

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case Nos. 17-0879
17-1558

ROYAL ROOFING AND RESTORATION,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed hearing was held in these cases on
September 14, 2017, in Tallahassee, Florida, before
Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioner: Leon Melnicoff, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Gary Lee Printy, Esquire
Gary Lee Printy, Attorney at Law
1804 Miccosukee Commons Drive, Suite 200
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

Whether Royal Roofing and Restoration, Inc. (Respondent or
Royal Roofing), failed to secure workers' compensation insurance
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 May 4 and June 8, 2016, the Department served Respondent with Stop-Work Orders and Orders of Penalty Assessment, pursuant to chapter 440, Florida Statutes, for failing to secure workers' compensation for its employees, arising from two separate inspections. On August 22, 2016, after review of records received from Respondent, the Department issued an Amended Order of Penalty Assessment in the first case, assessing Respondent a penalty of \$30,112.34. On August 23, 2016, the Department issued an Amended Order of Penalty Assessment in the second case, assessing Respondent a penalty of \$76,209.64.

On September 29, 2016, Respondent filed separate requests for hearing to dispute the Stop-Work Order and Amended Order of Penalty Assessment in both cases. On February 9, 2017, Petitioner referred the first case to the Division of Administrative Hearings (Division) for assignment of an Administrative Law Judge to conduct a final hearing in the matter. That case was assigned DOAH Case No. 17-0879.

On March 15, 2017, Petitioner referred the second case, which was assigned DOAH Case No. 17-1558.

The final hearing in DOAH Case No. 17-0879 was originally scheduled for April 6, 2017, but was continued following the referral of DOAH Case No. 17-1558 and the parties' request to consolidate the cases. The cases were consolidated on March 21, 2017, and scheduled for final hearing on May 31, 2017. The final hearing was subsequently continued twice, once at the request of Petitioner, and again by joint request of the parties to analyze large volumes of data in an effort to further reduce the penalty to be assessed. The final hearing was rescheduled to September 14, 2017.

Following records review and the deposition of Respondent's President, Petitioner requested, and was granted, leave to file a Second Amended Order of Penalty Assessment in both cases. On August 30, 2017, Petitioner filed a Second Amended Order of Penalty Assessment in DOAH Case No. 17-0879, reducing the penalty to \$19,115.84, and in DOAH Case No. 17-1558, reducing the penalty to \$60,072.96.

The final hearing commenced as rescheduled on September 14, 2017. At the final hearing, Petitioner presented the testimony of Ginger Chalker; Jesse Holman, Department Compliance Investigator; Donald Hurst, Department Compliance Facilitator; and Eunika Jackson, Department Penalty Auditor. Petitioner's Exhibits P1 through P35, were admitted into evidence.

Respondent offered the testimony of Traci Fisher, Respondent's President, and introduced Respondent's Exhibits R24 through R32, which were admitted into evidence.

A one-volume Transcript of the proceedings was filed on October 4, 2017. Petitioner timely filed a Proposed Recommended Order, which has been considered by the undersigned in preparing this Recommended Order. Respondent requested, and was granted, an extension of time until November 6, 2017, to submit a proposed recommended order; however, as of the date of this Recommended Order, Respondent has not made any post-hearing filing.

Unless otherwise indicated, all references to the Florida Statutes herein are to the 2016 version.

FINDINGS OF FACT

1. Petitioner is the state agency charged with enforcing the requirement of chapter 440, that Florida employers secure workers' compensation coverage for their employees.

§ 440.107(3), Fla. Stat.

2. Respondent is a Florida for-profit corporation organized on July 28, 2015, and engaged in the business of roofing and storm damage restoration. The company was formed, and initially conducted business, in Tallahassee, Florida, but expanded to the Panama City area in 2016.

3. Traci Fisher is Respondent's President and Registered Agent, with a mailing address of 1004 Kenilworth, Tallahassee, Florida 32312.

DOAH Case No. 17-0879

4. On May 4, 2016, Department Compliance Investigator Jesse Holman, conducted a routine workers' compensation compliance inspection at 374 Brown Place in Crestview, Florida. Mr. Holman observed four men removing shingles from the roof of a residential structure at that address.

5. Mr. Holman first interviewed a worker who identified himself as Dustin Hansel and reported that he and the other three workers on site were a new crew for Respondent, the permit for the job had not yet been pulled, and the workers were not aware of the rate of pay for the job.

6. Mr. Hansel telephoned Respondent's sales manager, Dillon Robinson, who then spoke directly with Mr. Holman via telephone.

7. Mr. Robinson informed Mr. Holman that Respondent obtained workers' compensation coverage through Payroll Management Inc. (PMI), an employee-leasing company.

8. Mr. Holman identified the three remaining workers at the jobsite as Milton Trice, Winston Perrotta, and Kerrigan Ireland.

9. Mr. Holman contacted PMI and secured a copy of Respondent's then-active employee roster. None of the workers at the jobsite, including Mr. Hansel, were included on Respondent's employee roster.

10. Upon inquiry, Mr. Holman was informed that PMI had no pending employee applications for Respondent.

11. Mr. Holman consulted the Department's Coverage Compliance Automated System (CCAS) and found Respondent had no workers' compensation insurance policy and no active exemptions.

12. During Mr. Holman's onsite investigation, the workers left the jobsite.

13. Mr. Holman could not immediately reach Ms. Fisher, but did speak with her husband, Tim Fisher. Mr. Fisher informed Mr. Holman that the crew was on their way to the PMI Fort Walton office to be enrolled on Respondent's employee roster.

14. On May 5, 2016, based on his investigation, and after consultation with his supervisor, Mr. Holman issued Respondent Stop-Work Order (SWO) 16-148-1A, along with a Business Records Request (BRR) for records covering the audit period of July 27, 2015 through May 4, 2016.

15. Later that day, Mr. Holman spoke to Ms. Fisher, who informed him the crew did not have permission to begin the work on that date, as she had not yet pulled the permit for the reroof. Ms. Fisher further explained that the crewmembers had

been instructed to complete applications with PMI prior to departing Tallahassee for Crestview. Ms. Fisher confirmed the crewmembers were completing applications at PMI Fort Walton that same day.

16. Mr. Holman met with Ms. Fisher the following day and personally served SWO 16-148-1A. Ms. Fisher delivered to Mr. Holman an updated employee roster from PMI which included Mr. Hansel, Mr. Perrotta, and Mr. Ireland; a letter documenting Mr. Trice was not employed by Respondent; and a \$1000 check as downpayment on the penalty.

17. Respondent initially submitted business records in response to the BRR on May 23 and 25, 2017.

DOAH Case No. 17-1558

18. On June 8, 2016, Mr. Holman conducted a random workers' compensation compliance inspection at 532 Rising Star Drive in Crestview. The single-family home at that address was undergoing renovations and Mr. Holman observed three men on the roof removing shingles.

19. None of the men on the roof spoke English, but a fourth man, who identified himself as Jose Manuel Mejia, appeared and stated he worked for Respondent, and that all the workers onsite were paid through PMI at a rate of \$10.00 per hour. Mr. Mejia admitted that one of the worker's onsite, Emelio Lopez, was not enrolled with PMI and explained that

Mr. Mejia brought him to the worksite that day because he knew Mr. Lopez to be a good worker.

20. The remaining workers onsite were identified as Juan Mencho and Ramon Gonzalez, both from Atlanta, Georgia.

Mr. Mejia produced some PMI paystubs for himself and Mr. Mencho.

21. Mr. Mejia stated that he and his crews also received reimbursement checks directly from Respondent for gas, rentals, materials, and the like.

22. Mr. Holman contacted PMI, who produced Respondent's then-active employee roster. Mr. Mejia and Mr. Mencho were on the roster, but neither Mr. Gonzalez nor Mr. Lopez was included.

23. Mr. Holman next contacted Ms. Fisher, who identified Mr. Mejia as a subcontractor, but was not familiar with any of the other men Mr. Holman encountered at the worksite.

24. Mr. Holman consulted via telephone with his supervisor, who instructed him to issue an SWO to Respondent for failing to secure workers' compensation coverage for its employees. Mr. Holman issued SWO 16-198-1A by posting the worksite on June 8, 2016. Department Facilitator Don Hurst, personally served Ms. Fisher with SWO 16-198-1A in Tallahassee that same day.

SWO 16-148-1A Penalty Calculation^{1/}

25. Department Penalty Auditor Eunika Jackson, was assigned to calculate the penalties associated with the SWOs issued to Respondent.

26. On June 8, 2016, Ms. Jackson began calculating the penalty associated with SWO 16-148-1A. Ms. Jackson reviewed the documents submitted by Respondent in response to the BRR. The documents included Respondent's Wells Fargo bank statements, check images, and PMI payroll register for the audit period.^{2/}

27. Based on a review of the records, Ms. Jackson identified the following individuals as Respondent's employees because they received direct payment from Respondent at times during the audit period: David Rosinsky, Dylan Robinson, Jarod Bell, Tommy Miller, and David Shields.

28. Ms. Jackson determined periods of non-compliance for these employees based on the dates they received payments from Respondent and were not covered for workers' compensation via PMI employment roster, separate policy, or corporate officer exemption.

29. Ms. Jackson deemed payments to each of the individuals as gross payroll for purposes of calculating the penalty.

30. Based upon Ms. Fisher's deposition testimony, Ms. Jackson assigned National Council on Compensation Insurance (NCCI) class code 5551, Roofing, to Mr. Miller; NCCI class

code 5474, Painting, to Mr. Rosinsky; NCCI class code 8742, Sales, to Mr. Bell and Mr. Robinson; and NCCI class code 8810, clerical office employee, to Mr. Shields.

31. Utilizing the statutory formula for penalty calculation, Ms. Jackson calculated a total penalty of \$191.28 associated with these five "employees."

32. Ms. Jackson next calculated the penalty for Dustin Hansel, Kerrigan Ireland, Milton Trice, and Winston Perrotta, the workers identified at the jobsite as employees on May 4, 2016.

33. The Department maintains that the business records submitted by Respondent were insufficient to determine Respondent's payroll to these "employees," thus, Ms. Jackson used the statutory formula to impute payroll to these workers.

34. Ms. Jackson calculated a penalty of \$14,970.12 against Respondent for failure to secure payment of workers' compensation insurance for each of these four "employees" during the audit period. The total penalty associated with these four "employees" is \$59,880.48.

35. Ms. Jackson calculated a total penalty of \$60,072.96 to be imposed against Respondent in connection with SWO 16-148-1A.

Business Records

36. In compliance with the Department's BRR, Respondent submitted additional business records on several occasions-- March 21, May 3 and 31, June 7, and August 15 and 24, 2017--in order to establish its complete payroll for the audit period. While the Department admits that the final documents submitted do establish Respondent's complete payroll, the Department did not issue amended penalty assessment based on those records in either case. The Department maintains Respondent did not timely submit records, pursuant to Florida Administrative Code Rule 69L-6.028(4), which allows an employer 20 business days after service of the first amended order of penalty assessment to submit sufficient records to establish payroll.

37. All business records submitted by Respondent were admitted in evidence and included as part of the record. The undersigned is not limited to the record before the Department at the time the amended penalty assessments were imposed, but must determine a recommendation in a de novo proceeding. The undersigned has relied upon the complete record in arriving at the decision in this case.

Penalty Calculation for Ireland, Trice, and Perrotta

38. For purposes of workers' compensation insurance coverage, an "employee" is "any person who receives remuneration

from an employer" for work or services performed under a contract. § 440.02(15)(a), Fla. Stat.

39. Respondent did not issue a single check to Mr. Ireland, Mr. Trice, or Mr. Perrotta during the audit period.

40. Mr. Ireland, Mr. Trice, and Mr. Perrotta are not included on any PMI leasing roster included in the record for the audit period.

41. The uncontroverted evidence, including the credible and unrefuted testimony of each person with knowledge, established that Mr. Ireland, Mr. Trice, and Mr. Perrotta were newly hired for the job in Crestview on May 4, 2016, and began working that day prior to submitting applications at PMI, despite Ms. Fisher's directions otherwise.

42. Petitioner did not prove that either Mr. Ireland, Mr. Trice, or Mr. Perrotta was Respondent's employee at any time during the audit period.

43. Petitioner did not correctly calculate the penalty of \$44,911.26 against Respondent for failure to secure workers' compensation insurance for Mr. Ireland, Mr. Trice, and Mr. Perrotta during the audit period.

Penalty Calculation for Hansel

44. Ms. Fisher testified that Mr. Hansel has owned several businesses with which Respondent has conducted business over the years.

45. Originally, Mr. Hansel owned a dumpster rental business, now owned by his father. Mr. Hansel also owned an independent landscaping company with which Respondent occasionally transacted business.

46. When Respondent expanded business into the Panama City area, Ms. Fisher hired Mr. Hansel as a crew chief to supervise new crews in the area. The job on May 4, 2016, was his first roofing job.

47. A review of Respondent's records reveals Respondent issued the following checks to Mr. Hansel during the audit period: December 4, 2015, in the amount of \$360, \$300 of which was for "dumpster rental" and the remaining \$60 for "sod"; May 4, 2016, in the amount of \$200 for "sod repair"; May 6, 2016, in the amount of \$925 as reimbursement for travel expenses; May 9, 2016, in the amount of \$1,011.50 (with no memo); and May 21, 2016, in the amount of \$100 for "7845 Preservation."

48. Mr. Hansel was included on Respondent's PMI leasing roster beginning on May 13, 2016.

49. Petitioner proved that Mr. Hansel was Respondent's employee at times during the audit period.

50. Petitioner did not prove that Respondent's records were insufficient to determine payroll to Mr. Hansel during the audit period, which would have required an imputed penalty.

51. Petitioner did not correctly calculate the penalty of \$14,970.42 against Respondent for failure to secure workers' compensation insurance coverage for Mr. Hansel during the audit period.

52. Sod repair by Mr. Hansel is a service performed for Respondent during the audit period.

53. Reimbursement of travel expenses is specifically included in the definition of payroll for purposes of calculating the penalty. See Fla. Admin. Code R. 69L-6.035(1)(f) ("Expense reimbursements, including reimbursements for travel" are included as remuneration to employees "to the extent that the employer's business records and receipts do not confirm that the expense incurred as a valid business expense.").

54. Dumpster rental is neither work performed on behalf of, nor service provided to, Respondent during the audit period.

55. The correct uninsured payroll amount attributable to Mr. Hansel is \$2,296.50.

56. Petitioner correctly applied NCCI class code 5551, Roofing, to work performed by Mr. Hansel based on the observation of Mr. Holman at the worksite on May 4, 2016.

57. With respect to Mr. Hansel's services for sod and sod repair, Petitioner did not correctly apply NCCI class code 5551.

58. Petitioner did not introduce competent substantial evidence of the applicable NCCI class code and premium amount for landscaping services performed during the audit period.^{3/}

59. Uninsured payroll attributable to Mr. Hansel for roofing services during the audit period is \$2,036.50.

60. The approved manual rate for workers' compensation insurance for NCCI class code 5551 during the period of non-compliance--May 9 and 21, 2016--is \$18.60.

61. The premium amount Respondent would have paid to provide workers' compensation insurance for Mr. Hansel is \$378.79 (One percent of Mr. Hansel's gross payroll during the non-compliance period--\$20.36--multiplied by \$18.60).

62. The penalty for Respondent's failure to secure worker's compensation coverage insurance for Mr. Hansel during the period of non-compliance is calculated as two times the amount Respondent would have paid in premium for the non-compliance period.

63. The correct penalty for Respondent's failure to maintain workers' compensation coverage for Mr. Hansel during the period of non-compliance is \$757.58.

Penalty Calculation for Salesmen

64. Independent contractors not engaged in the construction industry are not employees for purposes of

enforcing workers' compensation insurance requirements. See
§ 440.02(15)(d)1., Fla. Stat.

65. Sales is a non-construction industry occupation.

66. The Department calculated a penalty associated with payroll attributable to the following persons identified by Ms. Fisher as independent salesmen: Dylan Robinson, Kevin Miller, Marc Medley, Mike Rucker, Colby Fisher, David Jones, Jarod Bell, Matt Flynn, and Todd Zulauf.

67. Section 440.02(15)(d)1. provides that an individual may be an independent contractor, rather than an employee, as follows:

a. In order to meet the definition of independent contractor, at least four of the following criteria must be met:

(I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;

(II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;

(III) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;

(IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying

business expenses or other expenses related to services rendered or work performed for compensation;

(V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or

(VI) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

b. If four of the criteria listed in subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.

(II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.

(III) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform.

(IV) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.

(V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.

(VI) The independent contractor has continuing or recurring business liabilities or obligations.

(VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

68. Ms. Fisher testified that each of the above-named salesmen sold roofing jobs for her at various times during the audit period on a commission-only basis. The contractors inspect homeowner roofs, draft schematics, use their own equipment (e.g., drones), incur all of their own expenses, and handle the insurance filing for the homeowner's insurance to pay on the claim.

69. Ms. Fisher further testified that each of the salesmen also sells for other roofing contractors in the Tallahassee area. She pays the salesmen on a per-job basis. Ms. Fisher does not compensate the salesmen for the time involved in inspecting a roof, preparing schematics, or making the sale. Nor does Ms. Fisher reimburse the salesmen for travel to sales jobsites.

70. Ms. Fisher's testimony was credible, persuasive, and uncontroverted.

71. Respondent introduced in evidence four "Independent Contractor Checklists" allegedly completed by Mr. Robinson, Mr. Medley, Mr. Fisher, and Mr. Flynn. Each form checklist follows the format of section 440.02(15)(d)1., listing the criteria set forth in subparagraphs a. and b. The forms indicate that they each meet all the criteria listed in subparagraph b.: they perform, or agree to perform services for a specific amount of money and control the means of performing the service; they incur the principal expenses related to the service performed; they are responsible for satisfactory completion of the services performed; they receive compensation for the services performed on a per-job or commission basis; they may realize a profit or suffer a loss in connection with performing the services; they have continuing and recurring business liabilities or obligations; and the success or failure of their business depends on the relationship of business receipts to expenditures.^{4/}

72. In its Proposed Recommended Order, Petitioner conceded the nine men identified by Respondent as independent sales contractors "would not be considered employees of Respondent" because the "salesmen would seem to meet the majority of [the] requirements [of section 440.02(15)(d)1.b.]."

73. Respondent issued Dylan Robinson, Mark Medley, Colby Fisher, Matt Flynn, Kevin Miller, Mike Rucker, Jarod Bell, David

Jones, and Todd Zulauf an IRS FORM 1099-MISC for income paid during the 2016 tax year.

74. Respondent did not prove by clear and convincing evidence that the above-named salesmen were Respondent's employees during the audit period.

75. For SWO 16-148-1A, Respondent did not correctly calculate the penalty because Respondent included a penalty associated with Petitioner's failure to provide workers' compensation insurance coverage for Dylan Robinson and Jarod Bell.

76. Penalty in the amount of \$20.70 associated with Dylan Robinson and Jarod Bell should not be included in the total penalty.

77. The correct penalty amount for SWO 16-148-1A, based on records submitted by Respondent on or before March 20, 2016, is \$929.16.

Draft Revised Second Amended Order of Penalty Assessment

78. The additional records submitted by Respondent revealed payments made to persons during the audit period who were not included in the Department's Second Amended Order of Penalty Assessment. The Department and Respondent disagreed at hearing whether the payments qualified as payroll.

79. At hearing, Petitioner submitted a draft revised second amended penalty calculation for SWO 16-148-1A based on

all records received from Respondent. The revised penalty is in the amount of \$61,453.50.

80. Ms. Jackson populated the spreadsheet with the name of every individual to whom a check was written on Respondent's business bank account during the audit period, removing only those payments to individuals and entities which, to Petitioner's knowledge, were not Respondent's employees.

81. Respondent's calculations in the revised penalty suffer from some of the same errors as in the second amended penalty calculation--they include individuals Petitioner did not prove were Respondent's employees, as well as payments which were not uninsured payroll.

82. For the reasons explained herein, Petitioner did not prove that salesmen David Jones, Dylan Robinson, Jarod Bell, Kevin Miller, Mark Medley, Matt Flynn, Mike Rucker, Tim Fischer, and Colby Fisher were Respondent's employees during the audit period.

83. Respondent did not accurately calculate the penalty associated with those persons.

84. Respondent made payments to David Shields during the audit period, which the Department argues should be included as payroll. The Department included payments to Mr. Shields in its draft revised second amended order of penalty assessment and assigned NCCI class code "8810" for clerical work.

85. Mr. Shields is a licensed professional roofing contractor who acts as "qualifier" for Respondent's business. A qualifier is a licensed professional who certifies plans for permit applications submitted by another business.

86. Respondent pays Mr. Shields a flat fee per permit application qualified by him.

87. The record evidence does not support a finding that Mr. Shields provides clerical services to Respondent. Mr. Shields provides some sort of professional services to Respondent, and is likely an independent contractor providing his own materials and supplies, maintaining his own business accounts, and liable for his own business success.

88. Assuming Mr. Shields were Respondent's employee, the Department introduced no evidence of an appropriate NCCI class code for Mr. Shields' services.

89. The Department did not prove that payments to Mr. Shields should be included as Respondent's uninsured payroll during the audit period.

90. Respondent paid Susan Swain a total of \$258 during the audit period for clerical work. Ms. Fisher maintained Ms. Swain's work was casual at first, and the payments reflect a time when she worked on-again, off-again, handling the paperwork for restoration insurance claims. Later, Ms. Swain came to work

for Respondent full-time and was added to the PMI leasing roster.

91. Section 440.02(15)(d)5. provides that a person "whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer" is not an employee. The statute defines "casual" employment as work that is anticipated to be completed in 10 working days or less and at a total labor cost of less than \$500. See § 440.02(5), Fla. Stat.

92. In its Proposed Recommended Order, the Department argues Ms. Swain's wages should be included as payroll because the "testimony regarding Ms. Swain does not suggest that she was employed for less than 10 days[.]" However, it was the Department's burden to prove that Ms. Swain was a statutory employee.

93. The Department did not prove that Ms. Swain's wages should be included within Respondent's uninsured payroll.

94. The largest portion of the penalty assessed by the Department, as well as in the draft revised second amended penalty assessment, against Respondent is in connection with various roofers who were employed by Respondent at times during the audit period.

95. Each of the roofers was included on Respondent's PMI leasing roster, but received checks directly from Respondent in

addition to PMI payroll checks. The Department included all the direct payments to those roofers as payroll for purposes of calculating a penalty in this case.

96. As Ms. Fisher explained, the company bids a reroof on a per job basis--usually a per square foot price. Ms. Fisher adds each roofing contractor's name to the PMI leasing roster to ensure that each roofer is covered by workers' compensation insurance for the duration of the job. When the job is completed (which is a matter of just a few days), the contractor reports to Ms. Fisher what amount of the contract price was spent on materials, supplies, or other non-labor costs. Ms. Fisher cuts a check to the contractor for that amount and authorizes PMI to issue payroll checks for the "labor cost" (the difference between the contract price and the non-labor costs). Ms. Fisher refers to this process as "back-charging" the contractors for their materials, maintenance, tools, and other non-labor costs.

97. The Department is correct that the direct payments are payroll to the roofing contractors. See Fla. Admin. Code R. 69L-6.035(1)(b) and (h) (remuneration includes "payments, including cash payments, made to employees by or on behalf of the employer" and "payments or allowances made by or on behalf of the employer for tools or equipment used by employees in their work or operations for the employer.").

98. The Department would be correct to include these payments in the penalty calculation if they represented uninsured payroll. However, the evidence supports a finding that the direct payments to the roofing contractors were made for the same jobs on which Respondent secured workers' compensation coverage through PMI. The roofing contractors were covered for workers' compensation throughout the job, even though they may have received partial payment for the job outside of the PMI payroll checks.^{5/}

99. The direct payments were not for separate reroofs on which the roofers were not otherwise insured.

100. The Department did not correctly calculate penalties associated with the following roofing contractors: Donald Tontigh, Joseph Howard, Keith Mills, Aaron Kilpatrick, Gustavo Tobias, Jose Mejia, and Tommy Miller.

101. Ms. Fisher also received cash payments from Respondent during the audit period. These payments were made in addition to her payroll through PMI.

102. Ms. Fisher described these payments as "cash tickets," which were paid outside of her PMI payroll to reimburse her for investments made in the company.

103. For purposes of calculating the penalty in this case, these "cash tickets" are clearly payroll, as that term is to be calculated pursuant to rule 69L-6.035.

104. Similar to the issue with the roofing contractors, the question is whether the payments represent uninsured payroll.

105. Ms. Fisher did not hold a corporate officer exemption at any time relevant hereto. Ms. Fisher testified that she was covered through PMI payroll leasing.

106. In contrast to the roofing contractors, Ms. Fisher's direct payments do not directly coincide with any particular job or specific time frame during which Ms. Fisher was covered for workers' compensation insurance through PMI. The evidence was insufficient to determine that the amounts were insured payroll.

107. The Department properly calculated a penalty associated with payroll attributable to Ms. Fisher.

108. Respondent made one payment of \$75 to Donald Martin during the audit period. The Department calculated a penalty of \$27.90 associated with this payment to Mr. Martin.

Ms. Fisher explained that Mr. Martin was a down-on-his-luck guy who came by the office one day complaining that Mr. Hansel owed him some money. Ms. Fisher offered to put him on a roofing crew and wrote him the \$75 check to help him out.

109. Ms. Fisher's testimony was both credible and unrefuted.

110. Mr. Martin was never hired by Respondent, put on any roofing crew, or added to the PMI leasing roster.

111. Mr. Martin was not Respondent's employee because he did not receive remuneration for the "performance of any work or service while engaged in any employment under any appointment or contract for hire" with Respondent. § 440.02(15)(a), Fla. Stat.

112. Cale Dierking works for Respondent full-time in a clerical position. During the audit period, Respondent paid Mr. Dierking directly by check for \$1,306.14. This payment was made outside of Mr. Dierking's PMI payroll checks.

113. Ms. Fisher testified that she paid Mr. Dierking directly on one occasion when "PMI's payroll got stuck in Memphis, I believe it was a snow-in situation where payroll checks didn't come." Rather than ask her employee to go without a timely paycheck, she advanced his payroll.

114. Ms. Fisher's testimony was both credible and unrefuted.

115. The payment to Mr. Dierking is clearly payroll. However, Mr. Dierking was covered for workers' compensation through PMI for the period during which the check was issued. Thus, there is no evidence that it was uninsured payroll.

116. The Department did not correctly calculate a penalty associated with payments to Mr. Dierking.

117. The correct penalty to be assessed against Respondent for failure to secure workers' compensation coverage for its

employees during the audit period in connection with SWO 16-148-1A is \$770.60.

Penalty Calculation for SWO 16-198-1A

118. Ms. Jackson calculated a total penalty against Respondent in connection with SWO 16-198-1A in the amount of \$19,115.84, as reflected in the Second Amended Order of Penalty Assessment.

119. The Department correctly imputed penalty against Respondent in the amount of \$91.68 each for uninsured payroll to Mr. Gonzalez and Mr. Lopez. The evidence supported a finding that these workers were Respondent's statutory employees on June 8, 2016, and were not enrolled on the PMI leasing roster.

120. The Department did not correctly calculate the penalty associated with salesmen Dylan Robinson, Jarod Bell, Kevin Miller, Mark Medley, Matt Flynn, and Todd Zulauf.

121. The Department did not correctly calculate the penalty associated with roofing contractors Abraham Martinez-Antonio, Edwin Kinsey, Dustin Hansel, Efrian Molina-Agustin, Jose Mejia, Joseph Howard, Keith Mills, Samuel Pedro, and Tommy Miller.

122. The Department did not correctly calculate the penalty against Respondent associated with Mr. Shields, Respondent's qualifier.

123. Based on a review of Respondent's complete "untimely" records, the Department discovered direct payments made to additional employees not included on the Second Amended Order of Penalty Assessment.

124. Respondent made a direct payment to Ethan Burch in the amount of \$602.50 during the audit period.

125. Ethan Burch is one of Respondent's full-time clerical employees. The evidence is insufficient to determine whether the payment of \$602.50 was insured or uninsured payroll. As such, the Department did not prove it correctly calculated the penalty associated with Mr. Burch.

126. Respondent also made a direct payment to Chelsea Hansel in the amount of \$965 during the audit period. Ms. Hansel is another clerical employee. Ms. Hansel's PMI enrollment was delayed due to some background investigation. Respondent paid Ms. Hansel for work she completed prior to enrollment.

127. The direct payment to Ms. Hansel constitutes uninsured payroll.

128. The Department correctly calculated the penalty associated with the payment to Chelsea Hansel.

129. The correct penalty amount to be imposed against Respondent for failure to secure payment of workers' compensation coverage for its employees (Gonzalez, Lopez, and

Chelsea Hansel) during the audit period in connection with SWO 16-198-1A is \$187.80.

CONCLUSIONS OF LAW

130. 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.

131. 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.

132. "Employer" includes "every person carrying on any employment." § 440.02(16)(a), Fla. Stat.

133. "Employment" means "any service performed by an employee for the person employing him or her." § 440.02(17)(a), Fla. Stat.

134. Respondent is an "employer" subject to the statutory requirement to provide workers' compensation insurance coverage for its employees.

135. 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).

136. 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).

137. 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).

138. The Department proved by clear and convincing evidence that Respondent is an employer subject to the Workers' Compensation statute.

139. For SWO 16-148-1A, the Department proved by clear and convincing evidence that Mr. Hansel and Ms. Fisher were Respondent's employees required to be covered by, or obtain an exemption from, workers' compensation insurance during the audit period, and that such coverage was not secured for specified periods of non-compliance.

140. The Department did not demonstrate by clear and convincing evidence that it correctly calculated the penalty to be imposed under the law.

141. The correct penalty to be assessed against Respondent for failure to secure workers' compensation coverage for its employees during the audit period in connection with SWO 16-148-1A is \$770.60.

142. For SWO 16-198-1A, the Department proved by clear and convincing evidence that Mr. Lopez, Mr. Gonzalez, and Ms. Hansel were Respondent's employees required to be covered by, or obtain an exemption from, workers' compensation insurance during the audit period, and that such coverage was not secured for specified periods of non-compliance.

143. The Department did not demonstrate by clear and convincing evidence that it correctly calculated the penalty to be imposed under the law.

144. The correct penalty amount to be imposed against Respondent for failure to secure payment of workers' compensation coverage for its employees (Gonzalez, Lopez, and Chelsea Hansel) during the audit period in connection with SWO 16-198-1A is \$187.80.

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 Royal Roofing and Restoration, Inc., violated the workers' compensation insurance law and, in DOAH

Case No. 17-0879, assessing a penalty of \$770.60; and in DOAH
Case No. 17-1558, assessing a penalty of \$187.80.

DONE AND ENTERED this 24th day of January, 2018, 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 24th day of January, 2018.

ENDNOTES

^{1/} The penalties referred to herein are from the Department's Second Amended Order of Penalty Assessment, which are the Department's final calculations and the subject of the instant Petition.

^{2/} Ms. Jackson's calculations were also informed by the deposition testimony of Ms. Fisher taken on April 6, 2017.

^{3/} Department Exhibit 35 is a draft revised second amended penalty calculation spreadsheet prepared by Ms. Jackson based on records received from Respondent which were deemed by the Department as "untimely." For some of the payments issued to Mr. Hansel, Ms. Jackson assigned NCCI class code 0042, but she did not testify as to what type of work corresponded with that NCCI class code or from what source she obtained the NCCI class code.

^{4/} While the checklists are pure hearsay, they were admissible to corroborate Ms. Fisher's testimony regarding the nature of

work performed by the salesmen and the payment arrangement between the salesmen and Respondent. See Fla. Admin. Code R. 28-106.213(3).

^{5/} While this payment method may have payroll tax implications, that issue is beyond the scope of the instant proceeding.

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.