STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 18-0426

AMERIBUILD CONSTRUCTION MGT., INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 29, 2018, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Tabitha G. Harnage, Esquire
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For Respondent: Mason A. Pokorny, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to secure workers' compensation coverage for its employees, as

Petitioner alleges; and, if so, whether a penalty based upon the unpaid premium should be assessed against Respondent.

PRELIMINARY STATEMENT

On May 31, 2017, Petitioner Department of Financial Services, Division of Workers' Compensation, issued a Stop-Work Order to Respondent Ameribuild Construction Management, Inc., following a random inspection at a worksite in North Miami Beach, Florida, which had given the agency grounds for alleging that Respondent was not in compliance with its duty to secure workers' compensation on behalf of all its employees. The Stop-Work Order required Respondent to cease all business operations at the worksite.

On November 6, 2017, the agency served Respondent with an Amended Order of Penalty Assessment reflecting a total penalty of $137,719.54, which was based upon the imputed payroll of six individuals employed by CJ Meeko, LLC, and an imputed payroll of Brandon Roth, Respondent's principal.

Respondent timely requested a formal administrative hearing. On January 25, 2018, the agency referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing took place as scheduled on June 29, 2018, with both parties present. The agency called two witnesses, i.e., an investigator named Anthony Vinci and an auditor, Lynne

Murcia, whose job it was to calculate penalties for employers, such as Respondent, alleged to have failed to secure compensation. Petitioner's Exhibits 1 through 20 were admitted into evidence.

Respondent's witnesses were Mr. Roth and Jack Rosales. Respondent's Exhibits 1 through 9 were received in evidence as well.

The final hearing transcript was filed on July 30, 2018. Both parties timely filed proposed recommended orders on August 14, 2018, in accordance with the schedule established at the conclusion of the hearing.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. Petitioner Department of Financial Services, Division of Workers' Compensation ("DFS" or the "Department"), is the state agency responsible, among other things, for the enforcement of the workers' compensation insurance coverage requirements established in chapter 440, Florida Statutes.

2. Respondent Ameribuild Construction Management, Inc. ("Ameribuild"), is a Florida corporation having its principal office in Boca Raton, Florida. Brandon L. Roth ("Roth") is the owner and qualifier, and a corporate officer, of Ameribuild. At

all relevant times, Ameribuild was licensed to engage in construction activity in the state of Florida.

3. In the instant case, DFS alleges that Ameribuild, as the general contractor for a construction project in Miami, failed to secure workers' compensation insurance for Roth and six employees (the "Workers") of CJ Meeko, LLC ("CJM"), a business which, DFS alleges, was a subcontractor of Ameribuild on the project in question. In its defense against this allegation of noncompliance, Ameribuild raises two disputes of material fact, asserting that, contrary to DFS's preliminary determinations, (i) Roth did not perform services *for remuneration* for Ameribuild, and (ii) CJM was not Ameribuild's subcontractor but was, rather, in a direct contractual relationship with Prestige Imports Outparcel LLC ("Prestige"), the owner of the project. Based on these exculpatory (but disputed) factual allegations, Ameribuild argues that, as a matter of law, neither Roth nor any of the Workers was a statutory "employee" (a term of art in this context) of Ameribuild, and thus, to the point, Ameribuild was not obligated to secure compensation for these individuals.

4. Of the material facts in dispute, the question of whether CJM was a subcontractor of Ameribuild is by far the most significant, as the Workers account for $132,593.32 (or 96 percent) of the $137,719.54 penalty that DFS seeks to impose. The Department, which has the burden of proving the affirmative

of this crucial question, relies largely (although not entirely) on the hearsay statements of Roth and Eugene Parker ("Parker"), the latter an employee of Ameribuild at all material times who was foreman or superintendent of the subject project. These statements are admissible as substantive evidence under the "admissions" exception to the hearsay rule.[1/] DFS introduced the statements of Roth and Parker through its investigator, Anthony Vinci, to whom (according to Mr. Vinci) the statements were made. Mr. Vinci also testified about statements made to him by Jack Rosales, the owner of CJM (and one of the six Workers mentioned above). To the extent offered for the truth of the matters asserted, Mr. Rosales's out-of-court statements to Mr. Vinci constitute hearsay that does not fall within any recognized exception. The undersigned has not made any findings of fact based, in whole or in part, on Mr. Rosales's hearsay statements.[2/]

5. Roth and Mr. Rosales testified at hearing. Both men denied that CJM had been Ameribuild's subcontractor, contradicting the section 90.803, Florida Statutes, admissions to which Mr. Vinci attested. Because the resolution of this particular dispute turns on credibility determinations, the undersigned will discuss the testimony itself in somewhat more detail than is usually warranted.

6. On May 31, 2017, Mr. Vinci performed a random worksite inspection at 15050 Biscayne Boulevard, North Miami Beach,

Florida, where an automobile dealership was being constructed on a site that had been occupied by a drugstore. He immediately observed several men performing drywall work and debris removal. The first person to whom Mr. Vinci spoke was Mr. Rosales, who identified himself as the owner of CJM and confirmed that the five laborers presently at work were CJM's employees. Mr. Vinci immediately conducted on online database search and discovered that Mr. Rosales did not have an active exemption for himself or workers' compensation coverage for any of CJM's employees at the worksite.

7. Parker, the Ameribuild employee, was present at the worksite, too, when Mr. Vinci arrived. As the project foreman, his duties included coordinating the job and making sure that the work flow continued. Parker told CJM's employees what to do. He opened and closed the worksite daily, coordinated all the subcontractors, and kept a log of persons entering and leaving the area. Parker, in short, was "in charge" on site.

8. Mr. Vinci interviewed Parker, who acknowledged being an employee of Ameribuild and identified CJM as Ameribuild's subcontractor. Parker named Roth as Ameribuild's owner and gave Mr. Vinci Roth's name and number. Before calling Roth, Mr. Vinci went to his car and conducted an online search of Ameribuild's records. He learned that Ameribuild had workers' compensation coverage through a leasing company, which showed coverage for

Parker. The leasing roster, however, did not cover Roth or any of CJM's employees.

9. Mr. Vinci then got Roth on the phone to notify him that Ameribuild had not secured workers' compensation coverage for all of its employees and that, consequently, the Department would enforce compliance, including through the issuance of a Stop-Work Order ("SWO"). At hearing, Roth denied having spoken to Mr. Vinci at this time.[3/] Mr. Vinci's contemporaneous notes, however, corroborate his recollection of the discussion at issue, and, equally important, the conversation fits comfortably into the undisputed chain of events, whereas its nonexistence would be harder, albeit not impossible, to reconcile with the parties' subsequent conduct. The undersigned finds that, in fact, Mr. Vinci and Roth spoke on the telephone on the afternoon of May 31, 2017.

10. As recounted by Mr. Vinci, the ensuing discussion was, for the most part, about what you'd expect. After introducing himself, Mr. Vinci asked Roth about CJM and whether its Workers were covered. When Roth replied that Mr. Rosales had an exemption from workers' compensation, which he (Roth) had seen, Mr. Vinci informed him that, actually, Mr. Rosales did not have one. Asked whether he (Roth) had an exemption, Roth answered that he would need to check. In response to another of Mr. Vinci's inquiries, Roth told the investigator (according to

the latter's contemporaneous notes) that he (Roth) did not receive any remuneration from Ameribuild. According to Mr. Vinci, whose testimony in this regard is hotly disputed, Roth stated that he had hired Mr. Rosales's company, CJM, as Ameribuild's subcontractor on the project in question.

11. Armed with this information, DFS prepared a SWO for issuance to Ameribuild, which commanded Ameribuild to cease all business operations at the worksite and assessed a monetary penalty (exact amount to be determined) equal to two times the premium Ameribuild would have paid to provide the required coverage during the preceding two years. Mr. Vinci called Roth to tell him about the SWO and make arrangements for the service thereof. (Roth's denial of his participation in this conversation is rejected as unpersuasive.) Roth was informed of the requirements for obtaining a conditional release from the SWO so that Ameribuild could resume operations at the worksite pending a final release upon compliance and payment in full of the assessed penalty. Roth agreed to meet Mr. Vinci the following day at the Department's Miami office.

12. That meeting took place as scheduled. Mr. Vinci personally served Roth with the SWO and a Request for Production of Business Records for Penalty Assessment Calculation ("BRR"). Roth then paid $1,000.00 towards the penalty, which had yet to be calculated, and delivered a signed "reduction-of-workforce"

letter, i.e., a sworn statement, on Ameribuild letterhead, promising DFS that "Ameribuild Construction Management will no longer permit CJ Meeko LLC or his employees [to] work on the jobsite @ 15050 Biscayne Blvd., North Miami Beach, FL 33132 until CJ Meeko LLC is in compliance with Florida State Law." Upon receipt of Ameribuild's check and reduction-of-workforce letter, the Department executed an Agreed Order of Conditional Release from Stop-Work Order, which authorized Ameribuild to resume operations at the worksite.

13. There is no evidence suggesting that, during this meeting on June 1, 2017, Mr. Vinci or anyone else interrogated Roth, who could have remained silent and refused to comment on DFS's allegations, given that it would be DFS's burden to prove the charges, were Ameribuild to request a hearing. Roth, however, volunteered his opinion that if CJM lacked coverage (as DFS alleged), then Mr. Rosales must have made an "honest mistake" because he (Roth) sincerely believed that Mr. Rosales had applied for and obtained an exemption. The point of this statement, obviously, was not to deny the violation, but to minimize it as having been neither knowing nor intentional. Roth, it appears, was offering up facts that he probably hoped would mitigate the penalty. Regardless, more telling is what Roth——in responding to the accusation that Ameribuild was responsible for its subcontractor's (CJM's) failure to secure compensation——did *not*

say. If CJM really were not Ameribuild's subcontractor, it would be expected that Roth would protest the Department's misunderstanding of this basic fact, and state that, in fact, CJM was *Prestige*'s contractor. While Roth's silence in this regard perhaps does not rise to the level of an evidentiary admission,[4/] the undersigned finds that his failure then (or later) to inform the Department of the "true" contractual relationships is suspiciously inconsistent with Ameribuild's current litigating position. If Ameribuild did not have a contract with CJM, then Roth, if he were not going to keep quiet, should have been making that point early and often.

14. In the months that followed, Ameribuild provided documents to DFS responsive to the BRR, which DFS deemed insufficient for purposes of determining Ameribuild's payroll for the audit period of June 1, 2015, through May 31, 2017. In such situations, where the records are insufficient to establish actual payroll, the Department is authorized to base its penalty assessment upon an "imputed payroll." Consequently, using the methodology specified in section 440.107(7)(d)1. and (e) and Florida Administrative Code Rule 69L-6.027, DFS determined (for the entire audit period) Ameribuild's imputed payroll, which is the compensation that Ameribuild is deemed to have paid the Workers and Roth.

15. It is unnecessary in this case to make detailed findings regarding the assumptions behind Ameribuild's imputed payroll figures because Ameribuild does not dispute them or the amount of the resulting penalty ($137,719.54), which was set forth in an Amended Order of Penalty Assessment served on November 6, 2017. Rather, Ameribuild maintains that DFS has failed to prove the alleged violations, meaning there can be no penalty, which makes the imputed payroll irrelevant. If, on the other hand, Ameribuild were found to have violated a duty to secure compensation for Roth and Workers, which Ameribuild of course believes should not happen, then Ameribuild would concede that the imputed payroll and concomitant penalty are correct.

16. As mentioned above, it is Ameribuild's contention that the Workers were not "employees" of Ameribuild for workers' compensation purposes because CJM was under contract, not to Ameribuild, but to the owner of the project, Prestige. Both Roth and Mr. Rosales testified about this purported contract; under the CJM-Prestige agreement as they described it,[5/] the Workers might not have been Ameribuild's employees.[6/]

17. Ameribuild sought to introduce a copy of the contract as proof of the fact that CJM was Prestige's contractor. The Department objected because Ameribuild had not disclosed the contract as an exhibit until a few days before the hearing, long past the deadline established in the Order of Pre-hearing

Instructions. Ameribuild could provide no explanation for the late disclosure. Wanting to avoid the exclusion of evidence that could be dispositive, but unwilling to countenance the prejudice DFS might suffer if the surprise exhibit were admitted, the undersigned ruled that the document would be received on the condition that the hearing be recessed for a reasonable, but brief, period so that DFS could depose the appropriate person(s) at Prestige about the purported CJM-Prestige agreement, and then supplement the record with the deposition(s).

18. Ameribuild, however, elected to withdraw the exhibit to prevent the Department from obtaining Prestige's testimony about the alleged contract. Thus, Ameribuild neither offered (nor proffered) the purported CJM-Prestige agreement, which, accordingly, is not in the evidentiary record. The undersigned probably would be permitted to draw an adverse inference from Ameribuild's counterintuitive failure to introduce the written agreement, which was obviously available and within Ameribuild's immediate control, and which (if genuine) would be, if not dispositive, certainly persuasive exculpatory evidence directly rebutting the Department's case-in-chief. The undersigned reasonably could infer from the totality of the circumstances that Ameribuild had reason to believe Prestige would not recognize and authenticate the purported contract if asked about

it under oath in deposition, which reason being (need it be said?) that the purported contract is a fake.

19. The undersigned declines to draw such an inference. Instead, the undersigned finds that, without the contract as corroborating evidence, Ameribuild has failed to present proof sufficient to undermine the strength of the Department's prima facie case. DFS has carried its burden of proving, by clear and convincing evidence, that CJM was Ameribuild's subcontractor.

20. On the question of whether Roth was an employee of Ameribuild for compensation purposes during the period when his name did not appear on the coverage roster, however, the undersigned finds that the Department failed to carry its burden of proof. Roth testified at hearing that he had received no remuneration from Ameribuild during the months in 2016 and 2017 when he was not included in the company's compensation coverage, which testimony was consistent with his prior statement to Mr. Vinci in this regard. Other documentation in evidence shows that in 2015, when Roth received remuneration from Ameribuild, he was also provided workers' compensation coverage, through South East Personnel, Inc., a leasing company. While the evidence fails clearly to establish that Roth did not receive remuneration from Ameribuild, it fails clearly and convincingly to prove that he did. It is determined, therefore, that Roth was not an uncovered employee during the audit period.

21. The proposed penalty must be adjusted to remove the amount attributable to Roth——$5,126.22. Ameribuild's penalty for noncompliance, based on the Workers' imputed payroll, should be $132,593.32.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

23. The Department is required to prove by clear and convincing evidence that Ameribuild failed to secure the payment of workers' compensation and that the Department calculated the penalty appropriately. See Dep't of Banking & Fin. v. Osbourne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

24. Pursuant to sections 440.10 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. The term "employer" means "every person carrying on any employment" and, "if the employer is a corporation, [includes] parties in actual control of the corporation, [e.g.,] officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation." § 440.02(16)(a), Fla. Stat.

25. The term "employee" includes, as relevant here: (i) "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," section 440.02(15)(b); and (ii) "[a]ll persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor." § 440.02(15)(c)2., Fla. Stat.

26. Section 440.10(1)(b) provides that when "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."

27. Because it has been determined, as a matter of fact, that CJM was Ameribuild's subcontractor on a construction project, the law deems the Workers statutory "employees" of Ameribuild for whom Ameribuild, as a construction contractor, was

required to secure the payment of compensation. As found above, Ameribuild did not, in fact, secure compensation for the Workers.

28. While Ameribuild did not secure compensation for Roth for part of the audit period, the evidence, as found above, is insufficient to support a finding that Roth provided services for remuneration during the time when he was not provided compensation. Thus, he was not shown to have been Ameribuild's "employee" for purposes of chapter 440, which means that Ameribuild was not required to secure the payment of workers' compensation for his benefit.

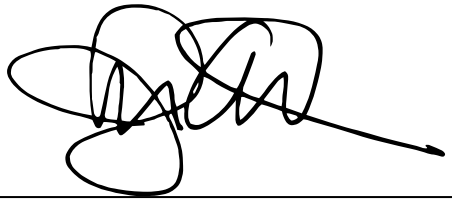
29. The department must "assess against any employer who has failed to secure the payment of compensation as required by . . . chapter [440] a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which 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." § 440.107(7)(d)1., Fla. Stat.

30. There is no dispute that the statutory penalty based on the payroll imputed to the Workers is $132,593.32.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order finding Ameribuild Construction Management, Inc., in violation of its obligation to secure workers' compensation and imposing a penalty of $132,593.32 for such noncompliance.

DONE AND ENTERED this 6th day of September, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of September, 2018.

ENDNOTES

[1/] See § 90.803(18), Fla. Stat. Roth's statements on behalf of his company are obviously attributable to Ameribuild. Parker's statements fall under section 90.803(18)(d), Florida Statutes, which covers statements "by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship."

[2/] Resort to section 120.57(1)(c), Florida Statutes, was not necessary.

[3/] This testimony might have come as a surprise to Ameribuild's counsel, who previously had stated, during the direct examination of Mr. Vinci, that Ameribuild did not object "to [the] existence of [the] phone call per se," contrary to DFS's belief, but rather disputed Mr. Vinci's testimony concerning what Roth had said to Mr. Vinci during their telephone conversation. Tr. at 38.

[4/] See § 90.803(18)(b), Fla. Stat. In determining whether the declarant's silence in the face of an accusatory statement constitutes an admission by acquiescence, the "essential inquiry [is] whether a reasonable person would have denied the statement[] under the circumstances." Nelson v. State, 748 So. 2d 237, 243 (Fla. 1999).

[5/] Because Ameribuild was attempting to prove the contents of the writing, the testimony about the contract's terms might have been excluded on a timely "best evidence" objection. See § 90.952, Fla. Stat. Such an objection was not made, however, probably because, as will be discussed, Ameribuild had put the purported contract on its exhibit list, which might have caused the Department's counsel to suppose that the document would be admitted into evidence. Aside from the best evidence rule, there is also a latent hearsay issue, given that the purpose of the testimony about the contract's terms was to establish the truth of the matters asserted therein, which would show, supposedly, that CJM and Prestige were contractually bound to an exclusive undertaking. The undersigned is unaware of an exception to the hearsay rule that would authorize the admission of testimony about the terms of a contract whose only relevance is the *truth* those terms. It is not necessary, however, to deem the testimony at issue inadmissible or incompetent because it is insufficiently persuasive in any event.

[6/] DFS has asserted alternative legal theories under which Ameribuild would be required to secure compensation for the Workers even if Mr. Rosales's testimony about the contents of the alleged CJM-Prestige contract were credited. Because the undersigned does not believe this testimony, however, it is unnecessary to address DFS's alternative theories.

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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.