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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:	)	
	)	
HAMMOND CONTRACTS, INC.	)	
	)	**Docket No. 12.28-103471A**
and	)	
	)	**WC Appeal - Insurance**
BERKLEY REGIONAL INSURANCE COMPANY	)	
	)	

FINAL ORDER

This matter was heard on August 3, 2009, in Nashville, Tennessee before the Honorable J. Randall LaFevor, Administrative Judge appointed by the Secretary of State, with Larry C. Knight, Assistant Commissioner of Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner Designee, Mr. Knight makes the final determination as to Findings of Facts and Conclusions of Law in this matter. The Petitioner, Hammond Contracts, Inc. was represented at the hearing by Attorney Phillip Robertson. Neither the Respondent, Berkley Regional Insurance Company, or its legal counsel was present at the hearing.

Petitioner moved for default based on the failure of the Respondent or its representative to appear at the scheduled hearing after receiving proper notice thereof. In support of such motion, Petitioner submitted return receipts acknowledging receipt of the Notice of Hearing by Berkley Risk Administrator and Aon Risk Services in July 2009. The Court determined service to Respondent proper in accordance with the provisions of provisions of Tenn. Code Ann. § 4-5-307 and found in favor of proceeding by default, to which Commissioner Knight agreed.

The subject of the hearing was: (a) whether the class codes assigned to certain Hammond employees during the period the workers' compensation insurance policy was in effect were correct; and (b) whether certain individuals or entities performing construction work on projects for which Hammond was the general contractor were misclassified under the workers compensation policy as employees when they were, in fact, independent contractors.

Upon consideration of the entire record, including all relevant testimony and exhibits filed in this matter, it is determined that class codes assigned to certain Hammond employees were incorrect and certain individuals and/or entities considered as employees under the workers' compensation insurance policy were independent contractors. This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Commissioner of Commerce and Insurance (the "Commissioner") has jurisdiction over this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. Hammond Contracts, Inc. ("Hammond") is a licensed residential building contractor engaged in home improvement construction in Tennessee. Benjamin Hammond ("Mr. Hammond") is the sole shareholder of Hammond.

3. Berkley Regional Insurance Company ("Berkley") holds a certificate of authority to sell workers' compensation coverage in Tennessee and is a servicing carrier of the Tennessee Workers' Compensation Insurance Plan ("TWCIP").

4. Berkley Risk Administrators Company, LLC ("BRAC") contracts with Berkley to provide administrative services on behalf of Berkley.

5. Aon Risk Services ("Aon") is the plan administrator of the Tennessee Workers' Compensation Insurance Plan ("TWCIP").

6. Berkley issued workers' compensation insurance policy WC 414101057200 (the "Policy") insuring Hammond for the policy period July 3, 2007 through July 3, 2008 (the "Policy Period").

7. Hammond employed the following individuals during the Policy Period: Charles Pless, Hunter Hancock, Reginald Terrell, James Woodard, Steven Bailey and Jonathan Woods.

8. At various times during the Policy Period, Hammond engaged the following individuals or entities ("Contracted Person(s)") to perform specialized trades services on construction projects for which Hammond was the general contractor: Russell North, Robert Waddell, Fred Driver, Robert Granito, Mike Glennon, and Treg Miles d/b/a A-Team Coatings and Restoration.

9. A premium audit of the Policy was conducted by Hamel Consolidated, Inc. ("Hamel") on August 15, 2008 which determined that the Contracted Persons specified in Paragraph 8 were employees of Hammond and that all payments made to them should be included in Hammond's payroll for purpose of calculating insurance premium under the Policy.

10. A subsequent audit of the Policy was conducted by Information Providers, Inc. on November 17, 2008. The audit determined that one individual, Lauree Castleman, previously classified as an employee, should be reclassified as an independent contractor; however, the audit otherwise confirmed the findings of the audit conducted by Hamel.

11. Hammond disputed the audit findings on November 24, 2008, in response to which BRAC on December 2, 2008 advised that the documentation Hammond previously provided regarding the employment/independent contractor status of the Contracted Persons was insufficient.

12. On December 19, 2008, Hammond advised Aon that it the wrong class codes were assigned to some Hammond employees and that the specified Contracted Persons were classified as employees in error.

13. Aon advised Hammond to file an appeal if it was unable to provide the documentation previously requested by Berkley and BRAC and, on January 30, 2009, Hammond filed an appeal with the Commissioner.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Hammond, bears the burden of proof in proving 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:

> 50-6-102. Chapter definitions. -- 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. Any reference in this chapter to an employee who has been injured shall, where the employee is dead, also include the employee's legal representatives, dependents and other persons to whom compensation may be payable under this chapter;
>
> (B) "Employee" includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and elects to be included in the definition of employee by filing written notice of the election with the division at least thirty (30) days before the occurrence of any injury or death, and may at any time withdraw the election by giving notice of the withdrawal to the division;
>
> (C) The provisions of this subdivision (10), allowing a sole proprietor or a partner to elect to come under this chapter, shall not be construed to deny coverage of the sole proprietor or partner under any individual or group

accident and sickness policy the sole proprietor or partner may have in effect, in cases where the sole proprietor or partner has elected not to be covered by the provisions of the Workers' Compensation Law, for injuries sustained by the sole proprietor or partner that would have been covered by the provisions of the Workers' Compensation Law had the election been made, notwithstanding any provision of the accident and sickness policy to the contrary. Nothing in this section shall require coverage of occupational injuries or sicknesses, if occupational injuries or sicknesses are not covered under the terms of the policy without reference to eligibility for workers' compensation benefits;

(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;

* * * * *

3. In accordance with the factors specified in Tenn. Code Ann. § 50-6-102(10)(D), Hammond has shown, by a preponderance of the evidence, that the Contracted Persons should have been considered as independent contractors during the Policy Period, rather than as employees. Hammond has shown that it had a limited degree of control over the work performed by each of the Contracted Persons and that each Contracted Person provided its own tools, equipment and materials. Hammond did withhold individual income taxes for or provide employee benefits to any Contracted Persons, or require it to work exclusively for Hammond. Each scheduled its own work and invoiced Hammond for the work it performed. Hammond did not withhold individual income taxes or provide any employee benefits with respect to the Contracted Persons.

4. Tenn. Code Ann. § 56-5-320 requires each insured to be a member of the designated rate service organization and to adhere to a uniform classification system filed by the designated rate service organization and approved by the Commissioner.

5. Pursuant to Tenn. Code Ann. § 56-5-320, National Council on Compensation Insurance, Inc. ("NCCI") is the Commissioner's designated rate service organization for workers' compensation insurance. Workers' compensation classification codes are determined in accordance with the Basic Manual for Workers' Compensation Liability Insurance ("Basic Manual") and Scopes of Manual Classifications ("Scopes Manual") published by NCCI.

6. Hammond has further shown, by a preponderance of the evidence, that the class code(s) assigned to certain employees were incorrect.

8. 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 following individuals or entities should have been considered independent contractors during the Policy Period rather than employees in accordance with Tenn. Code Ann. § 50-6-102(10): Russell North, Robert Waddell, Fred Driver, Robert Granito, Mike Glennon, and Treg Miles d/b/a A-Team Coatings and Restoration.

2. The correct class codes for certain Hammond employees during the Policy Period should have been as follows:

Charles Pless – 5474 – Painting or Paperhanging
Hunter Hancock – 5610 - Cleaner, Debris Removal
Reginald Terrell – 5610 - Cleaner, Debris Removal
James Woodard – 5437 – Carpentry, Installation of cabinet work or interior trim
Steven Bailey – 5437 – Carpentry, Installation of cabinet work or interior trim

Jonathan Woods – 5610 - Cleaner, Debris Removal.

3. Costs of this proceeding are assessed against the Respondent, Berkley Regional Insurance Company.

This Final Order is entered and effective this the 18 day of March, 2010.

Larry C. Knight, Jr.
Assistant Commissioner of Insurance

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 19, day of MARCH, 2010.

Thomas G. Stovall

Thomas G. Stovall, Director
Administrative Procedures Division

APPENDIX A TO INITIAL ORDER

NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Eighth Avenue N., Nashville, Tennessee, 37243. (Telephone No. 615-741-7008). See Tenn. Code Ann. § 4-5-315 (review of initial orders by the agency).

(2) A party filing a petition for reconsideration of the Initial Order must state the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See Tenn. Code Ann. §4-5-317 (petitions for reconsideration).

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See Tenn. Code Ann. §4-5-316.

Review of Final Order

Within fifteen (15) days after an Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See Tenn. Code Ann. § 4-5-317 (petitions for reconsideration).

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See Tenn. Code Ann. § 4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty (60) day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See Tenn. Code Ann. §§ 4-5-317 and 4-5-322.

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STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
Insurance Division – Policy Analysis Section
4th Floor, 500 James Robertson Parkway
Nashville, TN 37243-1133

Phone (615) 741-2825 **Fax (615) 741-0648**

MEMORANDUM

TO: Administrative Procedures Division

FROM: Jacquie Fortenberry, Administrative Services Assistant

DATE: March 22, 2010

RE: Filing of Certificate of Service
Hammond Contracts, Inc. and Berkley Regional Insurance Company
Docket No. 12.28-103471A
Workers' Compensation Rate Appeal Hearing

Please find enclosed the original Certificate of Service on the above. The Certificate of Service was inadvertently left off of the enclosed Final Order. Please file the original Certificate of Service and return in the enclosed self-addressed messenger mail envelope for our records.

Please feel free to contact me at (615) 532-5340 if you have any questions.

Thank you.

Enclosures

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TN POLICY ANALYSIS SECTION

CERTIFICATE OF SERVICE

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This is to certify that a true and exact copy of the Notice of Hearing has been mailed by certified mail, postage prepaid, return receipt requested to the following:

Receipt No. __7005 0390 0004 5662 8753__
Michael R. Ewing, Esq.
Waller, Landsen, Dortch & Davis, LLP
311 Union Street, Suite 2700
Nashville, TN 37219

Receipt No. __7005 0390 0004 5662 8760__
Philip L. Robertson, Esq.
144 Second Avenue North
Pilcher Building, Suite 300
Nashville, TN 37201

Receipt No. __7005 0390 0004 5662 8777__
Kim Zersen, Assistant Vice President
Aon Risk Services
11213 Davenport Street, Suite 201
Omaha, Nebraska 68154-2604

This the 22nd day of March, 2010.

Jacquie Fortenberry

Jacquie Fortenberry