

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Petitioner,)
)
vs.) Case No. 03-0928
)
BERISFORD CHAMPAGNIE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before P. Michael Ruff duly-designated Administrative Law Judge in Ocala, Florida, on July 30, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: John M. Iriye, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Berisford Champagnie, pro se
15508 Southwest 34th Avenue
Ocala, Florida 34473

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent failed to abide by the coverage requirements of the Florida Workers' Compensation Law embodied

in Chapter 440, Florida Statutes, by not obtaining a workers' compensation insurance policy and whether the Petitioner properly assessed a penalty against the Respondent pursuant to Section 440.107, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose under the Workers' Compensation Law, Chapter 440, Florida Statutes, whereby the Department of Financial Services, Division of Workers' Compensation (Department/Petitioner) seeks to enforce the statutory requirement that employers secure the payment of workers' compensation for their employees. The Petitioner has issued a "stop work order" alleging that Berisford Champagnie (Respondent) failed to secure the payment of workers' compensation for his employees.

The cause arose on December 18, 2002, when William Pangrass, an investigator for the Department observed several workers hanging "drywall" on a residential construction site. Two of the men identified the Respondent as their employer. The Respondent had not secured the payment of workers' compensation for those men who asserted they were his employees. The investigator, Mr. Pangrass, issued a Stop Work and Penalty Assessment Order on that occasion, which directed the Respondent to cease business operations and assessed a minimum payment of \$1,100.00, which is \$100.00 under Section 440.107(5), Florida

Statutes, and a \$1,000.00 under Section 440.107(7), Florida Statutes. The Respondent elected to contest that initial decision and filed a "Petition for Review." The Petition was referred to the Division of Administrative Hearings and to the undersigned administrative law judge.

The cause came on for hearing as noticed. The Respondent appeared without counsel and represented himself. During the hearing the Petitioner introduced the testimony of William Pangrass, its investigator, and 10 exhibits, which were admitted into evidence. The Respondent introduced his own testimony and 12 exhibits, admitted into evidence. The parties were given an extended period to submit proposed recommended orders following the filing of the transcript, which was filed October 2, 2003. The Proposed Recommended Order filed by the Petitioner was timely filed and has been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Investigator Pangrass conducted a random inspection of a construction site at 9 Pecan Drive Pass, Ocala, Florida, on December 18, 2002. On that occasion he observed several people working, hanging drywall. Investigator Pangrass spoke to one of the workers, Daniel Maloney, and asked him, to identify his employer. Daniel Maloney identified the Respondent as his employer. When Maloney identified him the Respondent was only

10 feet away and the noise level at the site was such that the Respondent could hear himself being identified as the employer. The Respondent did not then deny that he was Daniel Maloney's employer. Daniel Maloney stated he had worked for the Respondent full-time for two months and was paid by the hour. The Respondent told Mr. Pangrass he was unable to complete the work at the job without additional labor. Mr. Maloney assisted the Respondent by "hanging the ceiling." The Respondent offered a hearsay statement of Mr. Maloney, wherein he stated, "I am the employee." The Respondent confirmed that he had a prior employment relationship with Daniel Maloney and that Daniel Maloney wanted to work with the Respondent.

2. Another worker observed by Mr. Pangrass, Desmond Neil, told Investigator Pangrass that he worked for the Respondent part-time and was paid by the hour. The Respondent had used the services of Desmond Neil on prior occasions and stated "we do a job for Holiday the day before." The Respondent told Mr. Pangrass that he was trying to get workers' compensation for Desmond Neil. The Respondent made a statement against his own interest and said he "re-hired" Desmond Neil because Neil could not get a workers' compensation exemption. The Respondent's use of the word "re-hired" is significant because in a prior compliance matter the Respondent had employed Desmond Neil and agreed to terminate Desmond Neil's employment. The Respondent

in testimony, changed his version of the facts and said that he re-hired Desmond Neil, but that Neil worked for Charles Brandon.

3. Investigator Pangrass interviewed the Respondent. During this interview the Respondent stated he had labor expenses connected with his business. He testified he was paid by Holiday Builders and then in turn paid Desmond Neil and Daniel Maloney.

4. Charles Brandon did not employ or was not the sole employer of Desmond Neil or Daniel Maloney on December 18, 2002. Investigator Pangrass contacted Mr. Brandon, who stated he knew the Respondent was going to hire helpers. Mr. Brandon was not at the job-site to direct Desmond Neil or Daniel Maloney and could only be reached by phone.

5. The Petitioner's evidence that the Respondent was the employer of Desmond Neil and Daniel Maloney on December 18, 2002, instead of Mr. Brandon or some other person or entity, is the most persuasive and is accepted. The Respondent offered conflicting evidence regarding who provided money to Desmond Neil and Daniel Maloney. The Respondent offered a hearsay statement of Daniel Maloney that Holiday Builders was Daniel Maloney's employer. The Respondent said that when Holiday Builders pays him (the Respondent) he then pays his employees. The Respondent changed his testimony, however, and then said Charles Brandon gave him checks to give to the employees.

(Implying that they were Brandon's employees in this version of his story.)

6. The Respondent submitted a signed statement to the Petitioner indicating that he had no employees between 1999 and 2002, in evidence as Petitioner's Exhibit 10-B. The Respondent recognized the signature on that statement as being his own, but professed not to remember who wrote it or what it said. The Respondent, however, did admit to having at least one employee in 2001, directly contradicting his own statement. The Respondent also testified that the only times he used Desmond Neil's services were the two times Investigator Pangrass stopped by the Respondent's job sites. It is a trifle too coincidental that the only two times the investigator visited the job sites were the only times when the Respondent purportedly used the services of Desmond Neil. This is especially the case since Desmond Neil's testimony and even that of the Respondent himself tend to contradict that statement. Finally, the Respondent admitted that he did not have a workers' compensation policy for any employees.

7. In summary, the evidence adduced by the Petitioner is deemed more consistent and credible and is accepted. It was thus demonstrated that the Respondent had one or more employees at the times pertinent hereto.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla.Stat. (2002).

9. Employers are required to secure payment of compensation for their employees. §§ 440.10(1)(a) and 440.38(1), Fla. Stat. (2002).

10. "Employer" is defined in part as, "every person carrying out employment." § 440.02(15), Fla. Stat. (2002). "Employment . . . means any service performed by an employee for the purpose of employing him or her," and, "with respect to the construction industry, [includes] all private employment in which one or more employees are employed by the same employer." § 440.02(16)(a) and (b)(2), Fla. Stat. (2002).

11. "Employee" means, "any person who is engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." § 440.02(14)(a), Fla. Stat. (2002).

12. The Petitioner is required to assess \$100.00 per day for each day an employer was out of compliance with the Workers' Compensation Law. § 440.107(5), Fla. Stat. (2002). In addition, an employer who fails to secure payment of compensation is subject to a penalty of, "[t]wice the amount the

employer would have paid during the periods it illegally failed to secure payment of compensation in the preceding 3-year period based on the employer's payroll during the preceding 3-year period; or

. . . [o]ne thousand dollars, whichever is greater."

§ 440.107(7)(a) and (b), Fla. Stat. (2002).

13. The Petitioner has the burden of proving by a preponderance of the evidence that an employer violated the Workers' Compensation Law and that the penalty assessments were correct under the law. Department of Labor and Employment Security, Division of Workers' Compensation v. Genesis Plastering, Inc., DOAH No. 00-3749 (Recommended Order Para. 32) (Adopted by Final Order May 24, 2001); Department of Labor and Employment Security, Division of Workers' Compensation v. Bobby Cox, Sr., d/b/a CH Well Drilling, DOAH No. 99-3854 (Recommended Order Para. 34) (adopted in part by a Final Order June 8, 2000).

14. The Petitioner has established by a preponderance of the evidence that the Respondent was an employer in the construction industry on December 18, 2002, and that the Respondent failed to abide by the coverage requirement of the workers' compensation law. §§ 440.10(1) and .38(1), Fla. Stat. (2002). Thus the Respondent should cease operations in accordance with the Stop Work and Penalty Assessment Order until such time as he secures workers' compensation coverage and the

Respondent should pay the penalty sought by the Petitioner in the amount of \$1,100.00 in accordance with Sections 440.107(5) and 440.107(7), Florida Statutes (2002).

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties it is, therefore,

RECOMMENDED that a Final Order be entered by the Department of Financial Services, Division of Workers' Compensation directing that the Respondent stop work and cease his operations until such time as he secures workers' compensation coverage for employees and directing that the Respondent pay a penalty in the amount of \$1,100.00.

DONE AND ENTERED this 4th day of December, 2003, in Tallahassee, Leon County, Florida.



P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
Division of Administrative Hearings
this 4th day of December, 2003.

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.