

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 18-4121

ALMIROLA BUILDING SERVICES,
INC.,

Respondent.

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RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on December 5, 2018, by video teleconference at sites in Tampa and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Herbert Fiss, Esquire
Herbert W. Fiss, Jr., P.A.
341 South Plant Avenue
Tampa, Florida 33606

STATEMENT OF THE ISSUE

The issues are whether Respondent, Almirola Building Services, Inc. ("Respondent"), failed to secure workers'

compensation coverage for its employees; and, if so, whether the Department of Financial Services, Division of Workers' Compensation ("Petitioner" or "Department"), correctly calculated the penalty assessment imposed against Respondent.

PRELIMINARY STATEMENT

This proceeding arose from the requirement that employers must secure workers' compensation insurance for their employees. On May 15, 2018, Petitioner served a Stop-Work Order for Specific Worksite Only and Order of Penalty Assessment on Respondent for failing to secure workers' compensation for the benefit of its employees as required by chapter 440, Florida Statutes (2017). Petitioner issued an Agreed Order of Conditional Release from Stop-Work Order to Respondent on May 16, 2018. Respondent filed its petition for hearing on June 5, 2018, disputing the issue of material fact of whether Respondent had any employees.

On August 6, 2018, the matter was referred to DOAH and was assigned to the undersigned. On August 13, 2018, Petitioner filed a Motion for Leave to Amend Order of Penalty Assessment seeking to impose an Amended Order of Penalty Assessment on Respondent and assessing a penalty of \$117,013.08.

On August 13, 2018, Respondent filed a Reply to Initial Order. Petitioner filed a Unilateral Response to Initial Order on August 14, 2018, and a hearing was scheduled in this matter for October 8, 2018, by video teleconference at sites located in

Tampa and Tallahassee, Florida. On August 15, 2018, the Motion for Leave to Amend Order of Penalty Assessment was granted.

On September 25, 2018, Petitioner's Agreed Motion to Continue Final Hearing was filed and granted. The undersigned entered an Order Granting Continuance and Rescheduling Hearing by Video Teleconference, setting the final hearing for December 5, 2018, and the hearing proceeded as scheduled.

At the hearing, Petitioner presented the testimony of Munal Abedrabbo, compliance investigator; and Lynne Murcia, penalty auditor; and offered 23 exhibits, all of which were admitted into evidence without objection. Respondent presented the testimony of Elizabeth Hernandez, who handles payroll, human resources, and contracts for DeVito Builders, Inc.; Karina Almirola, a corporate director of Respondent; and offered eight exhibits, all of which were admitted into evidence.

The one-volume Transcript of the final hearing was filed on December 21, 2018.

Petitioner and Respondent timely submitted their Proposed Recommended Orders on January 18, 2019.

References to statutes are to Florida Statutes (2017), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for enforcing the statutory requirement that employers secure the payment of

workers' compensation for the benefit of their employees pursuant to section 440.107.

2. Respondent is a Florida corporation established on May 8, 2016. Respondent has operated since 2007, providing roofing, repairs, and painting services, primarily on residential structures. According to the 2018 Annual Report filed with the Florida Secretary of State, no officers are indicated, but Juan Carlos Almirola, Caridad Almirola, and Karina Almirola are each listed as directors of the company.

3. Respondent operates out of an office at 4715 Mullins Road, Tampa, Florida 33614, and provides its services in Tampa, Clearwater, St. Petersburg, and Pasco County, Florida.

4. Respondent does not directly employ workers to perform the roofing, repairs, and painting services that it provides to customers.

5. Respondent asserts that it does not utilize subcontractors to provide roofing, repairs, and painting services. Rather, Respondent asserts that it "borrows" employees from DeVito Builders, Inc. ("DeVito"), to perform roofing, repairs, and painting services. Pursuant to this "borrowing" process, Respondent pays DeVito for the services of DeVito's employees, who then perform the actual roofing, repairs, and painting services for Respondent's customers.

6. No evidence was presented that DeVito was ever a licensed employee leasing company authorized to lend employees to other entities.

7. On May 15, 2018, a company called Maurer and Maurer was contracted to perform a re-roof at 518 West 122nd Avenue, Tampa, Florida. Maurer and Maurer subcontracted that re-roof to Respondent, i.e., Respondent performed the work for which Maurer and Maurer was contractually obligated to complete. Respondent, through Karina Almirola, pulled a permit for the job on May 10, 2018. The Hillsborough County permit number is ROF38978. Respondent then subcontracted the re-roof to DeVito, from whom Respondent asserts it "borrowed" employees to complete the work originally contracted by Maurer and Maurer. For purposes of workers' compensation law, Respondent, which was Maurer and Maurer's subcontractor, subsequently contracted its requirements under the original contract to a sub-subcontractor, specifically DeVito.

8. Respondent identified the employees being "borrowed" for the re-roof on May 15, 2018, as Didier Rodriguez, Rolando Perez-Perez, Martin Barrera Huerta, and Octavio Leon.

9. Munal Abedrabbo is an investigator for Petitioner, who investigates worksites to determine if employers have secured the payment of workers' compensation for their employees.

10. On May 15, 2018, Mr. Abedrabbo investigated the worksite at 518 West 122nd Avenue, Tampa, Florida, a residential home. Mr. Abedrabbo testified that he observed six individuals on the roof of the home actively engaged in tearing off the existing roof by removing the shingles and dumping the shingles into a dumpster.

11. The individuals observed at the worksite were performing activities consistent with National Council on Compensation Insurance ("NCCI") class code 5551, "Roofing - All Kinds & Drivers."

12. The six individuals found at the worksite by Mr. Abedrabbo identified themselves to Mr. Abedrabbo as Didier Rodriguez, Rolando Perez-Perez, Martin Barrera Huerta, Moises Enrique Castro, Octavio Leon, and Lencho Martinez.

13. Didier Rodriguez identified himself to Mr. Abedrabbo as the crew leader and said that the workers on-site worked for "Carlos." A phone number for "Carlos" was on a work trailer parked at the worksite, which had Respondent's company name and contractor license number on it. Mr. Abedrabbo placed a call to "Carlos," who said he was close to the worksite and would go there. Mr. Abedrabbo identified "Carlos" as Juan Carlos Almirola because Juan Carlos Almirola arrived at the worksite in response to Mr. Abedrabbo's telephone call to the "Carlos" listed on the work trailer.

14. While waiting for Juan Carlos Almirola to arrive, Mr. Abedrabbo searched Petitioner's Coverage and Compliance Automated System ("CCAS") database for workers' compensation coverage and any exemptions held by Respondent.

15. CCAS contains workers' compensation insurance information, as well as workers' compensation exemptions. The workers' compensation insurance information in CCAS comes from the NCCI, which obtains that information directly from insurance carriers. All carriers writing workers' compensation policies must notify Petitioner within 21 days of writing a policy pursuant to section 440.185(6). Petitioner grants exemptions and then inputs that data into CCAS where Mr. Abedrabbo would reasonably expect to find such information if it existed.

16. Mr. Abedrabbo's search of CCAS revealed that on May 15, 2018, Respondent had no workers' compensation insurance coverage and only one exemption, for Karina Almirola. There were no active exemptions for Juan Carlos Almirola and Caridad Almirola on that date. Mr. Almirola was an active participant in the roofing job. Ms. Caridad Almirola works in the office and runs errands and secures notices of commencement for the company.

17. Mr. Almirola informed Mr. Abedrabbo that Karina Almirola, a licensed roofing contractor, had pulled the building permit for the job and that Respondent subcontracted the work to

DeVito. Mr. Almirola further indicated that the workers present were working for DeVito.

18. Mr. Abedrabbo observed a copy of the building permit pulled by Respondent, which was posted at the worksite.

19. On May 15, 2018, DeVito secured the payment of workers' compensation solely through an employee leasing agreement with SouthEast Personnel Leasing, Inc. ("SouthEast"). Of the six individuals on-site, DeVito's employee leasing agreement covered only two, Rolando Perez-Perez and Didier Rodriguez. On May 15, 2018, DeVito had one active workers' compensation exemption, which was for Nicholas DeVito. Neither Respondent nor DeVito purchased a policy of workers' compensation insurance at any time relevant to this proceeding.

20. Mr. Abedrabbo contacted Nicholas DeVito of DeVito, who confirmed that the workers on-site were working for DeVito. Mr. Abedrabbo informed him that DeVito had not added four of the six workers present to the employee leasing agreement, to which Mr. DeVito replied that DeVito would add them by the end of the day.

21. At hearing, Respondent presented the testimony of Elizabeth Hernandez, who handles human resources and payroll for DeVito, as well as handling paperwork for when Respondent "borrows" employees from DeVito. Ms. Hernandez claimed that DeVito employed Martin Barrera Huerta and Octavio Leon for the

first time on May 15, 2018, but that Moises Castro and Lencho Martinez were never hired by DeVito. Ms. Hernandez claimed that DeVito employed Martin Barrera Huerta and Octavio Leon because they filled out applications for DeVito's employee leasing agreement. Ms. Hernandez claimed that DeVito did not hire Moises Castro and Lencho Martinez because DeVito did not add Moises Castro and Lencho Martinez to DeVito's employee leasing agreement. Ms. Hernandez further claimed that DeVito did not hire Moises Castro and Lencho Martinez because DeVito ultimately did not pay them.

22. Ms. Martinez's claims of the employment relationship between DeVito and Martin Barrera Huerta, Octavio Leon, Moises Enrique Castro, and Lencho Martinez are directly contradicted by the defined terms of Florida's Workers' Compensation Law, as detailed below. Martin Barrera Huerta and Octavio Leon had not yet been hired by DeVito to perform the roofing job on May 15, 2018, but had received applications for employment from DeVito, which they had not yet returned completed to the company. Moises Enrique Castro, and Lencho Martinez were hired by DeVito to perform a re-roof on May 15, 2018, which was their first day on the job with DeVito.

23. Respondent did not request an employee leasing roster from DeVito prior to the commencement of the work at the worksite. In this regard, Respondent affirmatively assumed the

risk that DeVito may not have had required workers' compensation coverage in place for its employees.

24. Based on the findings of his investigation, Mr. Abedrabbo determined that Respondent failed to ensure that its subcontractor, DeVito, secured the payment of workers' compensation for its employees. Section 440.10(b) provides that when a contractor sublets any part of its contract to a subcontractor, the employees of such contractor and subcontractor are deemed to be employed in one and the same business and the contractor shall be liable for the payment of compensation to all such employees. As a result, on May 15, 2018, Petitioner issued Respondent a Stop-Work Order for Specific Worksite Only and Order of Penalty Assessment for engaging employees in the construction industry without securing the payment of workers' compensation.

25. On May 15, 2018, Petitioner issued Respondent a Request for Production of Business Records for Penalty Assessment Calculation. The Request for Production of Business Records for Penalty Assessment Calculation requested several categories of business records from Respondent for the period of September 17, 2017, through May 15, 2018, to determine Respondent's payroll during that period. Included in the Request for Production of Business Records for Penalty Assessment Calculation was a request for Respondent to provide all business check journals and statements including cleared checks for all open and/or closed

business accounts established by Respondent. Respondent was also requested to provide payroll documents including time sheets, time cards and attendance records, earnings records, check stubs and payroll summaries, and federal income tax documents; disbursements including check and cash disbursements; workers compensation coverage information; professional employer organization records; and subcontractor records including all documents which reflect the identity of each subcontractor, the contractual relationship with them, and payments to the subcontractor including, but not limited to: contracts, invoices, check stubs, and check ledgers.

26. Petitioner penalizes employers for the amount of workers' compensation premiums that they have evaded paying during the preceding two-year period. Petitioner determines evaded premiums by reviewing the employer's business records.

27. Respondent submitted business records to Petitioner consisting of bank statements, check images, and a check detail report. However, the records Respondent submitted were incomplete.

28. Respondent submitted bank statements for two accounts, a checking account ending in 3595 and a checking account ending in 0052. Respondent failed to submit complete copies of the records for these two accounts. For the account ending in 3595, Respondent failed to produce the account statements for March,

April, and May 2018, which were the final three months of the penalty audit period. For the account ending in 0052, Respondent submitted an incomplete statement for March 2018, which was missing the check list. Some of the check images were also missing, which precluded analysis of the corresponding payments.

29. The check detail report provided by Respondent failed to identify whether the checks paid as subcontractor expenses and payroll expenses were net or gross wages. Because workers' compensation premiums are based on gross payroll, the Department could not determine Respondent's payroll without knowing if the amounts in the check detail report were net or gross wages.

30. More significantly, however, an analysis of Respondent's bank records revealed the possibility that Respondent had another business bank account. Respondent's bank records included multiple transfers to a checking account ending in 0411. If this account is another business account, then Respondent could have paid additional, uncovered, employees or subcontractors out of that account. If this account was a personal or non-business account, then it could have been excluded from the penalty. Respondent provided no information regarding the owner of this third account, despite Petitioner informing Respondent that this information was needed on September 4 and November 9, 2018.

31. Petitioner calculated an Amended Order of Penalty Assessment, which imposed a \$117,013.08 penalty against Respondent.

32. At no point during the penalty audit review period did Respondent secure the payment of workers' compensation.

33. Respondent failed to submit records sufficient for Petitioner to determine Respondent's payroll, which required Petitioner to calculate the Amended Order of Penalty Assessment based on completely imputed payroll. The gross payroll for an employer, who provides insufficient records, is imputed at the statewide average weekly wage multiplied by 1.5 for each employee for the period requested for the calculation of the penalty.

34. Petitioner properly included Juan Carlos Almirola and Caridad Almirola in the Amended Order of Penalty Assessment as employees of Respondent because they performed services for Respondent and Respondent remunerated them for those services. The Almirolas' remuneration for services provided to Respondent is undisputed. The Almirolas further fill positions of authority listed in the articles of incorporation with the Department of State and receive remuneration for services.

35. Juan Carlos Almirola worked for Respondent between September 2017 and May 2018, as an estimator. Respondent paid him a salary for this work.

36. Although Juan Carlos Almirola was listed on the SouthEast employee leasing roster for DeVito, this coverage was only effective for work that he performed while he was being paid by SouthEast.

37. Caridad Almirola worked for Respondent full time between September 2017 and May 2018, pulling permits, recording notices of commencement, and running errands. Respondent paid her a salary for this work.

38. Respondent's subcontractor, DeVito, failed to secure the payment of workers' compensation for its employees Lencho Martinez, Martin Barrera Huerta, Moises Enrique Castro, and Octavio Leon on May 15, 2018. Because Respondent subcontracted its obligations under the Maurer and Maurer contract to DeVito, which failed to secure workers' compensation coverage, Respondent became the statutory employer of DeVito's unsecured employees by operation of law.

39. Respondent, therefore, had four employees required to have workers' compensation: Juan Carlos Almirola, Caridad Almirola, Martin Barrera Huerta, and Octavio Leon. As described above, Juan Carlos Almirola and Caridad Almirola had no active exemptions and were thus required to have coverage; and Martin Barrera Huerta and Octavio Leon were required to have coverage in place prior to their beginning work for Respondent on May 15,

2018, even though that was their first day working for Respondent or DeVito.

40. In a penalty based on imputed payroll, an employer's period of noncompliance shall be either the same time period requested in the Request for Production of Business Records for Penalty Assessment Calculation or an alternative period of noncompliance as determined by Petitioner, whichever is less. In this case, Respondent has been in operation since 2007, but Petitioner requested business records from September 19, 2017, through May 15, 2018, which became the period of noncompliance. Between September 2017 and May 2018, Respondent continuously operated without securing workers' compensation for its employees.

41. Juan Carlos Almirola and Caridad Almirola acquired workers' compensation exemptions on May 16, 2018, after the end of the period of noncompliance.

42. When Petitioner calculates a penalty based on imputed payroll, Petitioner assigns the employer's employees to the highest rated workers' compensation classification code based upon records submitted or the investigator's physical observation of any employee's activities. In this case, Mr. Abedrabbo observed the employees on-site conducting roofing activities, which was the highest rated code indicated by the investigation. Petitioner applied the corresponding NCCI class code, 5551, for

all of Respondent's employees for the entire period of noncompliance.

43. Petitioner determines the amount of evaded workers' compensation insurance premiums by multiplying the employer's gross payroll by the approved manual rates. Because Respondent failed to provide sufficient records to determine its payroll, Petitioner imputed Respondent's gross payroll at 1.5 times the statewide average weekly wage for each employee. The approved manual rate is the workers' compensation premium dollar amount associated with each class code expressed as dollars per \$100 of gross payroll. Petitioner determined the evaded premium by multiplying Respondent's imputed gross payroll by the approved manual rates. Petitioner then multiplied the evaded premium by two which resulted in a penalty of \$117,013.08.

44. Petitioner has demonstrated by clear and convincing evidence that Respondent violated Florida's Workers' Compensation Law by employing employees in the construction industry without securing the payment of workers' compensation or elections to be workers' compensation exempt, which required the issuance of the Stop-Work Order for Specific Worksite Only and Order of Penalty Assessment. Petitioner further demonstrated by clear and convincing evidence that Respondent failed to submit sufficient records for Petitioner to determine Respondent's payroll during the penalty audit review period. However, based upon the

findings above that only four of the eight employees in question were working for all or part of the period of noncompliance, that penalty assessment must be adjusted to remove any calculations for Rolando Perez-Perez, Didier Rodriguez, Moises Enrique Castor, and Lencho Martinez since they were either covered for workers' compensation by SouthEast (Perez-Perez and Rodriguez) or had not yet become employees of DeVito (Castro and Martinez).

Accordingly, Petitioner has shown by clear and convincing evidence that Petitioner is correct that some penalty is due, but not the full amount previously calculated by its staff as a penalty for Respondent's evaded workers' compensation insurance premium based on imputed gross payroll for the entire period of noncompliance (except for the two employees who worked for only one day of the noncompliance period, May 15, 2018).

CONCLUSIONS OF LAW

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

46. The burden of proof in this matter is on the Department because it is asserting the affirmative of the issue. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

47. Because administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence that Respondent violated Florida's Workers' Compensation

Law during the relevant time period and that the penalty assessments are correct. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996).

48. The Department is the agency responsible for enforcement of chapter 440. As the responsible agency, the Department must abide by the statutes and rules that govern it.

49. Pursuant to sections 440.10, 440.107(2), and 440.38, every "employer" is required to secure the payment of workers' compensation for the benefit of its employees unless exempted or excluded under chapter 440. Strict compliance with the workers' compensation law is required. See C&L Trucking v. Corbitt, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

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

51. Pursuant to section 440.107(3)(g):

(3) The department shall enforce workers' compensation coverage requirements . . . the department shall have the power to:

* * *

(g) Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.

52. Section 440.02(16)(a) defines "employer," in part, as "every person carrying on any employment." Further,

[i]f the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.

53. Florida's Workers' Compensation Law requires employers to secure the payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2015).

54. An employer is required to have workers' compensation coverage in the form of a workers' compensation insurance policy, a workers' compensation employee leasing agreement, self-insurance, or a workers' compensation exemption, for all employees if the employer is operating in the construction industry. §§ 440.02(16)(a), 440.02(17)(b)2., 440.02(24), 440.10, and 440.38, Fla. Stat.

55. "Employee" includes any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment. § 440.02(15)(a), Fla. Stat. Respondent employed Juan Carlos Almirola and Karina Almirola because Respondent paid them salaries in exchange for services they provided to Respondent.

56. Section 440.107(7)(a) states, in relevant part:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the

compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

57. The Department is empowered to examine and copy the business records of any employer conducting business in Florida to determine whether it is in compliance with Florida's Workers' Compensation Law. See § 440.107(3), Fla. Stat. Whenever the Department finds an employer who is required to have such coverage, but fails to do so, such failure is deemed an immediate serious danger to the public health, safety, or welfare sufficient to justify service by the Department of a stop-work order on the employer requiring the cessation of all business operations. See § 440.107(1) and (7)(a), Fla. Stat.

58. "Employee" also includes any person who is an officer of the corporation and who performs services for remuneration. § 440.02(15)(b), Fla. Stat. A corporate officer is any person who fills an office provided for in the corporate charter or articles of incorporation. § 440.02(9), Fla. Stat. The original articles of incorporation for Respondent provide for directors as the only officers of the corporation as do the subsequent annual reports filed with the Florida Department of State. Juan Carlos

Almirola, Caridad Almirola, and Karina Almirola are listed on Respondent's articles of incorporation filed with the Florida Department of State as directors of Respondent. Thus, the Almirolas are filling the offices provided for in Respondent's articles of incorporation and would be considered officers of the corporation. § 440.02(9), Fla. Stat. Further, at the time of the site visit where the Stop-Work Order for Specific Worksite Only was imposed, only Karina Almirola held a workers' compensation exemption. A workers' compensation exemption holder must be a corporate officer of the business. § 440.05, Fla. Stat. To obtain these exemptions, Karina Almirola swore under penalty of perjury that she was a corporate officer of Respondent. When Juan Carlos Almirola and Caridad Almirola subsequently sought exemptions (that were not in place on May 15, 2018), they made similar pledges that they were corporate officers.

59. Regarding the employee leasing agreement between SouthEast and DeVito, section 440.11(2) states:

The immunity from liability described in subsection (1) shall extend to an employer and to each employee of the employer which uses the services of the employees of a help supply services company, as set forth in North American Industrial Classification System Codes 561320 and 561330, when such employees, whether management or staff, are acting in furtherance of the employer's business. An employee so engaged by the employer shall be considered a borrowed

employee of the employer and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company.

An employee leasing company is not responsible for a claimant's workers' compensation coverage where there is no evidence that the claimant was an employee of the leasing company at the time of the accident. Crum Servs. v. Lopez, 975 So. 2d 1184, 1186 (Fla. 1st DCA 2008). An employee leasing company has employees the same way that any other employer has employees, by compensating people for services provided. § 440.02(15)(a), Fla. Stat. If another company, however, pays the employees of an employee leasing company directly, that company has not engaged the services of the employee leasing company to lease its employees. Id. (finding that an employee leasing company is only responsible for providing workers' compensation coverage to an employee when the employee meets the requirements agreed to by the parties to lease those employees). In that scenario, the other company has become a second employer to that employee and becomes responsible to provide the required workers' compensation to that employee for the services performed without coverage under the employee leasing agreement. Id.

60. In this case, Respondent paid Juan Carlos Almirola directly for services rendered to Respondent rather than engaging SouthEast to lease his services. Accordingly, Juan Carlos Almirola was Respondent's employee on the jobs for which Respondent directly compensated him.

61. Despite Respondent's common law theory of "borrowed employees" (more commonly known as the "borrowed servant doctrine"), in this instance, the process meets the definition of subcontracting. A subcontractor is a person who enters into a contract with a contractor for the performance of any part of the contractor's contractual obligation to a third party. See § 713.01(28), Fla. Stat. A contract is an agreement to improve real property, written or unwritten, express or implied. See § 713.01(6), Fla. Stat. Florida retains the common law "borrowed servant" doctrine that one employer can lend its employee to another temporary employer. See, e.g., Pensacola Christian Coll. v. Bruhn, 80 So. 3d 1046, 1049 (Fla. 1st DCA 2011). The company to whom the employee is lent is sometimes known as the "special employer." Fossett v. S.E. Toyota Distributions, LLC, 60 So. 3d 1155, 1157-58 (Fla. 1st DCA 2011) ("A special employer qualifies as such where '(1) there was a contract for hire, either express or implied, between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to

control the details of the work resided with the special employer.'") (quoting St. Lucie Falls Prop. Owners Ass'n v. Morelli, 956 So. 2d 1283, 1286 (Fla. 4th DCA 2007)).

62. Respondent did not establish sufficient facts to support its "lent employees" scenario. Here, Respondent engaged DeVito as a subcontractor to provide the labor for roofing, repair, and painting services that Respondent was obliged to perform for Maurer and Maurer under the original contract. See Cent. Fla. Lumber Unlimited, Inc. v. Quagish, 12 So. 3d 766, 769 (Fla. 2d DCA 2009) (finding that when a subcontractor subcontracts part of its work, the employees of both the contractor and subcontractor are deemed employed in one and the same business or establishment, and the contractor is liable for payment of workers' compensation to those employees); Proctor & Gamble Cellulose Co. v. Mann, 667 So. 2d 338, 341 (Fla. 1st DCA 1995) (finding that to establish a statutory employment relationship, the entity claimed to be a contractor must have incurred a contractual obligation to a third party and must have delegated or sublet a part of its contractual obligation to a subcontractor); and Miami Herald Publ'g v. Hatch, 617 So. 2d 380, 384 (Fla. 1st DCA 1993) (finding that to sublet means to pass on to another an obligation under a contract for which the person is primarily obligated).

63. A person who does not receive remuneration for services is presumed to be a volunteer unless there is substantial evidence that a valuable consideration was intended by both employer and employee. § 440.02(15)(d)6., Fla. Stat.

Ms. Hernandez conceded that some of the individuals working at the worksite were there for DeVito and that they expected payment for their work, i.e., they were not volunteers. However, Ms. Hernandez's testimony that two of the workers at the jobsite, Moises Castro and Lencho Martinez had never completed the paperwork to allow them to be employees is credible, and they should be excluded from any assessments, since they had not been hired for the job. The reasonable expectation of remuneration for construction work performed at the worksite created an employment relationship between DeVito and Martin Barrera Huerta, and Octavio Leon, but not Moises Castro and Lencho Martinez. § 440.02(15)(a), Fla. Stat. Moreover, it was not reasonable for the individuals whose paperwork had not been received by the employer to be considered employees. The mere fact they showed up at a jobsite ready to work did not make them employees.

64. Moreover, whether DeVito's employees are Respondent's borrowed servants or employees of a subcontractor is a distinction without a difference because Florida's Workers' Compensation Law imposes identical responsibilities under both classifications. Regarding a subcontractor workers' compensation

coverage liability, section 440.10(1)(b) provides in relevant part:

In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment. (Emphasis added).

Regarding workers' compensation coverage liability for "borrowed servants," section 440.11(2) provides in relevant part:

An employee so engaged by the employer shall be considered a borrowed employee of the employer and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company. (Emphasis added).

When an employer "borrows" employees it becomes responsible for providing workers' compensation insurance coverage for those employees unless the entity they are borrowing those employees from has already secured workers' compensation insurance coverage for those employees. Hazealeferiou v. Labor Ready, 947 So. 2d 599, 603 (Fla. 1st DCA 2007) (finding that an employer borrowing employees becomes a special employer to those employees, responsible for securing the payment of workers' compensation

unless the lender of the employees has already done so); Folds v. J.A. Jones Constr. Co., 875 So. 2d 700, 703 (Fla. 1st DCA 2004) (finding that an employer borrowing employees becomes the statutory employer of the borrowed employees); Dep't of Fin. Servs. v. Michael Cribbs Constr. of Pensacola, Inc., Case No. 13-4577 (Fla. DOAH Aug. 22, 2014; Fla. DFS Oct. 2, 2014) (finding that section 440.11(2) requires an employer borrowing employees to secure the payment of workers' compensation unless the lending employer, or general employer, has already done so).

65. Further, no evidence was presented that DeVito is an employee leasing company, thereby entitling it to employ the workers who were on the jobsite in question. DeVito's business manager, Ms. Hernandez, never asserted the contractor was as much.

66. Respondent, as a contractor, was required to request evidence of workers' compensation insurance coverage from DeVito. § 440.10(1)(c), Fla. Stat. Since DeVito's coverage was through an employee leasing company, Respondent was required to obtain a list of the employees leased to DeVito from the employee leasing company as of the date DeVito commenced work for Respondent on the project. Fla. Admin. Code R. 69L-6.032(3). Such evidence of leased employees was not presented at hearing, nor was a representative of SouthEast called to testify or authenticate

documents that would show any relationship between the employee leasing company and either DeVito or Respondent.

67. As an employer engaged in employment, Respondent was required to secure the payment of workers' compensation insurance coverage for its employees. § 440.10(1), Fla. Stat. Two of the six purported employees at the site on May 15, 2018, Moises Enrique Castro and Lencho Martinez, reported for work without having submitted their applications for employment or ever having been put on the payroll by DeVito and, therefore, had never been hired by the company. Consequently, they never became "employees" of Respondent or DeVito, and cannot have income assigned or imputed to them. They must be excluded from any penalty assessment sought to be imposed by Petitioner. Moreover, since two other workers on the jobsite on May 15, 2018, Martin Barrera Huerta and Octavio Leon, had submitted employment applications to DeVito and were sent to the job at issue for their first day of work on May 15, 2018, they can only be considered "employees" of DeVito for that single day, not for any portion of the previous period of the penalty assessment. Insufficient evidence of their having been added to the employee leasing company prior to their employment on May 15, 2018, was offered by Respondent. Therefore, these two individuals are subject to the penalty assessment for one day of work.

68. Regarding the issuance of a stop-work order on an employer, section 440.107(7)(a) states in relevant part:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours.

69. Retroactive compliance after a violation has been identified is not sufficient to comply with an employer's responsibility to secure the payment of workers' compensation. Dep't of Fin. Servs. v. Mad Dog Mktg. Grp, Inc., Case No. 13-3217 (Fla. DOAH Dec. 20, 2013; Fla. DFS Mar. 17, 2015) (finding that a workers' compensation insurance coverage not effective at the time of the Stop-Work Order and Order of Penalty Assessment did not cure the violation even where the policy issued was backdated to have an effective time of before the violation).

70. Regarding the assessment of penalties, section 440.107(7)(d)1. states in relevant part:

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.

71. Florida's Workers' Compensation Law requires Respondent to maintain and produce upon demand business records, which would have allowed Petitioner to determine Respondent's payroll.

§ 440.107(5), Fla. Stat.; see also § 440.107(3)(c), Fla. Stat. and Fla. Admin. Code R. 69L-6.015. The requisite records include bank statements and check images for all business bank accounts.

Id. Respondent is also required to maintain other business records which would have allowed Petitioner to determine Respondent's payroll and to produce them upon demand including, among other items: employment records which include identifying information and start dates; all forms together with supporting reports and schedules filed with the Internal Revenue Service; written contracts or agreements entered into with employees; and all employment and unemployment reports filed pursuant to Florida law. Id. Respondent produced only a subset of the records it could have produced and that subset was incomplete. Respondent's selective and incomplete records are insufficient to accurately determine Respondent's payroll.

72. Rule 69L-6.028 sets forth the method for imputing an employer's payroll:

(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.

Petitioner is required to use the imputation methodology when an employer fails to provide sufficient records for Petitioner to determine the employer's payroll. § 440.107(7)(e), Fla. Stat.; Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 566 (Fla. 1st DCA 2007) (when an employer refuses to provide business records the Department is required to impute the missing payroll for the period requested in order to assess the penalty). This methodology does not permit Petitioner to impute payroll for some employees and not others during any

period of time for which Petitioner is unable to determine the employer's payroll. § 440.107(7)(e), Fla. Stat.

73. Petitioner properly utilized the procedures mandated by section 440.107(7)(d)1. and (7)(e) and rule 69L-6.028 to calculate the penalty owed by Respondent as a result of Respondent's failure to comply with the coverage requirements of chapter 440 and Respondent's failure to provide sufficient records to allow Petitioner to determine Respondent's payroll.

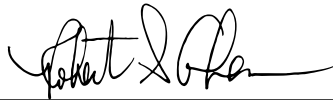
74. Therefore, Petitioner has proven by clear and convincing evidence that it properly issued a Stop-Work Order for Specific Worksite Only and Order of Penalty Assessment to Respondent, and that the penalty assessment of \$117,013.08 originally imposed should be reduced to \$58,746.52, which represents the full penalty assessment levied for Juan Carlos Almirola and Caridad Almirola (\$29,253.27 each), as well as one day's worth of penalty assessment being levied for Martin Huerta and Octavio Leon (\$119.99 each). These numbers represent imputed income against the four identified employees of Respondent (or DeVito) who were not proven to be covered by workers' compensation insurance for the period of noncompliance or properly exempt from workers' compensation coverage by Respondent. The specific figures are taken from the Penalty Calculation Worksheet prepared by Mr. Abedrabbo and entered into evidence as part of Petitioner's Exhibit 13, which provides the

calculations for all of the individuals alleged by Respondent to be employees and subject to the First Amended Order of Penalty Assessment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order assessing Respondent \$58,746.52.

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



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2019.

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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.