STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENNY NOLAN, d/b/a GREAT SOUTHERN TREE SERVICE, Petitioner, vs. DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION, Respondent.	)	Case No. 06-2785

RECOMMENDED ORDER

A hearing was held pursuant to notice, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings, on October 5, 2006, via video-teleconference in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: David C. Hawkins, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Kenneth B. Wright, Esquire
Bledsoe, Jacobsen, Schmidt, Wright, Wilkinson, & Lang
1301 Riverplace Boulevard, Suite 1818
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue is whether The Department of Financial Services properly imposed a Stop Work Order and Amended Order of Penalty

Assessment pursuant to the requirements of Chapter 440, Florida Statutes.

PRELIMINARY STATEMENT

On June 6, 2006, the Department of Financial Services, Division of Workers' Compensation (Division) issued a Stop Work Order and Order of Penalty Assessment to Petitioner, Kenny Nolan d/b/a Great Southern Tree Service. On June 27, 2006, the Division issued an Amended Order of Penalty Assessment in the amount of $272,948.96. Respondent contested the Stop Work Order and Amended Penalty Assessment, and requested an administrative hearing. The matter was forwarded to the Division of Administrative Hearings on or about August 3, 2006.

A Notice of Hearing was issued scheduling the hearing for October 5, 2006. On September 29, 2006, the Division filed a Motion to Amend Administrative Charges, seeking to further amend the Order of Penalty Assessment by increasing the amount by $47,000. Petitioner opposed the motion. Argument was heard on the motion at the commencement of the hearing. Upon consideration of the motion, the response, and arguments of counsel, the motion was denied.

At hearing, Petitioner presented the testimony of Kenny Nolan, David Soloman, and Eric Kane. Petitioner offered Exhibits numbered 1 and 2, which were admitted into evidence.

Respondent presented the testimony of Michael Robinson and Andrew Sabolic. Respondent offered Exhibits numbered 1 through 5 and 8 through 13, which were admitted into evidence.
A one-volume Transcript was filed on October 23 2006. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

1. The Division is charged with the regulation of workers' compensation insurance in the State of Florida.

2. Petitioner Kenny Nolan, d/b/a/ Great Southern Tree Service, is a sole proprietor located in Jacksonville, Florida, and is engaged in the business of cutting trees, which is not a construction activity.

3. Michael Robinson is an investigator employed by the Division. His duties include making site visits at locations where work is being conducted and determining whether the employers in the state are in compliance with the requirements of the workers' compensation law and related rules.

4. On June 6, 2006, Mr. Robinson visited a job site in a subdivision in Jacksonville, Florida, and observed five individuals at the residential work site.

5. Mr. Robinson interviewed the individuals and, based upon these interviews, determined that four of the individuals worked for Mr. Nolan: Chad Pasanen, David Soloman, Michael Walton, and Eric Kane. None of these workers had a workers' compensation exemption.

6. Mr. Robinson also completed a Field Interview Worksheet on June 6, 2006, when interviewing the four workers. Mr. Robinson wrote on the interview worksheet that Mr. Pasanen worked for Mr. Nolan for three weeks with a daily basis of pay and that Mr. Walton worked for Mr. Nolan for two weeks with a daily basis of pay. The interview worksheet has no entry for the length of time Mr. Solomon worked for Mr. Nolan but does indicate he was paid by the job. The portion of the interview worksheet regarding Mr. Kane is not in evidence.

7. Mr. Robinson checked the database in the Coverage and Compliance Automated System and found no proof of coverage nor an exemption for Mr. Nolan.

8. After conferring with his supervisor, Mr. Robinson issued a Stop-Work Order and Order of Penalty Assessment to Petitioner on June 6, 2006, along with a request for business records for the purpose of calculating a penalty for lack of coverage for the period June 6, 2003 through June 6, 2006. The request for business records instructed Mr. Nolan to produce business records within five days.

9. Mr. Nolan did not produce business records as requested.

10. On June 27, 2006, Mr. Robinson issued an Amended Order of Penalty Assessment to Petitioner for $272,948.96. Attached to the Amended Order of Penalty Assessment is a penalty worksheet with a list of names under the heading, "Employee Name," listing the names of Chad Pasanen, David Solomon, Michael Walton and Eric Kane.

11. The amount of the penalty was imputed using the statewide weekly average wage that was in effect at the time of the issuance of the stop-work order. Through imputation of payroll for the four employees, the Department calculated a penalty for the time period of October 1, 2003 through June 6, 2006. Using rates from an approved manual, Mr. Robinson assigned a class code to the type of work performed by Petitioner and multiplied the approved manual rate with the imputed payroll per one hundred dollars, then multiplied all by 1.5. Penalties are calculated by determining the premium amount the employer would have paid based on his or her Florida payroll and multiplying by a factor of 1.5. The payroll was imputed back to October 1, 2003. For the period prior to October 1, 2003, Mr. Robinson assessed a penalty of $100 per day for each calendar day of noncompliance. The portion of the penalty

attributable to the period June 6, 2003 through September 30, 2003, is $11,600.00.

Respondent's Business

12. Mr. Nolan started the business, Great Southern Tree Service, in February or March 2005, as a sole proprietor. Mr. Nolan was not in business prior to early 2005 and did not employ anyone in 2003 or 2004.

13. At the inception of his tree trimming business, Mr. Nolan's brother worked for Mr. Nolan for two to three months until his brother's health rendered him unable to continue working for Mr. Nolan.

14. Mr. Nolan subsequently worked with Christopher Wilcox until December 2005, when Mr. Wilcox was in an automobile accident and became unable to work.

15. After Wilcox was injured in December 2005, Mr. Nolan did not have any employees for the remainder of the winter. Only Mr. Nolan's brother and Christopher Wilcox worked with Mr. Nolan in 2005.

16. The nature of the tree trimming business is seasonal. Mr. Nolan obtained work sporadically. Typically, he had jobs two or three times a week. It is busiest in the spring and summer and slowest during the fall and winter months.

17. In March 2006, Mr. Nolan was approached by David Solomon who was looking for work. Mr. Solomon worked for Mr. Nolan "maybe twice a week" and possibly three times a week when he was "lucky."

18. Mr. Nolan worked exclusively for residential customers. He obtained business by knocking on doors and handing out business cards. When he was paid by his customers, he immediately paid the men who were helping him. He was usually paid in cash. In the instances when he was paid by a check, he would take his employees to the bank, where he would cash the check and pay off his workers.

19. Eric Kane also began working for Nolan in March 2006. Like Mr. Soloman, he also worked two to three days a week for Mr. Nolan.

20. Kane was at the jobsite on the day Mr. Robinson made the site visit, but was not working that day. He was sitting off to the side and was "just hanging out" with the other men. According to Mr. Kane, Mr. Robinson did not ask him any questions.

21. In May 2006, a storm or small tornado hit an area of Jacksonville called Ortega. The resulting tree damage temporarily enabled Mr. Nolan to get more work.

22. At that point, Mr. Nolan hired Chad Pasanen. Mr. Nolan estimates that Mr. Pasanen worked for him for about three weeks before the site visit by Mr. Robinson.

23. Mr. Pasanen previously worked for Asplundh Tree Expert Company. One of his paycheck stubs establishes that he worked for Asplundh as late as April 8, 2006.

24. Mr. Nolan also hired Michael Walton in May 2006. Mr. Walton previously worked for Seaborn Construction Company. A paycheck stub establishes that he worked for Seaborn as late as April 26, 2006. Mr. Walton sporadically worked for Mr. Nolan for about two weeks prior to the site visit.

25. The Division did not count Mr. Nolan as an employee for purposes of calculating the penalty assessment.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

27. Administrative fines are penal in nature. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern, Inc., 670 So. 2d 932 (Fla. 1996). Therefore, the Division bears the burden of proof herein by clear and convincing evidence.

28. Section 440.10(1), Florida Statutes, requires every employer coming within the provisions of Chapter 440 to secure coverage under that chapter.

29. Subsection 440.02(17), Florida Statutes, reads in pertinent part as follows:

> 440.02. Definitions.--
>
> (17)(a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her.
>
> (b) "Employment" includes:
>
> * * *
>
> 2. <u>All private employments in which four or more employees are employed by the same employer</u> or, with respect to the construction industry, all private employment in which one or more employees are employed by the same employer. (emphasis supplied)

30. Section 440.107, Florida Statutes, authorizes the Division to issue stop-work orders and penalty assessment orders in its enforcement of workers' compensation coverage requirements, and reads in pertinent part:

> (7)(d)1. In addition to any penalty, stop-work order, or injunction, the department shall assess <u>against any employer</u> who has failed to secure the payment of compensation as required by this chapter a penalty equal to 1.5 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 3-year period or $1,000, whichever is greater.

* * *

(e) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5.

31. Florida Administrative Code Rule 69L-6.028 reads in pertinent part:

(1) In the event an employer fails to provide business records sufficient for the department to determine the employer's payroll for the period requested for the calculation of the penalty pursuant to Section 440.107(7)(e), F.S., the department shall impute payroll at any time after the expiration of fifteen business days after receipt by the employer of a written request to produce such business records.

(2) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty pursuant to Section 440.107(7)(d), F.S., the imputed weekly payroll for each employee, corporate officer, sole proprietor or partner for the portion of the period of the employer's non-compliance occurring on or after October 1, 2003, shall be calculated as follows:

(a) . . . [F]or . . . each employee identified by the department as an employee of such employer at any time during the period of the employer's non-compliance, the imputed weekly payroll for each week of the employer's non-compliance for each such employee shall be the statewide average weekly wage . . . that is in effect at the time the stop work order was issued to the employer, multiplied by 1.5. Employees include sole proprietors and partners in a partnership.

* * *

(c) 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 shall be prorated from the imputed weekly payroll for a full week.

* * *

(4) Where periods of the employer's non-compliance occurred prior to October 1, 2003, and the employer fails to provide business records sufficient to enable the department to determine the employer's payroll for periods of non-compliance prior to October 1, 2003, for purposes of calculating the penalty to be assessed against the employer for periods of non-compliance prior to October 1, 2003, the department shall assess against the employer a penalty of $100 per day for each and every calendar day in the period of non-compliance occurring prior to October 1, 2003, the employer was not in compliance, pursuant to Section 440.107(5), F.S. (2002). (emphasis supplied)

32. In Meyer v. Kimberly, 765 So. 2d 951 (Fla. 1st DCA 2000), the Court addresses the definition of "employer" as it relates to persons not in the construction industry:

> By its terms, the statute imposes no obligation upon one who is not an "employer," and a private employer with less than four employees, who engages in business outside the construction industry is, by legislative definition, not an "employer" for purposes of chapter 440. . . . Chapter 440 automatically relieves such employers of any obligation to secure compensation, and no separate election is required.
>
> 765 So. 2d 951 at 952 and 953.

33. To be subject to the workers' compensation requirements of Chapter 440, including the requirement to maintain records sufficient for the Division to determine an employer's payroll for periods of non-compliance, an individual who is not in the construction business must employ four persons. Meyer v. Kimberly, supra; § 440.02(17)(b)2., Fla. Stat.

34. Clearly, Mr. Nolan was not an employer before he started his business in early 2005. Thus, all of the proposed penalty attributed to the time period June 6, 2003 until when he started his business in February or March 2005, has no basis in law or fact.

35. During 2005, Mr. Nolan worked only with his brother and Christopher Wilcox. Therefore, he was not an employer for purposes of Chapter 440 in 2005, as he had fewer than four employees during that year. Consequently, the proposed penalty attributed to all of 2005 is not supported by the evidence.

36. In March 2006, both Mr. Soloman and Mr. Kane began working for Mr. Nolan two to three days a week. He only had two employees during January and February 2006, and, therefore, was not an employer during that time for purposes of Chapter 440. Thus, the proposed penalty for January and February, 2006, is not supported by the evidence.

37. From March until May 2006, when Mr. Pasanen and Mr. Walton began working for Mr. Nolan on a part-time basis, Mr. Nolan only had two employees, Mr. Soloman and Mr. Kane. Therefore, Mr. Nolan was not an employer from March until May, 2006, for purposes of Chapter 440. Thus, the amount of the proposed assessment for March and April 2006 is not supported by the evidence.

38. The only remaining question is whether or not Mr. Nolan was an employer for purposes of Chapter 440 from May 2006 until June 6, 2006, the day of Mr. Robinson's site visit.

39. Both Mr. Soloman and Mr. Kane worked occasionally for Mr. Nolan. All of the employees interviewed were paid on a daily or job basis, which is consistent with occasional or

sporadic employment. At the time of the site visit, Mr. Pasanen had worked for Mr. Nolan for three weeks and Mr. Walton had worked for Mr. Nolan for two weeks. Both Pasanen and Walton worked two or three days a week. Both Pasanen and Walton began working for Mr. Nolan as a result of an event, i.e. a storm that caused tree damage.

40. Courts have interpreted "employment" as used in Section 440.02(17)(b)2., Florida Statutes, as follows:

> . . . an occasional increase in the number of workmen for some unusual occasion does not automatically result in application of the Act. [citations omitted] The prevailing theory is that liability of an employer should not vary from day to day according to the number of persons in his employ each day, but should be governed by the established mode or plan of his business or operation, and from that determine if he regularly and customarily employs the requisite number. . . . In order, therefore, to bring employment within the purview of our Act, it was necessary to show the existence of an established more or plan of hiring [four] [1/] or more persons 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, 444-445 (Fla. 1st DCA 1959); Accord Subterranean Circus v. Lewis, 319 So. 2d 600 (Fla. 1st DCA 1975).

41. Applying the reasoning of the Mathers and Subterranean Circus opinions, to the facts in evidence, the undersigned is not persuaded that Mr. Nolan was an employer for purposes of Chapter 440 from May until June 6, 2006. Thus, under the rationale of this case law, the proposed penalty for that period of time is not supported by the evidence.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is,

RECOMMENDED:

That the Division of Workers' Compensation enter a Final Order rescinding the Amended Order of Penalty Assessment issued June 27, 2006, and the Stop Work Order issued to Petitioner on June 6, 2006.

DONE AND ENTERED this 28th day of November, 2006, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2006.

ENDNOTE

[1/] Section 440.02, Florida Statutes, was amended in 1990, increasing the number of employees from three to four in the definition of "employment". At that time, the definition was found in Section 440.02(15), Florida Statutes (1989). s. 9, Ch. 90-201, Laws of Florida.

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.