RECEIVED
2013 JUL -2 PM 3:58
SECRETARY OF STATE

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

IN THE MATTER OF	)	
DUMP CABLE, INC. D/B/A SHARP ELECTRONICS SATELLITE	)	
	)	**Doc. No.: 12.28-116500A**
and	)	
	)	**WC Appeal - Insurance**
COMPANION PROPERTY & CASUALTY GROUP	)	

FINAL ORDER

This matter was heard on February 25, 2013, before The Honorable Stephen Riley Darnell, appointed by the Secretary of State, with Chlora Lindley-Myers, Deputy Commissioner, sitting as Designee of the Commissioner of Commerce and Insurance. As the Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to Findings of Facts and Conclusions of Law in this matter. The Petitioner, Dump Cable, Inc. d/b/a Sharp Electronics Satellite ("Dump Cable") was represented at the hearing by Attorney Norman D. McKellar. Companion Property & Casualty Group ("Companion") was represented by Richard Clark, Jr. and J. Allen Callison.

JURISDICTION

The Commissioner of the Department of Commerce and Insurance for the State of Tennessee ("Commissioner") has jurisdiction over this matter pursuant to TENN. CODE ANN. § 56-5-309(b) (2006), 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 subject of this hearing was: (1) whether the 50 installation/service technicians ("Technicians") engaged by Dump Cable should be considered "employees" within the meaning of TENN. CODE ANN. § 50-6-102(10)(D) (2012) or independent contractors; and, based on such determination, (2) whether Dump Cable owes additional premium in the amount of Thirty Four Thousand Eight Hundred Twenty-three dollars ($34,823.00) based on the remuneration paid to the Technicians during the July 13, 2010 to July 13, 2011 period in which the workers' compensation insurance policy issued by Companion was in effect.

Upon consideration of the record, it is determined that: (1) the Technicians should be considered employees rather than independent contractors; and (2) Dump Cable owes additional premium to Companion in the amount of Thirty Four Thousand Eight Hundred Twenty-three dollars ($34,823.00).

This decision is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Dump Cable is a satellite television installation and service company, owned by Raghid Ardahji, that contracts with multiple companies, including Dish Network Corporation ("Dish"), DirecTV, and Up Communications, LLC ("Up Dish"), to perform installation services throughout Tennessee.

2. Dump Cable engaged 50 Technicians to perform satellite TV installation, service and repair on a 1099 basis during the Companion policy period.

3. Dump Cable required the Technicians to sign an Independent Contractor Agreement ("Agreement") which was entered as Exhibit 2 at the hearing.

4. The Agreement allowed either party the right of termination with thirty (30) day written notice. (Exhibit 2).

5. The Agreement required the Technicians to perform the necessary work in accordance with specifications provided by Dump Cable. (Exhibit 2).

6. The Agreement specified that the Technicians were to provide all tools, supplies, materials and related instruments, including a vehicle, necessary for the performance of the work.

7. The Agreement provided that Dump Cable could inspect the Technicians' work for up to one year after completion. (Exhibit 2).

8. The Agreement required the Technicians to warranty their work for ninety (90) days and that the Technicians were responsible for their own liability insurance as well as workers' compensation insurance. (Exhibit 2).

9. The Agreement contained non-compete clauses restricting the Technicians from providing services for any competitor during the contract term as well as precluding the Technicians from soliciting employees or customers of Dump Cable for a period of two (2) years after the termination. (Exhibit 2).

10. Companion holds a certificate of authority to sell workers' compensation coverage in Tennessee and is in the business of providing workers' compensation insurance coverage to Tennessee employers.

11. Dump Cable obtained workers' compensation insurance through the Tennessee Workers' Compensation Insurance Plan ("TWCIP") for policy year July 13, 2010 to July 13, 2011. The policy was assigned to Companion by the TWCIP and the policy number was WTN102939 0041 41.

12. Two witnesses testified at the hearing in this matter on February 25, 2013: Raghid Ardahji, who is the owner of Dump Cable, and Jeffrey Goodman, who was the auditor for Companion.

13. Mr. Ardahji testified that he is the owner of Dump Cable and has been in the satellite installation business for about sixteen (16) years.

14. Mr. Ardahji testified that Dump Cable performed satellite installation and service pursuant to a written contract with Up Dish ending in December 2010. Subsequently, Dump Cable dealt directly with Dish Network. About seventy percent (70%) of Dump Cable's work, between July 2010 and December 2010, was performed on behalf of Up Dish.

15. The contract between Dump Cable and Up Dish ("Up Dish Contract") provides that Dump Cable and its Technicians shall "perform certain services for the Company [i.e. Up Dish], and the Contractor [i.e. Dump Cable] desires to accept such engagement, all under the terms and conditions set forth herein." (Exhibit 4).

16. Among the requirements of the Up Dish Contract, Dump Cable was required to provide "the services in accordance with the Dish Network Services Quality Assurance Guidelines;" to provide all satellite technicians "with vehicles, tools, mobile phones, and drop materials necessary to perform the services;" to "perform an inspection of at least twenty percent (20%) of all installation-related work orders;" to perform the

work within a specified window of time and, if such a task is not possible, "to inform the customer that a Technician will be arriving late;" to "follow specific Dish Guidelines for installation at all times;" to maintain "comprehensive general liability policy" with at least One Million dollars ($1,000,000.00) in coverage; to maintain "automobile liability" of One Million dollars ($1,000,000.00) in coverage; and to maintain "workers' compensation coverage" of Five Hundred Thousand dollars ($500,000.00). (Exhibit 4).

17. Dish Network did not have a contract in place with Dump Cable between January 2011 and July 2011. However, Mr. Ardahji testified that Dish Network had published policies, procedures and guidelines, which Dump Cable consulted, for how to install the equipment.

18. On October 3, 2011, Jeffrey Goodman conducted an audit of Dump Cable on behalf of Charter Premium Audits at the request of Companion. The audit report was tendered as Exhibit 1 at the Hearing in this matter.

19. Mr. Goodman's audit report indicated that Dump Cable paid Seven Hundred Fifty-seven Thousand Six Hundred Fifty-five dollars ($757,655.00) on a 1099 basis to 50 Technicians during the policy year.

20. Mr. Goodman's audit report concluded that the Technicians should be considered employees rather than independent contractors based on the information received and lack of proof of required insurance coverage.

21. Suzanne Rich, the Premium Audit Coordinator for Companion, testified by affidavit. (Exhibit 5).

22. Ms. Rich testified that she reviewed Mr. Goodman's audit along with supporting documentation and agreed with the conclusion that the 50 Technicians should have been classified as employees. (Exhibit 5).

23. Ms. Rich testified that the additional premium owed for the 50 Technicians is Thirty Four Thousand Eight Hundred Twenty-three dollars ($34,823.00) for the policy year. (Exhibit 5).

24. Ms. Rich testified that, upon receiving Dump Cable's request for review of the premium endorsement, she discussed the facts with Mr. Robert Shyrock, the Premium Audit Manager for Companion. Ms. Rich and Mr. Shyrock did not change their opinion and notified Dump Cable that the decision was being maintained. (Exhibit 5).

25. The factors relied upon by Ms. Rich and Mr. Shyrock included the non-compete clauses that precluded the Technicians from installing satellite equipment for any competitor during the term of the contract; the clause that precluded the Technicians from soliciting employees or customers from Dump Cable; and the fact that invoices are submitted on a weekly basis by the Technicians. (Exhibit 5).

26. This matter was further appealed to Aon, the administrator of the Tennessee Workers' Compensation Insurance Plan. Aon affirmed Companion's determination, prompting this appeal to be filed with the Department of Commerce and Insurance. (Exhibit 5).

CONCLUSIONS OF LAW

1. Pursuant to TENN. COMP. R. & REGS. 1360-4-1-.02(7), the Petitioner, Dump Cable, 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 (2012) 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 defined in subdivision (11), under an 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;
>
> ****
>
> (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. Dump Cable has failed to show by preponderance of the evidence that the 50 Technicians should be considered independent contractors rather than employees. Of the factors set forth in TENN. CODE ANN. § 50-6-102(10)(D) (2012), which must be considered in determining whether an individual is an employee or independent contractor, no single factor is determinative. However, Tennessee courts have repeatedly emphasized the importance of the right to control work rather than whether such control is actually exercised. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991). Although the testimony by Mr. Ardahji indicated that the Technicians accepted, scheduled and completed work assignments independently, there is no evidence that Dump Cable did not have a right to control the assignments. The terms of the Independent Contractor Agreement, signed by the Technicians, provided that services must be performed "in accordance with certain cable specifications furnished" by Dump Cable. Additionally, the contractual agreement between Dump Cable and Up Dish required Dump Cable to provide "the services in accordance with the Dish Network Services Quality Assurance Guidelines;" to provide all satellite technicians "with vehicles, tools, mobile phones, and drop materials necessary to perform the services;" to "perform an inspection of at least twenty percent (20%) of all installation-related work orders;" to perform the work within a specified window of time and, if such a task is not possible, "to inform the customer that a Technician will be arriving late;" to "follow specific Dish Guidelines for installation at all times;" to maintain "comprehensive general liability policy" with at least one million dollars ($1,000,000.00) in coverage; to

maintain "automobile liability" of one million dollars ($1,000,000.00) in coverage; and to maintain "workers' compensation coverage" of five hundred thousand dollars ($500,000.00). The testimony that Dump Cable exercised, little, if any direct control with regard to the conduct of work performed or did not keep accurate records with regard to the contractual provisions of the Up Dish agreement does not support a position that Dump Cable did not have the right to control the work of the Technicians.

4. With regard to the other factors specified in TENN. CODE ANN. § 50-6-102(D) (2012), the testimony shows that Dump Cable did not pay taxes, employee benefits, sick pay or vacation days. Technicians either provided or were responsible for their own vehicle, tools, equipment and materials other than the actual satellite itself. The testimony also indicated that the Technicians were free to perform work outside of the relationship with Dump Cable; however, pursuant to the independent contractor agreement, the Technicians could not perform similar work with other Dish Network providers and was subject to a two year non-compete clause with any of Dump Cable's employees, contractors or customers. According to testimony, while the Technicians could hire an assistant, that assistant was subject to Dump Cable's drug testing policy and background check. Additionally, work appointments were set between the hours of 8:00-12:00 or 12:00 to 5:00. The independent contractor agreement specified that the work relationship between Dump Cable and the Technicians could be terminated at any time with written notice. The right to terminate a work relationship at will is, however, contrary to the full control of work activities usually enjoyed by an independent contractor. *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982).

5. Once the existence of an employment relationship is established, the employer has the burden of proving the worker was an independent contractor rather than an employee. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584,586 (Tenn. 1991). Any doubt as to whether the worker is an employee or an independent contractor should be resolved in favor of the former. *Armstrong v. Spears*, 393 S.W.2d 729, 731 (Tenn. 1965); *CNA v. King*, No. M2004-02911-COA-R3-CV, 2006 WL 2792159, at *8 (Tenn.Ct. App. M.S., Sept. 28, 2006)

6. Tennessee workers' compensation law is intended as a comprehensive scheme to provide broad coverage for injured workers. *King*, 2006 WL 2792159, at *5. Under TENN. CODE ANN. § 50-6-405 (2009), employers whose operations fall within the scope of the law are required to maintain a policy of insurance to secure any possible workers' compensation liability or, in the alternative, to meet stringent financial requirements in order to establish and maintain the status of a self-insured employer.

7. TENN. COMP. R. & REGS. 0780-1-82-10(2)(g) provides that "orders 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:**

1. The 50 Technicians engaged by Dump Cable, Inc., doing business as Sharp Electronic Satellite, should be considered employees rather than independent contractors;

2. Dump Cable, Inc. shall pay additional premiums to Companion Property and Casualty Group in the amount of thirty four thousand eight hundred twenty three ($34,823.00) for the policy period of July 13, 2010 to July 13, 2011; and

3. The cost of this matter shall be taxed against the Petitioner, Dump Cable.

Chlora Lindley-Myers
Deputy Commissioner

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2, day of July, 2013.

Robert Collier, 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. 0780-01-82-.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 has been served upon the following:

Norman D. McKellar, Esq.
The McKellar Law Firm, PLLC
625 Market Street, Seventh Floor
Knoxville, Tennessee 37902

Richard R. Clark, Esq.
J. Allen Callison, Esq.
Morgan & Akins, PLLC
2000 Richard Jones Road, Suite 260
Nashville, Tennessee 37215

By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 2nd day of July, 2013.

Jacquie Fortenberry

Jacquie Fortenberry