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SECRETARY OF STATE

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

IN THE MATTER OF:	)	
	)	
CUSTOM COMMERCIAL INTERIORS, INC.	)	**Docket No. 12.28-109612A**
	)	**WC Appeal - Insurance**
	)	
and	)	
	)	
BERKLEY REGIONAL INSURANCE COMPANY	)	
	)	

FINAL ORDER

This matter was heard on November 15, 2010 in Nashville, Tennessee before the Honorable Bettye Springfield, Administrative Law Judge, appointed by the Secretary of State, with Marie Murphy, Executive Assistant to the Commissioner, Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Ms. Murphy makes the final determination in this matter as to Findings of Fact and Conclusions of Law. The Petitioner, Custom Commercial Interiors, Inc. ("CCI") was represented at the hearing by Rucker Betty ("Mr. Betty"), President and Treasurer of CCI. The Respondent, Berkley Regional Insurance Company ("Berkley"), was represented by Attorneys Kelly Bacon and J. Michael Morgan.

JURISDICTION

The Commissioner of Commerce and Insurance (the "Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b), which provides:

> Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance afforded. If the insurer

fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by the action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days' written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The issues raised by the Petitioner's August 24, 2010 appeal are: (1) whether Berkley correctly determined that twenty-one (21) individuals engaged by CCI to install drywall should be considered independent contractors or employees within the meaning of Tenn. Code Ann. § 50-6-102(10); and (2) whether the additional premium billing in the amount of $8,969 resulting from the payments made by CCI for work performed by such individuals from March 26, 2009 through March 26, 2010 (the "Policy Period") was correct.

After consideration of all evidence presented in this matter, it is determined that: (1) the twenty-one (21) individuals which CCI claimed were independent contractors should be considered employees of CCI; and (2) the premium audit billing of $8,969 was correct and payable. This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At all times relevant to the rate determination contested by the Petitioner, CCI was a for-profit corporation engaged in the business of installing drywall and interior finishing. CCI was managed by its President and Treasurer, Mr. Betty, and its Vice President and Secretary, Lee Hopper ("Mr. Hopper"). CCI was dissolved effective November 2, 2010. Mr. Betty has, however, subsequently continued doing business in partnership with Mr. Hopper under the name Custom Commercial Interiors.

2. Berkley is authorized to sell workers' compensation insurance policies in the State of Tennessee and is a Servicing Carrier for the Tennessee Workers' Compensation

Insurance Plan ("TWCIP"). Administrative services are provided on behalf of Berkley by Berkley Risk Administrators Company, LLC (referred to herein, individually and collectively with Berkley, as "Berkley").

3. Berkley issued Workers' Compensation and Employers Liability Policy Number WC-41-41-014068-00 (the "Policy") to CCI for the Policy Period. Such Policy included provisions requiring CCI to provide documentation to Berkley to determine whether any person engaged by CCI was an independent contractor rather than an employee.

4. Berkley engaged Premium Audit to perform an annual audit of the Policy for the Policy Period in order to determine revised actual premium.

5. On May 14, 2010, a premium audit of the Policy was conducted by Marlo Turley ("Ms. Turley"), an auditor employed by Premium Audit.

6. The premium audit conducted by Ms. Turley determined that the following twenty-one (21) individuals ("Workers") engaged by CCI to install drywall during the Policy Period should be considered CCI employees rather than independent contractors: Alvaro Lopez Rodriquez, Andres Garcia, Cecil Smith, David Flores, Fabian Ramirez, Jaime B. Carrion, Jaime I. Rodriguez, Jonathan Ortiz, Jose I. Garcia, Jose Morales, Luis J. Reyes, Mark Anthony Ramsey, Martin Olalde, Mauricio Reveles Ramirez, Melissa Fardon, Noe Carrales Garcia, Obando Guerrero, Oscar Flores, Raul M. Villagomez, Remedios Velazquez, Santiago Gomez and Walter L. Hite. The audit further found that the payroll of $122,503 for such Workers should be included into the calculation of the premium due under the Policy.

7. On or about May 28, 2010, Berkley sent CCI a Statement of Premium Audit Adjustment indicating that an additional premium of $8,969 was due based on the amounts paid to the Workers during the Policy Period.

8. In a letter dated June 11, 2010, CCI advised Berkley that it disputed the audit findings, contending that it had documentation showing that the Workers were "sole proprietors."

9. A series of correspondence occurred between CCI and Berkley, which included notices of premiums due, CCI's dispute of the premium amounts, Berkley's requests for documentation, and CCI's contention that I-18 Forms, while no longer used by the State, should be considered as evidence that the Workers were independent contractors.

10. In support of its position that the Workers were independent contractors, CCI provided copies of I-18 forms and "Subcontracts" between CCI and each Worker, which in pertinent part provided as follows:

> The CONTRACTOR agrees that he is independent of the COMPANY and the work relationship with the COMPANY meets the following tests:
>
> 1. The right to control the conduct of the work
> 2. The right of termination
> 3. The method of payment
> 4. The freedom to select and hire helpers
> 5. Furnishing of tools and equipment
> 6. Self-scheduling of work hours
> 7. The freedom to offer services to others

11. On June 25, 2010, Berkley sent a letter to CCI requesting documentation pertaining to the Workers such as invoices, bids, business cards, advertisements, and tax returns, noting that the audit conducted by Ms. Turley indicated that such individuals "work together as a crew/team to hang drywall and do not work independent of each other."

12. On June 29, 2010, Berkley sent a Notice of Cancellation of Workers' Compensation Policy, advising CCI that the Policy would be cancelled effective July 14, 2010 for non-payment of the additional $8,969 premium; however, on July 16, 2010, Berkley sent a

Notice of Reinstatement of Workers' Compensation Policy indicating that the Policy had been reinstated with no lapse in coverage.

13. The Plan Administrator of the TWCIP, Aon Risk Services ("Aon"), sent a letter to CCI, also dated July 16, 2010, advising that the Policy should not have been cancelled "without providing [CCI] with more time to take the dispute to the next level." The letter further advised that I-18 forms were discontinued by the State of Tennessee in 2004 and that the "Subcontracts" submitted by CCI did not constitute valid documentation to determine that the Workers were subcontractors rather than employees. The letter also requested copies of business cards, bids, invoices, advertisements, job estimates, contracts, certificates of insurance, etc., and information as to whether any of such individuals had employees or helpers.

14. By letter dated August 4, 2010, Aon advised CCI that the three invoices it submitted did not have a business address or phone number on them, and that business cards submitted were not for any of the Workers for which additional premium had been billed. The letter also advised CCI of its right to file a formal appeal to the Commissioner if additional documentation could not be provided.

15. On August 24, 2010, CCI filed an appeal to the Commissioner contesting the additional premium of $8,969 billed by Berkley resulting from the audit of the Policy.

16. Testimony provided at the hearing indicated that CCI: (a) oversaw and monitored the work performed by the Workers; (b) checked on jobs as work progressed; (c) controlled schedules; and (d) had the right to terminate any or all of the Workers. Work was assigned by a call to the Workers, or in response to a call from Workers. Although testimony was offered by CCI that it paid Workers by the board or square foot, it did not present any evidence showing that they were paid on any basis other than by the hour.

17. The documentation relied on by CCI in this matter consisted of correspondence between the parties, business cards for individuals not included in the audit, two invoices with names matching workers included in the audit and one without a matching name totaling $1,192, none of which included business names, telephone numbers or references to show that the invoice was for payment priced by the board or square foot.

18. CCI admitted that the Policy contained provisions requiring documentation to support a claim that a worker is an independent contractor.

19. Testimony established that CCI hired each one of the Workers. No evidence was presented by CCI that the Workers hired helpers. CCI provided scaffolding and drywall materials, determined the amount of boards and mud needed for a job, normally assigned two or three people on a job site during normal business hours, and established deadlines for completion of work. Usually, three or four workers worked a job using that ladders and scaffolding provided by CCI to hang boards that weighed between 80 and 90 pounds. Groups of workers were in a single room, indicating that that the Workers worked together as a team under the direction of CCI, rather than independently, notwithstanding testimony by CCI that Mr. Rucker would divide a room by a picking a line in a corner so that each worker worked independently.

20. CCI was dissolved on November 2, 2010, which information was not provided until the hearing in response to cross-examination.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, CCI, bears the burden of proof by a preponderance of the evidence that the facts alleged in the Petition are true and that the issues raised therein should be resolved in its favor.

2. Tenn. Code Ann. § 50-6-102 provides in pertinent part as follows:

As used in this chapter, unless the context otherwise requires:

* * * * *

(10)(A) "Employee" includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice president, secretary, treasurer or other executive officer of a corporate employer without regard to the nature of the duties of the corporate officials, in the service of an employer, as employer is defined in subdivision (11), under any contract of hire or apprenticeship, written or implied. . . .

* * * * *

(D) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

(i) The right to control the conduct of the work;
(ii) The right of termination;
(iii) The method of payment;
(iv) The freedom to select and hire helpers;
(v) The furnishing of tools and equipment;
(vi) Self-scheduling of working hours; and
(vii) The freedom to offer services to other entities;

(11) "Employer" includes any individual, firm, association or corporation, the receiver or trustee of the individual, firm, association or corporation, or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay, except as provided in § 50-6-113, and, in the case of an employer engaged in the mining and production of coal, one (1) employee for pay. If the employer is insured, it shall include the employer's insurer, unless otherwise provided in this chapter;

* * * * *

3. Tenn. Code Ann. § 50-6-113 provides in pertinent part as follows:

(a) A principal or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

* * * *

> (f)(1) [A]ny person engaged in the construction industry, including principal contractors, intermediate contractors, or subcontractors, shall be required to carry workers' compensation insurance. This requirement shall apply whether or not the person employs fewer than five (5) employees. Sole proprietors and partners shall not be required to carry workers' compensation insurance on themselves. In addition, the provisions of this subsection (f) shall not apply to any person building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the person's own property for the person's own use and for which the person receives no compensation.

4. CCI has failed to show by a preponderance of the evidence that the Workers specified in Paragraph 6 of the Findings of Fact were independent contractors during the Policy Period rather than employees. Although CCI provided I-18 forms for the Workers, use of such forms was discontinued by the State of Tennessee effective September 7, 2004, and cannot be used to evidence the status of the Workers as independent contractors. Such status must be determined by application of the statutory factors in Tenn. Code Ann. §50-6-102(D). *See Warner v. Potts*, No. M2003-02494-SC-WCM-CV, 2005 Tenn. LEXIS 369, 2005 WL 995236, at *1 (Tenn. Workers' Comp. Panel Apr. 29, 2005). The fact that each of the Workers signed a one-page "Subcontract" stating that he or she was "independent" of CCI and that his or her relationship with CCI "meets" the "tests" of the seven factors specified in Tenn. Code Ann. § 50-6-102(D) is equally unpersuasive. Such documents appear to have been created for the purpose of declaring the status of the Workers as independent contractors; they are not, however, dispositive on the issue in the absence of other facts supporting the status claimed. *See Boruff v. CAN Ins. Co.*, 795 S.W.2d 125, 126 (Tenn. 1990).

5. The Tennessee Supreme Court has recognized that, while no single factor is "entirely indicative," the primary factor in determining whether a person is an independent contractor is the right to control the conduct of the work. *See Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982). The record shows that Mr. Betty visited job

sites where drywall was installed and provided supervision of work performed by the Workers which would constitute exercising control.

6. The evidence presented by CCI of a prior audit from Liberty Mutual, a company not a party, is clearly insufficient to establish that an independent contractor relationship existed with the Workers.

7. CCI failed to comply with the Policy provision requiring documentation to prove its claim that the Workers were independent contractors.

8. Because the Workers were properly classified by the audit as employees rather than independent contractors, Berkley properly applied its rate and the additional premium of $8,969 is due to Berkley by CCI.

9. Berkley was in error in cancelling the Policy effective July 14, 2010; however, such cancellation was inadvertent, not in retaliation to CCI's dispute of Berkley's premium audit findings, and did not result in a lapse in CCI's workers' compensation insurance coverage.

10. The partnership Custom Commercial Interiors is operating as a successor to CCI, which was dissolved immediately prior to the hearing of this matter.

11. Tenn. Comp. R. and Regs. 0780-1-82-10(2) provides that "[o]rders issued under this Rule shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. The twenty-one Workers specified in Paragraph 6 of the Findings of Fact should be considered employees of CCI rather than independent contractors;

2. The audit premium billing adjustment issued by Berkley on May 28, 2010, in the amount of $8,869 is correct and payable within thirty (30) days of the entry of this Final Order; and

3. Costs of this proceeding are taxed against the Petitioner, Custom Commercial Interiors, or other successor to Custom Commercial Interiors, Inc.

This Final Order is entered and effective this the 18th day of February, 2011.

Marie Murphy

Marie Murphy, Commissioner's Designee
Executive Assistant to Commissioner

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____, day of February, 2011.

_____

Thomas G. Stovall, Director
Administrative Procedures Division

NOTICE OF APPEAL PROCEDURES

Review of Final Order

This Final Order is issued pursuant to Tenn. Comp. R. & Regs. 0780-1-82-.10. Any party who is aggrieved by this Final Order is entitled to judicial review pursuant to Tenn. Code Ann. § 4-5-322. See Tenn. Comp. R. & Regs. 0780-1-82-.11.

Tenn. Code Ann. § 4-5-322 provides in relevant part:

> (a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.
>
> * * * * *
>
> (b)(1)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.
>
> * * * * *
>
> (2) In a case in which a petition for judicial review is submitted within the sixty-day period but is filed with an inappropriate court, the case shall be transferred to the appropriate court. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record, including the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.
>
> (c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail, postage prepaid, to the following on this 22nd day of February, 2011:

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