

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KENNY NOLAN, d/b/a GREAT )  
SOUTHERN TREE SERVICE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-1479F  
 )  
DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF )  
WORKERS' COMPENSATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

A hearing was held pursuant to notice on July 13, 2007, via video teleconference with locations in Tallahassee and Jacksonville, Florida, before Barbara J. Staros, a duly-appointed Administrative Law Judge.

APPEARANCES

For Petitioner: Kenneth B. Wright, Esquire  
Bledsoe, Jacobson, Schmidt,  
Wright, Wilkinson & Long  
1301 Riverplace Boulevard, Suite 1818  
Post Office Drawer 1759  
Jacksonville, Florida 32207

For Respondent: Colin Roopnarine, Esquire  
Thomas Duffy, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to an award of attorney's fees pursuant to Section 57.111, Florida Statutes.<sup>1/</sup>

PRELIMINARY STATEMENT

On March 30, 2007, Petitioner, Kenny Nolan, d/b/a Great Southern Tree Service (the business will hereinafter be referred to as Nolan), filed a Petition for Attorney's Fees Pursuant to the Florida Equal Access to Justice Act (Petition), an Affidavit of Attorney's Fees, and supporting fee statement. The Petition requests an award of fees incurred by Petitioner in litigating the underlying case styled, Kenny Nolan, d/b/a Great Southern Tree Service v. Department of Financial Services, Division of Workers' Compensation, DOAH Case No. 06-2785 (Recommended Order entered November 28, 2006; Final Order issued February 23, 2007).

On April 23, 2007, Respondent, Department of Financial Services, Division of Worker's Compensation (Department), filed a Response to Petition for Attorney's Fees (Response). In the Response, the Department acknowledged that Nolan is the prevailing party in the underlying case and asserted that the Department did not dispute the reasonableness of the fees. The Department asserts that its actions were substantially justified and, therefore, an award of attorney's fees would be unjust.

Each party requested an evidentiary hearing.

At the commencement of the hearing, the Department stipulated that Petitioner is a small business party for purposes of Section 57.111, Florida Statutes.

At hearing, Respondent presented the testimony of Michael Robinson and Robert Lambert. Respondent's Exhibits 1 through 11 were admitted into evidence, which included the transcript of the final hearing of the underlying proceeding. Petitioner did not offer any witnesses or exhibits. The parties timely filed Proposed Final Orders, which have been considered in preparation of this Final Order.

#### FINDINGS OF FACT

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

2. The Department issued a Stop Work Order to Petitioner on June 6, 2006. On June 27, 2006, the Department issued an Amended Order of Penalty Assessment, assessing \$272,948.96 in penalties against Petitioner.

3. Petitioner timely challenged the Stop Work Order and Amended Order of Penalty Assessment and requested an administrative hearing. A formal hearing was held on October 5, 2006.

4. The Recommended Order, which was entered on November 28, 2006, recommended that the Department enter a final order rescinding the Amended Order of Penalty Assessment and the Stop Work Order.

5. On February 23, 2007, a Final Order was issued by the Agency adopting the findings of fact and conclusions of law set forth in the Recommended Order.

6. On March 30, 2007, Petitioner filed the Petition with a supporting affidavit and fee statement which initiated the instant proceeding.

7. In the Petition, Petitioner seeks relief under the Florida Equal Access to Justice Act, Section 57.111, Florida Statutes.

8. There is no dispute that Petitioner is the prevailing party in the underlying case.

9. Petitioner seeks attorney's fees in the amount of \$20,197.50. There is no dispute as to the reasonableness of the fees sought.

10. At the time the underlying action was initiated, Petitioner was a sole proprietor located in Jacksonville, Florida, which engaged in the business of cutting trees. There is no dispute that Petitioner is a small business party for purposes of Subsection 57.111(4)(a), Florida Statutes.

11. On June 6, 2006, the Department's investigator, Michael Robinson, conducted a site visit at a job site where he observed five individuals, four of whom were involved in tree cutting activities.

12. During his June 6, 2006, site visit, Robinson interviewed the four individuals and recorded their responses on a field interview worksheet. The workers identified Nolan as their employer, and answered Mr. Robinson's questions regarding how long they had been employed by Nolan, and their basis of pay. One of the workers informed Mr. Robinson that he had been employed by Nolan for two weeks; a second worker informed him that he had worked for Nolan for three weeks. Both of these workers informed Mr. Robinson that they were paid on a daily basis. A third worker informed Mr. Robinson that he was paid by the job. The workers were compliant and responsive to Mr. Robinson's inquiries.

13. Mr. Nolan was not at the jobsite at the time of Mr. Robinson's site visit, but Mr. Robinson obtained his phone number, called, and left a message. Mr. Nolan promptly returned the call. Mr. Nolan was also compliant and responsive to Mr. Robinson's questions. Mr. Nolan acknowledged to Mr. Robinson that the four individuals interviewed by Mr. Robinson were his employees and that he had no workers' compensation insurance. Mr. Nolan also informed Mr. Robinson

that his business was a non-construction business entity and was not required to carry workers' compensation insurance.

Mr. Robinson told Mr. Nolan that he was required to have workers' compensation insurance.

14. Mr. Robinson also searched the Coverage and Compliance Automated System (CCAS) and found no proof of coverage nor an exemption for Nolan.

#### The Stop Work Order

15. On the same day as the site visit, Mr. Robinson conferred with his supervisor, Robert Lambert, to discuss the issuance of a stop work order. Mr. Robinson conveyed to Mr. Lambert that Nolan had four employees who were non-construction workers, and that there was no workers' compensation coverage. Mr. Robinson did not convey the short duration of employment of two employees or that they were paid daily or by the job.

16. Based upon this information, Mr. Lambert immediately approved a Stop Work Order, which was issued that day. Mr. Robinson also issued a request for business records to Nolan for the purpose of calculating a penalty for lack of coverage.

17. Paragraphs 12 through 24 of the Recommended Order, adopted within the Final Order, found that Mr. Nolan started the business, Great Southern Tree Service, in February or March 2005, as a sole proprietor; that he did not employ anyone in

2003 or 2004; that the nature of the tree trimming business is seasonal and sporadic; that Nolan had fewer than four employees during 2005; and that the only time Nolan had four employees was from May 2006 until June 6, 2006, when two workers worked occasionally for Nolan due to tree damage in the Jacksonville area from a storm.

18. Nolan did not produce business records as requested by the Department because there were no such records to produce.

The Amended Order of Penalty Assessment

19. On June 27, 2006, an Amended Order of Penalty Assessment (Amended Order) was issued to Nolan in the amount of \$272,948.96, for the time period June 6, 2003 to June 6, 2006. Attached to the Amended Order is a worksheet with the names of the four workers interviewed by Mr. Robinson on June 6, 2006. Using a statutory formula, Mr. Robinson imputed a penalty for the period October 1, 2003 to June 6, 2006, and a penalty of \$100 per day for the time period between June 6, 2003 and September 30, 2003.

20. At the time of the issuance of the Stop Work Order and the Order of Penalty Assessment, Mr. Robinson and Mr. Lambert were aware of the statutory requirement that to be considered an employer under the workers' compensation law, four or more persons must be employed by the same private non-construction employer. However, neither Mr. Robinson nor Mr. Lambert was

aware of well-established case law holding that the elements of regularity, continuity, common employment, and duration, should be considered in determining the applicability of the law, and that an occasional increase in the number of workers for some unusual occasion does not automatically result in application of the workers' compensation law.<sup>2/</sup>

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 57.111 and 120.57, Fla. Stat.

22. Attorney's fees have been sought by Petitioner in this matter pursuant to Section 57.111, Florida Statutes, the Equal Access to Justice Act.

23. The legislative intent for enacting the Equal Access to Justice Act is provided in Subsection 57.111(2), Florida Statutes, which provides the following:

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain



situations an award of attorney's fees and costs against the state.

24. In pertinent part, Subsection 57.111(4)(a), Florida Statutes, provides the following:

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. (emphasis supplied)

25. Subsection 57.111(3)(c), Florida Statutes, defines a "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

26. Petitioner prevailed in the underlying proceeding. There is no dispute that Petitioner is a small business party for purposes of Subsection 57.111(3), Florida Statutes. Thus,

Petitioner is a prevailing small business party for purposes of Subsection 57.111(3)(c), Florida Statutes.

27. The term "substantially justified" is defined in Subsection 57.111(3)(e), Florida Statutes, as follows:

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

28. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying action and that it was a small business party at the time the action was initiated. Once the party requesting the award has met this burden, the burden shifts to the agency to establish that its actions in instituting the proceeding were substantially justified or that special circumstances exist that would make an award of attorney's fees and costs to Petitioner unjust. Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

29. As there is no dispute that Petitioner is a prevailing small business party, the Department bears the burden of establishing that its actions in initiating this proceeding were substantially justified. The "substantially justified" standard

falls somewhere between "the no justiciable issue standard of Section 57.105 . . . and an automatic award of fees to a prevailing party." Id.

30. To be substantially justified, the government agency must have a solid basis in both fact and law in its actions initiating the underlying case. Casa Febe Retirement Home, Inc. v. Agency for Health Care Administration, 892 So. 2d 1103 (Fla. 2nd DCA 2004). In order to be substantially justified, the agency must, at the very least, have a working knowledge of the applicable statutes under which it is proceeding. Helmy, supra, 707 So. 2d 366, 370. It follows that the agency must have a working knowledge of the case law construing the statutes under which it is proceeding.

31. The actions in question are the issuance of the Stop Work Order and the Amended Order.

32. As for the Stop Work Order, Section 440.107(7)(a), Florida Statutes, requires the Department to issue a stop work order within 72 hours of determining that an employer who is required to secure workers' compensation coverage has not done so. The Stop Work Order was issued immediately, despite Nolan's assertion that he was not required to carry workers' compensation coverage and despite receiving the information from the employees interviewed regarding the short duration of their employment, and that three of the four interviewed were paid on

a daily or "by the job" basis. Other than requesting business records which Nolan was not required to keep, no further inquiry was undertaken during the 72-hour period to determine if Nolan was subject to the law.<sup>3/</sup>

33. As for the Amended Order, the Department argues that because of Nolan's lack of business records, Mr. Robinson was unable to determine the length of time Nolan had been in business, and could not determine whether the employees were sporadic, intermittent, or constant.

34. However, since Nolan was not subject to the requirements of the workers' compensation law, he was not required to maintain the records requested by the Department.

35. In analyzing whether the Department had a solid basis in fact and law, the analysis becomes intertwined. That is, Mr. Robinson had the information that two of the necessary four employees had worked for Nolan for a brief period of time and were paid in a manner to indicate occasional or intermittent employment. However, the lack of knowledge of the significance of the case law interpreting the applicable statutes upon which the Department proceeded was critical and resulted in the Department's actions not having a solid basis in law at the time its actions were initiated. That is, knowledge of this case law would have alerted the Department that the workers' factual answers to Mr. Robinson's questions had a legal significance

that needed to be explored before the Stop Work Order was issued and certainly before the Amended Order was issued three weeks later.

36. Subsection 57.111(4)(a), Florida Statutes, also affords the Agency an opportunity to avoid attorney's fees if special circumstances exist which would make such an award unjust. The Department bears the burden of showing that special circumstances exist. The Department's response did not specifically address the "special circumstances" prong of Subsection 57.111(4), Florida Statutes, except to assert that the award of fees would be unjust because the Department believes that its actions were substantially justified. The Department did not meet its burden in this regard.

37. Based upon the foregoing, Petitioner is entitled to an award of attorney's fees for the underlying action. The amount of fees requested, \$20,197.50, is reasonable. Petitioner did not request that any taxable costs be reimbursed.

#### ORDER

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

ORDERED that Petitioner's Petition and Application for Attorney's Fees Pursuant to the Florida Equal Access to Justice Act is granted. Respondent shall pay to Petitioner within 30 days of the date of this Final Order the sum of \$20,197.50

for attorney's fees incurred by Petitioner in DOAH Case  
No. 06-2785.

DONE AND ORDERED this 3rd day of October, 2007, in  
Tallahassee, Leon County, Florida.

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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 3rd day of October, 2007.

ENDNOTES

1/ Unless otherwise indicated, all statutory references in this  
Final Order are to the 2006 version of the Florida Statutes.

2/ Mathers v. Sellers, 113 So. 2d 443 (Fla. 1st DCA 1959);  
Subterranean Circus v. Lewis, 319 So. 2d 600 (Fla. 1st DCA  
1975).

3/ The Department is authorized to administer oaths, issue  
subpoenas, and use other methods of investigation. §440.107(3),  
Fla. Stat.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.