STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 16-1863

FANTASTIC CONST. OF DAYTONA, INC., A FLORIDA CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed hearing was held in this case on June 13, 2016, via video teleconference with sites in Tallahassee and Daytona Beach, Florida, before Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Richard W. Hennings, Esquire
Richard W. Hennings, P.A.
205 North Joanna Avenue
Tavares, Florida 32778-3217

STATEMENT OF THE ISSUES

Whether Fantastic Construction of Daytona, Inc. ("Respondent"), failed to secure the payment of workers'

compensation coverage for its employees; and, if so, whether the Department of Financial Services, Division of Workers' Compensation ("Petitioner" or "Department"), correctly calculated the penalty to be assessed against Respondent.

PRELIMINARY STATEMENT

On November 19, 2015, the Department served a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) on Respondent, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation for its employees. On February 18, 2016, the Department served an Amended Order of Penalty Assessment on Respondent, assessing a penalty of $17,119.80.

On March 8, 2016, Respondent requested a hearing to dispute the penalty calculation. On April 1, 2016, Petitioner referred this matter to the Division of Administrative Hearings, which scheduled a final hearing for June 13, 2016.

On June 6, 2016, the Department filed its Unopposed Motion for Leave to Amend Order of Penalty Assessment. The motion was granted on June 8, 2016, and the penalty sought was amended to $9,629.36 as reflected in the Second Amended Order of Penalty Assessment.

The final hearing commenced as scheduled. Petitioner presented the testimony of Scott Mohan, Department investigator,

and Sarah Beal, Department penalty auditor. Petitioner's Exhibits P1 through P11 were admitted in evidence.

Respondent presented the testimony of Foster Coleman, Respondent's president. Respondent's Exhibits R1 and R2 were not admitted at hearing, but were proffered by Respondent.

The one-volume Transcript of the proceedings was filed on July 6, 2016. Petitioner timely filed a Proposed Recommended Order, which has been considered by the undersigned in preparing this Recommended Order. Respondent did not make any post-hearing filing.

All references to the Florida Statutes herein are to the 2015 version.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing the requirement of chapter 440, Florida Statutes, that employers in Florida secure workers' compensation coverage for their employees. § 440.107(3), Fla. Stat.

2. Respondent is a corporation engaged in the construction industry with headquarters in Daytona Beach, Florida.

3. On November 19, 2015, the Department's compliance investigator, Scott Mohan, observed five individuals framing a single-family house at 173 Botefuhr Avenue in Daytona, Florida.

4. Mr. Mohan interviewed the individuals he observed working at the jobsite and found they were working for

Respondent on lease from Convergence Leasing ("Convergence"). Mr. Mohan contacted Convergence and found that all of the workers on the jobsite were employees of Convergence, except Scott Barenfanger. Mr. Mohan also confirmed that the workers' compensation policy for Convergence employees was in effect.

5. Mr. Mohan reviewed information in the Coverage and Compliance Automated System, or CCAS, for Respondent. CCAS indicated Respondent's workers were covered for workers' compensation by Convergence and that Respondent's contract with Convergence was active.

6. Mr. Mohan also confirmed, through CCAS, that Foster Coleman, Respondent's president, had previously obtained an exemption from the workers' compensation requirement, but that his exemption expired on July 18, 2015.

7. Mr. Mohan then contacted Mr. Coleman via telephone and informed him that one of the workers on the jobsite was not on the active employee roster for Convergence, thus Respondent was not in compliance with the requirement to obtain workers' compensation insurance for its employees.

8. Mr. Coleman reported to the jobsite in response to Mr. Mohan's phone call. Mr. Coleman admitted that Mr. Barenfanger was not on the Convergence employee leasing roster. Mr. Coleman subsequently obtained an application from

Convergence for Mr. Barenfanger and delivered it to his residence.

9. Mr. Mohan served Mr. Coleman at the jobsite with a Stop-Work Order and a Request for Production of Business Records for Penalty Assessment Calculation ("BRR").

10. In response to the BRR, Respondent provided to the Department business bank statements, check stubs, copies of checks, certificates of liability insurance for various suppliers and subcontractors, and an employee leasing roster for most of the audit period from November 20, 2013, to November 19, 2015.[1/]

11. Respondent did not produce any check stubs for November and December 2013. Mr. Coleman testified, credibly, that his bookkeeper during that time period did not keep accurate records. Mr. Coleman did produce his business bank statements and other records for that time period.

12. Based on the review of initial records received, the Department calculated a penalty of $17,119.80 and issued an Amended Order of Penalty Assessment in that amount on February 18, 2016.

13. On March 17, 2016, Respondent supplied the Department with additional records. Altogether, Respondent submitted over 400 pages of records to the Department. The majority of the records are copies of check stubs for checks issued on

Respondent's business bank account. The check stubs are in numerical order from 1349 to 1879, and none are missing. The check stubs were hand written by Mr. Coleman, who is 78 years old. Some of his writing on the check stubs is difficult to discern.

14. On April 4, 2016, following review of additional records received, the Department issued a Second Amended Order of Penalty Assessment in the amount of $9,629.36.

15. The Department assigned penalty auditor Sarah Beal to calculate the penalty assessed against Respondent.

Identification of Employees

16. Ms. Beal reviewed the business records produced by Respondent and identified Respondent's uninsured employees first by filtering out payments made to compliant individuals and businesses, and payments made for non-labor costs.

17. However, the evidence demonstrated that the Department included on its penalty calculation worksheet ("worksheet") payments made to individuals who were not Respondent's employees.

18. Neal Noonan is an automobile mechanic. Mr. Noonan was neither an employee of, nor a subcontractor for, Respondent for any work performed by Respondent during the audit period. Mr. Noonan performed repairs on Mr. Coleman's personal vehicles during the audit period. Checks issued to Mr. Noonan during the

audit period were for work performed on Mr. Coleman's personal vehicles.

19. The Department's worksheet included a "David Locte" with a period of noncompliance from June 19, 2014, through December 31, 2014. The basis for including Mr. Locte as an employee was a check stub written on December 10, 2014, to a business name that is almost indiscernible, but closely resembles "Liete & Locke" in the amount of $100. The memo reflects that the check was written for "architect plans."

20. Mr. Coleman recognized the worksheet entry of David Locte as pertaining to David Leete, an architect in Daytona. Mr. Leete has provided architectural services to Respondent off and on for roughly five years.

21. Mr. Leete signs and seals plans for, among others, a draftsman named Dan Langley. Mr. Langley provides drawings and plans for Respondent's projects. When Respondent submits plans to a local governing body which requires architectural drawings to accompany permit applications, Mr. Leete reviews and signs the plans.

22. Mr. Leete was neither an employee of, nor a subcontractor for, Respondent during the audit period. The single payment made to Mr. Leete by Respondent during the audit period was for professional architectural services rendered.

23. Mr. Langley was neither an employee of, nor a subcontractor for, Respondent during the audit period. Payments made to Mr. Langley during the audit period were for professional drafting services rendered.

24. Among the names on the Department's worksheet is R.W. Kicklighter. Mr. Kicklighter is an energy consultant whose office is located in the same building with Mr. Leete. Mr. Kicklighter prepares energy calculations, based on construction plans, to determine the capacity of heating and air-conditioning systems needed to serve the planned construction.

25. Mr. Kicklighter was neither an employee of, nor a subcontractor for, Respondent during the audit period. Payments made to Mr. Kicklighter during the audit period were for professional services rendered.

26. Respondent made a payment of $125 on September 15, 2014, to an entity known as Set Material. Set Material is a company that rents dumpsters for collection of concrete at demolition and reconstruction sites. Removal and disposal of the concrete from the jobsite is included within the rental price of the dumpster.

27. The Department included on the worksheet an entry for "Let Malereal." The evidence revealed the correct name is Set

Material and no evidence was introduced regarding the existence of a person or entity known as Let Malereal.

28. Set Material was neither an employee of, nor a subcontractor for, Respondent during the audit period. The single payment made to Set Material during the audit period was for dumpster rental.

29. The Department's worksheet contains an entry for "CTC" for the penalty period of January 1, 2014, through May 1, 2014. Respondent made a payment to "CTC" on April 11, 2014, in connection with a job referred to as "964 clubhouse." The records show Respondent made payments to Gulfeagle Supply, Vern's Insulation, John Wood, Bruce Bennett, and Ron Whaley in connection with the same job.

30. At final hearing, Mr. Coleman had no recollection what CTC referred to. Mr. Coleman's testimony was the only evidence introduced regarding identification of CTC. CTC could have been a vendor of equipment or supplies for the job, just as easily as an employee.

31. The evidence is insufficient to support a finding that CTC was an employee of, or a subcontractor for, Respondent during the audit period.

32. The check stub for check 1685 does not indicate to whom the $60 payment was made. The stub reads "yo for Doug." The Department listed "Doug" as an employee on its worksheet and

included the $60 as wages to "Doug" for purposes of calculating workers' compensation premiums owed.

33. At hearing, Mr. Coleman was unable to recall ever having employed anyone named Doug, and had no recollection regarding the January 7, 2015, payment.

34. The evidence was insufficient to establish that "Doug" was either Respondent's employee or subcontractor during the audit period.

35. Ken's Heating and Air was not an employee of, nor a subcontractor to, Respondent for any work undertaken by Respondent during the audit period. Ken's Heating and Air conducted repairs on, and maintenance of, Mr. Coleman's personal residence during the audit period. Checks issued to Ken's Heating and Air during the audit period were payments for work performed at Mr. Coleman's personal residence.

36. Barry Smith is an electrical contractor. Mr. Smith was neither an employee of, nor subcontractor to, Respondent for any work performed by Respondent during the audit period. Mr. Smith did make repairs to the electrical system at Mr. Coleman's personal residence during the audit period. Checks issued to Mr. Smith during the audit period were payments for work performed at Mr. Coleman's personal residence.

37. The remaining names listed on the Department's penalty calculation worksheet were accurately included as Respondent's employees.[2/]

Calculation of Payroll

38. Mr. Coleman's exemption certificate expired on July 18, 2015, approximately four months shy of the end of the audit period.

39. Payments made by Respondent to Mr. Coleman during the time period for which he did not have a valid exemption (the penalty period) were deemed by the Department as wages paid to Mr. Coleman by Respondent.

40. Respondent's business records show seven checks written either to Mr. Coleman or to cash during that time period in the total amount of $3,116.52. The Department included that amount on the worksheet as wages paid to Mr. Coleman.

41. Check 1873 was written to cash, but the check stub notes that the payment of $1,035.69 was made to Compliance Matters, Respondent's payroll company.

42. Check 1875 was written to cash, but the check stub notes that the payment of $500 was made to Daytona Landscaping.

43. The evidence does not support a finding that checks 1873 and 1875 represented wages paid to Mr. Coleman.

44. The correct amount attributable as wages paid to Mr. Coleman during the penalty period is $1,796.52.

45. Respondent's employees Tyler Eubler, Brian Karchalla, Keith Walsh, and John Strobel, were periodically paid by Respondent during the audit period in addition to their paychecks from Convergence. Mr. Coleman testified that the payments were advances on their wages. He explained that when working on a job out of town, the crew would arrive after Convergence had closed for the day, and Mr. Coleman would pay them cash and allow them to reimburse him from their paychecks the following day.

46. Unfortunately for Respondent, the evidence did not support a finding that these employees reimbursed Mr. Coleman for the advances made. The Department correctly determined the payroll amount attributable to these employees.

47. The Department attributed $945 in payroll to "James Sharer." The Department offered no evidence regarding how they arrived at the name of James Sharer as Respondent's employee or the basis for the payroll amount.

48. James Shores worked off-and-on for Respondent. Mr. Coleman recognized the worksheet entry of "James Sharer" as a misspelling of Mr. Shores' name.

49. Respondent's records show payments totaling $535 to Mr. Shores during the audit period.

50. The correct amount of payroll attributable to Mr. Shores from Respondent during the audit period is $535.

51. The Department included wages totaling $10,098.84 to Mr. Barenfanger during the period of noncompliance from November 20, 2013, to December 31, 2013. The Department imputed the average weekly wage to Mr. Barenfanger for that period because, in the Department's estimation, Respondent did not produce records sufficient to establish payroll for those two months in 2013. See § 440.107(7)(e), Fla. Stat.

52. The voluminous records produced by Respondent evidenced not a single payment made to Mr. Barenfanger between January 2014, and November 19, 2015. Even if Mr. Coleman had not testified that he did not know or employ Mr. Barenfanger before November 19, 2015, it would be ludicrous to find that he worked weekly for Respondent during the last two months of 2013. Mr. Coleman testified, credibly, that Mr. Barenfanger worked the jobsite for Respondent on November 18 and 19, 2015, but not prior to those dates.

53. The evidence does not support a finding that the worksheet entry for Mr. Barenfanger in the amount of $10,098.84 accurately represents wages attributable to Mr. Barenfanger during the period of noncompliance.

54. The Department's worksheet includes an employee by the name of Ren W. Raly for the period of noncompliance from January 1, 2014, through May 1, 2014, and a Ronnie Whaley for the period of noncompliance from June 19, 2014 through December

31, 2014. Mr. Coleman testified that he never had an employee by the name of Raly and he assumed the first entry was a misspelling of Ronnie Whaley's name.

55. Mr. Coleman testified that Ronnie Whaley was a concrete finisher and brick layer who did work for Respondent. Mr. Coleman testified that he submitted to the Department a copy of Mr. Whaley's "workers' comp exempt," but that they must not have accepted it.

56. The records submitted to the Department by Respondent do not contain any exemption certificate for Ronnie Whaley.

57. However, in the records submitted to the Department from Respondent is a certificate of liability insurance dated February 25, 2014, showing workers' compensation and liability coverage issued to Direct HR Services, Inc., from Alliance Insurance Solutions, LLC. The certificate plainly states that coverage is provided for "all leased employees, but not subcontractors, of Ronald Whaley Masonry." The certificate shows coverage in effect from February 1, 2013, through February 1, 2015.

58. Petitioner did not challenge the reliability of the certificate or otherwise object to its admissibility.[3/] In fact, the document was moved into evidence as Petitioner's Exhibit P1.

59. Petitioner offered no testimony regarding whether the certificate was insufficient proof of coverage for Mr. Whaley during the periods of noncompliance listed on the worksheet.

60. The evidence does not support a finding that Mr. Whaley was an uninsured individual during the periods of noncompliance. Thus, the wages attributed to Mr. Whaley by the Department were incorrect.

61. Ms. Beal assigned the class code 5645—Carpentry to the individuals correctly identified as Respondent's uninsured employees because this code matched the description of the job being performed by the workers on the jobsite the day of the inspection.

62. Ms. Beal correctly utilized the corresponding approved manual rates for the carpentry classification code and the related periods of noncompliance to determine the gross payroll to the individuals correctly included as Respondent's uninsured employees.

Calculation of Penalty

63. For the employees correctly included as uninsured employees, Ms. Beal applied the correct approved manual rates and correctly utilized the methodology specified in section 440.107(7)(d)1. and Florida Administrative Code Rules 69L-6.027 and 69L-6.028 to determine the penalty to be imposed.

64. For the individuals correctly included as uninsured employees, and for whom the correct payroll was calculated, the correct penalty amount is $2,590.06.

65. The correct penalty for payments made to Mr. Coleman during the penalty period is $571.81.

66. The correct penalty for payments made to James Shores is $170.24.

67. The correct total penalty to be assessed against Respondent is $3,332.11.

68. The Department demonstrated by clear and convincing evidence that Respondent was engaged in the construction industry in Florida during the audit period and that Respondent failed to carry workers' compensation insurance for its employees at times during the audit period as required by Florida's workers' compensation law.

69. The Department demonstrated by clear and convincing evidence that Respondent employed the employees named on the Second Amended Order of Penalty Assessment, with the exception of Ken's Heating and Air, CTC, Don Langly, Ren W. Raly, R.W. Kicklighter, Dave Locte, Let Malereal, Ronnie Whaley, and "Doug."

70. The Department did not demonstrate by clear and convincing evidence that it correctly calculated the gross payroll attributable to Mr. Coleman and Mr. Shores.

71. The Department demonstrated by clear and convincing evidence that Ms. Beal correctly utilized the methodology specified in section 440.107(7)(d)1. to determine the appropriate penalty for each of Respondent's uninsured employees.

72. The Department did not demonstrate by clear and convincing evidence that the correct penalty is $9,629.36.

73. The evidence demonstrated that the correct penalty to be assessed against Respondent for failure to provide workers' compensation insurance for its employees during the audit period is $3,332.11.

CONCLUSIONS OF LAW

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

75. Employers are required to secure payment of workers' compensation for their employees unless exempted or excluded. See §§ 440.10(1)(a) and 440.38(1), Fla. Stat. Strict compliance with the workers' compensation law is required by the employer. See C&L Trucking v. Corbett, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

76. The Department has the burden of proof in this case and must show by clear and convincing evidence that the employer violated the workers' compensation law and that the penalty

assessments were correct under the law. See Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

77. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

78. "Employer" is defined, in part, as "every person carrying on any employment." § 440.02(16), Fla. Stat.

79. "Employment" means "any service performed by an employee for the person employing him or her" and includes, "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) and (b)(2), Fla. Stat.

80. "Employee" is defined, in part, as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any

appointment or contract for hire or apprenticeship, express or implied, oral or written." § 440.02(15)(a), Fla. Stat.

81. The Department's evidence as to the employees included on the worksheet, and amount of payroll attributable to each, was anything but precise and explicit. Ms. Beal testified that for the check stubs that were barely legible, she "did [her] best with the name[s]." The Department's worksheet contained names bearing little resemblance to actual employees of the company, and included single names, such as "Doug" and "CTC" for which it would be impossible to determine whether workers' compensation coverage existed.[4/]

82. Furthermore, the Department provided no testimony regarding how it arrived at the specific amount of wages for particular employees included on the worksheet. The undersigned was forced to wade through a flood of check stubs and bank statements searching for the evidence to support the total wages included on the Department's worksheet.[5/] Frequently, the undersigned was unable to arrive at the same total wages for a particular employee as that listed on the worksheet.

83. The Department did not prove by clear and convincing evidence that Ken's Heating and Air, CTC, Don Langly, R.W. Kicklighter, Dave Locte, Let Malereal, Ronnie Whaley, and "Doug" were Respondent's employees during the audit period.

84. "Employee" also includes "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state." § 440.02(15)(b), Fla. Stat. Thus, Mr. Coleman was Respondent's employee during the penalty period.

85. However, the Department did not demonstrate by clear and convincing evidence that $3,116.52 was the payroll attributable to Mr. Coleman during the penalty period.

86. Nor did the Department prove by clear and convincing evidence that $945 was the correct payroll attributable to Mr. Shores during the period of noncompliance from January 1, 2015, through November 19, 2015.

87. With regard to Mr. Barenfanger, the Department did not prove by clear and convincing evidence that payroll of $10,098.84 was attributable to him.

88. Section 440.107(7)(e) provides as follows:

> 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 . . . the imputed weekly payroll for each employee . . . shall be the statewide average weekly wage . . . multiplied by 1.5.

The Department argues that it correctly imputed the average weekly wage to Mr. Barenfanger because Respondent produced no pay stubs for November 19 through December 31, 2013.

89. The statutory imputation formula is properly utilized in cases in which employers have failed to supply records in response to the Department's request or when the records do not enable the Department to determine payroll.

90. The formula should not have been utilized in this case where the evidence was contrary to the amount determined pursuant to the formula. In this case, Mr. Coleman kept and submitted detailed records, and complied with the Department's requests. The record demonstrates that Mr. Coleman supplied voluminous records to the Department and engaged in a series of communications with the Department's facilitator to supply the records required to accurately calculate the penalty.

91. The records were sufficient for the Department to establish payroll for Mr. Barenfanger, to whom no payments had been made in either 2014 or 2015. To impute a payroll of over $10,000 for two months to an employee who received no remuneration during the subsequent 22-month period simply defies logic.

92. The Department proved by clear and convincing evidence that Respondent violated the workers' compensation insurance law but not that $9,629.36 is the correct penalty to be assessed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the

Department of Financial Services, Division of Workers' Compensation, finding that Fantastic Construction of Daytona, Inc., violated the workers' compensation insurance law and assessing a penalty of $3,332.11.

DONE AND ENTERED this 18th day of August, 2016, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2016.

ENDNOTES

[1/] The audit period is the two years prior to the date of inspection. See § 440.107(7), Fla. Stat.

[2/] The evidence showed that the worksheet entry for "Allen Tracter" should be "Allen Campbell," but Mr. Campbell was correctly included as an employee for the periods of noncompliance noted.

[3/] At final hearing, Respondent sought to introduce the identical document as Respondent's Exhibit 1. Petitioner objected on the basis of timeliness (or, failure to disclose), which was sustained according to the Order of Pre-hearing Instructions. Petitioner did not object to the authenticity or persuasiveness of the document nor did Petitioner address this evidence in its PRO. The document was proffered by Respondent.

[4/] Overall, the case suffered from a lack of communication between the Department and Respondent, which the undersigned cannot help but believe would have resolved many of the issues without resort to a disputed-fact hearing.

[5/] The undersigned's task was made no less onerous by the fact that Respondent did not file a proposed recommended order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.