

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, DIVISION OF WORKERS' )  
COMPENSATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-4760  
 )  
SW CYCLE OF LEE COUNTY, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference at sites in Fort Myers and Tallahassee, Florida, on April 13, 2010. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in Fort Myers, Florida.

APPEARANCES

For Petitioner: Timothy L. Newhall  
Assistant General Counsel  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

For Respondent: David Leckie  
Qualified Representative  
SW Cycle of Lee County, Inc.  
620 Northeast 15th Avenue, Unit 101  
Cape Coral, Florida 33909

STATEMENT OF THE ISSUE

The issue is whether Respondent conducted business operations without securing the payment of workers' compensation and, if so, the penalty, pursuant to Section 440.107(7)(d)1., Florida Statutes.

PRELIMINARY STATEMENT

By Amended Order of Penalty Assessment filed April 12, 2010, Petitioner proposed the assessment of a total penalty of \$24,033.44 for conducting business without securing the payment of workers' compensation.

At the hearing, Petitioner called two witnesses and offered into evidence 12 exhibits: Petitioner's Exhibits 1-12. Respondent called one witness and offered into evidence no exhibits. All exhibits were admitted.

The court reporter filed the transcript on April 29, 2010. Petitioner filed a Proposed Recommended Order on June 8, 2010.

FINDINGS OF FACT

1. Respondent is engaged in the business of selling and servicing used motorcycles in Cape Coral and is not engaged in the construction industry. Respondent's president is David Leckie, and its vice-president is his brother, Stephen Leckie. (For ease of reference, the brothers shall be referred to as David and Stephen or the two brothers.)

2. The period at issue in this case is from April 16, 2006, through April 15, 2009. During this entire period, Respondent conducted business at its former location, whose address was 1020 Northeast Pine Island Road, Units 304-305, Cape Coral, Florida.

3. During the entire audit period, Respondent was an employer and employed at least four persons. At no time during the audit period did Respondent secure the payment of workers' compensation for any of its employees.

4. The record includes UCT-6 forms for the entire audit period. These are quarterly earnings reports filed by employers pursuant to the requirements of unemployment compensation law. The Administrative Law Judge has found David to be an exceptionally candid witness and credits the UCT-6 forms as reliable.

5. According to the UCT-6 forms, for the last three quarters of 2006, Respondent employed four persons: the two brothers, John Gleason, and Barry Loar. Respondent paid gross wages during this period of \$12,600 to David, \$8,250 to Stephen, \$13,540 to Mr. Gleason, and \$12,416 to Mr. Loar.

6. According to the UCT-6 forms, for 2007, Respondent employed six persons: the two brothers, Mr. Gleason, Mr. Loar, Richard Meyer, and Robert Walsh. Respondent paid gross wages during this period of \$30,000 to David, \$27,942.20 to Stephen,

\$3,500 to Mr. Gleason, \$30,737.49 to Mr. Loar, \$25,316.19 to Mr. Meyer, and \$9,312 to Mr. Walsh.

7. According to the UCT-6 forms, for 2008, Respondent employed five persons: the two brothers, Mr. Loar, Mr. Meyer, and Jason Cabral. Respondent paid gross wages during this period of \$32,000 to David, \$29,255.20 to Stephen, \$43,812.23 to Mr. Loar, \$29,427.83 to Mr. Meyer, and \$6,998.43 to Mr. Cabral.

8. According to the UCT-6 forms, for the first quarter of 2009, Respondent employed five persons: the two brothers, Mr. Loar, Mr. Meyer, and Mr. Cabral. Respondent paid gross wages during this period of \$8,000 to David, \$7,313.80 to Stephen, \$9,744 to Mr. Loar, \$7,316.40 to Mr. Meyer, and \$1,224 to Mr. Cabral.

9. Because the audit period does not correspond precisely to calendar quarters, adjustments are required to these reported earnings. After these adjustments, the gross payroll calculated for these employees by Petitioner in the Amended Order of Penalty Assessment is accurately stated to be \$353,045.14.

10. During the audit period, Mr. Meyer was a counter worker and service writer, and David performed exclusively sales and accounting services. Mr. Gleason and Mr. Loar were mechanics. Although the record is unclear, Mr. Walsh and Mr. Cabral were also likely mechanics. Stephen served mostly in sales and customer relations, but worked as a mechanic about

25 percent of 2007 and 10 percent of the remainder of the audit period.

11. Mr. Meyer's duties required him to establish initial contact with the customer visiting the sales and repair facility for service on her motorcycle. Mr. Meyer listened to the customer's complaints and assessed the bike. Mr. Meyer transferred the motorcycle to a mechanic who diagnosed the specific problem. If the mechanic needed parts, Mr. Meyer assembled them and entered them on the customer's invoice. Mr. Meyer's job included collecting the required parts from their inventory bins and delivering them to the mechanic in the service bay where work on the bike took place. Except for this, Mr. Meyer did not enter the service bay because the vending machine and employee rest room were located outside of the service bay in which mechanical work was performed.

12. David and Stephen (except when he worked on bikes, as noted above) did not enter the service bay. They performed their services in an area in which no mechanical work was performed.

13. As discussed in the Conclusions of Law, Petitioner classifies the risk factor for specific jobs by using the Scopes<sup>®</sup> Manual of the National Council on Compensation Insurance, Inc. In this case, Petitioner properly classified all employees, except David, as Code 8380, which applies to automotive service

workers, as well as parts department employees and counter workers, even if physically separated from the service areas, and service writers.

14. The only questionable classifications in this case are for David and Stephen. The narrative accompanying Code 8380 explains their proper classification: "Automobile salespersons who exclusively sell or lease vehicles are classified to Code 8748, a Standard Exception classification." As noted above, during the audit period, Stephen worked part of the time in the service bay doing mechanical work, so Petitioner properly classified him under code 8380. However, David never worked as a mechanic and never entered the service bay where mechanical work was performed, so Petitioner should have classified him under the presumably lower-risk Code 8748.

15. Calculating the workers' compensation premium requires the use of the manual rate assigned, for each period of time, to a Coded activity. The manual rates for the audit period for Code 8748 are not in the record, so Petitioner needs to recalculate the unpaid premium and, then, the penalty based on the correct manual rates applied to David's earnings under Code 8748. Otherwise, Petitioner's penalty calculations are entirely correct.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

17. Section 440.02(16)(a), Florida Statutes, defines an employer to be "every person carrying on any employment." Section 440.02(15), Florida Statutes, defines an employee as "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment. . . ." Section 440.02(17)(b)2., Florida Statutes, defines employment subject to workers' compensation coverage as "[a]ll private employments in which four or more employees are employed by the same employer. . . ." Sections 440.31(1) and 440.09(1), Florida Statutes, require employers to secure the payment of workers' compensation for covered accidents. Section 440.107(2), Florida Statutes, provides that "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of Chapter 440, Florida Statutes.

18. Because Petitioner seeks to impose a penalty against Respondent, Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996).

19. Petitioner has proved that Respondent was required to secure the payment of workers' compensation and failed to do so.

20. Section 440.107(7)(d)1., Florida Statutes, provides:

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.

21. In its Proposed Recommended Order, Petitioner states that Florida Administrative Code Rule 69L-6.021(2) adopts the Scopes® Manual and the codes at issue in this case. This rule does not adopt the codes at issue in this case. However, the widespread use of the Scopes® Manual justifies its use based on the language, "approved manual rates," in Section 440.107(7)(d).1, Florida Statutes, as cited immediately above. Cf. Fla. Admin. Code R. 69L-5.201(21).

22. Petitioner has proved the correctness of the amended penalty in all respects but one: the classification of David under Code 8380. David should be classified under Code 8748. Petitioner needs to recalculate the penalty based on the manual rates applicable to David's earnings during the audit period for this code and recalculate the penalty.



RECOMMENDATION

It is

RECOMMENDED that the Department of Financial Services enter a final order determining that Respondent has not secured required workers' compensation insurance and imposing against Respondent the penalty set forth in the Amended Order of Penalty Assessment, adjusted only to reflect a code of 8748, not 8380, for David Leckie's earnings throughout the audit period.

DONE AND ENTERED this 15th day of June, 2010, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
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 15th day of June, 2010.

COPIES FURNISHED:

Timothy L. Newhall, Esquire  
Department of Financial Services  
Division of Workers' Compensation  
200 East Gaines Street  
Tallahassee, Florida 32399

David Leckie  
620 Northeast 15th Avenue  
Coral Gables, Florida 33909

David Leckie  
SW Cycle of Lee County, Inc.  
1020 Northeast Pine Island Road  
Unit 304-305  
Cape Coral, Florida 33909

Julie Jones, CP, FRP, Agency Clerk  
Department of Financial Services  
Division of Legal Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0390

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

Benjamin Diamond, 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.