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

FILED
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SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
JARRETT CONSTRUCTION	)	**Doc. No.: 12.28-125953A**
	)	**WC Appeal – Insurance**
	)	
and	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
	)	

FINAL ORDER

This matter was heard on November 24, 2014, before the Honorable Kim Summers, Administrative Law Judge, appointed by the Secretary of State, with Maliaka Bass, Chief Counsel for Consumer Affairs and Administration of the Tennessee Department of Commerce & Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Ms. Bass makes the final determination as to the findings of fact and conclusions of law in this matter. The Petitioner, Jarrett Construction, is a sole proprietorship and was represented *pro se* by its principal, Tim Jarrett. The Respondent, Riverport Insurance Company ("Riverport Insurance"), was represented by Attorney J. Allen Callison.

JURISDICTION

The Commissioner of Commerce & Insurance ("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 matter in which the rating system has been applied in conjunction 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 an 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 whether Riverport Insurance is owed additional premium by Jarrett. The disputed issues are:

1. Whether Jarrett Construction does not owe any additional premium because owner Tim Jarrett was an exempt construction service provider during the policy period.

2. Whether Jarrett Construction does not owe any additional premium because, during the entirety of the policy period, all work performed was done by Tim Jarrett on property either owned by him or owned by a general partnership of which he was partner.

3. Whether Riverport Insurance Company determined the appropriate rate classification code for the payroll earned by Tim Jarrett during the policy year.

Upon consideration of the record and for the reasons stated below, it is determined that the petition brought by Jarrett Construction is without merit and that Jarrett Construction owes additional premium to Riverport Insurance in the amount of one thousand thirty three dollars ($1,033).

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

FINDINGS OF FACT

1. Jarrett Construction is a sole proprietorship engaged in the construction of residential dwellings. Jarrett Construction has no employees other than the principal, Tim Jarrett.

2. The Tennessee Workers' Compensation Insurance Plan ("TWCIP") is a statutory workers' compensation insurance plan to provide coverage for employers unable to obtain such

coverage through the voluntary market, the market of "last resort" for workers' compensation insurance in Tennessee.

3. Riverport Insurance Company is an insurance company licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the underwriting carrier for Jarrett's workers' compensation insurance through the TWCIP.

4. Jarrett Construction obtained workers' compensation insurance from Riverport Insurance for the policy year January 25, 2012 to January 25, 2013. The policy was assigned to Riverport Insurance by the TWCIP.

5. Jarrett Construction is engaged in the business of building and managing residential properties. Jarrett Construction does not directly employ any workers other than its principal, Tim Jarrett. The coverage status of any independent contractors that may have been employed by Jarrett Construction during the policy period was not placed in issue by either party.

6. At the conclusion of the policy term, Riverport Insurance conducted a payroll audit. Based on the information contained in Tim Jarrett's 2012 tax return, Riverport Insurance calculated that Jarrett Construction earned $41,914 from "homebuilding" activities which were thereby subject to worker compensation premium. Based on this amount of payroll, Riverport Insurance calculated that an additional $1,033 in premium was due under the terms of the policy. Jarrett presented no evidence at the hearing to contradict Riverport Insurance's calculation of payroll earned by him during the policy period.

7. Tim Jarrett registered as an exempt construction service provider through the Tennessee Secretary of State's office effective January 2, 2013.

8. In its premium calculation, Riverport Insurance did not include any premium for work performed by Tim Jarrett after the January 2, 2013, effective date of his registration as an exempt construction service provider.

9. Jarrett Construction asserts that at all times during the policy period he performed no work for hire and was exclusively employed working on his own properties and was otherwise exempt from having to obtain worker compensation coverage under Tenn. Code Ann. § 50-6-903(a)(5).

10. A significant portion of the work performed by Tim Jarrett during the policy year was for and on property owned by Professional Park Properties, a General Partnership. Professional Park Properties is owned by Tim Jarrett and James F. Schacht, III.

11. No finding can be made, based on the evidence presented at the hearing, on how much of the payroll was earned during the policy year by Tim Jarrett on properties personally owned by him and how much of the payroll was earned through Tim Jarrett's work on properties owned by Professional Park Properties.

12. Jarrett Construction failed to keep any work records, logs, or preserve any other evidence which would aid Riverport Insurance in determining the amount of payroll earned by Tim Jarrett, or its source, for construction work during the policy period. Furthermore, owner Tim Jarrett was uncooperative with the premium audit process which necessitated Riverport Insurance to make a payroll estimate subject to worker compensation premium based on the best available data that it was able to obtain from Jarrett Construction.

13. Jarrett Construction made no objection to this payroll estimate and did not present an alternate calculation for the Commissioner's consideration.

14. Riverport Insurance asserts that worker compensation classification code 5645: "Carpentry—Construction of Residential Dwellings Not Exceeding Three Stories in Height" is the appropriate classification code for the work performed by Tim Jarrett during the policy year.

15. Code 5645 is described in the NCCI Scopes manual as:

> When all of the carpentry work in connection with the construction of residential dwellings not exceeding three stories in height is performed by employees of the same carpentry contractor or general contractor responsible for the entire dwelling construction project, the work is assigned to Code 5645. This includes the construction of the sill, rough framework, rough floor, wood or light-gauge steel studs, wood or light-gauge steel joists, rafters, roof deck, all types of roofing materials, sidewall sheathing, siding, doors, wallboard installation, lathing, windows, stairs, finished flooring, cabinet installation, fencing, decking, detached structures, and all interior wood trim. Light-gauge steel framing is generally a thickness of 12 to 25 gauge.
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> Carpentry repair or remodeling of residential dwellings is also assigned to Code 5645. To qualify for Code 5645, carpentry repair or remodeling operations of an interior or exterior nature must take place along with some framing or structural carpentry renovation of the premises that would ordinarily be assigned to Code 5645. When these conditions occur, the insured is performing operations that are analogous to the construction of residential dwellings, and Code 5645 is assigned to all carpentry operations in connection with the repair or renovation project. Merely performing singular operations such as repairing or replacing cabinets or installing wallboard does not constitute work to be classified to Code 5645. These singular repair operations are assigned to the appropriate classifications representing their specific trades. However, when activities of this nature take place in connection with operations that involve some framing or structural renovation of the dwelling, Code 5645 must be assigned to these specialty operations.
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> Code 5645 is also assigned to carpentry operations on residential structures in connection with building raising or moving operations. When no separation of payroll exists, the payroll for the entire building raising or moving operation must be assigned to Code 5703 or the highest rated classification applicable, whichever is greater.

16. Jarrett Construction asserts that worker compensation classification code 5606: "Contractor—Project Manager, Construction Executive, Construction Manager or Construction Superintendent" is the appropriate classification code for the work performed by Tim Jarrett during the policy year.

17. Code 5606 is described in the NCCI Scopes manual as:

> Code 5606 is intended to cover the project manager, construction executive, construction manager, or construction superintendent of both specialty and general contracting risks. The project manager, etc., will spend some time in the office and the remainder of time visiting various job sites conferring with the job superintendent or foreperson to keep track of the progress of the work being conducted at each job or project. The qualifications established for the use of Code 5606 are that the project manager, etc., of a construction or erection concern must be exercising supervision through superintendents or forepeople of the employer and cannot have direct charge over the workers at the construction or erection site. The project manager may also exercise supervision through subcontractors, superintendents, or forepeople, but each subcontractor must have an on-site superintendent or foreperson at each and every job site. The important element is determining their job duties and not their title as well as that the supervision must be indirect rather than direct.
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> When terms such as "all employees," "all other employees," "all operations," and "all operations to completion" appear in the phraseology of a construction or erection operation applicable to an insured, Code 5606 may also be assigned to those employees who are otherwise qualified to be assigned to Code 5606.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & Regs. 1360-04-01-.02(3) and (7), the Petitioner, Jarrett Construction bears the burden of 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. Jarrett Construction first argues that it does not owe any worker compensation premium for the work performed because Tim Jarrett was an exempt construction service provider.

Tenn. Code Ann. § 50-6-902(a) specifies that construction service providers are required to carry workers' compensation insurance on themselves unless an exception or exemption applies. One way a construction service provider can avoid the coverage requirement of Tenn. Code Ann. § 50-6-902(a) is to apply for an exemption. Tenn. Code Ann. § 50-6-903(a). In Jarrett's case, a sole proprietorship is valid grounds to apply for an exemption. Tenn. Code Ann.

§ 50-6-903(a)(4). However, this exemption is not automatic. A construction service provider must file an application with the Secretary of State and is not exempt from the workers' compensation coverage requirements until the exemption is approved and published. Tenn. Code Ann. § 50-6-905(b).

In this case, Tim Jarrett did apply for an exemption, which was granted with an effective date of January 2, 2013. This exemption is not, however, retroactive. Riverport Insurance asserts that its premium calculation was not based on any payroll earned after January 2, 2013. Jarrett Construction did not contest this assertion. Therefore, Jarrett Construction is not entitled to any additional relief from the calculated premium due to his obtaining an exemption effective January 2, 2013.

3. Jarrett Construction next argues that none of the payroll he earned performing construction work is subject to worker compensation premium because this work falls under the exception found in Tenn. Code Ann. § 50-6-902(b).

Tenn. Code Ann. § 50-6-902(b) provides an exception to the workers' compensation coverage requirements of Tenn. Code Ann. § 50-6-902(a). If a Tenn. Code Ann. § 50-6-902(b) exception applies, the construction provider need not formally apply for exemption under Tenn. Code Ann. § 50-6-903 and would not be obligated to obtain workers' compensation coverage for any payroll covered by the exception.

Jarrett Construction relies on Tenn. Code Ann. § 50-6-902(b)(5) which states, ". . . [A] construction services provider shall be exempt from subsection (a) if the provider: . . . Is a construction services provider building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the construction service provider's own property . . . ."

One issue here is whether the words "own property" include work on property owned by a general partnership for which the worker is a general partner. Unfortunately for Jarrett Construction, it does not.

Tennessee has adopted the Revised Uniform Partnership Act. Tenn. Code Ann. § 61-1-101, *et seq.* While the original Uniform Partnership Act was, at best, unclear about whether a general partnership was a separate legal entity from its constituent partners, the revised act removes any ambiguity. Tenn. Code Ann. § 61-1-201(a) states "A partnership is an entity distinct from its partners." *See comment in* Unif. Parnership Act 1997 § 201. The effect of this is that the work performed by Tim Jarrett on behalf of the partnership cannot be considered work on his "own property" as that term is used on Tenn. Code Ann. § 50-6-902(b)(5). Accordingly, the work performed by Tim Jarrett for the general partnership is still subject to the workers' compensation coverage requirements of Tenn. Code Ann. § 50-6-902(a), at least up until the time he obtained an exemption as discussed above.

Jarrett Construction likewise did not rebut the assertion made by Riverport Insurance that they bore a risk of loss for any construction related injury under the policy, even if it were subject to a Tenn. Code Ann. § 50-6-902(b) exception. There is no prohibition against a construction service provider obtaining workers' compensation coverage on himself for labor where the coverage is not required due to an exception or exemption. *See* Tennessee Department of Commerce & Insurance, Insurance Bulletin dated Dec. 28. 2012; NCCI Circular 02-TN-2012. As discussed in the Bulletin, a sole proprietor construction service provider might want to obtain this coverage for a variety of reasons. To obtain any relief from Riverport Insurance's calculated premium owed, Jarrett Construction would not only have had to prove a quantifiable amount of the work done during the policy year was on Tim Jarrett's personally owned property, but that the policy itself specifically excluded coverage for such work. Since no such proof was offered,

Jarrett Construction has failed to carry its burden of proof to show that the total amount of payroll upon which the final premium was determined by Riverport Insurance was erroneous.

4. Jarrett Construction next argues that the Riverport Insurance applied the wrong classification code. On this point it is clear that Jarrett Construction failed to meet its burden of proof. While Jarrett Construction argued in its pre-hearing brief that Code 5606 was applicable, it presented no direct evidence in support of this assertion at the hearing.

On a plain reading of the two classification codes, it is clear that Code 5606 is only applicable to a person who is providing indirect supervision of a construction operation and certainly not to an individual who is performing direct and substantial labor on a site. Code 5645 appears to be a far more accurate description of the work performed by Tim Jarrett. Nevertheless, in the absence of proof by Jarrett Construction that Code 5645 was erroneous, Riverport Insurance's determination of the applicable rate code must be upheld.

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

1. Jarrett Construction shall pay additional premium to Riverport Insurance in the amount of one thousand thirty three dollars ($1,033.00) for the January 25, 2012—January 25, 2013 policy period within sixty (60) days of this Order.

2. The costs of this matter shall be taxed against the Petitioner, Jarrett Construction.

Maliaka Bass
Commissioner's Designee

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.
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> (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.
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> (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.
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> (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.

Filed in the Administrative Procedures Division, Office of the Secretary of State, this _____ day of February, 2015.

_____
Richard Collier, Director
Administrative Procedures Division

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 9th day of February, 2015:

J. Allen Callison
2908 Poston Ave., #101
Nashville, TN 37203

Tim Jarrett
124 Copperstone Circle
Clarksville, TN 37043

_____
Michael R. Shinnick,
Workers' Compensation Manager