STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,

Petitioner,

vs. Case No. 18-1632

PFR SERVICES CORP.,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on August 8 and October 17, 2018, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Rosana Gutierrez
PFR Services Corp.
No. 101-102
8040 Northwest 95th Street
Hialeah, Florida 33016

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Respondent, PFR Services Corp., failed to secure the payment of workers' compensation coverage for its employees in violation of chapter 440, Florida Statutes (2017)[2/]; and (2) if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On October 16, 2017, Petitioner, Department of Financial Services, Division of Workers' Compensation, issued a Stop-Work Order, alleging that Respondent failed to secure the payment of workers' compensation in violation of chapter 440 and the Insurance Code, and assessing a penalty. On November 16, 2017, Petitioner issued an Amended Order of Penalty Assessment, seeking to impose a penalty of $35,262.32. Respondent timely requested an administrative hearing, and the matter was referred to DOAH to conduct an administrative hearing under sections 120.569 and 120.57(1).

The final hearing initially was scheduled for June 4, 2018, but pursuant to the parties' request, was continued until August 8, 2018. The final hearing was convened on August 8, 2018; however, Respondent did not appear due to Respondent's representative's illness. Petitioner's ore tenus motion for continuance was granted, and the hearing was rescheduled for October 17, 2018.

The final hearing was held on October 17, 2018. A duly sworn Spanish language interpreter served as translator at the final hearing. Petitioner presented the testimony of Cesar Tolentino, Yeanli Velez, and Lawrence Pickle. Petitioner's Exhibits 1 through 7 and 9 through 15 were admitted into evidence without objection, and Petitioner's Exhibit 8 was admitted into evidence over objection. Rosanna Gutierrez testified on behalf of Respondent. Respondent did not tender any exhibits for admission into evidence.

A one-volume Transcript was filed on October 25, 2018, and Petitioner timely filed a proposed recommended order on November 5, 2018. However, due to numerous material errors and inaccuracies in the transcript, Petitioner was granted leave to file a corrected transcript.

The Corrected Transcript was filed on November 15, 2018, and the parties were given until November 26, 2018, to file proposed recommended orders based on the Corrected Transcript. Petitioner's Amended Proposed Recommended Order was timely filed on November 16, 2018, and was duly considered in preparing this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

The Parties

1. Petitioner is the state agency responsible for enforcing the requirement that employers in the State of Florida secure the payment of workers' compensation insurance covering their employees, pursuant to chapter 440.

2. Respondent is a Florida corporation. At all times relevant to this proceeding, its business address was 8040 Northwest 95th Street, Hialeah, Florida.

3. The evidence establishes that Respondent was actively engaged in business during the two-year audit period, from October 17, 2015, through October 16, 2017, pertinent to this proceeding.[3/]

The Compliance Investigation

4. On October 16, 2017, Petitioner's compliance investigator, Cesar Tolentino, conducted a workers' compensation compliance investigation at a business located at 8040 Northwest 95th Street, Hialeah, Florida.

5. The business was being operated as a restaurant, to which National Council on Compensation Insurance ("NCCI") class code 9082 applies.

6. Tolentino observed Maria Morales, Gabriela Nava, and Geraldine Rodriquez performing waitressing job duties and Rafael

Briceno performing chef job duties. The evidence established that these four persons were employed by Respondent.

7. Additionally, the evidence established that corporate officers Rosanna Gutierrez and Mary Pineda were employed by Respondent.[4/] The evidence established that neither had elected to be exempt from the workers' compensation coverage requirement.

8. In sum, the evidence established that Respondent employed six employees, none of whom were independent contractors, and none of whom were exempt from the workers' compensation coverage requirement.

9. Tolentino conducted a search of Petitioner's Coverage and Compensation Compliance Automated System, which consists of a database of workers' compensation insurance coverage policies issued for businesses in Florida, and all elections of exemptions filed by corporate officers of businesses in Florida. Tolentino's search revealed that Respondent had never purchased workers' compensation coverage for its employees; that its corporate officers had not elected to be exempt from the workers' compensation coverage requirement; and that Respondent did not lease employees from an employee leasing company.

10. Gutierrez acknowledged that Respondent had not purchased workers' compensation coverage for its employees, and told Tolentino that she did not know it was required.

11. Based on Tolentino's investigation, on October 16, 2017, Petitioner served Stop-Work Order No. 17-384 ("Stop-Work Order") on Respondent.

12. At the time Tolentino served the Stop-Work Order, he informed Gutierrez that if Respondent obtained a workers' compensation policy and provided Petitioner a receipt of the amount paid to activate the policy within 28 days of issuance of the Stop-Work Order, Respondent's penalty would be reduced by the amount paid to activate the policy.

13. On October 16, 2017, Petitioner, through Tolentino, also served on Respondent a Request for Production of Business Records for Penalty Assessment Calculation ("Business Records Request"), requesting Respondent provide several categories of business records covering the two-year audit period from October 16, 2015, to October 16, 2017. Specifically, Petitioner requested that Respondent provide its payroll documents consisting of time sheets, time cards, attendance records, earnings records, check stubs, check images, and payroll summaries, as applicable. Petitioner also requested that Respondent provide, as applicable, its federal income tax documents; account documents, including business check journals and statements and cleared checks for all open or closed business accounts; cash and check disbursements records;

workers' compensation coverage records; and independent contractor records.

14. At the time Tolentino served the Business Records Request, he informed Gutierrez that if Respondent obtained a workers' compensation policy and provided Petitioner the complete business records requested within ten business days, Respondent's penalty would be reduced by 25 percent.

15. The evidence establishes that Respondent did not provide any business records within that time period, so is not entitled to receive that penalty reduction.

16. On November 16, 2017, Petitioner issued an Amended Order of Penalty Assessment, assessing a total penalty of $35,262.32 against Respondent for having failed to secure workers' compensation coverage for its employees during the audit period.

17. On December 14, 2017, Gutierrez met with Tolentino and, at that time, provided documentation to Petitioner showing that Respondent had acquired workers' compensation coverage for its employees, effective October 28, 2017, and had paid $3,966.00 for the policy. At the December 14, 2017, meeting, Gutierrez presented an envelope postmarked October 30, 2017, showing that Respondent had mailed Petitioner proof of having obtained the workers' compensation coverage within 28 days of the date the Stop-Work Order was issued; however, this mail was

returned, so Petitioner did not receive such proof within 28 days. The evidence established that this mail was returned to Respondent on December 4, 2017——several days after the 28-day period had expired, and too late for Respondent to take additional steps to deliver to Petitioner the proof of its having purchased the workers' compensation policy.[5/]

18. Because Petitioner did not receive Respondent's proof of having purchased a workers' compensation policy within 28 days of issuance of the Stop-Work Order, it did not reduce the penalty imposed on Respondent by the amount that Respondent had paid for the premium.

19. The evidence also establishes that at the December 14, 2017, meeting, Respondent tendered to Petitioner a cashier's check in the amount of $1,000.00.

20. As a result of having received proof of workers' compensation coverage for Respondent's employees, Petitioner issued an Agreed Order of Conditional Release from Stop-Work Order ("Order of Conditional Release") on December 14, 2017, releasing Respondent from the Stop-Work Order.

21. The Order of Conditional Release expressly recognized that Respondent "paid $1,000.00 as a down payment for a penalty calculated pursuant to F.S. 440.107(7)(d)1." Additionally, page 1 of 3 of the Penalty Calculation Worksheet attached to the Amended Order of Penalty Assessment admitted into evidence at

the final hearing reflects that Respondent paid $1,000.00 toward the assessed penalty of $35,262.32. This document shows $34,262.32 as the "Balance Due."

Calculation of Penalty to be Assessed

22. Petitioner penalizes employers based on the amount of workers' compensation insurance premiums the employer has avoided paying. The amount of the evaded premium is determined by reviewing the employer's business records.

23. In the Business Records Request served on October 16, 2017, Petitioner specifically requested that Respondent provide its payroll documents, federal income tax documents, disbursements records, workers' compensation coverage records, and other specified documents.

24. When Gutierrez met with Tolentino on December 14, 2017, she provided some, but not all, of the business records that Petitioner had requested. Respondent subsequently provided additional business records to Petitioner, on the eve of the final hearing.

25. Petitioner reviewed all of the business records that Respondent provided. However, these business records were incomplete because they did not include check images, as specifically required to be maintained and provided to Petitioner pursuant to Florida Administrative Code

Rule 69L-6.015(6). Check images are required under Florida Administrative Code Rule 69L-6.015(6) because such images reveal the payees, which can help Petitioner identify the employees on the employer's payroll at any given time. This information is vital to determining whether the employer complied with the requirement to have workers' compensation coverage for all of its employees.

26. Because Respondent did not provide the required check images, the records were insufficient to enable Petitioner to calculate Respondent's payroll for the audit period.

27. Under section 440.107(7)(e), business records provided by the employer are insufficient to enable Petitioner to calculate the employer's payroll for the period for which the records are requested, Petitioner is authorized to impute the weekly payroll for each employee as constituting the statewide average weekly wage multiplied by 1.5.

28. To calculate the amount of the penalty due using the imputed method, Petitioner imputes the gross payroll for each employee for each period during which that employee was not covered by required workers' compensation insurance. To facilitate calculation, Petitioner divides the gross payroll amount for each employee for the specific non-compliance period by 100.[6/] Petitioner then multiplies this amount by the approved NCCI Scopes Manual rate——here, 2.34, which applies to

restaurants——to determine the amount of the avoided premium for each employee for each non-compliance period. This premium amount is then multiplied by two to determine the penalty amount to be assessed for each employee not covered by required workers' compensation insurance for each specific period of non-compliance.

29. Performing these calculations, Petitioner determined that a penalty in the amount of $35,262.32 should be assessed against Respondent for failing to provide workers' compensation insurance for its employees, as required by chapter 440, for the period from October 17, 2015, through October 16, 2017.

30. As discussed above, on December 14, 2017, Respondent paid a down payment of $1,000.00 toward the penalty, and this was expressly recognized in the Stop-Work Order that was issued that same day. Thus, the amount of the penalty to be assessed against Respondent should be reduced by $1,000.00, to $34,262.32. As previously noted, this amount is identified on page 1 of 3 of the Amended Order of Penalty Assessment as the "Balance Due."

31. As discussed in paragraphs 17 and 18, above, the evidence establishes that Respondent purchased a workers' compensation policy to cover its employees within 11 days of issuance of the Stop-Work Order, and mailed to Petitioner proof of having purchased such policy on October 30, 2017——well within

the 28-day period for providing such proof. However, as discussed above, this mail was returned to Respondent on December 4, 2017——too late for Respondent to take additional steps to provide such proof to Petitioner within the 28-day period. There is no evidence in the record showing that failure of the mailed proof to be received by Petitioner was due to any fault on Respondent's part.

Respondent's Defenses

32. On behalf of Respondent, Gutierrez testified that Respondent did everything that Tolentino had told them to do. Respondent purchased workers' compensation insurance and provided proof to Petitioner that its employees were covered.[7/]

33. Gutierrez also testified that although Respondent's business was created in May 2013, it did not begin operating and, therefore, did not have any employees, until January 2016.[8/] However, as previously noted, the persuasive evidence does not support this assertion.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), Fla. Stat.

35. This is a penal proceeding to enforce the workers' compensation coverage requirements of chapter 440. Because Petitioner's action at issue in this proceeding is penal, Petitioner has the burden of proof to show, by clear and

convincing evidence, that Respondent committed the violations alleged in the Stop-Work Order and Amended Order of Penalty Assessment. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

36. The clear and convincing evidence standard of proof has been described by the Florida Supreme Court as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

37. Pursuant to sections 440.10, 440.107(1) through (3), and 440.38, every employer is required to obtain workers' compensation insurance coverage for the benefit of its employees unless exempted or otherwise excluded under chapter 440. Strict compliance with the workers' compensation coverage provision requirement by the employer is required. See C & L Trucking v. Corbett, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).

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

39. "Employment" is defined to include "[a]ll private employments in which four or more employees are employed by the same employer." § 440.02(17)(b)2., Fla. Stat.

40. "Employee" is defined, in pertinent part, as "any person who receives remuneration for an employer for the performance of any work or service while engaged in any employment." § 440.02(15)(a), Fla. Stat. "Employee" is also defined to include "any person who is an officer or a corporation and who performs services for remuneration for such corporation in this state." § 440.02(15)(b), Fla. Stat.

41. As discussed in detail above, the evidence clearly and convincingly establishes that between October 17, 2015, and October 16, 2017, Respondent employed employees for whom it did not secure workers' compensation insurance coverage, in violation of sections 440.10, 440.107, and 440.38.

42. Section 440.107(7)(d) sets forth the method for assessing penalties for employer failure to secure workers' compensation coverage in violation of section 440.10. The statute states, in pertinent part:

> 1. In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed

to secure the payment of compensation as required by this chapter a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 2-year period or $1,000, whichever is greater.

a. For employers who have not been previously issued a stop-work order or order of penalty assessment, the department must allow the employer to receive a credit for the initial payment of the estimated annual workers' compensation policy premium, as determined by the carrier, to be applied to the penalty. Before applying the credit to the penalty, the employer must provide the department with documentation reflecting that the employer has secured the payment of compensation pursuant to s. 440.38 and proof of payment to the carrier. In order for the department to apply a credit for an employer that has secured workers' compensation for leased employees by entering into an employee leasing contract with a licensed employee leasing company, the employer must provide the department with a written confirmation, by a representative from the employee leasing company, of the dollar or percentage amount attributable to the initial estimated workers' compensation expense for leased employees, and proof of payment to the employee leasing company. The credit may not be applied unless the employer provides the documentation and proof of payment to the department within 28 days after service of the stop-work order or first order of penalty assessment upon the employer.

b. For employers who have not been previously issued a stop-work order or order of penalty assessment, the department must reduce the final assessed penalty by

> 25 percent if the employer has complied with administrative rules adopted pursuant to subsection (5) and has provided such business records to the department within 10 business days after the employer's receipt of the written request to produce business records.

43. Pursuant to section 440.107(7)(e), when an employer does not provide business records sufficient to enable Petitioner to determine its payroll during all or part of this two-year period for purposes of calculating the penalty to be assessed, Petitioner imputes the employer's payroll, pursuant to rule 69L-6.028(3).

44. Rule 69L-6.028, which establishes Petitioner's procedures for imputing payroll and penalty calculations, provides, in pertinent part:

> (1) In the event an employer fails to provide business records sufficient for the Department to determine the employer's payroll for the time period requested in the business records request for the calculation of the penalty pursuant to paragraph 440.107(7)(e), F.S., the Department may impute the employer's payroll at any time after ten business days after receipt by the employer of a written request to produce such business records.
>
> (2) The employer's time period or periods of non-compliance means the time period(s) within the two years preceding the date the stop-work order was issued to the employer within which the employer failed to secure the payment of compensation pursuant to chapter 440, F.S., and must be either the same time period as set forth in the business records request for the calculation

of penalty or an alternative time period or period(s) as determined by the Department, whichever is less. The employer may provide the Department with records from other sources, including, but not limited to, the Department of State, Division of Corporations, the Department of Business and Professional Regulation, licensing offices, and building permitting offices to show an alternative time period or period(s) of non-compliance.

(3) When an employer fails to provide business records sufficient to enable the Department to determine the employer's payroll for the time period requested in the business records request for purposes of calculating the penalty pursuant to paragraph 440.107(7)(d), F.S., the imputed weekly payroll for each current and former employee, corporate officer, sole proprietor or partner identified by the Department during its investigation will be the statewide average weekly wage as defined in subsection 440.12(2), F.S., that is in effect at the time the stop-work order was issued to the employer, multiplied by 1.5.

(a) If a portion of the period of non-compliance includes a partial week of non-compliance, the imputed weekly payroll for such partial week of non-compliance will be prorated from the imputed weekly payroll for a full week.

(b) The imputed weekly payroll for each employee, corporate officer, sole proprietor, and partner will be assigned to the highest rated workers' compensation classification code for an employee based upon records or the investigator's physical observation of any employee's activities.

(4) If the Department imputes the employer's payroll, the employer will have twenty business days after service of the first amended order of penalty assessment to

> provide business records sufficient for the Department to determine the employer's payroll for the period requested in the business records request for the calculation of the penalty or for the alternative time period(s) of non-compliance. The employer's penalty will be recalculated pursuant to paragraph 440.107(7)(d), F.S., only if the employer provides all such business records within the twenty days after the service of the first amended order of penalty assessment. Otherwise, the first amended order of penalty assessment will remain in effect.

45. As addressed above, Respondent failed to provide business records sufficient to enable Petitioner to determine its payroll for the portion of the penalty period between October 17, 2015, and October 16, 2017. Thus, as discussed above, Petitioner applied the methodology codified at rule 69L-6.028(3) to impute Respondent's gross payroll for that period.

46. Based on the foregoing, it is concluded that Petitioner correctly applied section 440.107(7)(d)1. and (7)(e) and rule 69L-6.028(3) to accurately impute and calculate the gross payroll amounts for Respondent for the applicable penalty period. Petitioner also applied the pertinent NCCI classification code, for restaurants, to each employee on Respondent's payroll during the audit period for whom it had failed to secure workers' compensation coverage, and correctly calculated a penalty of $35,262.32.

47. However, as discussed above, on December 14, 2017, Respondent paid a down payment of $1,000.00 against this calculated penalty, so should be given credit for that payment. Accordingly, it is concluded that the calculated penalty of $35,262.32 should be reduced by the $1,000.00 down payment, bringing the total amount of the outstanding penalty to $34,262.32.

48. Additionally, the undersigned concludes that Respondent should be given credit in the amount of $3,966.00—— the amount of the premium paid to secure workers' compensation coverage——toward the total amount of the penalty remaining due. As discussed above, the evidence establishes that Respondent mailed to Petitioner the proof of payment for the workers' compensation policy it obtained, well within the 28-day statutory period for doing so in order to obtain credit toward the assessed penalty. Through no fault of its own, that mailed proof of payment was returned to Respondent, long after Respondent had timely mailed the proof of payment, and too late for it to make another timely attempt to provide the proof of payment to Petitioner.

49. When construing statutes, courts must first look to the plain meaning of the words used by the Legislature. See Verizon Bus. Purchasing, LLC v. Dep't of Rev., 164 So. 3d 806, 809 (Fla. 1st DCA 2015)(citing W. Fla. Reg'l Med. Ctr., Inc. v.

See, 79 So. 3d 1, 9 (Fla. 2012)). If the language of the statute is unambiguous and conveys a clear and definite meaning, the court must apply that meaning, even if it conflicts with the interpretation of the statute adopted by the administrative agency charged with enforcing the statute. See Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002) ("An agency's interpretation of the statute it is charged with enforcing is entitled to great deference . . . [and] a court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly erroneous.'"); Verizon Bus. Purchasing, 164 So. 3d at 812 ("Judicial deference does not require that courts adopt an agency's interpretation of a statute when the agency's interpretation cannot be reconciled with the plain language of the statute."). See also Micjo, Inc. v. Dep't of Bus. & Prof'l Reg., 78 So. 3d 124, 126-27 (Fla. 2d DCA 2012)(rejecting the agency's interpretation of the definition of "wholesale sales price" in section 210.25(13), Florida Statutes, because that interpretation was inconsistent with the plain language of the statute).

50. Here, the operative statute, section 440.107(d)1.a., authorizes credit toward the assessed penalty if the employer "provides" such proof of payment to Petitioner within the specified period. Notably, the statute does not expressly

require such proof of payment to be "received" by Petitioner within that period. The term "provide" is not defined in Chapter 440; accordingly, it is appropriate to look to the dictionary definition of that term to discern its meaning. Brandy's Prods. v. Dep't of Bus. & Prof'l Reg., 188 So. 3d 130, 132 (Fla. 1st DCA 2016). Merriam-Webster's New Collegiate Dictionary, 11th edition ("Merriam-Webster's"), defines "provides" as "to supply something." The focus of this definition is on the action taken by an individual or entity—— here, the employer——to supply something to a recipient——here, Petitioner. By contrast, Merriam-Webster defines the term "receive" as "to come into possession of: acquire." The focus of this definition is on the entity having obtained or acquired the thing supplied. See Accardi v. Dep't of Envtl. Prot., 824 So. 2d 992 (Fla. 1st DCA 2002)(factually and legally distinguishing between the mailing of notice and the receipt of notice).

51. Pursuant to the plain language of section 440.107(7)(d)1.a., it is concluded that because Respondent sent to Petitioner, by U.S. Mail, its proof of payment within the 28-day period from issuance of the Stop-Work Order, it timely provided such proof of payment, and, therefore, should be given credit for the amount paid for the workers' compensation coverage premium. Because the statute expressly keys credit for

premium payment to the employer providing, rather than Petitioner receiving, such proof of payment, Petitioner's not having received the proof of payment within the 28-day period is not a valid statutory basis for disallowing such credit in reducing the penalty in this case.

52. Subtracting $3,966.00 from the penalty balance due of $34,262.32 results in a penalty balance of $30,296.32.

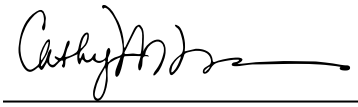
53. Accordingly, it is concluded that Respondent owes to Petitioner a total penalty of $30,296.32 for failure to secure workers' compensation coverage for its employees during the audit period.

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 determining that PFR Services Corp. violated the requirement in chapter 440, Florida Statutes, to secure workers' compensation coverage for its employees during the audit period, and imposing a penalty of $30,296.32.

DONE AND ENTERED this 14th day of January, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2019.

ENDNOTES

[1/] All references to chapter 120, Florida Statutes, and the provisions therein are to the 2018 version.

[2/] All references to chapter 440 and the provisions therein are to the 2017 version, which was in effect at the time the Stop-Work Order was issued on October 17, 2017.

[3/] Respondent asserted that although the company was established in May 2013, it did not commence business operations until, variously, January 2016 or January - February 2017. Because Respondent asserted this defense to the requirement to have workers' compensation coverage for its employees for the entire two-year audit period, Respondent bore the burden to establish this defense. No credible evidence was presented supporting this assertion, and, in fact, the clear and convincing evidence, consisting of documents provided by Respondent to Petitioner, shows otherwise.

[4/] Respondent asserted that although Gutierrez and Pineda worked at the restaurant, they did not receive remuneration from Respondent for their work, so did not fall within the definition of "employee" for purposes of the workers' compensation coverage requirement. However, apart from Gutierrez' testimony, no

persuasive evidence was presented to substantiate that assertion.

[5/] Section 440.107(7)(d)1.a. states that the employee will receive credit for the initial payment of the estimated annual workers' compensation policy premium, to be applied to the penalty. The statute further states: "[t]he credit may not be applied unless the employer provides the documentation and proof of payment to the department within 28 days after service of the stop-work order or first order of penalty assessment upon the employer."

[6/] Pickle explained that the imputed gross payroll for each employee was divided by 100 for each non-compliance period because, for ease of calculation, the approved NCCI Scopes Manual rate has been multiplied by 100.

[7/] Although Respondent paid a down payment toward the penalty and, as discussed herein, timely provided proof of purchase of workers' compensation coverage, and the undersigned has recommended that Respondent be given credit for these payments toward the penalty due, the fact remains that Respondent did not have workers' compensation coverage for its employees during the audit period, so is liable under section 440.107 for a penalty for noncompliance with that statute.

[8/] If this were the case, Respondent would not have been required to have workers' compensation coverage for the portion of the audit period from October 17, 2015, to some date in January 2016. This would have slightly reduced the penalty to be imposed. However, as discussed above, the credible, persuasive evidence establishes that Respondent operated its business during the entire audit period.

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.