STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 07-4765
SOUTHERN INSIGHT, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on April 3, 2008, in Bunnell, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Anthony B. Miller, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: John Cauley, President
Southern Insight, Inc.
Post Office Box 2592
Bunnell, Florida 32110

STATEMENT OF THE ISSUE

Whether Respondent Corporation, Southern Insight, Inc., failed to secure payment of workers' compensation coverage as

required by Chapter 440, Florida Statutes, and the Florida Insurance Code, and if so, whether the Department of Financial Services, Division of Workers' Compensation (Department) has lawfully assessed the penalty against Respondent in the amount of $27,805.11.

PRELIMINARY STATEMENT

By an August 17, 2007, Stop-Work Order and Order of Penalty Assessment (Stop-Work Order), the Department alleged that Respondent had failed to secure the payment of workers' compensation as that term is defined in Section 440.107(2), Florida Statutes. On August 22, 2007, the Department issued and served an Amended Order of Penalty Assessment in the amount of $27,805.11.

Respondent timely requested a disputed-fact hearing, and on October 17, 2007, the cause was referred to the Division of Administrative Hearings.

The case was originally scheduled for December 12, 2007. On December 7, 2007, a continuance was granted at the request of the Department. On January 29, 2008, an Order was entered denying the Department's Motion to Deem Matters Admitted and Motion to Dismiss and re-scheduling final hearing for April 3, 2008.

At final hearing on April 3, 2008, the style of this cause was amended to reflect the burden of proof, as set out above.

The Department presented the testimony of Department Investigator Lynise Beckstrom and John Cauley, Respondent's President, and had 14 exhibits admitted in evidence. Respondent had two exhibits admitted in evidence.

A Transcript was filed with DOAH on April 8, 2008. The parties were required to file proposed recommended orders by April 28, 2008. The Department timely filed its Proposed Recommended Order. Respondent's Proposed Recommended Order, which was filed one day late, has also been considered.

FINDINGS OF FACT

1. The Department is the state agency responsible for enforcing Section 440.107, Florida Statutes, which requires that employers secure the payment of workers' compensation coverage for their employees and otherwise comply with the workers' compensation coverage requirements under Chapter 440, Florida Statutes.

2. Respondent has been a Florida corporation, actively involved in the construction industry providing framing services, during the period of February 16, 2006, through August 17, 2007 (assessed penalty period). At all times material, Respondent has been an "employer," as defined by Chapter 440, Florida Statutes. At all times material, John Cauley has been Respondent's president and sole employee. At no time material

did Respondent obtain workers' compensation insurance coverage for John Cauley.

3. On August 17, 2007, Department Investigator Lynise Beckstrom conducted a random workers' compensation compliance check of a new home construction site in Palm Coast, Florida. At that time, Ms. Beckstrom observed four men, including John Cauley, framing a new home.

4. Utilizing the Department's Compliance and Coverage Automated System (CCAS) database, which contains all workers' compensation insurance policy information from the carrier to an insured and which further lists all the workers' compensation exemptions in the State of Florida, Ms. Beckstrom determined that for the assessed penalty period, Respondent did not have in effect either a State of Florida workers' compensation insurance policy or a valid, current exemption for its employee, John Cauley.

5. During the assessed penalty period, Respondent paid remuneration to its employee, John Cauley.

6. John Cauley admitted that during the assessed penalty period he was not an independent contractor, as that term is defined in Section 440.02(15)(d)(1), Florida Statutes.

7. Section 440.05, Florida Statutes, allows a corporate officer to apply for a construction certificate of exemption from workers' compensation benefits. Only the named individual

on the application is exempt from workers' compensation insurance coverage. On or about April 15, 2006, John Cauley, as Respondent's President, applied for such an exemption. That application was denied. Mr. Cauley received neither an exemption card nor a denial of exemption from the Department.

8. During the assessed penalty period, Respondent was a subcontractor of the contractor, Mass Builders, Inc.

9. Sections 440.107(3) and 440.107(7)(a), Florida Statutes, authorize the Department to issue stop-work orders to employers unable to provide proof of workers' compensation coverage, including proof of a current, valid workers' compensation exemption.

10. Based on the lack of workers' compensation coverage and lack of a current, valid workers' compensation exemption for Respondent corporation's employee, John Cauley, the Department served on Respondent a stop-work order on August 17, 2007. The stop-work order ordered Respondent to cease all business operation for all worksites in the State of Florida.

11. Immediately upon notification by Investigator Beckstrom of his lack of valid exemption, Mr. Cauley submitted a new exemption application, which was granted, bringing Respondent corporation into compliance. However, in order to have the stop-work order lifted so that he can work as a corporation again, Mr. Cauley must pay a percentage of the

penalty assessment and enter into a payment plan with the Agency. In the meantime, Mr. Cauley cannot pay the percentage required by the Department if he cannot find work as someone else's employee, which he had been unable to do as of the date of the hearing. Herein, it is not disputed that Respondent was inadvertently out of compliance. Mr. Cauley seeks merely to reduce the amount of the penalty assessment so that removal of the stop-work order against Respondent corporation can be negotiated.

12. On the day the stop-work order was issued, Investigator Beckstrom also served Respondent with a "Request for Production of Business Records for Penalty Assessment Calculation," in order to determine a penalty under Section 440.107(7), Florida Statutes. Pursuant to Florida Administrative Code Rule 69L-6.015, the Department may request business records for the three years preceding the date of the stop-work order. Logically, however, Ms. Beckstrom only requested business records dating back to February 14, 2006, Respondent's date of incorporation in Florida. The requested records included payroll, bank records, check stubs, invoices, and other related business records. Ms. Beckworth testified that, "Business records requests usually consist of payroll, bank records, taxes, check stubs, invoices, anything relating to that business." This is a fair summation of a much more

detailed listing of records required to be kept pursuant to Rule 69L-6.015, Florida Administrative Code, which was in effect at all times material.

13. In response to the Request for Production, Respondent provided Southern Insight Inc.'s corporate bank statements for the assessed penalty period, detailing corporate income and expenses through deposits and bank/debit card purchases.

14. However, Investigator Beckworth did not deem the corporate bank statements produced by Respondent to be an adequate response, and she did not base her calculations for penalty purposes thereon.

15. Mr. Cauley expected that the Department would, and has argued herein that the Department should, have subtracted from the total deposits to Respondent's corporate account (the minuend) the total corporate business expenses (the subtrahend) in order to determine the Respondent's payroll to Mr. Cauley (the difference), upon which difference the Department should have calculated his workers' compensation penalty.

16. In fact, the Department, through its investigator, did not utilize the total amount deposited to Respondent's corporate account, because some deposits "could" have come from a family member of Mr.Cauley. That said, there are no individual names on the account; the account is clearly in the name of the Respondent corporation; and there is no proof herein that any

deposits to Respondent's corporate bank account were derived from anyone other than Mr. Cauley, as Respondent's President.

17. Ms. Beckstrom testified that if the Agency had accepted the total of the deposits to this corporate account for the assessed penalty period as Respondent's payroll, the result would have been more than the total amount actually determined by her to constitute Mr. Cauley's payroll, but that statement was not demonstrated with any specificity.

18. The Department also did not use any of the subtracted amounts shown on the corporate bank statements, even though the bank statements listed the same information as would normally be found on a corporate check, including the transaction number, recipient of the money, the date, and the amount for each bank/debit card transaction. All that might be missing is the self-serving declaration of the check writer on the check stub as to what object or service was purchased from the recipient named on the bank statement.

19. Ms. Beckstrom testified that if Mr. Cauley had provided separate receipts for the transactions recorded on the bank statements as bank/debit card entries, she could have deducted those amounts for business expenses from the corporation's income, to arrive at a lesser payroll for Mr. Cauley. In other words, if Mr. Cauley had provided separate receipts as back-up for the transactions memorialized on the

corporate bank statements, the Department might have utilized the bank/debit card transactions itemized on Respondent's corporate bank statements as the amount deducted for Respondent corporation's business expenses, so as to obtain the payroll (difference) paid to Mr. Cauley.

20. It is the amount paid to Mr. Cauley as payroll, upon which the Department must calculate the workers' compensation penalty.

21. The reason Ms. Beckworth gave for not using Respondent's bank statements was that without more, the transactions thereon might not be business expenses of the corporation. However, she also suggested that if, instead of submitting bank/debit card statements, Mr. Cauley had submitted checks payable to third parties and if those corporate checks showed an expenditure for a deductible business expense, like motor vehicle fuel, she might have accepted the same expenditures in check form (rather than the statements) in calculating Respondent's payroll.

22. Ultimately, Ms. Beckworth's only reasons for not accepting the bank statements showing recipients, such as fuel companies like Amoco, was "agency policy," and her speculation that Amoco gas could have been put into a non-company truck or car. She also speculated that a prohibition against using bank statements showing deductions might possibly be found in the

basic manual of the National Council on Compensation Insurance (NCCI) or in a rule on payrolls (Rule 69L-6.035) which became effective October 10, 2007, after the assessed penalty period. However, the NCCI manual was not offered in evidence; a rule in effect after all times material cannot be utilized here; and no non-rule policy to this effect was proven-up.

23. In addition to not using Respondent's bank statements to calculate a penalty, the Department also did not "impute" the statewide average weekly wage to Respondent for Mr. Cauley. Ms. Beckworth testified that to impute the statewide average weekly wage would have resulted in a higher penalty to Respondent. As to the amount of the statewide average weekly wage, she could only say she thought the statewide average weekly wage was "about $1,000.00".

24. Instead of using Respondent's corporate bank statements or imputing the statewide average weekly wage, Investigator Beckstrom determined that Mass Builders, Inc., was the prime contractor on the jobsite being worked by Respondent, and that Mass Builders, Inc., had not produced proof of securing workers' compensation coverage for Respondent, its sub-contractor. Therefore, she sought, and received, Mass Builders, Inc.'s "payroll records" of amounts paid by the prime contractor, Mass Builders, Inc., to Respondent Southern Insight, Inc., via a separate site-specific stop-work order and business

records request directed to Mass Builders, Inc. The only "payroll records" that Mass Builders, Inc., offered in evidence were Mass Builders, Inc.'s check stubs, which Ms. Beckstrom utilized to come up with an income/payroll amount for Respondent Southern Insight, Inc.

25. Mr. Cauley did not know until the hearing that Mass Builders, Inc.'s check stubs had been utilized in this fashion by the Department. However, he ultimately did not dispute the accuracy of the check stubs and did not object to their admission in evidence.

26. In calculating Respondent's total payroll for the assessed penalty period, Investigator Beckstrom considered only the total of the check stubs from Mass Builders, Inc. It is unclear whether or not she reviewed Mass Builders, Inc.'s actual cancelled checks. No one from Mass Builders, Inc., appeared to testify that the stubs represented actual cancelled checks to Respondent or Mr. Cauley. The Department also did not deduct from the total of Mass Builders, Inc.'s check stubs any of the bankcard deductions made by John Cauley from Respondent's corporate bank account, for the same reasons set out above.

27. Mr. Cauley testified, without refutation, that some of the expenses noted on Respondent's bank statements, paid by bank/debit card, most notably expenses for gasoline for his truck, constituted legitimate business expenses of Respondent

corporation, which should have been deducted from either the bank statement's total income figure or from the amounts paid by Mass Builders, Inc., to Respondent corporation, before any attempt was made by the Department to calculate the amount paid by Respondent corporation to Mr. Cauley as payroll.

28. Utilizing the SCOPES Manual, which has been adopted by Department rule, Ms. Beckstrom assigned the appropriate class code, 5645, to the type of work (framing) performed by Respondent.

29. In completing the penalty calculation, Ms. Beckstrom multiplied the class code's assigned approved manual rate by the payroll (as she determined it) per one hundred dollars, and then multiplied all by 1.5, arriving at an Amended Order of Penalty Assessment of $27,805.11, served on Respondent on August 22, 2007.

30. Subsequent to the filing of its request for a disputed-fact hearing, in an effort to have the penalty reduced, Respondent provided the Department with additional business records in the form of portions of Southern Insight, Inc.'s 2006 and 2007 U.S. Income Tax Returns for an S Corporation (2006 and 2007 income tax returns). However, neither itemized deductions nor original receipts for Respondent's business expenses were provided to Ms. Beckworth at the same time, and she determined that without itemized deductions, there was no way to calculate

Respondent's legitimate business deductions so that they could be deducted from the total of Mass Builders, Inc.'s, check stubs to determine a lesser payroll applicable to Mr. Cauley.

31. Investigator Beckstrom testified that the tax returns, as she received them, did not justify reducing Respondent's payroll used in calculating the penalty. The vague basis for this refusal was to the effect that, "The Internal Revenue Service permits different business deductions than does the Department."

32. Itemization pages (schedules) of Respondent's income tax returns were not provided until the de novo disputed-fact hearing. Confronted with these items at hearing, Ms. Beckworth testified that ordinary business income is not used by the Department to determine payroll, but that automobile and truck expense and legitimate business expenses could be deducted, and that she would probably accept some of the deductions on Respondent's 1020-S returns. Also, if Respondent's bank statement corresponded to the amount on the tax form, she could possibly deduct some items on the bank statements as business expenses before reaching a payroll amount. However, she made no such calculations at hearing.

33. Ms. Beckworth testified that if she had Respondent's checks or "something more" she could possibly deduct the motor fuel amounts. Although Respondent's 2006, and 2007, income tax

returns reflected Respondent corporation's income minus several types of business deductions, Ms. Beckstrom testified that the tax deductions were not conclusive of the workers' compensation deductions, because the Internal Revenue Service allows certain deductions not permissible for workers' compensation purposes, but she did not further elaborate upon which tax deductions were, or were not, allowable under any Department rule. She did not "prove up" which deductions were not valid for workers' compensation purposes.

34. Respondent's 2006, tax deductions for "automobile and truck expense" were $2,898.00, and for 2007, were $4,010.00. There was no further itemization by Respondent within these categories for fuel. Other business deductions on the tax returns were also listed in categories, but without any further itemization. The only supporting documentation for the tax returns admitted in evidence was Respondent's bank statements. Respondent believed that the tax returns and possibly other documentation had been submitted before hearing by his accountant. It had not been submitted.

35. The Department never credibly explained why it considered a third party's check stubs (not even the third party's cancelled checks) more reliable than Respondent's bank statements or federal tax returns. Even so, at hearing, the Department declined to utilize the business deductions itemized

on Respondent's tax forms or any bank/debit card deductions on its bank statements so as to diminish the amount arrived-at via the Mass Builders, Inc.'s check stubs, and ultimately to arrive at a difference which would show a lesser payroll to Mr. Cauley.

36. Although Mr. Cauley's questions to Ms. Beckstrom suggested that he would like at least all of the fuel company deductions on his bank statements to be considered as business deductions of Respondent Southern Insight, Inc., and for those fuel company expenditures to be subtracted from either the total deposits to the corporate bank account or deducted from the payroll total as calculated by Ms. Beckstrom from Mass Builders, Inc.'s check stub total, he did not testify with clarity as to which particular debits/charges on the bank statements fell in this category. Nor did he relate, with any accuracy, the debits/charges on the bank statements to the corporate tax returns.

37. Upon review by the undersigned of Respondent's bank statements admitted in evidence, it is found that the bulk of Respondent's bank/debit card deductions during the assessed penalty period were cash withdrawals or ATM debits which cannot be identified as being paid to fuel companies or purveyors of construction material. As Investigator Beckstrom legitimately observed, "Big Al's Bait" is not a likely source of motor fuel. "Publix" and "Outback Steak House" are likewise unlikely sources

of fuel or construction material, and cannot stand alone, without some other receipt to support them, as a legitimate corporate business entertainment expense. Other debits/charges on the bank statements are similarly non-complying, ambiguous, or defy categorization.

38. However, the undersigned has been able to isolate on the corporate bank statements purchases from the known fuel distributors "Amoco" and "Chevron" on the following dates: 7/09/07, 7/10/07, 6/04/07, 6/04/07, 6/11/07, 5/03/07/ 4/09/07, 4/10/07, 4/13/07, 4/16/07, 3/02/07, 3/05/07, 3/13/07, 3/15/07, 3/20/07, 1/29/07, 5/01/06, 6/02/06, 8/02/06, 11/03/06, totaling $556.98.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

40. As reflected by the amended style above, the Department has the duty to go forward and the burden to prove, by clear and convincing evidence, that Respondent violated the workers' compensation law during the relevant period and that the penalty assessment is correct. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Inc., 670 So. 2d 932, 935 (Fla. 1996); L and W

Plastering and Drywall Services, Inc., v. Department of Financial Services, Division of Workers' Compensation, Case No. 06-3261 (DOAH, March 16, 2007).

41. There has never been any real dispute over the Department's jurisdiction; that John Cauley was the sole, non-exempt corporate officer/employee of Respondent during the period from Respondent's incorporation up to the date of the stop-work order; that the stop-work order was authorized by statute; or that Respondent owes some amount of penalty for that period. What is at issue herein is what formula should be applied in order to calculate the penalty owed.

42. As to how the penalty is to be calculated, Section 440.107, provides, in pertinent part, as follows:

> (7)(d)1. 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 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.
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> * * *
>
> (7)(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.

43. Pursuant to Florida Administrative Code Rule 69L-6.015, in effect at all times material, employers must at all times maintain required records, including, but not limited to "(4) Tax records. Every employer shall maintain all forms, together with supporting records and schedules, filed with the Internal Revenue Service." Employers also must produce those records when requested by the Department. This Respondent did not keep all the records required by the rule, but he produced, or thought he had produced, what records he had.

44. The Department was tasked by Section 440.120 (7) (e), with using the records that Respondent could produce to calculate a penalty. If those records did not suffice, then the Department was required to impute the statewide average weekly wage.

45. Instead of complying with the statute, the Department elected to get a third party's (Mass Builders, Inc.'s) records and try to calculate Respondent's penalty that way.

46. The Department's heart may have been in the right place, because there is at least speculation that if the Department had used the deposits to Respondent's bank account

but not the deductions from that account for fuel, the penalty assessed would have been higher than the off-statute method used, and there also is minimal evidence that using the statewide average weekly wage would have increased Respondent's penalty above the off-statute method used, but the method of using a third party prime contractor's check stubs was not statutorily authorized.

47. A new computation of penalty is in order.

48. Liability herein has been accepted and proven by clear and convincing evidence: the Department is entitled to its penalty. Only damages (the penalty amount) is at issue. To correctly assess that penalty, the Department must first attempt to calculate a penalty according to law, using the bank statements (all deposits and at least those fuel deductions specifically culled out in Finding of Fact 38, as being clearly payments for "motor fuel," the one business expense Ms. Beckstrom was willing to recognize), and to the extent it can use them, Respondent's tax returns, which as submitted at hearing are now complete with schedules showing fuel costs and other business deductions.

49. Given the sum of Ms. Beckstrom's testimony about the Department being able to deduct at least Respondent's fuel costs if the fuel costs are supported by cancelled checks, and the failure of the Department to establish any distinction that

would render Respondent's bank/debit card transactions for fuel less reliable than cancelled checks for fuel, it is concluded that the Department should, at a minimum, have considered the fuel costs described in Finding of Fact 38, and any other fuel costs for which Respondent can produce some type of receipt.

50. Today, a bank/debit card transaction is the equivalent of a check paid. Posting of a bank/debit card transaction to a bank statement is the equivalent of a check clearing the bank, and constitutes evidence that is, at a minimum, as credible as a check stub and probably as credible as the cancelled check itself. It also is axiomatic that today most people no longer use checks to purchase motor vehicle fuel at the pump, and they very rarely receive a separate receipt at the pump. There also was no specific rule prohibiting the use of itemized bank statements in effect at any time material. Moreover, if the Department will accept a third party's check stubs without supporting documentation and will accept Respondent's checks without supporting receipts, it is inconsistent and unreasonable to require Respondent to submit more than the detailed bank statements submitted here.

51. Also, The Department has not drawn any distinction that would render a third party's check stubs more reliable than Respondent's deposits. Indeed, the Department has not demonstrated that Mass Builders, Inc.'s check stubs, admitted

herein, constitute evidence of anything at all without some predicate from the writer of the check stubs.

52. Beyond that, the income tax returns, now complete, may or may not yield information for further deductions from Respondent's total deposits.

53. Only if no calculation using these materials is possible, may the Department impute the average weekly wage to Respondent's Mr. Cauley.

54. In this case, the system sadly penalizes Mr. Cauley for incorporating and for not working for someone else, which is a proposition contrary to "The American Dream," but just as incorporation is designed to insulate an individual from certain types of liability, the complicated structure of Chapter 440, is designed to protect those whom that individual might hire as employees and those general contractors, like Mass Builders, Inc., who might "sub-out" work to Southern Insight, Inc., in the event Mr. Cauley, or one of his employees, suffers a construction industry accident. Inadvertent though Mr. Cauley's non-compliance was, the Department was obligated to protect him and any potential employees he might hire.

55. Pursuant to Section 440.107(7)(a), Florida Statutes, the Department may issue an order of conditional release from a stop-work order upon a finding that the employer has complied with the coverage requirements of Chapter 440, Florida Statutes,

and has agreed to remit periodic payments of the penalty pursuant to a payment schedule agreement with the Department. Considering the facts that no injuries addressed by workers' compensation have befallen Mr. Cauley and that the Department may be, in effect, "double-dipping" by pursuing another penalty against Mass Builders, Inc., as well as against Respondent (see Finding of Fact 24) the instant case may be one that can be settled. However, it is clear that at this stage, this case should be returned to the Department for the calculations the Department is best qualified to conduct.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Financial Services, Division of Workers' Compensation, that affirms the stop-work order and concludes that a penalty is owed; that provides for a recalculation of penalty to be completed, on the basis set out herein, within 30 days of the final order; and that guarantees the Respondent Southern Insight, Inc., a window of opportunity to request a Section 120.57 (1) disputed-fact hearing solely upon the recalculation.

DONE AND ENTERED this 1st day of July, 2008, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of July, 2008.

COPIES FURNISHED:

Anthony B. Miller, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

John Cauley, President
Southern Insight, Inc.
Post Office Box 2592
Bunnell, Florida 32110

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 32399-0300

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.