

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

IN THE MATTER OF:)	
THE SHEFFIELD GROUP)	Doc. No.:12.01065501J
and)	
MGM INDUSTRIES)	WC Appeal - Insurance

NOTICE

THIS ORDER IS AN INITIAL ORDER RENDERED BY THE DEPARTMENT OF COMMERCE AND INSURANCE.

THIS INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. PARTY FILES A WRITTEN APPEAL OR PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NOT LATER THAN FIFTEEN (15) DAYS AFTER THE ENTRY DATE OF THIS INITIAL ORDER.

2. THE AGENCY FILES A WRITTEN NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN FIFTEEN (15) DAYS AFTER THE ENTRY DATE OF THIS INITIAL ORDER.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION OR NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION AT THE ADDRESS OF:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
312 EIGHTH AVE NORTH
NASHVILLE, TN 37243

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, 615-741-7008 OR 741-2078 OR FAX 741-4472. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

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INITIAL ORDER

This matter came to be heard April 5, 2005, before Steve Darnell, Administrative Judge, assigned by the Secretary of State, along with Larry C. Knight, Assistant Commissioner for Insurance of the Tennessee Department of Commerce and Insurance. Mr. Knight sits as the Commissioner's designee and as such makes the final determination as to findings of fact in this matter. Sheffield Group was represented at the hearing by Byron Gill, Attorney at Law. MGM Industries was represented by James Kay, Jr., Attorney at Law.

INITIAL ORDER

The subject of this hearing was whether Sheffield Group's audit of MGM Industries (hereinafter referred to as "MGM") appropriately included as payroll additional amounts that were paid to MGM employees in the way of bonuses. After consideration of the record in this case, it is determined that Sheffield Group did not provide evidence that MGM bonuses were paid in lieu of wages and were paid as part of the wage contract. This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Commissioner of the Department of Commerce and Insurance for the State of Tennessee (hereinafter referred to as the “Commissioner”) has her official residence in Nashville, Tennessee at Davy Crockett Tower, Fifth Floor, 500 James Robertson Parkway. The Commissioner has jurisdiction of this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. Sheffield Group currently holds a certificate of authority to sell workers’ compensation insurance in this state and is in the business of providing workers’ compensation insurance to employers in Tennessee and Alabama.

3. MGM Industries (hereinafter referred to as “MGM”) is a company located in Hendersonville, Tennessee. MGM manufactures windows and doors. MGM is owned by three brothers, Joe Gaskins, Abe Gaskins, and Zeke Gaskins.

4. From April 25, 2002 until April 25, 2004, MGM received its workers’ compensative coverage from Sheffield Group.

5. For the policy year April 25, 2002 to April 25, 2003, Sheffield Group performed an audit, which is the subject of this appeal and concerns whether bonuses paid to employees should be included in payroll. The disputed amount of premium is thirty two thousand, four hundred eighty-three dollars (\$32,483).

6. MGM’s total audited payroll excluding officer compensation and overtime for the policy year in question was three million, three hundred seventy-two thousand, and five dollars (\$3,372,005). For this policy year, MGM paid an additional seven hundred and one thousand, one hundred fifty-three dollars (\$701,153) in bonuses to its employees, which is twenty-one percent (21%) of audited payroll.

7. Beginning in 1997, MGM reorganized their bonus system from a Christmas bonus to a weekly or monthly bonus that is based on the company’s performance. This was done to better manage MGM’s cash flow and because of the cyclical nature of MGM’s business.

8. MGM's bonus policy is as follows:

Employee bonuses are paid only for perfect attendance. To ensure customer satisfaction, it is vital for workload competition; therefore, you must be here on time every day for the time scheduled. If for any reason you cannot report to work, you must call in between 7:00 and 7:30 and talk to your supervisor. Do not leave a message. This bonus, as all bonuses, will be paid solely at the discretion of management.

9. The bonus program is paid on a monthly basis if a person's job is in the areas of management, supervision or extrusion or on a weekly basis if a person's job is a driver or plant employee.

10. Tenn. Code Ann. § 50-6-402 and the National Council on Compensation Insurance (hereinafter referred to as "NCCI") require that in order for an insurer to charge premium based on allowances paid to employees, the allowances must have been paid in lieu of wages and as part of the wage contract.

11. Sheffield Group's auditor concluded that the MGM bonuses were paid in lieu of wages and included them in MGM's payroll. The auditor believed that had these employees not received the bonuses, they would have looked elsewhere for employment.

12. Sheffield Group did not speak with any employees to verify that if the bonuses were not paid that the employees would seek employment elsewhere.

13. Sheffield Group did not make any independent investigation as to whether MGM's hourly wage was competitive in comparison to other employers located in Sumner County or surrounding counties.

14. During the 2002-2003 policy year, MGM was paying more than one of its competitors, Gapco, located in Sumner County for its plant employees.

15. During the 2002-2003 policy year, MGM was paying more than one of its competitors, Better Built, located in Murfreesboro for its plant employees.

16. Sheffield Group's auditor also determined that the bonuses paid to MGM employees were paid as part of the wage contract. The auditor based this belief on the fact that MGM requires adherence to its attendance policy for an employee to be eligible for the bonuses.

17. Sheffield Group admitted that it could not prove that MGM's bonuses were guaranteed to the employees.

18. MGM produced testimony and evidence showing that the bonuses were paid at the discretion of management and could be ended at anytime without notice to the employees. Additionally, the amount of the bonus fluctuates based on the company's sales for that week or month.

CONCLUSIONS OF LAW

19. Tenn. Code Ann. § 50-6-402(a) allows an insurer to include allowances of any character in determining risk and premiums only when such allowances are in lieu of wages and are specified as part of the wage contract.

20. Pursuant to Tenn. Code Ann. § 56-5-320, the NCCI is the Commissioner's designated rate service organization for workers' compensation insurance. The NCCI has promulgated identical guidelines for determining which allowances are to be included in premium.

21. Sheffield Group had the burden of proof to show by a preponderance of the evidence that the bonuses paid to MGM were paid in lieu of wages and were part of the wage contract.

22. Sheffield Group failed to put into evidence the facts that showed that the bonuses paid to MGM employees were paid in lieu of wages. In making this argument, Sheffield Group relied entirely upon the opinion of the auditor that employees would leave MGM if they did not receive such bonuses. Sheffield Group failed to verify this opinion by either interviewing

employees or performing research as to whether the hourly wages paid to MGM employees were competitive in its industry and its location.

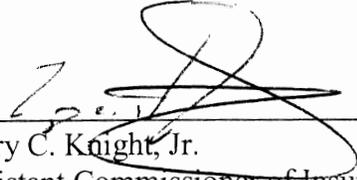
23. Sheffield Group also failed to prove that such bonuses are paid to MGM employees as part of the wage contract.

24. As Sheffield Group failed to carry its burden, there is no basis for Sheffield Group to include the bonuses MGM paid to its employees in payroll for the calculation of premium.

NOW THEREFORE, IN LIGHT OF THE FOREGOING, the following is hereby **ORDERED**:

1. The bonuses paid to MGM employees for the 2002-2003 year are not to be included in payroll; and
2. That Sheffield Group withdraw its assessment from the 2002-2003 policy year.

This Initial Order is entered and effective this the 22 day of September, 2005.



Larry C. Knight, Jr.
Assistant Commissioner of Insurance

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 Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating 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 T.C.A. §4-5-317 on 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 T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the 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 T.C.A. §4-5-317 on 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 T.C.A. §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 day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.