

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF WORKERS'
COMPENSATION,

Petitioner,

vs.

Case No. 19-1238

FORGUE GENERAL CONTRACTING,
INC.,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),^{1/} on August 29, 2019, by video teleconference at sites in Tallahassee and Tampa, Florida.

APPEARANCES

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

For Respondent: Claude M. Harden, III, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, Forgue General Contracting, Inc., violated the provisions of chapter 440, Florida Statutes, by failing to secure the payment of workers' compensation coverage; and, if so, what penalty is appropriate.

PRELIMINARY STATEMENT

The Department of Financial Services, Division of Workers' Compensation (the "Department"), served a Stop-Work Order for Specific Worksite Only on Respondent, Forgue General Contracting, Inc. ("Respondent"), on November 2, 2018.

On January 4, 2019, Respondent filed a Petition for Hearing with the Department requesting an administrative hearing to dispute the Department's action.

The Department referred this matter to the Division of Administrative Hearings ("DOAH") on March 11, 2019, and requested that an Administrative Law Judge conduct a chapter 120 evidentiary hearing.

The final hearing was held on August 29, 2019. The Department presented the testimony of Margaret Cavazos (a compliance investigator), Nathaniel Hatten (a penalty auditor), and Salma Qureshi (a district supervisor). The Department's Exhibits 1 through 17 were admitted into evidence. Respondent presented the testimony of Roberto C. Chavez. Respondent did not offer additional exhibits.

A one-volume Transcript of the final hearing was filed with DOAH on September 17, 2019. At the close of the hearing, the parties were advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. Both parties timely filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with enforcing workers' compensation coverage requirements in Florida, including the requirement that employers secure the payment of workers' compensation coverage for their employees. See § 440.107(3), Fla. Stat.

2. Respondent operates a construction company in Florida, and Respondent has been in business since 2004.

3. On October 31, 2018, Margaret Cavazos, a compliance investigator with the Department, conducted a random workers' compensation check at a worksite located at 1172 East State Road 434 in Winter Springs, Florida. The worksite is a two-story commercial building with five individual storefronts.

4. Investigator Cavazos arrived at the worksite at 8:30 a.m. There, she observed four individuals who she believed were preparing the exterior of the building for painting. One person was covering a window with tape and brown construction paper. Two more individuals were standing in the bucket of a

boom lift approximately 15 feet above the ground next to the building. They appeared to be placing blue tape over a sign of one of the businesses in the building. A fourth person was positioned by a truck supervising the activity. Investigator Cavazos further noticed that several of the business names had already been covered with construction paper and tape.

5. Investigator Cavazos approached the person standing by the truck and introduced herself. He identified himself as Jose Luis Chachel. Mr. Chachel informed Investigator Cavazos that he and the other three individuals at the worksite were working for a company called RC Painting Services, Inc. ("RC Painting"). Mr. Chachel further stated that they were preparing the building to be painted.

6. The other three individuals at the worksite identified themselves to Investigator Cavazos as Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque. Investigator Cavazos watched the four individuals work at the jobsite for about an hour, then they departed. Investigator Cavazos, however, did not obtain any information from Mr. Chachel or the other individuals concerning how long they had worked for RC Painting, when they had arrived at the jobsite, their rate of pay, or whether RC Painting had actually paid them for their work.

7. At the final hearing, Investigator Cavazos testified that her duties for the Department include inspecting businesses

and worksites to determine whether a business has obtained the required workers' compensation insurance coverage. Investigator Cavazos explained that a business that performs construction-related work must have workers' compensation coverage.

Therefore, Investigator Cavazos believed that, prior to beginning the painting activities, RC Painting should have secured sufficient workers' compensation coverage for all four individuals identified at the worksite.

8. After learning the name of the business that arranged for the presence of the four individuals at the jobsite, Investigator Cavazos consulted the Department's Coverage and Compliance Automated System ("CCAS") database for information on RC Painting. CCAS is a Department database that tracks workers' compensation insurance coverage. CCAS contains coverage data from insurance carriers, as well as any workers' compensation exemptions on file with the Department. Insurance providers are required to report coverage and cancellation information, which the Department uses to update CCAS.

9. CCAS had no record that RC Painting carried any workers' compensation coverage for the four individuals Investigator Cavazos observed at the worksite.

10. While reviewing CCAS, Inspector Cavazos also noted that the Department did not have on file any request from RC Painting for an "exemption" from workers' compensation coverage.

An exemption is a method by which a business's corporate officer may exempt him or herself from the requirements of chapter 440. See § 440.05, Fla. Stat.

11. CCAS also revealed to Investigator Cavazos that on the date of her inspection, RC Painting had an active employee leasing agreement with SouthEast Personnel Leasing ("SouthEast Leasing"), an employee staffing company. At the final hearing, Inspector Cavazos explained that a business is not required to obtain workers' compensation insurance for its employees if coverage is properly provided by or through an employee leasing company's workers' compensation policy.

12. However, in order for an employee leasing company to become responsible for the workers' compensation coverage of a particular employee, the business seeking coverage for that employee must ensure that the employee submits an application to the leasing company. Thereafter, if (and only if) the leasing company accepts the application, the leasing company becomes accountable for the workers' compensation insurance coverage for that employee.

13. Investigator Cavazos contacted SouthEast Leasing. SouthEast Leasing provided Investigator Cavazos an active roster of employees it leased to RC Painting. However, neither Mr. Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, nor Jenny Araque were listed on this roster. Therefore, Investigator

Cavazos concluded that none of the four individuals she identified at the worksite were covered by workers' compensation insurance under RC Painting's leasing arrangement with SouthEast Leasing on October 31, 2018.

14. After determining that neither CCAS nor SouthEast Leasing recorded any workers' compensation coverage for the persons at the worksite, Investigator Cavazos contacted RC Painting's owner, Roberto Chavez. (Mr. Chachel provided Investigator Cavazos with his phone number during her inspection.)

15. Investigator Cavazos testified that, during their phone call, Mr. Chavez confirmed that the four individuals worked for him. Mr. Chavez further informed Investigator Cavazos that RC Painting had been hired by Respondent to paint the building.

16. At that point, Investigator Cavazos called Respondent to inquire about workers' compensation coverage for Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque. Investigator Cavazos spoke with one of Respondent's employees, Anthony Gonzalez. Mr. Gonzalez confirmed that Respondent engaged RC Painting to paint the building.

17. Continuing to search for active workers' compensation coverage, Investigator Cavazos discovered that Respondent also had an employee leasing agreement with SouthEast Leasing. Investigator Cavazos reviewed SouthEast Leasing's roster which

recorded only two covered employees for Respondent, Anthony Gonzalez and Edward Forgue (Respondent's president). As with RC Painting's leasing agreement, Respondent's leasing agreement with SouthEast Leasing did not cover Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, or Jenny Araque on October 31, 2018.

18. As detailed below, under section 440.10(1), a contractor is liable for, and is required to secure, workers' compensation coverage for all employees of a subcontractor to whom the contractor sublets work. (Section 440.10(1)(c) also directs the contractor to require a subcontractor to provide evidence of workers' compensation insurance.) Therefore, as a contractor hiring a subcontractor for construction work, Respondent was required to exercise due diligence to ensure that all RC Painting's employees who were painting the building were covered by workers' compensation insurance.

19. On October 31, 2018, based on her findings, Investigator Cavazos issued a Stop-Work Order to RC painting. Later that day, Mr. Chavez ventured to the Department's local office to determine how his business could be released from the Stop-Work Order. There, he met with district supervisor, Salma Qureshi. Ms. Qureshi informed Mr. Chavez that, in order for his company to return to work, he needed to pay a \$1,000 fine and complete an Affirmation. She explained to Mr. Chavez that on

the Affirmation, he was to describe how RC Painting intended to come into full compliance with workers' compensation coverage requirements.

20. Mr. Chavez had, in fact, brought with him a cashier's check for \$1,000. (The amount was included on the Stop-Work Order.) Mr. Chavez then completed an Affirmation before Ms. Qureshi. On the Affirmation, Mr. Chavez wrote the names of the four individuals Investigator Cavazos identified at the jobsite. Next to each name, Mr. Chavez wrote "\$20." Below the names, he wrote "I am terminating." Mr. Chavez then signed and dated the Affirmation. At the final hearing, Ms. Qureshi expressed that Mr. Chavez told her that he was going to pay each of the four individuals \$20 for the day's work they performed on October 31, 2018, and then he was terminating them.

21. In addition to issuing the Stop-Work Order to RC Painting, on October 31, 2018, Investigator Cavazos issued a Stop-Work Order for Specific Worksite Only to Respondent, which was served on November 2, 2018. Investigator Cavazos also served Respondent with a Request for Production of Business Records for Penalty Assessment Calculation. Through this document, the Department requested several categories of business records from Respondent for the period of November 1, 2016, through October 31, 2018. The requested documents pertained to: employer identification, payroll documents,

account documents, disbursements, workers' compensation coverage, professional employer organization records, temporary labor service, exemptions, subcontractor records, and subcontractors' workers' compensation coverage.

22. Based on Investigator Cavazos's investigation, the Department determined that Respondent failed to secure adequate workers' compensation coverage for its employees. Therefore, the Department proceeded to calculate a penalty based on Respondent's lack of compliance with chapter 440.

The Penalty Calculation:

23. Nathaniel Hatten, the penalty auditor who determined the penalty the Department seeks to impose on Respondent, testified regarding his computation. Mr. Hatten explained that the penalty essentially consists of the "avoided" premium amount, or the actual premium the employer would have paid in workers' compensation insurance for the uncovered employees, multiplied by two.

24. To calculate the appropriate penalty for Respondent's failure to secure workers' compensation coverage, the Department first ascertained Respondent's period of non-compliance. To determine this time frame, the Department referred to Florida Administrative Code Rule 69L-6.028(2), which directs that:

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.

Based on these instructions, the Department deduced that Respondent's period of non-compliance ran from November 1, 2016, through October 31, 2018, which was the two-year period preceding the date of the Stop-Work Order. (This two-year period was also the time for which the Department requested business records from Respondent.)

25. After determining Respondent's period of non-compliance, the Department then calculated the monetary penalty it should impose upon Respondent. In accordance with section 440.107(7)(d)1., the Department must assess against an employer:

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.

Therefore, the Department reviewed the business records Respondent provided to ascertain the amount of Respondent's payroll during the two-year period of non-compliance.

26. In response to the Department's request for documents, Respondent produced its client leasing agreement with SouthEast Leasing. This leasing agreement, however, only covered Mr. Forgue and Mr. Gonzalez. Further, the leasing agreement was only in effect from February 7, 2018, through October 30, 2018, for Mr. Forgue and February 21, 2018, through October 30, 2018 for Mr. Gonzalez.

27. No evidence establishes that Respondent made any other payments for workers' compensation insurance coverage outside of the SouthEast Leasing agreement. Consequently, the evidence in the record establishes that Respondent had no workers' compensation coverage for any of its employees, officers, or subcontractor employees from November 1, 2016, through February 6, 2018. And, only Mr. Forgue and Mr. Gonzalez were covered from February 2018 through October 30, 2018.

28. Further, Respondent did not provide any payroll information to the Department per its request for business records. Consequently, the documentation was not comprehensive enough for the Department to determine all the wages Respondent paid to its employees, or the work they performed for the period of November 1, 2016, through October 31, 2018. Therefore, the

Department determined that Respondent did not provide business records sufficient for it to calculate Respondent's complete payroll or the actual employee wages it paid over the two-year period of non-compliance. Accordingly, the Department exercised its option to "impute" Respondent's weekly payroll from November 1, 2016, through October 31, 2018.

29. To calculate Respondent's imputed weekly payroll, section 440.107(7)(e) directs that the gross payroll for an employer who provides insufficient business records is imputed at the statewide average weekly wage, multiplied by 1.5, for each employee who worked during the period requested for the penalty calculation. Therefore, the Department obtained the statewide average weekly wage effective at the time of the Stop-Work Order (\$917.00)^{2/} for each identified employee, corporate officer, and subcontractor, then multiplied that number by 1.5. See § 440.107(7)(e), Fla. Stat.; and Fla. Admin. Code R. 69L-6.028(3)(a).

30. The Department imputed the payroll for all four individuals Investigator Cavazos observed at the worksite on October 31, 2018 (Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque), for all periods of non-compliance (November 1, 2016 through October 31, 2018). No evidence established that these individuals were covered under a

workers' compensation policy either through Respondent, RC Painting, or SouthEast Leasing.

31. The Department also included Mr. Forgue for a period of non-compliance from January 22, 2018, through February 8, 2018. The Department imputed his payroll during this period of time explaining that Respondent did not have an active workers' compensation exemption on file for Mr. Forgue. Neither was he covered by SouthEast Leasing's policy during this brief timeframe. Therefore, Respondent was required to carry workers' compensation for Mr. Forgue from January 22, 2018, through February 8, 2018. See Fla. Admin. Code R. 69L-6.028(3)(b).

32. To calculate a penalty based on the imputed payroll, the Department assigned Respondent's employees the highest rated workers' compensation classification code. The classification code is based on either the business records submitted or the investigator's observation of the employees' activities. In this case, the business records Respondent provided to the Department were not sufficient to categorize the exact type of work that the identified workers performed for Respondent over the two-year period of non-compliance. However, during her investigation of the jobsite on October 31, 2018, Investigator Cavazos observed the four employees engaging in activities associated with "painting."

33. According to the Scopes Manual issued by the National Council on Compensation Insurance, Inc. ("NCCI"), class code 5475 is applied to "painting contractors engaged in painting."^{3/} Consequently, the Department used class code 5474 for all Respondent's employees and corporate officer for the penalty period. See Fla. Admin. Code R. 69L-6.028(3)(b) and 69L-6.021(2)(jj)(painting is classified as "construction activity"). Therefore, to calculate the premium amount for the workers' compensation insurance Respondent should have paid for its "employees" (Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque) and officer (Mr. Forgue), the Department applied the manual rates corresponding to class code 5474.

34. Thereafter, based on: 1) the total periods of non-compliance, 2) Respondent's calculated payroll for the periods of non-compliance, and 3) the estimated premium for workers' compensation insurance, the Department issued the Amended Order of Penalty Assessment ("Penalty Assessment") on November 30, 2018, which was served on Respondent on February 28, 2019. The Penalty Assessment seeks to impose a penalty of \$129,089.60 against Respondent.

35. At the final hearing, Respondent argued that the individuals Investigator Cavazos identified at the worksite on October 31, 2018, were never hired by Respondent's

subcontractor, RC Painting. Therefore, they are not "employees" under chapter 440, and Respondent is not an "employer" for purposes of securing workers' compensation coverage.

Consequently, Respondent argues that the penalty the Department seeks to assess against Respondent is not warranted.

36. Mr. Chavez testified at the final hearing for Respondent describing his employment relationship with Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque. Initially, Mr. Chavez confirmed that Respondent hired RC Painting to paint the exterior of the shopping plaza.

37. Regarding the four individuals Investigator Cavazos identified at the jobsite, however, Mr. Chavez denied that they were "employees" of RC Painting on October 31, 2018. Mr. Chavez explained that he used SouthEast Leasing to "hire" his employees. Mr. Chavez asserted that before he puts someone to work, he requires them to complete an employment application with SouthEast Leasing. Only after SouthEast Leasing approved the employee would he allow the individual to work on a job.

38. In this matter, Mr. Chavez denied that he had ever worked with Mr. Chachel before, or ever met the other three individuals that Mr. Chachel brought with him to the jobsite. Mr. Chavez maintained that he called Mr. Chachel on the evening of October 30, 2018, about the prospective painting job. He then asked Mr. Chachel to bring two other workers and meet him

at the jobsite the following morning. Mr. Chavez testified that he instructed Mr. Chachel that he would need to send information to SouthEast Leasing before anyone actually started working on the project.

39. Mr. Chavez further contended that he did not have any discussion with Mr. Chachel about wages or the rate of pay for the job. He declared that he never commits to paying any prospective employee before ascertaining what type of skills they possess. Mr. Chavez explained that, "anyone can tell you, 'I've been painting all of my life,' and they show up and don't know how to paint, or they don't know how to do anything."

40. In response to Inspector Cavazos's testimony, Mr. Chavez exclaimed that he never told her that the four individuals were his "employees." He merely relayed that they were "with" him. Mr. Chavez also insisted that he never authorized Mr. Chachel or his crew to start preparing the building for painting prior to meeting with him. Mr. Chavez further relayed that Respondent provided the boom lift for the job. But, he never instructed Mr. Chachel to begin using it. Mr. Chavez arrived at the shopping plaza around 9:30 a.m. However, by that time Investigator Cavazos had issued the Stop-Work Order, and only Mr. Chachel remained at the scene.

41. Regarding the Affirmation he completed at the Department's district office, Mr. Chavez testified that, other

than Mr. Chachel, he did not know the names of individuals who Investigator Cavazos identified at the jobsite. He asserted that he wrote their names on the Affirmation only after Ms. Qureshi spelled them out for him on a sticky note.

42. Mr. Chavez further professed that he only penned "\$20" by each name because Ms. Qureshi told him that the Department would not release him from the Stop-Work Order until he added the wages he paid to each individual. Mr. Chavez claimed that Ms. Qureshi specifically instructed him to insert a number by each employee. Mr. Chavez declared that he felt like he had no choice but to include "\$20" on the Affirmation if he wanted to return to work. In actuality, however, Mr. Chavez insisted that he did not pay Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, or Jenny Araque anything for their activities on October 31, 2018.

43. Ms. Qureshi testified for the Department on rebuttal. She credibly voiced that she did not write out the names of the four "employees" for Mr. Chavez to list on his Affirmation. Neither did she suggest a wage amount for their work, or force Mr. Chavez to write that he "terminated" them. On the contrary, Ms. Qureshi attested, clearly and without hesitation, that Mr. Chavez independently completed his sworn Affirmation, and he did not ask for her assistance with the specific information he wrote down. Ms. Qureshi persuasively stated that Mr. Chavez

knew the names of Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque when he composed the Affirmation. Further, Mr. Chavez expressly told her that he was going to pay the four individuals \$20 for the day, and that he was terminating them.

44. The competent substantial evidence in the record establishes that Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque were "employees" of RC Painting under section 440.02(15) on October 31, 2018. Based on this finding, the Department demonstrated, by clear and convincing evidence, that Respondent failed to secure workers' compensation insurance coverage or a workers' compensation exemption for four employees for the period of November 1, 2016, through October 31, 2018, as well as its corporate officer from January 22, 2018, through February 8, 2018. Accordingly, the Department met its burden of proving that Respondent violated chapter 440 and should be penalized.

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

46. Under sections 440.10(1)(a), 440.107(2), and 440.38, every employer is required to obtain workers' compensation coverage for the benefit of its employees, unless exempted or

otherwise excluded under chapter 440. See Twin City Roofing Constr. Specialists, Inc. v. Dep't of Fin. Servs., 969 So. 2d 563, 564 (Fla. 1st DCA 2007) ("Florida law requires any company performing construction to secure the payment of workers' compensation."). Strict compliance with the workers' compensation law by the employer is required. See C & L Trucking v. Corbett, 546 So. 2d 1185, 1186 (Fla. 5th DCA 1989).

47. "Construction industry" means "for-profit activities involving any building, clearing, filling, excavation, or substantial improvement in the size or use of any structure or the appearance of any land." § 440.02(8), Fla. Stat.

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

49. "Employment," with respect to the construction industry, includes "all private employment in which one or more employees are employed by the same employer." § 440.02(17)(b)2., Fla. Stat.

50. "Employee" means "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." "Employee" also includes "any person who is an officer of a corporation and

who performs services for remuneration for such corporation within this state." § 440.02(15)(a) and (b), Fla. Stat.

51. In addition, under section 440.02(15)(c), "employee" encompasses:

2. All 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.

3. An independent contractor working or performing services in the construction industry.

4. A sole proprietor who engages in the construction industry.

52. Regarding a contractor's relationship and responsibility for subcontractors, section 440.10(1) states:

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

(c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as

permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

See Cent. Fla. Lumber Unlimited, Inc. v. Qaqish, 12 So. 3d 766, 769 (Fla. 2d DCA 2009) ("If a contractor subcontracts part of his work, then the employees of both the contractor and subcontractor are 'deemed to be employed in one and the same business or establishment' and the contractor is liable for payment of workers' compensation to those employees."); Miami-Dade Cnty v. Acosta, 757 So. 2d 539, 541 (Fla. 3d DCA 2000) ("It is clear that section 440.10(1)(b) places on the statutory employer, [the contractor] . . . the responsibility for providing, or ensuring that the subcontractor provides, workers' compensation coverage to its, including its subcontractors', employees"); and Mena v. J.I.L. Constr. Grp. Corp., 79 So. 3d 219, 224 (Fla. 4th DCA 2012) ("where a subcontractor performing part of the work of a contractor fails to secure payment of compensation, the contractor is liable for the same.").

53. Regarding the penalty for non-compliance with chapter 440, section 440.107(7) establishes the method to calculate the penalty the Department shall impose on an employer based on its failure to secure workers' compensation coverage. Section 440.107(7)(d)1. states:

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.

This provision does not provide the Department authority to reduce the amount of the statutory penalty.

54. Because administrative fines are penal in nature, the Department has the burden to prove, by clear and convincing evidence, that Respondent violated chapter 440 by failing to secure the payment of workers' compensation, and that the penalty proposed to be assessed is correct. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Clear and convincing evidence requires "more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

55. Turning to the facts in this matter, the Department demonstrated, by clear and convincing evidence, that Respondent violated chapter 440, as charged in the Stop-Work Order for Specific Worksite Only, by failing to provide workers' compensation coverage for its "employees."

56. Initially, the evidence in the record establishes that Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez,

and Jenny Araque all qualify as "employees" of RC Painting under section 440.02(15)(c). The Department proved that, on October 31, 2018, these individuals were working at the jobsite located at 1172 East State Road 434 in Winter Springs, Florida, through an agreement, either "express or implied, oral or written" with RC Painting. The Department further proved that each individual received \$20 in "remuneration"^{4/} from Mr. Chavez for their activities preparing a building for painting. Therefore, in accordance with section 440.10(1)(b), Respondent was statutorily responsible for securing workers' compensation coverage for the work they performed.

57. Respondent vigorously argues that none of the four individuals identified at the worksite should be considered an "employee" under chapter 440 based on Mr. Chavez's testimony that he did not formally hire them (despite the fact that they had worked at least an hour prior to his arrival), as well as his declaration that he did not actually pay them for their work.

58. Mr. Chavez's representations at the final hearing were not persuasive. Instead, the undersigned finds Mr. Chavez's Affirmation on October 31, 2018, dispositive on the issue of who RC Painting employed at the worksite (Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque), as well as the remuneration for their work (\$20 each). When

Mr. Chavez signed and dated his Affirmation, he swore that his statement was "true and correct to the best of his (or her) knowledge and belief." He further acknowledged that it was unlawful for him "to knowingly make any false, fraudulent, or misleading oral or written statement." Mr. Chavez's recantation of his Affirmation one year later at the final hearing did not ring true. Further, Ms. Qureshi's testimony that Mr. Chavez independently wrote down the names of the four individuals, as well as the wages he paid them, was credible and convincing. Accordingly, based on the evidence in the record, Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque meet the definition of RC Painting's "employees" under section 440.02(15)(a).

59. The Department also demonstrated that it properly applied the procedure mandated by section 440.107(7)(d)1. and (e) to determine Respondent's penalty. The Department correctly calculated the appropriate penalty to impose on Respondent in its Amended Order of Penalty Assessment.

60. Florida law requires Respondent, as an "employer," to maintain and produce business records which allow the Department to determine its payroll. § 440.107(5), Fla. Stat.; see also § 440.107(3)(c), Fla. Stat.; and Fla. Admin. Code R. 69L-6.015(1). Respondent, however, did not provide any payroll records in response to the Department's Request for Production

of Business Records for Penalty Assessment Calculation. Consequently, the Department established that Respondent failed to provide business records sufficient for it to determine Respondent's actual payroll for the two-year period of non-compliance requested for the penalty calculation (November 1, 2016, through October 31, 2018).

61. Because the Department was unable to sufficiently calculate the wages Respondent paid to its employees between November 1, 2016, through October 31, 2018, the Department is required to impute Respondent's weekly payroll. See Twin City, 969 So. 2d at 566. Rule 69L-6.028 sets forth the method for imputing an employer's payroll and provides:

(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.

See also § 440.107(7)(e), Fla. Stat.

62. Regarding which employees should be included in Respondent's imputed payroll, as discussed above, the evidence establishes that Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque are considered Respondent's "employees" over the two-year period of non-compliance.^{5/}

63. The Department also demonstrated that Respondent's corporate officer, Edward Forgue, should be included in the penalty calculation for the period of January 22, 2018, through February 8, 2018. Mr. Forgue was not covered by workers' compensation insurance by either Respondent or SouthEast Leasing during this timeframe. Neither did Respondent produce evidence that it had obtained a valid exemption for Mr. Forgue from the workers' compensation coverage requirements.

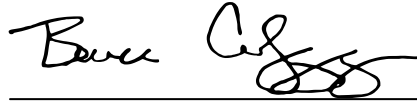
64. Finally, the Department correctly applied NCCI classification code 5474 to Respondent's imputed payroll. Class code 5474 covers "painting contractors." The work Investigator Cavazos observed the four individuals performing on October 31, 2018, meets the NCCI definition of "painting."

65. Accordingly, based on the evidence and testimony produced at the final hearing, the Department proved, by clear and convincing evidence, that the penalty calculated in the Amended Order of Penalty Assessment (\$129,089.60) is the appropriate penalty that should be assessed against Respondent pursuant to section 440.107(7)(d)1. and (e) and rule 69L-6.028.

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 Respondent, Forgue General Contracting, Inc., violated the requirement in chapter 440 to secure workers' compensation coverage, and imposing a total penalty of \$129,089.60.

DONE AND ENTERED this 18th day of October, 2019, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2019.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2018), which was the law in effect at the time of Respondent's alleged violation and, therefore, applies to this proceeding. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441, 444 (Fla. 5th DCA 2013).

^{2/} The Department obtained this figure from the Florida Department of Economic Opportunity, which determined that the statewide average weekly wage paid by employers beginning on January 1, 2018, equaled \$917.00.

^{3/} The Scopes Manual classification codes are four-digit codes assigned to various occupations by the NCCI to assist in the calculation of workers' compensation insurance premiums. The Department has adopted the Scopes Manual through rule 69L-6.021(1). Class code 5474 is the general painting classification and contemplates:

surface preparation and other work
incidental to the painting process as well
as the installation and dismantling of
scaffolding or other equipment used to

facilitate the painting and the preparation of surfaces to be painted when these operations are performed in conjunction with an insured's painting operations at a particular job site.

^{4/} "Remuneration" is defined as "something that remunerates: recompense, pay." "Remunerate" means "to pay an equivalent to for a service, loss, or expense." Merriam-Webster Dictionary, at <http://www.merriam-webster.com>. See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)("When necessary, the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary."); see also Raymond James Fin. Servs. v. Phillips, 110 So. 3d 908, 910 (Fla. 2d DCA 2011)("It is appropriate to refer to dictionary definitions when construing statutes or rules.").

^{5/} The Department asserts that a weekly payroll for each of the four "employees" should be imputed for the entire two-year period of non-compliance. The competent substantial facts, however, establish that Jose Luis Chachel, Juan Carlos Vasquez Garcia, Artemia Vasquez, and Jenny Araque only worked one day for RC Painting (October 31, 2018). At the final hearing, the Department explained that, because Respondent's business records were not sufficient to enable the Department to confirm Respondent's payroll for all of its employees, it is authorized to calculate the penalty for the four individuals from November 1, 2016, through October 31, 2018. While this penalty might appear inequitable based on one day of work, the language of chapter 440 allows this severe result.

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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.