered employee earned $10 per hour.

PRELIMINARY STATEMENT

By Stop-Work Order (SWO) dated November 23, 2015, Petitioner ordered Respondent to stop work at all worksites in the state of Florida for failing to obtain coverage that meets the requirements of chapter 440, Florida Statutes. The SWO includes an Order of Penalty Assessment imposing a penalty of two times the premium that Respondent would have paid when applying approved manual rates to Respondent's payroll "during periods for which it has failed to secure the payment of compensation within the preceding 2-year period."

By Petition for Administrative Hearing filed on December 14, 2015, Respondent requested a chapter 120 hearing. On December 30, 2015, Petitioner issued an Amended Order of Penalty Assessment assessing a penalty of $63,434.48 and transmitted the file to DOAH.

At the hearing, Petitioner called two witnesses and offered into evidence nine exhibits: Petitioner Exhibits 1-9. Respondent called one witness and offered into evidence ten exhibits: Respondent Exhibits A-J. All of the exhibits were admitted into evidence.

The court reporter filed the transcript on May 16, 2016. Each party filed a proposed recommended order on May 26, 2016.

FINDINGS OF FACT

1. Respondent was incorporated in 2008 by Ineido Soler, Sr., and his son, Ineido Soler, Jr. Since the corporation began operations, the wife of Mr. Soler, Jr., Idalmis Pedrero, has served as the office manager of this family-owned company.

2. At all material times, Respondent has contracted with a personnel leasing company to handle employee matters, such as securing the payment of workers' compensation. Ms. Pedrero's responsibilities include informing the employee leasing company of new hires, so the company can obtain workers' compensation coverage, which typically starts the day following notification.

3. On the afternoon of November 22, 2015, Mr. Soler, Jr., telephoned his wife and told her that he and his father had hired, at the rate of $10 per hour, a new employee, Geony Borrego Lee, who would start work the following morning. Customarily, Ms. Pedrero would immediately inform the employee leasing company. However, Ms. Pedrero was working at home

because, six days earlier, she had delivered a baby by caesarian section, and she was still recuperating and tending to her newborn. A fatigued Ms. Pedrero did not notify the employee leasing company that day of the new hire.

4. Late the next morning, Ms. Pedrero was awakened by a call from her husband, who asked her if she had faxed the necessary information to the employee leasing company. Ms. Pedrero admitted that she had not done so, but would do so right away. She faxed the information immediately, so that the employee leasing company could add Mr. Lee to the workers' compensation policy, effective the next day, November 24.

5. Uncovered for November 23, Mr. Lee joined three other employees of Respondent and performed roofing work at a worksite. Late in the afternoon of November 23, one of Petitioner's investigators conducted a random inspection of Respondent's worksite and determined that Respondent had secured the payment of workers' compensation for the three other employees, but not for Mr. Lee.

6. The investigator issued an SWO on the day of the inspection, November 23. The SWO contains three parts. First, the SWO orders Respondent to cease work anywhere in the state of Florida. Second, the SWO includes an Order of Penalty Assessment, which does not contain a specific penalty, but instead sets forth the formula by which Petitioner determines

the amount of the penalty to assess. Tracking the statute discussed below, the formula included in the SWO is two times the premium that the employer would have paid when applying approved manual rates to the employer's payroll "during periods for which it has failed to secure the payment of compensation within the preceding 2-year period." Third, the SWO includes a Notice of Rights, which advises Respondent that it may request a chapter 120 hearing.

7. On November 24, Petitioner released the SWO after Respondent had secured the payment of workers' compensation for Mr. Lee. On November 25, the investigator hand delivered to Respondent a Request for Production of Business Records for Penalty Assessment Calculation (Request). The Request covers November 24, 2013, through November 23, 2015, and demands records in eight categories: identification of employer, occupational licenses, payroll documents, account documents, disbursements, contracts for work, identification of subcontractors, and documentation of subcontractors' workers' compensation coverage.

8. The Request identifies "payroll documents" as:

> all documents that reflect the payroll of the employer . . . including . . . time sheets, time cards, attendance records, earning records, check stubs and payroll summaries for both individual employees and aggregate records; [and] federal income tax documents and other documents reflecting the

> . . . remuneration paid or payable to each employee . . . .

9. The Request adds:

> The employer may present for consideration in lieu of the requested records, proof of compliance with F.S. 440 by a workers' compensation policy or coverage through employee leasing for all periods of this request where such coverage existed. If the proof of compliance is verified by the Department the requested records for that time period will not be required.

10. The Request warns:

> If the employer fails to provide the required business records sufficient to enable the . . . 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 . . . shall be the statewide average weekly wage as defined in section 440.12(2), F.S., multiplied by 2. The Department shall impute the employer's payroll at any time after ten, but before the expiration of twenty eight business days after receipt by the employer of [the Request]. (FAC 69L-6.028) . . . .

11. On December 11, 2015, Respondent provided the following documents to Petitioner: itemized invoices, including for workers' compensation premiums, from the employee leasing company to Respondent and checks confirming payment, but the invoices and checks are from December 2011; an employee leasing agreement signed by Respondent on August 1, 2014, and signed by the employee leasing company on August 5, 2014; an employee

leasing application for Mr. Lee dated November 23, 2015, showing his date of birth as November 20, 1996, his hourly pay as $10, and his hire date as November 23, 2015; and an employee census dated December 1, 2015, showing, for each employee, a date of hire and, if applicable, date of termination. Partially compliant with the Request, this production omitted any documentation of workers' compensation coverage prior to August 1, 2014, and any documentation of payroll except for Mr. Lee's rate of pay.

12. On December 14, 2015, Respondent filed with Petitioner its request for a chapter 120 hearing. On December 30, 2016, Petitioner issued an Amended Order of Penalty Assessment (Amended Assessment), which proposes to assess a penalty of $63,434.48. On the same date, Petitioner transmitted the file to DOAH. Petitioner issued a Second Amended Order of Penalty Assessment on February 16, 2016, which is mentioned in, but not attached to, the Prehearing Stipulation that was filed on April 26, 2016, but the second amended assessment reportedly leaves the assessed penalty unchanged from the Amended Assessment.

13. In determining the penalty assessment, Petitioner assigned class code 5551 from the National Council on Compensation Insurance because Mr. Lee was performing roofing work; determined that the entire two-year period covered in the

Request was applicable; identified the AWW as $841.57 based on information provided by the Florida Department of Economic Opportunity for all employers subject to the Florida Reemployment Assistance Program Law, sections 443.01 et seq., Florida Statutes, for the four calendar quarters ending June 30, 2014; applied the appropriate manual rates for class code 5551 to $841.57, doubled, and divided the result by 100--all of which yielded a result of $31,717.24, which, doubled, results in a total penalty assessment of $63,434.48.

14. There is no dispute that the classification code for Mr. Lee is code 5551, the AWW is $841.57, and the manual rates are 18.03 as of July 1, 2013, 18.62 as of January 1, 2014, and 17.48 as of January 1, 2015. Because Petitioner determined that Respondent had failed to provide sufficient evidence of its payroll, Petitioner calculated the penalty assessment by using the AWW of $841.57, doubled, instead of Mr. Lee's actual rate of $10 per hour.

15. Petitioner's calculations are mathematically correct. For the 5.27 weeks of 2013, the penalty assessment is $3198.58 based on multiplying the AWW, doubled, by the manual rate of 18.03 divided by 100 multiplied by 2 and multiplied by 5.27. For the 52 weeks of 2014, the penalty assessment is $32,593.67 based on multiplying the AWW, doubled, by the manual rate of 18.62 divided by 100 multiplied by 2 and multiplied by 52. For

the 46.44 weeks of 2015, the penalty assessment is $27,326.48 based on multiplying the AWW, doubled, by the manual rate of 17.48 divided by 100 multiplied by 2 and multiplied by 46.44. Adding these sums yields a total penalty assessment of $63,118.73, which approximates Petitioner's penalty assessment calculation of $63,434.48. (Mistranscription of difficult-to-read manual rates or a different rule for handling partial weeks may account for the small difference.)

16. Respondent challenges two factors in the imputation formula: the two-year period of noncompliance for Mr. Lee instead of one day's noncompliance and the AWW, doubled, instead of Mr. Lee's $10 per hour rate of pay. Underscoring the differences between the two-year period of noncompliance and double the AWW and the actual period of noncompliance and Mr. Lee's real pay rate, at the start of the two-year period, Mr. Lee was three days past his 16th birthday and residing in Cuba, and Mr. Lee continues to earn $10 per hour as of the date of the hearing.

17. The impact of Petitioner's use of the two-year period of noncompliance and double the AWW is significant. If the calculation were based on a single day, rather than two years, the assessed penalty would be less than the statutory minimum of $1000, which is described below, even if double the AWW were used. One day is 0.14 weeks, so the penalty assessment would be

$82.38 based on multiplying the AWW, doubled, by the manual rate of 17.48 divided by 100 multiplied by 2 and multiplied by 0.14.

18. If the calculation were based on the entire two years, rather than a single day, the assessed penalty would be about one-quarter of the proposed assessed penalty, if Mr. Lee's actual weekly rate of pay were used instead of double the AWW. Substituting $400 for twice the AWW in the calculations set forth in paragraph 15 above, the penalty would be $760.14 for 2013, $7746.92 for 2014, and $6494.17 for 2015 for a total of $15,001.23.

19. Explaining why Petitioner treated one day of noncompliance as two years of noncompliance, one of Petitioner's witnesses referred to Mr. Lee as a "placeholder" because the real focus of the imputation formula is the employer. The same witness characterized the imputation formula as a "legal fiction," implying that the formula obviously and, in this case, dramatically departs from the much-smaller penalty that would result from calculating exactly how much premium that Respondent avoided by not covering the modestly paid Mr. Lee on his first day of work.

20. Regardless of how Petitioner characterizes the imputation formula, the statutory mandate, as discussed below, is to determine the "periods" during which Respondent failed to secure workers' compensation insurance within the two-year

period covered by the Request. The focus is necessarily on the employee found by the investigator to be uncovered and any other uncovered employees. Petitioner must calculate a penalty based on how long the employee found by the investigator on his inspection has been uncovered, determining how many other employees, if any, in the preceding two years have been uncovered, and calculating a penalty based on how long they were uncovered.

21. There is evidence of one or two gaps in coverage during the relevant two years, but Petitioner has failed to prove such gaps by clear and convincing evidence. One of Petitioner's witnesses testified to a gap of one month "probably" from late January to late February 2015. This witness relied on Petitioner Exhibit 2, but it is completely illegible. Ms. Pedrero testified that Respondent had workers' compensation coverage since 2011, except for a gap, which she thought had occurred prior to August 2014, which is the start date of the current policy. This conflicting evidence does not establish by clear and convincing evidence any gap, and, even if a gap had been proved, no evidence establishes the number of uncovered employees, if any, during such a gap, nor would such a gap justify enlarging the period of noncompliance for Mr. Lee.

22. Ms. Pedrero testified that her mother-in-law, Teresa Marquez cleaned the office and warehouse on an occasional basis,

last having worked sometime in 2015. Respondent never secured workers' compensation coverage for Ms. Marquez, but she did no roofing work and appears to have been a casual worker, so her periods of employment during the two-year period covered by the Request would not constitute additional periods for which Respondent failed to secure workers' compensation insurance.

23. Based on the foregoing, Petitioner has proved by clear and convincing evidence only a single day of noncompliance, November 23, concerning one employee, Mr. Lee, within the relevant two-year period for the purpose of calculating the penalty assessment.

24. Likewise, Petitioner has proved by clear and convincing evidence a rate of pay of only $10 per hour for the purpose of calculating the penalty assessment. At no time has Respondent provided payroll records of all its employees for November 23, 2015. Respondent Exhibit E covers payroll for Respondent's employees for a two-week period commencing shortly after November 23, 2015. But the evidence establishes that Mr. Lee's rate of pay was $80 for the day, which, as discussed below, rebuts the statutory presumption of double the AWW.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57, and 440.107(13), Fla. Stat. (2015). (All statutory references are to 2015 Florida Statutes.)

Section 440.107(13) provides that, if contested, proposed agency action "must be contested as provided in chapter 120."

26. A chapter 120 hearing is de novo. § 120.57(1)(k). "'De novo' means to try a matter anew, as though it had not been heard before and no decision had been rendered." Lee v. St. Johns Cnty. Bd. of Cnty. Comm'rs, 776 So. 2d 1110, 1113 (Fla. 5th DCA 2001). The purpose of a chapter 120 hearing is to formulate final agency action, not to review proposed agency action. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

27. Because Petitioner seeks to impose an administrative penalty or fine against Respondent, Petitioner has the burden of proving the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Clear and convincing evidence must make the facts "highly probable" and produce in the mind of the trier of fact "a firm belief or conviction as to the truth of the facts sought to be established," leaving "no substantial doubt." Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983).

28. An employer is required to secure the payment of workers' compensation for its employees. § 440.10(1)(a). An employer is any person carrying on employment. § 440.02(16)(a). In the construction industry, employment occurs when at least

one employee is employed by an employer, § 440.02(17)(b)2., although an "employee" does not include a person whose employment is "casual" and not in the course of the trade or business of the employer. § 440.02(15)(d)5. Respondent is an employer required to secure the payment of workers' compensation for its employees, such as Mr. Lee. However, Petitioner has failed to prove that Ms. Marquez is ineligible for the exclusion set forth at section 440.02(15)(d)5. because the evidence failed to establish that she performed roofing work and failed to preclude the possibility that Ms. Marquez satisfied the criteria for casual employment, as defined in section 440.02(5).

29. Petitioner enforces the requirement that an employer secure the payment of workers' compensation. § 440.107(3). Petitioner is authorized to order the production of business records, § 440.107(3)(f) and (5), and to issue penalty assessment orders. § 440.107(3)(g). Petitioner is authorized to issue an SWO when it determines that an employer has failed to secure the payment of workers' compensation or has failed to produce business records within ten business days after receipt of a Request. § 440.107(7)(a). Petitioner is required to release an SWO when an employer complies with the coverage requirements, apparently even though an independent reason for issuing an SWO--the failure to produce business records--may persist or emerge after coverage is secured. Id. However,

Petitioner has the power to subpoena business records, and a court may punish noncompliance with Petitioner's subpoena by civil or criminal contempt. § 440.107(6).

30. Petitioner is required to assess against any employer that has failed to secure the payment of workers' compensation "a penalty equal to" the greater of $1000 or "2 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 . . . within the preceding 2-year period . . . ." (emphasis supplied). § 440.107(7)(d)1. This is a penal statute that, if ambiguous, must be construed against Petitioner. See, e.g., Osborne Stern, supra; Lester v. Dep't of Prof'l & Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

31. Petitioner has adopted a rule that provides for a shorter alternative period to a two-year period of noncompliance. Florida Administrative Code Rule 69L-6.028(2) states:

> The employer's period of non-compliance shall be either the same as the time period requested in the business records request for the calculation of penalty or an alternative period of non-compliance as determined by the department, whichever is less. The department shall determine an alternative period of non-compliance by obtaining records from other sources, including, but not limited to, the Department of State, Division of

> Corporations, the Department of Business and Professional Regulation, licensing offices, building permitting offices and contracts, that evidence a period of non-compliance different than the time period requested in the business records request for the calculation of penalty.

32. The first sentence of the rule states nothing more than that the calculation of the penalty assessment shall be for a period of up to the two years set forth in the Request. The second sentence of the rule provides that Petitioner will use an alternative (i.e., shorter) period of noncompliance if evidence indicates that the period of noncompliance is "different" (i.e., shorter) than the two-year period set forth in the Request. Under this interpretation of the rule, it does not conflict with the statutory requirement that Petitioner calculate a penalty assessment for all periods of noncompliance within the relevant two-year period, but only for such periods.

33. In its proposed recommended order, Petitioner interprets its rule to provide a two-year period for calculating a penalty assessment, even when the evidence shows one or more periods of noncompliance totaling less than two years. When an employer fails to produce payroll business records, Petitioner contends that the proper period is two years because "the period of non-compliance is based upon the employer's compliance, not a particular employee." Pet. PRO, ¶ 37. Petitioner cites the last sentence of rule 69L-6.028(2) for the uncontroversial

principle that: "For purposes of this rule, 'non-compliance' means the employers' failure to secure the payment of workers' compensation . . .."

34. Petitioner's argument is unpersuasive. Obviously, noncompliance is a failure of an employer, not an employee, so the focus is on the employer in this sense. But the point of the inquiry is to identify the periods of noncompliance; this requires a determination of when particular employees were uncovered and for how long. Properly interpreted, the rule says that the period of noncompliance is the two years stated in the Request or, if shorter, the period or periods within these two years that the employer was in noncompliance.

35. Quoting from its final order in Department of Financial Services v. Aleluya Roofing Plus Construction, Inc., 2016 Fla. Div. Admin. Hear. LEXIS 109 (Fla. DOAH Jan. 29, 2016), Petitioner again worries that "a non-compliant employer could simply provide . . . records demonstrating that the employees observed by the Department were only employed on the date of the investigation, and the Department would be precluded from imputing payroll for each of those employees for the remaining periods of non-compliance." Along these lines, as quoted in Petitioner's proposed recommended order, one of its witnesses testified that she could not use a "shorter alternative period of non-compliance for Respondent because "[n]o records were

provided to show payroll and payroll records [that] are needed to show if any payments occurred outside of leasing of employees." (Tr. 46).

36. These concerns and suspicions do not warrant Petitioner's imputation of a two-year period of noncompliance when an employer fails to produce business records. Understandably, Petitioner prefers the expedience of the imputation of a two-year period of noncompliance to the proof of an actual period of noncompliance. If it matters, these concerns and suspicions fail to account for the remedies that are available to Petitioner if an uncooperative employer tries to shorten the penalty period by doling out selected business records. Although the statutory requirement of releasing an SWO when an employee secures the payment of workers' compensation probably undermines the utility of an SWO in obtaining business records, Petitioner still has the explicit authority to obtain an adjudication of civil or even criminal contempt, presumably of the principals of a corporate employer. And the de novo hearing provides the opportunity for discovery and sanctions for the failure to respond to discovery, including the sanction of striking the employer's request for hearing, thus leaving Petitioner's proposed penalty assessment intact and the employer subject to the more onerous penalty-calculation provisions that

apply prior to the transmittal of the file to DOAH, as discussed in paragraph 46 below.

37. More importantly, Petitioner's preference for imputation over proof, as reflected in its unsustainable interpretation of rule 69L-6.028(2), effectively creates an evidentiary presumption: if an employer fails to provide its business records, its failure to have secured the payment of workers' compensation will be presumed to have persisted for the entire two years. However, the power to create evidentiary presumptions is reserved to the legislature and the courts and does not extend to the executive branch. See, e.g., McDonald v. Dep't of Prof'l Regulation, 582 So. 2d 660 (Fla. 1st DCA 1991).

38. In Twin City Roofing Construction Specialists, Inc. v. Department of Financial Services, 969 So. 2d 563 (Fla. 1st DCA 2007) (per curiam), two uncovered employees had worked in Florida for "one-half" of an eight-month period of noncompliance. Petitioner calculated the penalty for the entire period of noncompliance. Affirming, the opinion cites section 440.107(7)(e), which, as discussed below, establishes a vanishing presumption of earnings during the pre-DOAH phase when an employer fails to provide payroll business records. The opinion does not cite rule 69L-6.028 because Petitioner adopted the rule in the year following the Twin City opinion. In the brief mention of section 440.107(7)(e), the opinion fails to

note that this statute establishes a presumption of the AWW, not a two-year period of noncompliance. Twin City should be limited to its facts in which, possibly on evidentiary grounds, the court sustained Petitioner's determination not to start and stop noncompliance periods within a relative short overall period. (Although the appeal did not address this issue, the Administrative Law Judge applied the preponderance of evidence standard, rather than the clear-and-convincing standard. Dep't of Fin. Serv. v. Twin City Roofing Constr. Specialist, Inc., Case No. 06-0024 (Fla. DOAH August 30, 2006).)

39. The Administrative Law Judge recognizes that, for many years, Petitioner has reversed recommended orders on this issue, adding conclusions of law to implement a presumptive two-year period of noncompliance when the employer fails to produce its business records, despite evidence of a shorter period or periods of noncompliance. See Aleluya, supra; Dep't of Fin. Serv. v. Nobles Quality Serv., LLC, 2016 Fla. Div. Admin. Hear. LEXIS 179 (Fla. DOAH April 5, 2016); Dep't of Fin. Serv. v. Lockhart Builders, Inc., 2008 Fla. Div. Admin. Hear. LEXIS 181 (Fla. DOAH March 31, 2008), Amended Final Order (DFS Case No. 92390-07-WC September 15, 2009).

40. Because this proceeding is not a rule challenge, under former law, the Administrative Law Judge lacked the authority effectively to invalidate the rule, if Petitioner were to

persist with its interpretation that conflicts with section 440.107(7)(d)1., Clemons v. State Risk Mgmt. Trust Fund, 870 So. 2d 881, 884 (Benton, J., concurring), even though an appellate court is not so constrained. See, e.g., Willette v. Air Products, 700 So. 2d 397 (Fla. 1st DCA 1997). Effective July 1, 2016, section 120.57(1)(e)1. provides that neither an agency nor an administrative law judge may "base agency action that determines the substantial interests of a party on . . . a rule that is an invalid exercise of delegated legislative authority." Ch. 2016-116, §§ 4 and 8, Laws of Fla. As interpreted by Petitioner to impose a two-year noncompliance on the facts of this case, rule 69L-6.028(2) contravenes section 440.107(7)(d)1., within the meaning of section 120.52(8)(c), and is thus an invalid exercise of delegated legislative authority, so that Petitioner may not rely on this rule in this case. Without implying that this determination is within the substantive jurisdiction of Petitioner so as to authorize Petitioner to disturb this Conclusion of Law, as set forth in section 120.57(1)(l), this recommended order includes an alternative penalty assessment based on the contingency of conclusions of law in Petitioner's final order sustaining its calculation of the penalty assessment for the entire two years, but using Mr. Lee's actual rate of pay.

41. By contrast, there is statutory authority for Petitioner's use of the AWW, doubled, in place of Mr. Lee's actual rate of pay when the employer fails to provide payroll business records. Section 440.107(7)(e) provides:

> 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 2.

(The multiplier of 2 reduces to 1.5, effective October 1, 2016. Ch. 2016-56, §§ 3 and 11, Laws of Fla.)

42. Section 440.107(7)(e) imposes a consequence for an employer's failure to produce payroll business records: the uncovered employee or employees will be presumed to have earned double the AWW. This statute does not authorize the use of the entire two years in the event of a failure to produce; for the period or periods that the doubled AWW is to be applied, section 440.107(7)(e) defers to section 440.107(7)(d)1., which, as noted above, authorizes the calculation of a penalty assessment only for the period or periods of noncompliance.

43. As it does with its misconstruction of its rule, so as to transform it into a self-made presumption concerning the two-year period of noncompliance, so Petitioner mistakenly

treats the statutory assumption concerning the doubled AWW as an irrebuttable presumption. According to Petitioner, if an employer fails to produce business records, the penalty assessment will invariably be calculated over the entire two years using double the AWW. By these means, Petitioner forges a $63,000 penalty out of an evidentiary record clearly establishing no more than a one-day failure to secure workers' compensation for an employee making $10 per hour. Under Petitioner's approach, on the penalty-calculation issue, the sole effect of an employer's demand for a chapter 120 hearing is that an Administrative Law Judge will check Petitioner's arithmetic.

44. The above-cited case law concerning de novo administrative hearings does not support Petitioner's restrictive approach to the penalty-calculation issue. But a nonadministrative case also reveals, from an evidentiary perspective, the flaw in Petitioner's approach. In Universal Insurance Co. v. Warfel, 82 So. 3d 47 (Fla. 2012), a homeowner insurer processing a sinkhole claim hired an engineer to investigate the claim, as required by statute. The engineer determined that the damage was not due to a sinkhole, and the insurer denied the claim. The homeowner commenced a legal action. By statute, the engineer's findings and opinions were presumed correct. At the request of the insurer, the trial

judge instructed the jury that the engineer's findings and opinions had a presumption of correctness, although it was rebuttable.

45. The district court of appeal reversed, and the supreme court affirmed the district court, holding that the trial court should not even have informed the jury of the presumption. The supreme court held that a presumption of this type, which did not involve public policy (such as presumptions of civil sanity, birth legitimacy, and marriage validity), is a vanishing or bursting-bubble presumption that does not alter the burden of proof under section 90.304, but only the burden of producing evidence under section 90.303. Id. at 53-54. In determining that the subject presumption was a vanishing presumption, the court engaged in a detailed analysis of the relevant statutes and concluded that "nothing in the sinkhole claim process statutory scheme . . . applies that scheme in the litigation context." Id. at 57. These statutes served the purpose of providing insurers "a framework . . . to follow when encountering specific types of claims," but the application of such provisions to the "evidentiary context is both misguided and inappropriate." Id.

46. Similarly, the provision of section 440.107(7)(e) authorizing the use of double the AWW following an employer's failure to produce its business records and, assuming its

correctness for this discussion, Petitioner's interpretation of rule 69L-6.028(2) authorizing the use of a two-year period of noncompliance following an employer's failure to produce its business records apply only to the phase of the penalty-assessment process that culminates with the issuance of a penalty assessment. These provisions lose their force once an employer produces contrary evidence in a chapter 120 hearing.

47. Based on the foregoing, the penalty in this case is the statutory minimum penalty of $1000; provided, however, if Petitioner replaces the Conclusions of Law interpreting rule 69L-6.028(2) with conclusions supporting a determination that Respondent failed to secure the payment of workers' compensation for Mr. Lee for two years, the penalty would be $15,001.23 based on his actual rate of pay of $10 per hour.

RECOMMENDATION

It is

RECOMMENDED that the Department of Financial Services enter a final order determining that Respondent has failed to secure the payment of workers' compensation for one employee for one day within the two-year period covered by the Request and imposing an administrative penalty of $1000.

DONE AND ENTERED this 19th day of July, 2016, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 19th day of July, 2016.

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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.