STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs. Case No. 16-2425

MS DOCKSIDE MARINA, LLC,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on July 11, 2016, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tabitha G. Harnage, Esquire
Department of Financial Services
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Tallahassee, Florida 32399

For Respondent: Daniel H. Cox, Esquire
Daniel H. Cox, P.A.
Post Office Drawer CC
1954 Cape Street
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STATEMENT OF THE ISSUES

The issue in this case is whether MS Dockside Marina, LLC (Respondent), violated the provisions of chapter 440, Florida

Statutes,[1/] by failing to secure the payment of workers' compensation, as alleged in the Stop-Work Order and Second Amended Order of Penalty Assessment; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On August 5, 2015, the Department of Financial Services, Division of Workers' Compensation (the Department), served Respondent with a Stop-Work Order and Order of Penalty Assessment (Stop-Work Order) and a Request for Production of Business Records for Penalty Assessment Calculation (Request for Production) for Respondent's failure to secure workers' compensation for its employees as required by chapter 440. Respondent timely responded to the Request for Production and the Department, in turn, calculated an Amended Order of Penalty Assessment. The Amended Order of Penalty Assessment, assessing a penalty of $34,718.00, was served on Respondent on September 11, 2015.

On November 3, 2015, Respondent requested an informal proceeding before the Department to dispute the Stop-Work Order and Amended Order of Penalty Assessment.

Prior to requesting the informal hearing, Respondent purchased a Florida workers' compensation insurance policy on August 19, 2015. In accordance with section 440.107(7)(d)1., the Department prepared a 2nd Amended Order of Penalty

Assessment which gave Respondent a premium credit of $1,678.00 against the previously calculated penalty. The 2nd Amended Order of Penalty Assessment, which reduced the penalty to $33,040.00, was served on Respondent on January 16, 2016.

Pursuant to section 120.57(2), Florida Statutes, an informal hearing was held before the Department on March 28, 2016. By Order dated April 4, 2016, on the ground that a disputed fact was raised at the informal hearing, Department hearing officer Merribeth Bohanan relinquished jurisdiction. On May 3, 2016, this matter was referred to the Division of Administrative Hearings (DOAH).

At the final hearing conducted before the undersigned, the Department presented the testimonies of Department compliance investigator, Donald Hurst, and penalty auditor, Lynne Murcia. The Department offered 12 exhibits, designated Petitioner's Exhibits P-1 through P-12, all of which were received into evidence. Respondent presented the testimony of Eric Pfeufer, as managing member of Respondent, and offered four exhibits, which were received into evidence as Respondent's Exhibits R-A, R-B, R-C, and R-D.

The proceedings were transcribed and a transcript was ordered. The due date for the parties to submit proposed recommended orders was initially set for 10 days from the filing of the transcript with the DOAH. The Transcript, consisting of

one volume, was filed on August 3, 2016. By Order granting the parties' Agreed Motion for Extension of Time to File Proposed Recommended Order, the parties were given until September 9, 2016, within which to file their proposed recommended orders. The parties thereafter timely filed their respective Proposed Recommended Orders, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing the statutory requirement that employers secure workers' compensation coverage for the benefit of their employees.

2. Respondent is a Florida limited liability company formed on May 13, 2010. The officers of Respondent are Angela and Eric Pfeufer.

3. At all pertinent times, Respondent has been active, licensed to do business, and engaged in the business of a boat storage and boat repair marina located on the Carrabelle River at 292 Graham Drive, Carrabelle, Florida 32322. The Carrabelle River is one of the navigable waters of the United States.

4. The boat repair services offered by Respondent include boat painting, sandblasting, structural repairs, driveline generator repairs, fiberglass repair, welding, pressure washing, and engine work.

5. On August 5, 2015, Department investigator Donald Hurst visited Respondent's marina in connection with a workers' compensation compliance investigation of Respondent. On that date, Respondent had 10 employees, but did not have a workers' compensation policy or employee leasing policy, and there were no active exemptions for Respondent's officers.

6. On the day of Investigator Hurst's visit, Respondent's employees were Angela Pfeufer, Eric Pfeufer, Shiloh Spivey, Austin Pfeufer, Luke Steinle, Travis Clayton, Richard Sand, Vernon Thompson, Gavin Pfeufer, and Jesse Carrot. Angela and Eric Pfeufer were Respondent's managing members. The categories and pay rate of Respondent's other employees were as follows: secretary Shiloh Spivey at $14 per hour; maintenance man and lift operator Austin Pfeufer at $15 per hour; boat lift operator Luke Steinle at $17.50 per hour; boat painter and fiberglass worker Richard Sand at $17 per hour; boat mechanic and boatyard worker Travis Clayton at $15 per hour; painter Gavin Pfeufer at $12 per hour; painter and fiberglass worker Jesse Carroll at $12 per hour; and maintenance man and boat-lift operator Vernon Thompson at $12 per hour.

7. Because Respondent had no workers' compensation insurance policy in place, on August 5, 2015, Investigator Hurst served the Stop-Work Order and a business records request on Respondent. When they were served, Investigator Hurst explained

to Respondent's officers the effect and purpose of the documents and how Respondent could come into compliance.

8. Respondent came into compliance on August 6, 2015, by making a $1,000 down payment, signing a conditional release, reducing its workforce, and obtaining exemptions for its two managing members. Respondent also purchased a Zenith Insurance Company workers' compensation insurance policy on August 15, 2015.

9. Respondent timely responded to the Department's business records request by providing the Department with financial documentation, payroll records, and business records.

10. After receiving Respondent's records, the Department assigned Department penalty auditor Lynne Murcia the task of reviewing the records and calculating the penalty to be assessed against Respondent.

11. Based on the information provided to Investigator Hurst at the job site by Respondent's managing member Angela Pfeufer, Investigator Hurst's observations at the job site on August 5, 2015, and the managing members' exemptions, Penalty Auditor Murcia assigned classification codes 8810 and 6836 in calculating a penalty.

12. Classification codes are four-digit codes assigned to various occupations by the National Council on Compensation Insurance (NCCI) to assist in the calculation of workers'

compensation insurance premiums. Classification codes are listed in the Scopes® Manual. Classification code 8810 applies to clerical office employees. Classification code 6836 applies to "waterfront operations including the operation of boat docks, storage facilities, repair shops . . . repair of boats and engines . . . and all dockside employees."

13. The Department determined the gross payroll for Respondent's employees in accordance with the procedures required by section 440.107(7)(d)1., and Florida Administrative Code Rule 69L-6.027(1), and the gross payroll was used in calculating the penalty.

14. Penalty auditor Murcia then applied the corresponding approved manual rates for classification codes 8810 and 6836 for the related periods of non-compliance and utilized the methodology specified in section 440.107(7)(d)1. and rule 69L-6.027 to determine the final penalty.

15. Once the penalty was calculated, on September 11, 2015, the Department served the Amended Order of Penalty Assessment on Respondent, assessing a penalty of $34,718.00.

16. After that, Respondent provided the Department with proof that it had obtained a Zenith Insurance Company workers' compensation insurance policy with a paid premium totaling $1,678.00.

17. In accordance with section 440.107(7)(d)1., the Department reduced Respondent's penalty by applying a $1,678.00 credit for a paid premium against the previously calculated penalty, resulting in the issuance of the 2nd Amended Order of Penalty Assessment totaling $33,040.00, served on Respondent by electronic mail on January 8, 2016.

CONCLUSIONS OF LAW

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

19. Chapter 440 is known as the "Workers' Compensation Law." § 440.01, Fla. Stat.

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

21. Section 440.107(3) provides that "[t]he department shall enforce workers' compensation coverage requirements," and "the department shall have the power to . . . (g) [i]ssue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section." § 440.107(3), Fla. Stat.

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

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

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

25. "Employment," subject to Florida's Workers' Compensation Law, includes "[a]ll private employments in which four or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer." § 440.02(17)(a) and (b)(2), Fla. Stat.

26. Section 440.107(2) states "'securing the payment of workers' compensation' means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code."

27. "Every employer who is required to provide workers' compensation coverage for employees engaged in work in this state shall obtain a Florida policy or endorsement for such employees that utilizes Florida class codes, rates, rules and manuals that are in compliance with and approved under the

provisions of Chapter 440, F.S., and the Florida Insurance Code, pursuant to Sections 440.10(1)g) and 440.38(7), F.S." Fla. Admin. Code R. 69L-6.019.

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

29. Strict compliance with the Workers' Compensation Law is required by the employer. See C & L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

30. Whenever the Department finds that an employer who is required to secure the payment of workers' compensation coverage has failed to do so, such failure is deemed an immediate serious danger to the public health, safety, or welfare sufficient to justify service by the Department of a Stop-Work Order or Order of Penalty Assessment on the employer. § 440.107 Fla. Stat.

31. Respondent argues that it is not required to secure workers' compensation coverage because most of its employees are covered by the Longshoremen and Harbor Workers' Compensation Act (the Act).

32. Although the Department bears the ultimate burden of proving its case against Respondent by clear and convincing evidence, Respondent has the burden of proving that it falls within an exception to the requirement that it provide workers'

compensation coverage for its employees under Florida law. As observed in Armstrong v. Ormond in the Pines, 734 So. 2d 596, (Fla. 1st DCA 1999):

> [A]s a general proposition, "it is incumbent on those relying on an act for protection to bring themselves within the specifications laid down . . . ." Robbins v. Webb's Cut Rate Drug Co., 153 Fla. 822, 16 So. 2d 121, 123 (Fla. 1943). More specifically, "an exception to a statute must be proven by the one seeking to establish it." Mayo's Clinic v. Livingston, 172 So. 2d 619, 620 (Fla. 2d DCA 1965). See also City of Chicago v. Westphalen, 95 Ill. App. 2d 331, 238 N.E.2d 225, 228 (Ill. App. 1968) ("When a party seeks to avoid the general application of a statute or ordinance and seeks to establish his case as within an exception thereto, it is incumbent upon him to prove those facts which would bring him within the defined exception. In other words, a party wishing to benefit by an exception must prove that he comes within it.").

33. Section 440.09(2) provides:

> Benefits are not payable in respect of the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, the Defense Base Act, or the Jones Act.

34. The Act is found in 33 U.S.C. § 18.

35. "[A]s a matter of state law, coverage under [the Act] precludes coverage under Florida's Workers' Compensation Law." FCCI Fund v. Cayce's Excavation, 726 So. 2d 778, 780 (Fla. 1st DCA 1998).

36. In order to obtain coverage under the Act, Respondent must show that it is an "employer" within the meaning of the Act that is not subject to coverage under Florida's workers' compensation laws, and that its employees qualify for coverage under the Act. 33 U.S.C. §§ 902(3) & (4), 903(d)(1-3).

37. Under the Act, "[t]he term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4).

38. The Act provides coverage for disability or death of employees from injuries occurring upon navigable waters of the United States. Specifically, the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily
>
> used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

39. In P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73-74 (1979), the Supreme Court set forth the requirements for qualifying under the Act after it was amended by Congress in 1972. It explained:

> The Act now extends coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard. The newly broadened situs test provides compensation for an "employee" whose disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." § 3(a), 33 U.S.C. § 903(a). The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship breaker . . . ." § 2(3), 33 U.S.C. § 902(3). To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains injury on the situs defined by § 3(a).

40. Arguably, as Respondent's business is adjacent to the Carrabelle River, Respondent meets the "situs" test. See Smart v. Marathon Seafood, 444 So. 2d 48, 50 (Fla. 1st DCA 1983).

41. Even if the situs test is met, that determination is superfluous if the employees do not meet the "status" test. Id. In Smart, the situs test was met, but the status test was not. Id. at 50. The claimant in Smart worked "upon the navigable waters of the United States (including any adjoining pier,

wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. However, the employee did not meet the "status" test because it was determined that "he was not engaged in moving cargo 'directly from ship to land transportation' or 'a worker responsible for some portion of that activity.'" Id. at 51-52.

42. In the case-at-bar, the definitional section of the Act precludes Respondent's employees from meeting the "status" test. With regard to the definition of "employee," section 902(3) of the Act provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;
> (E) aquaculture workers;

> (F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;
> (G) a master or member of a crew of any vessel; or
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

43. Paragraphs (A), (C), (F), (G) and (H) of section 902(3), quoted above, specifically exclude all of Respondent's employees from coverage under the Act. Paragraph (C), alone, excludes most of Respondent's employees from coverage, as employees of a marina are not included. "Marina" means a licensed commercial facility that provides secured public moorings or dry storage for vessels on a leased basis." § 327.02(22), Fla. Stat. Moreover, paragraph (A) excludes managing member Angela Pfeufer and secretary Shiloh Spivey, as both were office clerical workers. Paragraph (F) excludes Respondent's employees who "repair any recreational vessels." And, paragraphs (G) and (H), taken together, exclude a master or crew member of a vessel and any employees who are engaged by a master to repair any small vessel under 18 tons net.

44. Respondent also failed to meet the requirement under 33 U.S.C. § 903(d)(2)(B), that its employees are "not subject to

coverage under a State workers' compensation law." Respondent "has [n]either made the special payments required or controverted payment in the manner prescribed in the Act." 33 U.S.C. § 914(b) and (d).

45. Instead of showing that Respondent's operations and employees are covered by the Act, the clear and convincing evidence demonstrated that Respondent is a Florida marina that offers boat repair, storage, and berthing services and whose workers should be covered by workers' compensation obtained by Respondent under Florida law.

46. Respondent owns and maintains multiple docks with mooring space at the Carrabelle marina, as well as multiple storage units on its property, including dry storage on land, dry berthing units, and indoor storage units. Respondent also holds itself out as a boat repair facility. Boats are hauled out of the water with lifts and cranes and repaired in a large building or adjacent land on the property.

47. The NCCI specifically contemplated these services in NCCI Florida class code "6836 STATE ACT, MARINA & DRIVERS" (Code 6836). The operation of boat docks and storage facilities are specifically considered in code 6836, as are the operation of repair shops and the repair of boats and engines.

48. Code 6836 also applies to all dockside employees. Respondent's facility is a marina on the Carrabelle River with

multiple docks. Except for two clerical workers, all of Respondent's employees are dockside, working by, near, or on the dock at any given time during their employ.

49. Rather than code 6836, Respondent argues that NCCI class code 6824F applies to its marina and operations. Class code 6824F, however, is a federal class code applicable to the construction or repair of wood, metal, fiberglass or plastic yachts, motorboats, sailboats, or rowboats not exceeding 150 feet in length overall. Berthing, storage, or mooring services are not contemplated under class code 6824F.

50. Further, unlike code 6836, class code 6824F does not contemplate Respondent's operation of wet and dry boat storage. Further, class code 6824F is limited to operations within federal jurisdiction.

51. Rather than demonstrating that Respondent is an employer under the Act who is exempt from Florida's workers' compensation requirements, the evidence and law presented in this case demonstrated that, at all material times, Respondent was an employer[2/] under Florida law subject to the requirement under section 440.02(16)(a) that it "shall be liable for, and shall secure, the payment to his or her employees[3/] . . . the compensation payable under ss. 440.13, 440.15, and 440.16." § 440.10(1)(a), Fla. Stat.

52. It was also clearly shown that on August 5, 2015, Respondent employed eight uninsured employees, and that the Department properly issued and served the Stop-Work Order, Amended Order of Penalty Assessment, and 2nd Amended Order of Penalty Assessment on Respondent.

53. Section 440.107(7)(d)1. provides that "the [D]epartment shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 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 required by this chapter within the preceding 2-year period or $1,000, whichever is greater."

54. These statutory provisions mandate that the Department assess a penalty for noncompliance with chapter 440 and do not provide any authority for the Department to reduce the amount of the penalty.

55. Rule 69L-6.027 adopts a penalty calculation worksheet for the Department's penalty auditors to utilize "[f]or purposes of calculating penalties to be assessed against employers pursuant to section 440.107, Florida Statutes." Fla. Admin. Code R. 69L-6.027(1).

56. Rule 69L-6.035 defines payroll for calculating penalties. Remuneration includes, but is not limited to, wages,

salaries, loans, 1099 income, profit sharing, income distributions, dividends, and cash payments. Fla. Admin. Code R. 69L-6.035(1).

57. Considering evidence of Respondent's payroll for its employees during the applicable time frame and the applicable method for calculating penalties, it is found that the Department applied the proper methodology in computing the Amended Order of Penalty Assessment and 2nd Amended Order of Penalty Assessment pursuant to section 440.107(7)(d)1. and rules 69L-6.027 and 69L-6.035.

58. Therefore, under the evidence and law as outlined above, it is concluded that the Department proved by clear and convincing evidence that Respondent failed to secure workers' compensation coverage for its employees, and that the Department correctly calculated and issued the Stop-Work Order and 2nd Amended Order of Penalty Assessment of $33,040.00 against Respondent.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order, consistent with this Recommended Order, upholding the Stop-Work Order and imposing the penalty set forth in the 2nd Amended Order of Penalty Assessment against MS Dockside Marina, LLC.

DONE AND ENTERED this 3rd day of November, 2016, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2016.

ENDNOTES

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

[2/] Florida law defines "employment" as "all private employments in which four or more employees are employed by the same employer." 440.02(17)(b)2., Fla. Stat. Section 440.02(16)(a) defines "employer" in part as "every person carrying on any employment."

[3/] Florida law defines "employee" in part as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment." § 440.02(15)(a), Fla. Stat. Also included in the definition of "employee" is "any person who is an officer of a corporation and who performs services for remuneration for such corporation within this state, whether or not such services are continuous." § 440.02(15)(b), Fla. Stat.

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.