

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 16-5109

BEST FRAMING USA, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice to all parties, a final administrative hearing was held in this matter on December 21 and 22, 2016, before the Honorable R. Bruce McKibben, Administrative Law Judge for the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Tabitha Harnage, Esquire
Alexander Brick, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Kristian Eiler Dunn, Esquire
Dunn and Miller, P.A.
215 East Tharpe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Best Framing USA, Inc. ("Best Framing"), understated its business payroll as reported to the company's workers' compensation insurance carrier; if so, whether a penalty should be imposed by Petitioner, Department of Financial Services, Division of Workers' Compensation (the "Department"); and whether the Department properly calculated the penalty which it assessed against Respondent.^{1/}

PRELIMINARY STATEMENT

The Department began an investigation of Best Framing in the year 2015. In May 2016, the Department issued a business records request ("BRR") to Best Framing, seeking financial information needed for its investigation. Based upon its investigative findings, the Department issued a Stop-Work Order and Order of Penalty Assessment ("SWO") on or about August 16, 2016. At that time, it also issued a second BRR, seeking additional financial information. On August 22, 2016, Best Framing filed a Request for Formal Hearing with the Department, seeking to rescind the SWO and contesting the assessed penalty. The Department forwarded the request to DOAH on September 6, 2016, and it was assigned to the undersigned. At the final hearing conducted in this matter, the Department called six witnesses: Christopher Byrnes, investigator; Jill Skoglund,

investigator; Michelle Loy, supervisor; Jesse Holman, investigator; Kali King, investigator; and Lynn Murcia, auditor. The Department's Exhibits 1 through 3 and 5 through 26 were admitted into evidence. David Olmedo testified on behalf of Best Framing and was designated as its corporate representative. Best Framing's Exhibits 1, 2 and 3 were admitted into evidence.

A transcript of the proceedings was ordered. Parties are allowed by rule to submit a proposed recommended order ("PRO") to the administrative law judge within 10 days of the filing of the transcript at DOAH. The parties requested and were granted 30 days from the filing of the transcript to submit PROs. The Transcript was filed on January 23, 2017, making the PROs due on February 22, 2017. The Department and Best Framing both filed their PROs timely, although Best Framing's PRO exceeded the page limit allowed by rule. See Fla. Admin. Code R. 28-106.215. Nonetheless, both PRO's were duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for, inter alia, ensuring that all businesses operating in the state secure workers' compensation insurance coverage for their employees. Part and parcel of that responsibility is the determination that employers are accurately reporting their payrolls to the insurance carrier so that the proper level of

insurance coverage is provided. The premium paid by the employer to the carrier is determined by the level of payroll, i.e., generally the higher the payroll, the higher the premium to be paid.

2. Best Framing is a duly-formed and validly-existing corporation in the State of Florida. The company was formed on September 28, 2012, for the purpose of conducting any and all lawful business.^{2/} At the time of its formation, Abraham I. Olmedo-Cano was the only named officer of the corporation. (He will be referred to herein as "Abraham Olmedo.") Since its inception, Best Framing has primarily engaged in the business of framing new houses, mostly in the Pensacola, Florida, area.

3. The Department has been aware of Best Framing for a number of years. It is one of many construction businesses routinely monitored by the Department for the purpose of assuring compliance with workers' compensation insurance requirements. By way of example, Investigator King had stopped by job sites as early as 2012 where Best Framing workers were engaged in construction. Investigator Byrnes first ran across Best Framing in March 2015. Supervisor Loy had discussions with Best Framing workers on a job site in March 2015; she talked with Abraham Olmedo on a job site in October 2015.

4. There was, incidentally, very contradictory testimony at final hearing concerning Abraham Olmedo's ability to speak or

understand English. Several of the Department's investigators credibly recalled conversations with Abraham Olmdeo completely in English. In fact, at least three investigators met Abraham Olmedo in person at job sites and spoke to him in English. However, the Best Framing corporate representative, David Olmedo, said his cousin, Abraham Olmedo, does not speak English. Abraham Olmedo refused to attend his scheduled deposition during the discovery phase of this case, ostensibly for the reason that he did not speak English. Abraham Olmedo did not appear at final hearing nor did he provide any evidence concerning his purported inability to speak or understand English. The most persuasive evidence indicates that he can understand and speak English, albeit not fluently.

5. At some point in 2015, the Department became concerned that the number of employees associated with Best Framing was not consistent with the level of workers' compensation insurance coverage in place. After several Department investigators conferred and compared notes about Best Framing employees at various job sites, the Department made the decision to investigate further. Investigator King commenced the investigation by utilizing Daily Activity Reports prepared by investigators in order to list all of the job sites where Best Framing workers had been recently encountered. Then, based on the geographic location of each site, she contacted general

contractors who were building homes in those areas, requesting evidence of their payment history to Best Framing during the past few years. Based upon the payment histories she received, Investigator King was even more confident that something was amiss regarding Best Framing's insurance coverage.

6. On May 25, 2016, the Department prepared a BRR for Best Framing, seeking financial records and documentation in furtherance of the investigation. BRRs are normally issued in conjunction with an SWO, but this particular BRR was intended for purposes of investigation only. Investigator King called Abraham Olmedo and asked that he come to her office in Pensacola so she could personally serve the BRR to him. He expressed confusion as to what she was telling him, so he asked her to speak to his cousin, David Olmedo. King explained the purpose of the call to David Olmedo and scheduled a time for the men to come to her office. The two Olmedos came in on May 31, 2016, and accepted hand-delivery of the BRR. Investigator King also told them what the investigation was about, i.e., the possibility that Best Framing had understated payroll to its insurance carrier.

7. In response to the BRR, Best Framing provided the Department with some financial information: information on two Bank of America accounts, one ending in 8561 (referred to as "Account 8561") and the other ending in 9199 (referred to as

"Account 9199"); copies of checks and check stubs; handwritten payroll ledgers; Form RT6s for four employees; and other information. Best Framing did not provide any documentation or information relating to subcontractors who were doing business with the company. Upon review of those financial records, the Department was convinced that Best Framing had grossly understated its payroll to the insurance carrier. Tellingly, Best Framing's quarterly tax reports to the Department of Revenue disclose only a small portion of what the employees actually earned, at least based on the information provided to the Department pursuant to the BRR.

8. On August 16, 2016, the Department issued an SWO and a second BRR to Best Framing. The SWO indicated it was for "Failure to secure the payment of workers' compensation in violation of [statutes] by . . . failing to obtain coverage that meets the requirements of Chapter 440, F.S., and the Insurance Code." That is, Best Framing had insurance coverage in place, but it did not meet the statutory requirements because its payroll had been understated. The SWO was delivered to Best Framing's legal counsel (Kristian Dunn) via certified mail, return receipt requested. There are boxes that can be checked on an SWO form to indicate specific violations. For example, there is a box that states, "Materially understating or concealing payroll." That box was not checked on the SWO served

on Best Framing, even though that is the salient issue in this proceeding. However, one of the disputed issues of fact listed by the parties in their Prehearing Stipulation was whether Best Framing had intended to materially understate its payroll. Further, when the Department offered its Second Amended Order of Penalty Assessment at final hearing, the box concerning understated payroll was checked. Best Framing did not object to the entry of the document (Petitioner Exhibit 20) and it was admitted into evidence. There is no doubt each party was fully aware of the specific allegation at issue.

9. The second BRR issued by the Department to Best Framing requested five categories of records concerning Best Framing's business for the period October 2, 2014, through October 1, 2015 (the "First Audit Year"); and October 2, 2015, through July 27, 2016 (the "Second Audit Year"). The Department requested information similar to what it had asked for in the first BRR, including: payroll documents (including time sheets, earnings records, check stubs and payroll summaries); account documents, such as check journals and statements; disbursement information; names and contact information for subcontractors; and documentation of the subcontractors' workers' compensation insurance coverage.

10. Best Framing provided the Department some additional documents in response to the second BRR, but still did not

provide any information concerning possible subcontractors doing business with Best Framing.

11. The Department's review of the financial records provided by Best Framing confirmed its concerns about the company's underreporting of payroll. It appeared that the payroll checks written on Bank of America Account 8561 were reported to Best Framing's insurance carrier. However, the much larger payroll amounts written from Account 9199 had not been reported to the carrier.

12. The Department's investigation focused on the number of employees actually working for Best Framing during the last two years covered by the insurance policies. To this end, Best Framing employees (and/or subcontractors) were identified by Department investigators in various ways. At job sites, some of the workers produced valid identification cards while others provided their employer's name and telephone number, i.e., Abraham Olmedo at his office. When investigators called Abraham Olmedo, he would verify the workers who had provided his name and number as his employees. He would also provide information about purported workers' compensation insurance coverage for those employees. The bank records provided by Best Framing to the Department also included check stubs used to identify dozens of workers who were paid by Best Framing for construction work.

The Department ultimately counted 45 employees of Best Framing working at 22 different job sites.

13. However, Best Framing had identified only four employees to its insurance carrier: Abraham Olmedo, David Olmedo, Diana Guillen, and Obed Soldevilla (the "Named Employees").^{3/} Best Framing also identified a small number of subcontractors to the carrier. Each of the Named Employees received \$1,200 biweekly as salary from Best Framing. The total annual payroll to the four Named Employees and subcontractors for the First Audit Year was less than \$60,000; the payroll checks were issued from Account 8561. In the Second Audit Year, Best Framing still identified only the four Named Employees and a few additional subcontractors and increased its estimated payroll to \$125,000. That was still well below what the Department later determined to be the company's actual payroll.

14. Historically (at least for the first couple of years of its existence), Best Framing appeared to obtain appropriate and sufficient workers' compensation insurance coverage. In October 2012, Best Framing purchased its first workers' compensation policy from Auto-Owners Insurance Company ("Auto-Owners"). Best Framing projected its estimated payroll at \$100,000 for the period of October 2012 through October 2013. A telephone audit performed at the end of that period resulted in a finding that Best Framing's reported payroll for the period

was \$30,975 for its employees and \$7,600 for its subcontractors. As a result, Best Framing received a refund of premium from Auto-Owners. The next year (October 2013 through October 2014), Best Framing again estimated \$100,000 in payroll; upon audit, the amount was reported as \$60,400 for employees and \$28,800 for subcontractors. Again, Best Framing received a refund from its carrier. Beginning in the 2014 to 2015 period, Best Framing began projecting the reported payroll amounts discussed above.

15. The payroll reported by Best Framing to its carrier for the two years at issue, however, simply did not comport with the Department's investigative findings. The Department discovered that two of the three entities for which Best Framing did construction work had actually paid Best Framing well in excess of the payroll amounts reported to the insurer. A company known as D R Horton paid Best Framing approximately \$650,000 for framing labor during the First Audit Year and about \$630,000 during the Second Audit Year. Another entity, Henry Homes, paid Best Framing about \$1,180,000 during the First Audit Year and \$684,000 during the Second Audit Year. Those payments were for labor only and did not include costs for materials. When the Department compared those amounts to the Auto-Owners' audit reports for the two periods, it found that Best Framing had reported significantly lower "actual payroll" amounts to the carrier, even at the end of year audit.

16. There is no evidence that Best Framing advised its carrier during the First Audit Year to increase payroll amounts consistent with what those builders were paying Best Framing. Nor is there any evidence that Best Framing relied upon the end-of-year audit by its carrier to accurately correct the premium amount owed for insurance. As a matter of fact, there was no adjustment of the premium amount. (Best Framing did change its projected payroll from \$38,000 to \$59,000 for employees and \$46,000 for subcontractors at the end of the First Audit Year. However, those amounts were far less than their actual payroll for that period as evidenced by the payments from Account 9199.)

17. Despite the payroll amounts provided to the carrier and evidenced by the checks written from Account 8561, there were vastly larger amounts being paid to the four Named Employees from Account 9199. For example, Abraham Olmedo's Form W-2 for calendar year 2015 indicated he received a salary in the amount of \$15,600 for the year. He received checks totaling approximately that amount from Account 8561 for that year. However, during the same year he received many additional checks from Account 9199. Looking at just four of the numerous checks issued to him, he was paid over \$23,000 from Account 9199. There were many other checks written to Abraham Olmedo but the total of those checks was not disclosed at final hearing (although the amount could conceivably be derived from the bank

records entered into evidence). David Olmedo acknowledged at final hearing that Obed Soldevilla had been paid "tens of thousands of dollars" by Best Framing, all from Account 9199. Suffice it to say that each of the Named Employees received checks far greater than reflected in their W-2 forms and more than reported to the carrier.

18. None of the Named Employees provided evidence as to whether the payments from Account 9199 were for anything other than framing work. David Olmedo, the only one of the Named Employees to testify at final hearing, said simply that he was paid for services out of Account 9199 whenever he "ran a construction crew."

19. Account 9199 also included numerous checks written to dozens of other Best Framing workers. The memo line on most of the checks identified street addresses or names of builders, indicating the job on which the check recipient had been working. The checks were persuasive proof that the person receiving the money had done framing work at the site disclosed. Although Best Framing maintains those framers were subcontractors, it provided no proof to substantiate the claim. Its position in that matter is directly contrary to what Department investigators were told by the workers themselves and by Abraham Olmedo. Nor did Best Framing provide any proof that

the so-called subcontractors had workers' compensation insurance coverage.

20. None of the payroll evidenced by checks from Account 9199 was reported to Best Framing's insurance carrier. Had the actual payroll amounts been given to Lee Turner, Best Framing's insurance agent, he would not have written policies in the amount of \$58,000 and \$125,000 for the two years in question. Best Framing's premium for the First Audit Year was \$6,575; it should have been \$298,550 based on its actual payroll. For the Second Audit Year, the premium of \$17,767 should have been \$209,231.

21. David Olmedo, identified as the person most knowledgeable about Best Framing's business, became aware of the two bank accounts during the course of the Department's investigation. He did not admit to having any knowledge of how the accounts were utilized. He said that the company's accountant, Luis Ramirez, handled all of the bank transactions, the payroll, the payments to employees and vendors, and virtually all aspects of the business. Contra preferentem, Ramirez testified under oath he did next to nothing for the company, simply putting financial information provided to him by Best Framing onto a form used for paying quarterly taxes. Ramirez denied any knowledge of how the business operated

several times during his deposition(s), as evidence by the following excerpts:

"I don't run the business." [Ramirez deposition transcript, November 7, 2016 (the "First Deposition"), page 13].

In his second deposition in this case, Ramirez said his entire involvement with Best Framing was that, "I do taxes for them." (Ramirez deposition transcript, December 14, 2016 [the "Second Deposition, page 11].^{4/}

When asked what he did for Diana Guillen, he said, "We don't do payroll for her." [First Deposition, page 14].

"I don't run their business." [First Deposition, page 18].

"I don't do payroll for them." [First Deposition, page 20].

When asked if he was involved in setting workers' compensation insurance for Best Framing, he said, "I'm not involved. They're the ones who sets [sic] their insurance." [First Deposition, page 21].

"We don't provide payroll services for them." [Second Deposition, page 21].

22. Ramirez said that he would receive handwritten notes or verbal instructions from Best Framing's secretary, Diana Guillen, indicating how much each of the Named Employees was paid for the quarter, then insert those amounts into a tax document for reporting purposes. A copy of one of Ramirez' handwritten statements (taken down per Ms. Guillen's verbal representations), attached to Mr. Ramirez' deposition

transcript, shows a scribbled list of the Named Employees indicating they each received exactly \$600 biweekly during the quarter. The statement has no other support and is very questionable, i.e., it seems odd that the secretary of the company would receive the same salary as the president and the others who did more substantive work. Neither Mr. Ramirez, Abraham Olmedo, nor Ms. Guillen testified at final hearing to provide any explanation for the similar payments. Nor was this fact addressed in their depositions. David Olmedo did not address this issue during his testimony at final hearing.

23. There was no adequate or persuasive testimony concerning how Best Framing conducted its business. David Olmedo was the only person testifying on behalf of the company at final hearing. Though designated as the corporate representative and the person with the most knowledge of the company, he essentially knew very little regarding company operations. His testimony in that regard was as follows:

Q: Okay, and what do you do for the company?

A: I translate and order material, talk to superintendents, you know. If there's any problem, I will check and see what the problem is, just take care of the day-to-day operations.

Q: Okay, and what do the fellow members of the company do; Abraham, for example?

A: Abraham is the owner and he signs the contracts, looks for work, things like that.

Q: And how about Diana [Guillen]?

A: Diana was the secretary.

Q: And how about Mr. Obed Soldevilla?

A: He was the labor coordinator. He knew a lot of people in Pensacola, so if we would have a job set up and we didn't have anybody, we call and see if he could find someone for us.

Q: Okay. How many people are actual employees of Best Framing?

A: Four actual employees . . . Obed Soldevilla, Diana Guillen, Abraham Olmedo and [David Olmedo].

Tr. vol. 3, pp. 340-341.

Q: And how many people were subcontractors for your guys?

A: Everyone else that received a check.

Tr. vol. 3, p. 342.

Q: What do you consider - when you said you know the ins and outs of the company, what do you consider to be the ins and outs of the company?

A: The ins and outs as in the work part of the ins and outs.

Q: Yeah. What are the ins and outs?

A: The ins and outs of ordering material, how a house needs to be made, speaking to the superintendents.

Q: What about payroll, is that part of the "ins and outs" of the company?

A: No.

Tr. vol. 3, p. 360.

24. Neither David Olmedo nor anyone else associated with Best Framing could explain how the company was managed, i.e., how insurance coverage was determined, how subcontractors were

handled, or why only four employees were designated as the entire company. David Olmedo was obviously out of his element as the spokesperson for Best Framing at final hearing. (He is by his own admission a framer, not a businessman.) His minimal and general knowledge about the company was totally inadequate to establish substantive relevant facts for consideration by the undersigned.

25. David Olmedo candidly admitted that Best Framing should have reported the payroll paid to employees from Account 9199 and that the failure to do so was a mistake. While at first refusing to admit any wrongdoing by Best Framing, he ultimately acknowledged the company's failure. In response to questions posed at final hearing, he said:

Transcript pages 367-369

Q: Well, do you think now that you know about the [insurance] policy, that Best Framing should have reported that subcontractor payroll to Auto-Owners?

A: I mean, now that we're going through all of this, I think that we shouldn't have ever got Mr. Ramirez to do our books.

Q: Right. But don't you think that Best Framing should have reported that subcontractor - what you paid to your subcontractors?

A: I think Mr. Luis [sic] should have reported what he should have reported. I mean, Mr. Luis [sic] is the one that did the books.

Q: Should he have reported all that payroll from that second account [9199]?

A: Maybe he should have told us about it. And if it would have been known, we would have fixed the problem.

* * *

Q: And do you think that the payroll from that second account to the subcontractors, now that you know what you know, should have been reported to Auto-Owners?

A: Yeah, it should have been reported.

Q: Have you reported it yet to Auto-Owners?

A: No, we still haven't done our audit yet.

26. It is abundantly clear from the evidence presented that Best Framing did not report its entire payroll to the insurance carrier, resulting in much less insurance coverage than was required. The understatement of payroll resulted in a significantly smaller premium for insurance than was warranted by the actual provision of services. Again, Best Framing's insurance carrier would not have issued the policy had it known about the non-reported payroll.

27. In its defense, Best Framing raised several issues and concerns. First, David Olmedo said that the company was duped by its accountant, Luis Ramirez. Ramirez was the person utilized by Best Framing to assist with filing tax reports and end of year tax returns. Best Framing cannot absolve itself of its duty to accurately report payroll by blaming Ramirez of impropriety; the workers' compensation coverage is still required. However, as noted above, Ramirez claims to have no

knowledge of how Best Framing operates; his only involvement was preparing quarterly tax forms based on information provided by Best Framing. When asked about how subcontractors were handled by Best Framing, Ramirez said, "I don't know that. They don't give me that. They don't provide me that information." (Second Deposition, page 59.)

28. Second, Best Framing says that its most recent insurance period of coverage has not yet ended and it could still report the actual payroll amount. That is, the initial payroll and resulting premium was just an "estimate" by both the employer and the insurer. While that is true, the facts of this case prove that Best Framing intentionally understated its payroll from the outset. It is clear from the evidence that the payroll paid from Account 9199 was never reported to the insurance carrier. The time for updating the policy period of October 2014 to October 2015 has already passed, and Best Framing did not advise its carrier of the actual payroll amount for that period of coverage. Nor did Best framing take steps to increase the premium for the period October 2015 to October 2016 on a quarterly basis as required, at least until the Department began its investigation. Even then, the attempted increase in premium was based on a fallacious premise.

29. Best Framing advised its insurance agent that it had an offer to be the exclusive provider of framing for a large

company, D R Horton. That contractual arrangement was to supposedly generate some \$1.2 million in work for Best Framing over the next year. Such a contract would necessarily result in the need to increase its insurance coverage. However, a representative of D R Horton testified that there was no plan to provide Best Framing such a contract. And by the time Best Framing went in to increase its premium under the false premise, the Department had already advised Auto-Owners about their investigation and the carrier was not interested in amending Best Framing's policy.^{5/} Auto-Owners ultimately decided not to renew Best Framing's policy at all, perhaps in response to the news it had received from the Department. Auto-Owners stated as the basis for its non-renewal Best Framing's use of "subcontractors without insurance and/or pay[ing] workers in cash."

30. Third, Best Framing claims that the Department failed to follow its own internal procedures concerning investigation of an understated payroll case. Best Framing points to the Department's Training Memo #04-001, dated February 26, 2009, revised September 14, 2015, which states in pertinent part:

STATUTORY AUTHORITY:

Section 440.381(6)(b), Florida Statutes, requires the department [to] immediately notify the employer's carrier if we determine that the employer has materially understated or concealed payroll

The carrier shall commence a physical onsite audit of the employer within 30 days after receiving a notice of determination from the department. In addition, a copy of the carrier's audit of the employer shall be provided to the department upon completion. The carrier is not required to conduct a physical audit of the employer if the carrier gives written notice of cancellation to the employer within 30 days after receiving the notice of determination, and an audit is conducted with the cancellation.

PROCEDURES:

Prior to issuing a Business Records Request or Enforcement Action upon an Employer for materially understating or concealing payroll . . . the Investigator, District Supervisor, Investigations Managers, Underreporting Analyst, and Bureau Chief together shall discuss and determine the next action to be taken, if any, for such cases.

Once an investigator determines, through the issuance of a Stop-Work Order or Order of Penalty Assessment, that an employer has materially understated or concealed payroll . . . the Investigator shall immediately notify the Bureau Chief's office by e-mail . . . and provide him with the following information [name, FEIN, address, etc.].

The information provided will be included in the Notice of Determination Letter that is prepared and mailed (certified) and emailed to the carrier

If the carrier does not commence a physical on-site audit, or give written notice of the cancellation within 30 days after receipt of the notice of determination . . . the Bureau Chief will notify the auditing professional under contract with the department to conduct the audit at the insurer's expense.

31. Best Framing argues two points concerning the training memorandum: 1) that the Department did not issue a written "Notice of Determination" that the employer had allegedly understated its payroll; and 2) that the carrier did not commence a "physical onsite audit of the employer" within 30 days after receipt of the Notice of Determination. Both of those allegations appear accurate. However, Best Framing failed to establish how the violation of an internal training memorandum by the Department absolves it (Best Framing) of the requirement for reporting its entire payroll, for direct employees and subcontractors alike. Best Framing also argues that the training memorandum is an unpromulgated rule. It is not. See the discussion in Conclusions of Law 47 through 49, below.

32. Fourth, Best Framing pointed out that there were no work-related injuries to any of its employees or subcontractors during the two years at issue. While that is laudable (and somewhat miraculous), it does not absolve Best Framing of its insurance requirements.

33. At final hearing, the Department offered a Second Amended Order of Penalty Assessment into evidence. The amended order set the penalty at \$891,418.46, an amount somewhat less than the original calculation. Best Framing did not object to the calculations that resulted in the penalty amount, although

it still maintains that no penalty is warranted. The assessed penalty is accepted as reasonable and accurate.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over this matter pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless otherwise stated specifically herein, all references to Florida Statutes will be to the 2016 version.

35. The burden of proof in matters such as this is on the Department because it is asserting the affirmative of the issue, i.e., that Best Framing did not have workers' compensation insurance in place which would "meet the requirements of Chapter 440, Florida Statutes." See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

36. In the instant case, the administrative fines being proposed by the Department are penal in nature. The standard of proof for such cases is clear and convincing evidence. See Dep't of Banking and Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

37. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil and administrative cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2d

DCA 1970). Further, clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 1st DCA 1983).

Citations omitted.

38. Chapter 440, Florida Statutes, is known as the "Workers' Compensation Law." Section 440.10, within that chapter, states in relevant part:

(1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.

(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.

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

39. Section 440.107 states at paragraph (3), "The Department shall enforce workers' compensation coverage requirements, including the requirement that . . . the employer provide the carrier with information to accurately determine payroll. . . ." The law mandates that subcontractors are to be treated the same as contractors, having the same responsibility for obtaining coverage for their employees. Where a subcontractor fails to provide proof of coverage for its employees, the contractor is responsible for providing such coverage. See § 440.10(1)(b), Fla. Stat.

40. At final hearing, Best Framing posited, without any support whatsoever, that the framers paid from Account 9199 were subcontractors. (This position squarely contradicts the testimony of David Olmedo who said the persons receiving checks from Account 9199 should have been reported to the insurance carrier as employees.) Even if that was true, Best Framing

would be required to provide proof that the subcontractors had valid workers' compensation insurance in place. If not, then Best Framing would be required to provide the coverage for the subcontractors. Clearly, the persons paid out of Account 9199 were engaged in "employment" for Best Framing as defined by section 440.02(17)(b)(2). Whether employers or subcontractors, Best Framing was responsible for ensuring they had workers' compensation coverage.

41. This case is not a run-of-the-mill case involving an employer's failure to obtain workers' compensation coverage for his or her employer. The underreporting or concealment of payroll is a different animal in the Workers' Compensation Law, Chapter 440.

42. Section 440.107 states in pertinent part:

(1) The Legislature finds that the failure of an employer to comply with the workers' compensation coverage requirements under this chapter poses an immediate danger to public health, safety, and welfare.

(2) For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. 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. A stop-work order issued because an employer is deemed to have failed to secure the payment of workers' compensation required under this chapter because the employer has materially understated or concealed payroll, materially misrepresented or concealed employee duties so as to avoid proper classification for premium calculations, or materially misrepresented or concealed information pertinent to the computation and application of an experience rating modification factor shall have no effect upon an employer's or carrier's duty to provide benefits under this chapter or upon any of the employer's or carrier's rights and defenses under this chapter, including exclusive remedy. (Emphasis added).

43. Department representatives at final hearing erroneously stated that even one dollar of unreported payroll would be a violation. The statute, however, speaks in terms of a "material understatement" of payroll. It is clear from the evidence that the understatement by Best Framing was material.

44. Section 440.381 addresses applications for worker's compensation insurance coverage and states in relevant part:

(2) [T]he application must contain a sworn statement by the employer attesting to the accuracy of the information submitted and acknowledging the provisions of former s. 440.37(4). The application must contain a sworn statement by the agent attesting that the agent explained to the employer or

officer the classification codes that are used for premium calculations.

* * *

(4) Each employer must submit a copy of the quarterly earnings report required by chapter 443 at the end of each quarter to the carrier and submit self-audits supported by the quarterly earnings reports required by chapter 443 and the rules adopted by the Department of Economic Opportunity or by the state agency providing reemployment assistance tax collection services under contract with the Department of Economic Opportunity through an interagency agreement pursuant to s. 443.1316. The reports must include a sworn statement by an officer or principal of the employer attesting to the accuracy of the information contained in the report.

* * *

(6)(b) If the department determines that an employer has materially understated or concealed payroll, has materially misrepresented or concealed employee duties so as to avoid proper classification for premium calculations, or has materially misrepresented or concealed information pertinent to the computation and application of an experience rating modification factor, the department shall immediately notify the employer's carrier of such determination. The carrier shall commence a physical onsite audit of the employer within 30 days after receiving notification from the department. If the carrier fails to commence the audit as required by this section, the department shall contract with auditing professionals to conduct the audit at the carrier's expense. A copy of the carrier's audit of the employer shall be provided to the department upon completion. The carrier is not required to conduct the physical onsite audit of the employer as set forth in this

paragraph if the carrier gives written notice of cancellation to the employer within 30 days after receiving notification from the department of the material misrepresentation, understatement, or concealment and an audit is conducted in conjunction with the cancellation.
(Emphasis added).

45. There is no evidence that Best Framing attempted to resolve its understated payroll conundrum by complying with the quarterly reporting requirements set forth above. Operating perhaps out of ignorance of the facts but more likely by design, Best Framing continued to misreport its payroll amount every single quarter. Its agent, Luis Ramirez, allegedly contributed to the problem, but that is no excuse for Best Framing's failure. Someone on behalf of the employer signed a sworn statement attesting to the accuracy of the payroll as submitted. Clearly, that statement was in error.

46. The Department did notify the carrier, Auto-Owners, of its determination that Best Framing had understated its payroll. The Department did not issue a written "Notice of Determination" to the carrier; however, it was done verbally. The statute does not require written notification although the training memorandum does and it would be the better practice. That the carrier failed to commence an on-site audit within 30 days, and the Department did not thereafter schedule an audit by its contracted auditing professionals, is inconsistent with the

statutory mandate. However, inasmuch as Best Framing admits its failure to provide accurate payroll figures, and it is no longer doing construction work, the negative impact of the Department's shortcomings are de minimus. An audit would likely increase, not decrease, the proposed penalty for non-compliance.

47. As to Training Memo #04-001 relied upon by Best Framing in its defense, it is axiomatic that not every document produced by an agency is a rule. A "rule" is an "agency statement of general applicability." See § 120.52(15), Fla. Stat. The training memorandum at issue applies only to employees of the Department's Bureau of Compliance and merely addresses the requirements already set forth in section 440.381(6)(b).

48. When determining whether the training memorandum is an illicit rule, the primary concern is its effect. Dep't of Rev. v. Vanjara, 675 So. 2d 252, 255 (Fla. 5th DCA 1996). An agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others" or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Dep't of Transp. v. Blackhawk Quarry, 528 So. 2d 976, 977-978 (Fla. 1st DCA 1984). A training memorandum is not the equivalent of a rule where it merely informs of a process or procedure. Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d

200, 204 (Fla. 1st DCA 2010) (citing Dep't of Rev. v. Novoa, 745 So. 2d 378, 382 (Fla. 1st DCA 1999)).

49. By its terms, the training memorandum is an internal tool, used by and applying to employees of the Department. It does not directly require any action by employers. It does not, in and of itself, create or adversely affect any of Best Framing's rights. Training Memo #04-001 is not a rule.

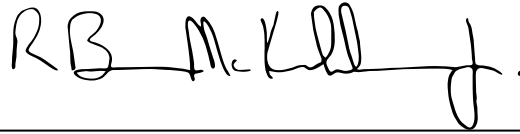
50. The clear and convincing evidence in this case established Best Framing's failure to obtain workers' compensation insurance coverage sufficient to cover all of its employees and/or subcontractors. Best Framing either intentionally hid payments from Account 9199 or was woefully ignorant of its responsibilities, thereby placing all of its employees at risk. Such action posed a "significant danger to [the] health, safety, and welfare of those persons it was charged with protecting. See § 440.107(1), Fla. Stat.

51. The penalty calculation is accepted as accurate and properly derived.^{6/}

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 upholding the Stop-Work Order and the Amended Penalty Assessment in the amount of \$891,418.46 imposed against Respondent, Best Framing USA, Inc.

DONE AND ENTERED this 9th day of March, 2017, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 2017.

ENDNOTES

^{1/} At final hearing, Best Framing essentially stipulated to the Department's calculation of the penalty amount, but not as to whether a penalty was warranted.

^{2/} The corporate documents were filed by Luis Ramirez, who became the company's accountant and is the person Best Framing blames for much of its turmoil in this matter.

^{3/} Amazingly, David Olmedo, corporate representative for Best Framing, did not know Obed Soldevilla's name as recently as September 2016 during his deposition taken in this case. Mr. Olmedo said he only knew the man as "Gordo" and did not know his real name, despite allegedly being only one of four employees at the company.

^{4/} A second deposition was necessitated by the actions of Best Framing's attorney, Kristian Dunn, at the initial deposition. Mr. Dunn, despite acknowledging that he did not represent Mr. Ramirez, nonetheless offered Ramirez legal advice and basically counselled Ramirez to terminate the deposition until he could obtain his own legal counsel. At his second deposition, Ramirez appeared with legal representation, Michael Guttman, Esquire. Mr. Guttman is either unfamiliar with or does

not care about the procedural rules governing discovery depositions. By way of example, Mr. Guttman on numerous occasions invoked the Fifth Amendment on behalf of Mr. Ramirez (rather than Mr. Ramirez doing so on his own) without specifying how the question might possibly lead to incrimination in a criminal proceeding. Mr. Guttman invoked the privilege, for example, when Mr. Ramirez was asked if his signature appeared on a document he had already identified. When Mr. Ramirez was asked to verify his email address, Mr. Guttman invoked the Fifth Amendment. He made numerous improper and irrational objections to questions posed by the Department's counsel. He offered unsolicited statements and comments on the record. He was rude and condescending to his client. He was disruptive and seemed more intent on scuttling the deposition than representing his client's interest. In whole, Mr. Guttman's behavior was deplorable and totally inconsistent with the standards enumerated in the Oath of Admission to the Florida Bar. Frankly, it is a wonder his reprehensible behavior has not been reported to the Florida Bar.

^{5/} David Olmedo's testimony about meeting with Best Framing's insurance agent was confusing, at best, and perhaps misleading. He first said that he and Abraham Olmedo went to see the agency because Best Framing was not receiving monthly bills from Auto-Owners. Then Olmedo said they went to see the agent for the purpose of increasing their policy amount, but he said that maybe that was tied to them not getting billed. The testimony was very disjointed and was not persuasive.

^{6/} Subsequent to the final hearing, at a motion hearing related to an earlier award of fees, the Department filed--under seal--an audiotape from the second deposition of Mr. Ramirez. The audiotape remains under seal and was not considered in the preparation and issuance of this Recommended Order (or Order regarding attorneys' fees).

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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.