FLORIDA
DEPARTMENT OF
FINANCIAL
SERVICES

FILED

FEB 23 2007

Chief Financial Officer
Docketed by:

ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

06-2785 000187

IN THE MATTER OF:

Case No. 86856-06-WC

KENNY NOLAN d/b/a
GREAT SOUTHERN TREE SERVICE
_____/

FILED
2007 FEB 27 A 11:23
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

This cause came on before Chief Financial Officer Alex Sink, as head of the Department of Financial Services (Petitioner), for consideration of and final agency action on the Recommended Order issued herein by Administrative Law Judge Barbara Staros (ALJ) on November 28, 2006, after a formal hearing conducted pursuant to Section 120.57(1), Florida Statutes. Petitioner timely filed exceptions, and Respondent Kenny Nolan timely filed a Response thereto.

The Recommended Order, Petitioner's Exceptions, and Respondent's Response thereto, the transcript of proceedings, the exhibits admitted into evidence, and applicable law, have all been considered during the promulgation of this Final Order.

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner's first exception is directed to the Conclusion of Law set forth in Paragraph 41 of the Recommended Order, stating that in view of the holdings in Mathers v. Sellers, 113 So.2d 443 (Fla. 1st DCA 1959) and Subterranean Circus v. Lewis, 319 So.2d 600 (Fla. 1st DCA 1975), Respondent Nolan was not, as a matter of law, an "employer" for the purposes of Ch. 440, Florida Statutes, and, therefore, that the Department's proposed penalty was not supported by the evidence. That Conclusion of

Law Is based on numerous Findings of Fact in Paragraphs 12-25 of the Recommended Order, where the ALJ found, inter alia, that the individuals purportedly in Respondent's employment worked only sporadically, and were paid in cash on a daily or per job basis. The ALJ also found that the fourth individual, who purportedly triggered the workers' compensation coverage requirement imposed by Sections 440.10(1) and 440.02(b)2., Florida Statutes, was working for Respondent only because of a temporary increase in the availability of work caused by a storm that had knocked down numerous trees in the Ortega area of Jacksonville. Petitioner does not challenge those Findings of Fact, and a review of the record shows those findings to be supported by competent substantial evidence. Those findings, in turn, support the challenged conclusion. The conclusion is also anchored in established and controlling case law cited by the ALJ. Accordingly, Petitioner's first exception is rejected.

Petitioner's second exception is directed to Paragraphs 35-38 and 41, apparently on the basis that as an employer Respondent was required to keep and produce certain employment records but failed to do so. While the record establishes the undisputed fact that Respondent did not produce those records when so requested by the Department, the record also establishes that Respondent was not an "employer" for Chapter 440 purposes, and therefore, as a matter of law, was under no obligation to keep or produce those records. Sections 440.107(3) and (5), Florida Statutes, and Rule 69L-6.015, Florida Administrative Code, are, by their own terms, applicable only to those who fall within the statutory definition of "employer" for Chapter 440 purposes. As the ALJ found, and as the record establishes by competent, substantial evidence, Respondent did not fit within that definition, and therefore was under no obligation to keep or produce such records because Chapter 440 imposes no obligations on anyone

who is not an "employer". Larry K. Meyer, P.A., v. Kimberly, 765 So.2d 951, 953 (Fla. 1st DCA 2000) Likewise, the imputation of payroll to Respondent for penalty purposes was ultimately inappropriate; imputation is to be performed only upon an "employer", a statutory category to which Respondent did not belong. A review of the record shows that the challenged conclusions are supported by competent, substantial evidence, and are anchored in established and controlling case law. Accordingly, Petitioner's second exception is rejected.

Under the particular record facts of this case, it is understandable that the Department's field investigator concluded that Respondent was not in compliance with Chapter 440. From all outward appearances, and individual statements then taken from the four individuals and Respondent, Respondent apparently had four non-insured men in his "employment" on a particular job-site on June 6, 2006. Thus, there was a reasonable basis for the initial issuance of the Stop Work Order. Given those circumstances, the division took the next logical step by demanding that Respondent produce business records that would establish the actual employment status of those four individuals. This, Respondent was unwilling or unable to do. That unwillingness or inability deprived Petitioner of the opportunity to objectively determine the actual employment status of the four individuals, which would determine the issue of Respondent's compliance with Chapter 440. Consequently, the only information available to the division on this question *at the time it had to make a decision as to whether to proceed* was the unsupported statements given by the four individuals and Respondent to the effect that that they all worked for Respondent, albeit at indeterminate times. Thus, at that critical juncture, the division lacked any documentary proof that would permit the division to actually ascertain whether Respondent was in

compliance with Chapter 440, and had little choice but to proceed with the stop work order process. That decision was reasonable and not inappropriate at the time it was taken, especially in view of the expressed legislative finding that an employer's failure to comply with the workers' compensation coverage requirements of Ch. 440, Fla. Stat., poses an immediate danger to the public health, safety, and welfare. [Section 440.107(1), Fla. Stat.]

However, established case law interpreting the word "employment", which word, in turn, is included within the statutory definition of the term "employer" and thus defines that term, holds that the "employment" must be "pursuant to some constant or periodic custom resulting in a numerical pattern of employment that becomes the rule and not the exception." Mathers v. Sellers, 113 So.2d 443,445 (Fla. 1st DCA 1959). See, also, Subterranean Circus v. Lewis, 319 So.2d 600, 602 (Fla. 1st DCA 1975); Sudler v. Sun Oil Company, 227 So.2d 482, 484 (Fla. 1969); Randell Inc., v. Chism, 404 So.2d 175, 177 (Fla. 1st DCA 1981). More succinctly, to be an "employer" for Chapter 440 purposes, one must *customarily* have four or more persons in his, her, or its "employment". Here, the record contains competent, substantial evidence to support the ALJ's findings and conclusions, arrived at after the benefit of a full evidentiary hearing, that having four or more men in his employment was not Respondent's constant or periodic custom, but was a temporary exception to that custom caused by a caprice of nature. Therefore, while the investigator's conclusions and the division's actions were initially reasonable and appropriate, a final determination of Respondent's status as a Chapter 440 "employer" must be made in light of established case law addressing that question. The ALJ correctly applied that established case law to the particular facts of this matter.

THEREFORE, IT IS HEREBY ORDERED that the Findings of Fact made by the Administrative Law Judge are adopted as the Department's Findings of Fact, and that the Conclusions of Law reached by the Administrative Law Judge are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department, and that the Amended Order of Penalty Assessment issued to Respondent on June 27, 2006 and the Stop work Order issued on June 6, 2006 are hereby rescinded.

DONE AND ORDERED this 23rd day of February 2007.

James R. Cassady
Chief of Staff

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## NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal within thirty (30) days of rendition of this Order.