

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

REX NEIL, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-4129  
 )  
 DEPARTMENT OF FINANCIAL )  
 SERVICES, DIVISION OF WORKERS' )  
 COMPENSATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 27, 2008, in Sarasota, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William Clay Rexford, pro se  
Rex Neil, Inc.  
1244 North Brink Avenue  
Sarasota, Florida 34237

For Respondent: Thomas H. Duffy, Esquire  
Department of Financial Services  
200 East Gaines Street, 6th Floor  
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent had workers' compensation coverage for his employees pursuant to Chapter 440,

Florida Statutes (2008), specifically whether Tabitha Rexford was an employee, and, if so, what penalty should be assessed.

PRELIMINARY STATEMENT

On May 14, 2008, Respondent, Department of Financial Services, Division of Workers' Compensation (hereinafter "DFS"), did a random compliance check at a residence where William Clay Rexford (hereinafter "Neil") was engaged in the installation of wood flooring. A person apparently working with Neil was deemed by DFS not to have workers' compensation coverage as required by law.

On the same date as the compliance check, DFS prepared a Stop-Work Order and Order of Penalty Assessment directing Petitioner to cease work and imposing a fine. This was followed by an Amended Order of Penalty Assessment, then, by yet another Amended Order of Penalty Assessment somewhat reducing the amount of the fine.

Petitioner filed a Petition for Hearing under Sections 120.569 and 120.57, Florida Statutes (2008), which was transmitted to the Division of Administrative Hearings on August 21, 2008, and assigned to the undersigned Administrative Law Judge.

At the final hearing, Neil testified on his own behalf and called one additional witness: Tabitha Rexford, his wife. Neil offered no exhibits into evidence. DFS called two witnesses:

Carol Porter, supervisor of District 7 Workers' Compensation Bureau of Compliance; and Colleen Wharton, investigator for DFS. DFS offered Exhibits 1 through 9, which were admitted into evidence.

At the close of the evidentiary portion of the final hearing, the parties were given ten days from the filing of the hearing transcript within which to file their respective proposed recommended orders. A one-volume hearing Transcript was filed on November 5, 2008. Each party timely submitted a Proposed Recommended Order. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

Unless otherwise stated, all references to Florida Statutes herein shall be to the 2008 version.

#### FINDINGS OF FACT

1. Neil owns and operates a business engaged in the practice of installing flooring, including carpets, tile, hardwood, and the like. Neil is a sole proprietor with no one else on his payroll. The flooring work is performed solely by Neil, individually, and he picks up and delivers his own supplies and materials.

2. Neil has been involved in the flooring business for approximately 30 years and has operated as Rex Neil, Inc., since 2003. There have never been any employees of Rex Neil, Inc.,

other than Neil himself. Neil is the only officer listed for Rex Neil, Inc., at the Division of Corporations.

3. On May 14, 2008, Neil was involved in the installation of hardwood floors at a newly constructed single-family residence in Sarasota County. Neil had recently injured his back, so his wife (Tabitha) had accompanied him to this particular job to assist with the unloading of materials. It was, apparently, the first and only time Tabitha had joined her husband at a job site.

4. On the date in question, an investigator from DFS (Colleen Wharton) conducted a compliance investigation at the house where Petitioner was working. Wharton spoke to other individuals working in the house; they directed her to another room in the house where Neil was working. In that room, Wharton witnessed Tabitha, dressed in work clothes and wearing knee pads, putting cardboard down on freshly lain wood floors. Wharton surmised that Tabitha was working for and/or with Neil based upon Tabitha's dress (work clothes) and her activities (laying cardboard on the floor).

5. When Wharton approached him, Neil mistakenly believed she was an officer from the Immigration and Naturalization Service. (Wharton had, moments before, been speaking with a group of Hispanic workers outside the house.) Wharton identified herself as a representative of DFS, but Neil refused

to acknowledge her presence. For some reason, Neil was "ugly" with Wharton and did not demonstrate any respect for her position.

6. After Wharton established her credentials, Neil properly identified himself and stated that he was doing the flooring work as a subcontractor for Carpet Home. Neil would not identify the name of his company, but Wharton was able to ascertain that from the general contractor. Neil told Wharton he had workers' compensation coverage when, in fact, he had an exemption from coverage; Tabitha did not have an exemption.

7. Wharton determined from the DFS database that Rex Neil, Inc., was a valid and current entity and that Neil had an exemption from coverage. Wharton noted that Neil was the only officer of the entity and that Tabitha was not listed as an officer or agent of the entity.

8. Wharton determined that although not listed as such, Tabitha was operating as an employee of Rex Neil, Inc. This assumption was bolstered by the fact that Tabitha had been issued checks from Rex Neil, Inc., on a regular basis. Also, Wharton believes Tabitha admitted working for her husband since December 2007. Tabitha maintains that the checks written to her were representative of the amounts owed to Neil for his work and were issued to Tabitha only so she would have access to the money to pay for family expenses. It appears no checks were

written to Neil directly, but that his compensation was represented by the checks written to Tabitha. Tabitha testified under oath that she had not helped her husband, except for the day of the investigation. Her testimony was credible.

9. Rex Neil, Inc.'s, business was identified in the Scopes Manual as Code 5478: Carpet or flooring installation. Wharton used the assigned rate for this code and it was then compared to the designated insurance rate. There were no records available concerning Tabitha's wage, so a wage of \$746 per week was imputed to her (based on the Statewide Average Weekly Wage scale). Once the amount of unpaid premiums for that wage was determined, the figure was multiplied by 1.5 to ascertain the penalty amount. The amount of penalty calculated by DFS was \$38,858.81. A Second Amended Order of Penalty Assessment was issued reducing the penalty to \$21,690.61 due to further review of relevant records.

10. The Stop-Work Order was left with Neil at the home where the investigation took place. Neil refused to accept it, so the Order was laid on the floor next to Neil. An Amended Order of Penalty Assessment was ultimately served on Neil on June 20, 2008, by Porter. In fact, the Order was served on Neil when he arrived at the DFS office to pick up some paperwork related to this matter. Neil did not believe the penalty was

fair based on the fact that Tabitha had only worked with him for one single day.

11. Tabitha and Neil testified that the May 14, 2008, date was the only time Tabitha had been involved with helping her husband as a worker. Their testimony is credible as to that fact, and it is accepted. Wharton's one-time observation of Tabitha laying cardboard on the flooring is not sufficient to establish that Tabitha was an employee. There was no non-hearsay evidence that Tabitha claimed to have worked with Neil since December 2007.

12. However, it is equally clear that on the day in question, Tabitha was indeed providing some sort of assistance to her husband in an employee-like capacity. She was, on that date, essentially an employee.

13. The absence of any Rex Neil, Inc., checks written directly to Neil is clear and convincing evidence that his personal remuneration from the company was being paid directly to his wife, rather than going to him first. The checks written to Tabitha did not include any reference in the memo line that the checks were payroll for her or Neil. It is, however, inconceivable that Neil was working for free.

14. Neil claims retaliation and that DFS (through Wharton) was punishing him for his disrespectful behavior. There is no evidence of such retaliation or the existence of a personal

vendetta, although it is clear Neil can be less than diplomatic in his dealings with authority figures.

15. Petitioner has not been engaged in business since the date the Stop-Work Order was issued. However, Neil has worked personally on some jobs since that time.

#### CONCLUSIONS OF LAW

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

17. The Department has the burden of proof in this case in that the administrative fines being proposed are penal in nature. The standard of proof is clear and convincing evidence. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

18. Pursuant to Sections 440.10 and 440.38, Florida Statutes, every employer is required to secure the payment of workers' compensation for the benefit of its employees, unless the employee is exempted or excluded under Chapter 440, Florida Statutes. Strict compliance with the workers' compensation law is required by the employer. See C & L Trucking v. Corbitt, 546 So. 2d 1185, 1187 (Fla. 5th DCA 1989).



19. Subsection 440.107(7)(a), Florida Statutes, states, in relevant part:

Whenever the department determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this chapter has failed to secure the payment of workers' compensation required by this chapter . . . such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the department of a stop-work order on the employer, requiring the cessation of all business operations. If the department makes such a determination, the department shall issue a stop-work order within 72 hours. . . .

The Department's issuance of the Stop-Work Order was properly done in this case.

20. "Employee" is defined in Subsection 440.02(15), Florida Statutes, as:

[A]ny 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, and includes, but is not limited to, aliens and minors.

21. An employee does not include:

A volunteer, except a volunteer worker for the state or a county, municipality, or other governmental entity. A person who does not receive monetary remuneration for services is presumed to be a volunteer unless there is substantial evidence that a

valuable consideration was intended by both employer and employee. . . .

§ 440.02(15)(d)6., Fla. Stat.

22. The record is unclear as to whether Tabitha received remuneration for the day she admittedly worked for Neil. Thus, Tabitha's status as either an employee or a volunteer was not resolved by the evidence.

23. "Employment . . . means any service performed by an employee for the person employing him or her." § 440.02(17)(a), Fla. Stat. Clearly, Tabitha performed some service to Neil as evidenced by Wharton's observation and Tabitha's own admission.

24. Persons are considered to be employees of an employer who pays them remuneration for periods of employment. The evidence supports a finding that checks written from the account of Rex Neil, Inc., to Tabitha were actually compensation to Neil for his work. Thus, the definition of "employee" does not apply to Tabitha for the time periods prior to the date of the current investigation. Nonetheless, Tabitha does admit to working for Neil on the day of the Wharton investigation. And it is clear Neil did not provide workers' compensation coverage for Tabitha on that date.

25. As to penalties, Subsection 440.107(7)(d)1., Florida Statutes, 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 the 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 payment of worker's compensation required by this chapter within the preceding 3-year period or \$1,000, whichever is greater.

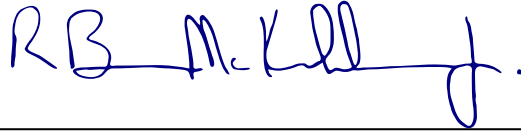
26. DFS has met its burden of proof to establish that Tabitha Rexford was, for one day, the employee of Rex Neil, Inc. A penalty assessment based upon imputed income is warranted for that violation. The assessment would be \$746 (imputed income) times 1.5 equals \$1,119 for a one-week penalty; \$1,119 divided by five (i.e., one day's work) equals \$223.80. Subsection 440.107(7)(d)1., Florida Statutes, allows for a minimum penalty of \$1,000. Neil should be penalized the minimum amount.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, assessing a penalty of \$1,000 against Petitioner for failure to provide workers' compensation coverage for its employee for one day.

DONE AND ENTERED this 21st day of November, 2008, in  
Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of November, 2008.

COPIES FURNISHED:

Thomas H. Duffy, Esquire  
Department of Financial Services  
200 East Gaines Street, 6th Floor  
Tallahassee, Florida 32399-4229

William Clay Rexford  
Rex Neil, Inc.  
1244 North Brink Avenue  
Sarasota, Florida 34237

Honorable Alex Sink  
Chief Financial Officer  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

Daniel Sumner, General Counsel  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0307

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.